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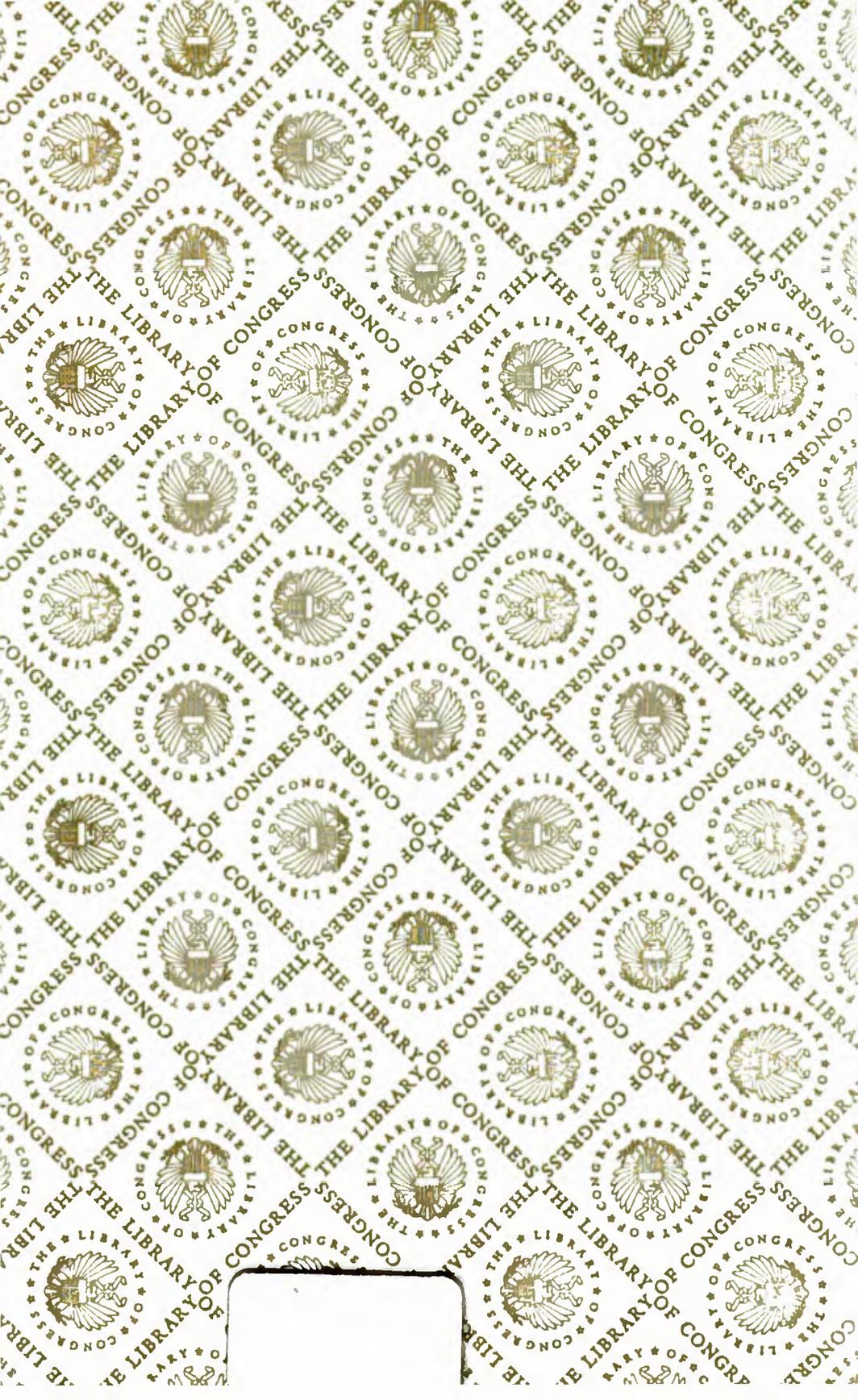
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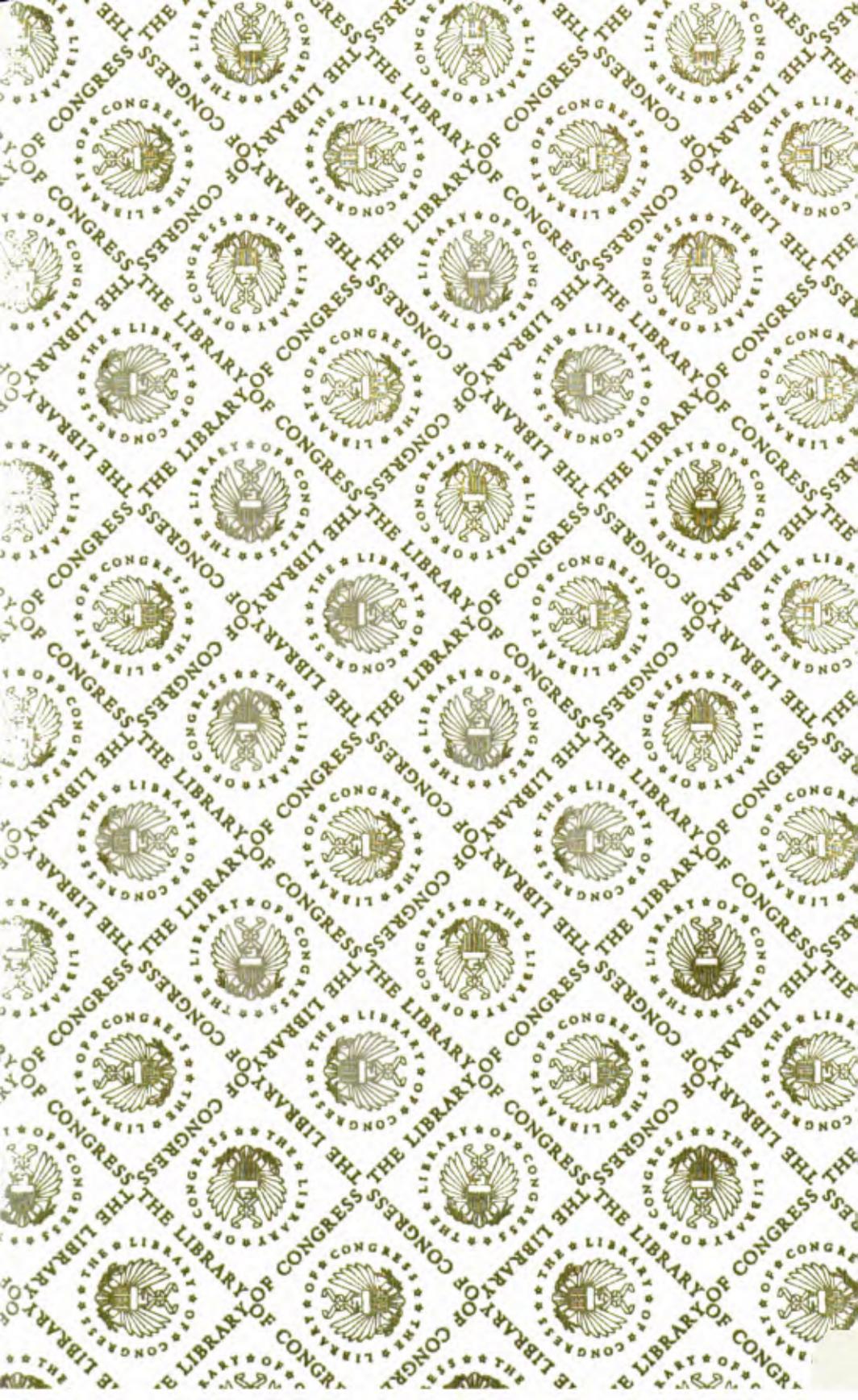
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# INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999

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## HEARING BEFORE THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

**H.R. 1686 and H.R. 1685**

\_\_\_\_\_  
JUNE 30, 1999  
\_\_\_\_\_

**Serial No. 46**



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# **INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999**

**WEDNESDAY, JUNE 30, 1999**

**HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.**

The committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, Lamar S. Smith, Bob Goodlatte, Steve Chabot, Asa Hutchinson, Edward A. Pease, Chris Cannon, James E. Rogan, Lindsey O. Graham, Mary Bono, David Vitter, John Conyers, Jr., Howard L. Berman, Rick Boucher, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Steven R. Rothman, Tammy Baldwin, and Anthony B. Weiner.

Staff present: Jon Dudas, deputy general counsel-staff director; Daniel M. Freeman, parliamentarian-counsel; Joseph Gibson, chief antitrust counsel; Sharee Freeman, counsel; Patrick Prisco, assistant to the deputy general counsel-staff director; Kirsti Garlock, counsel; Ray Smietanka, chief counsel; Jim Harper, counsel; Vince Garlock, counsel; Michael Connolly, press secretary; James B. Farr, financial clerk; Shawn Friesen, staff assistant/clerk and Cori Flam, minority counsel.

## **OPENING STATEMENT OF CHAIRMAN HYDE**

Mr. HYDE. Good morning. The committee will come to order. Today the committee holds a hearing on H.R. 1686, the Internet Freedom Act, introduced by Congressman Goodlatte and H.R. 1685, the Internet Growth and Development Act, introduced by Congressman Boucher.

These two bills seek to enhance the growth of the Internet. They involve two related issues. The first has to do with cable broadband lines and whether their owners will be required to grant access to them on nondiscriminatory terms. The second is whether the regional Bell operating companies will be able to transport data over long distance lines within their regions, something they are currently prohibited from doing. The resolution of both of these issues will have profound consequences for the future of the Internet and more broadly the ways that we will communicate in the future.

This committee has a long and proud history in shaping telecommunications policy, and we were instrumental in passing the

landmark Telecommunications Act of 1996 into law. We intend to continue that tradition in our consideration of this legislation. We are the committee responsible for competition policy throughout the economy, and I can't think of a set of competition issues that is more vital to our Nation's future.

At the time that they were considering the 1996 act, the Internet was in its infancy. In a little over 3 years, it has gone from a technological marvel to a near necessity for millions of Americans. That tremendous growth has dramatically changed many of the assumptions we held when we were considering the act.

That may mean that we need to reopen the act; on the other hand, it may not. It does, however, mean we ought to take a hard look at that question. And that is what we are here to do today. Several of the contending parties have visited with me in the last several weeks, and I will say publicly what I have said to them privately. I come to these issues with an open mind. I have taken no position on either of the bills before us; but I am very interested to hear the arguments of all the witnesses today.

[The bills, H.R. 1686 and H.R. 1685, follow:]

106TH CONGRESS  
1ST SESSION

## H. R. 1686

To ensure that the Internet remains open to fair competition, free from government regulation, and accessible to American consumers.

---

### IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1999

Mr. GOODLATTE (for himself and Mr. BOUCHER) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

### A BILL

To ensure that the Internet remains open to fair competition, free from government regulation, and accessible to American consumers.

*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 Act".

## TITLE I—ANTITRUST AND CRIMINAL PROVISIONS

#### SEC. 101. PROHIBITION ON ANTICOMPETITIVE BEHAVIOR BY INCUMBENT LOCAL EXCHANGE CARRIERS.

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that an incumbent local exchange carrier that has market power in the broadband service provider market has willfully and knowingly failed to provide conditioned unbundled local loops when economically reasonable and technically feasible under section 715(a) of the Communications Act of 1934, or restrains unreasonably the ability of a carrier to compete in its provision

of broadband services over a local loop, shall be sufficient to establish a presumption of a violation of such section 1, 2, or 3 of the Sherman Act.

**SEC. 102. PROHIBITION ON ANTICOMPETITIVE CONTRACTS BY BROADBAND ACCESS TRANSPORT PROVIDERS.**

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that a broadband access transport provider that has market power in the broadband service provider market has offered access to a service provider on terms and conditions, other than terms justified by demonstrable cost differentials, that are less favorable than those offered by such operator to itself, to an affiliated service provider, or to another service provider, or restrains unreasonably the ability of a service provider from competing in its provision of broadband services, shall be sufficient to establish a presumption of a violation of such section.

**SEC. 103. PROHIBITION ON ANTICOMPETITIVE OR DISCRIMINATORY BEHAVIOR BY BROADBAND ACCESS TRANSPORT PROVIDERS.**

It shall be unlawful for a broadband access transport provider to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to discriminate in favor of a service provider that is affiliated with a broadband access transport provider or to restrain unreasonably the ability of a service provider that is not affiliated with a broadband access transport provider from competing in its provision of any of the services provided by a service provider as set forth in section 105(3).

**SEC. 104. PROTECTION FROM FRAUDULENT UNSOLICITED E-MAIL.**

Section 1030 of title 18, United States Code, is amended—

(1) in subsection (a)(5)—

(A) by striking “or” at the end of subparagraph (B); and

(B) by inserting after subparagraph (C) the following new subparagraphs:

“(D) intentionally and without authorization initiates the transmission of a bulk unsolicited electronic mail message to a protected computer with knowledge that such message falsifies an Internet domain, header information, date or time stamp, originating e-mail address or other identifier; or

“(E) intentionally sells or distributes any computer program that—

“(i) is designed or produced primarily for the purpose of concealing the source or routing information of bulk unsolicited electronic mail messages in a manner prohibited by subparagraph (D) of this paragraph;

“(ii) has only limited commercially significant purpose or use other than to conceal such source or routing information; or

“(iii) is marketed by the violator or another person acting in concert with the violator and with the violator’s knowledge for use in concealing the source or routing information of such messages;

(2) in subsection (c)(2)(A)—

(A) by inserting “(i)” after “in the case of an offense”; and

(B) by inserting after “an offense punishable under this subparagraph;” the following: “; or (ii) under subsection (a)(5)(D) or (a)(5)(E) of this section which results in damage to a protected computer”;

(3) in subsection (c)(2), by adding at the end the following new subparagraph:

“(D) in the case of a violation of subsection (a)(5)(D) or (E), actual monetary loss and statutory damages of \$15,000 per violation or an amount of up to \$10 per message per violation whichever is greater; and”;

(4) in subsection (e)—

(A) by striking “and” at the end of paragraph (8);

(B) by striking the period at the end of paragraph (9); and

(C) by adding at the end the following new paragraphs:

“(10) the term ‘initiates the transmission’ means, in the case of an electronic mail message, to originate the electronic mail message, and excludes the actions of any interactive computer service whose facilities or services are used by another person to transmit, relay, or otherwise handle such message;

“(11) the term ‘Internet domain’ means a specific computer system (commonly referred to as a ‘host’) or collection of computer systems attached to or able to be referenced from the Internet which are assigned a specific reference point on the Internet (commonly referred to as an ‘Internet domain name’) and registered with an organization recognized by the Internet industry as a registrant of Internet domains;

"(12) the term 'unsolicited electronic mail message' means any substantially identical electronic mail message other than electronic mail initiated by any person to others with whom such person has a prior relationship, including prior business relationship, or electronic mail sent by a source to recipients where such recipients, or their designees, have at any time affirmatively requested to receive communications from that source; and

"(13) the term 'Internet' means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio."

(5) in subsection (g), by inserting "and reasonable attorneys' fees and other litigation costs reasonably incurred in connection with civil action" after "injunctive relief or other equitable relief".

#### SEC. 105. DEFINITIONS.

For purposes of this title:

(1) **BROADBAND.**—The term "broadband" refers to a transmission capability in excess of 200 kilobits per second in at least one direction.

(2) **BROADBAND ACCESS TRANSPORT PROVIDER.**—The term "broadband access transport provider" means one who engages in the broadband transmission of data between a user and his service provider's point of interconnection with the broadband access transport provider's facilities. Such term shall also include a service provider who provides to itself, over facilities owned by it or under its control, the broadband transport of services between itself and its users.

(3) **SERVICE PROVIDER.**—The term "service provider" means a person who provides a service that enables users to access content, information, electronic mail, or other services. The term may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.

(4) **INTERNET.**—The term "Internet" means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(5) **BROADBAND SERVICE PROVIDER MARKET.**—The term "broadband service provider market" includes the provision of broadband services over a single broadband access transport provider's facilities.

## TITLE II—ADDITIONAL PROVISIONS

#### SEC. 201. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

Title VII of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

#### "SEC. 715. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

"(a) **BROADBAND SERVICES PLANS.**—

"(1) **PLAN REQUIRED.**—Within 180 days after the effective date of this section, each local exchange carrier shall submit to the State commission in each State in which such carrier does business a plan to provide broadband telecommunications service in all local exchange areas in which such carrier has telephone exchange service customers as soon as such broadband telecommunications service is economically reasonably and technically feasible. The plan shall include all terms and conditions, including pricing, under which the services shall be provided. The test of economic reasonability and technical feasibility shall be made separately by the local exchange carrier for each local exchange, and the plan shall be considered certified 45 days after submission unless the State commission rejects the plan within such 45 days. Upon rejection of a plan, successive plans shall be submitted until approval is obtained. The plan shall be implemented within 180 days of the certification of the plan in each local exchange in which the provision of the service is both economically reasonable and technically feasible. Upon certification of its plan, the carrier shall be obligated by terms of the plan (including any modifications that it requests that are thereafter certified) but shall otherwise provide such services free of Federal and State price, rate, rate of return, and profit regulation. Upon a determination by the State commission that a local exchange is served by another provider of broadband telecommunications services, or any broadband

Internet access transport provider, or upon a determination by such State commission that the local exchange carrier makes broadband telecommunications services available to 70 percent of the access lines in an exchange, a local exchange carrier shall no longer be obligated by the terms of any such plan in such local exchange.

"(2) STATE MODIFICATIONS PROHIBITED.—Except upon request of the carrier, the State commission shall have no authority to modify any plan submitted pursuant to paragraph (1).

"(3) NO COMMISSION AUTHORITY.—The Commission shall have no authority with respect to the terms of any plan and shall have no authority with respect to the approval or rejection of any such plan.

"(b) SUPERSESSION OF OTHER REQUIREMENTS.—An incumbent local exchange carrier's provision of broadband local telecommunications services shall not be subject to the requirements of sections 251(c)(3) and 251(c)(4) of the Act in any State in which that carrier certifies to the State commission that—

"(1) in central offices in which it provides local loops that are conditioned for broadband services, it provides such loops to other carriers at least as quickly as it provides them for its own customers;

"(2) in central offices in which it does not currently provide local loops that are conditioned for broadband services, but in which such service is economically reasonable and technically feasible, it will provide such loops within 120 days of a request for such conditioning from another carrier; and

"(3) conditioned loops are provided upon such prices and other terms and conditions as the parties shall agree, or in any event of disagreements, as are determined through commercial arbitration, in which the commercial arbitrator shall establish the price based upon the cost of the loops and the costs for such conditioning that have been incurred by the local exchange carrier plus a reasonable profit."

#### SEC. 302. ACCELERATED DEPLOYMENT OF INTERNET BACKBONE.

(a) INTERLATA INTERNET SERVICES.—Paragraph (21) of section 3 of the Communications Act of 1934 (47 U.S.C. 153(21)), relating to the definition of interLATA service, is amended by inserting before the period the following: ", except that such term shall not include services that consist of or include the transmission of any data or information, including any writing, signs, signals, pictures, or sounds related to the transmission of such data or information, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology".

(b) VOICE INTERLATA INTERNET SERVICES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology, two-way voice-only interLATA telecommunications services originating in any of its in-region States until such time as the Federal Communications Commission approves the application of such company for such State pursuant to section 271(d) of the Communications Act of 1934. The terms in this subsection shall have the same respective meanings given such terms in sections 3 and 271 of such Act.



106TH CONGRESS  
1ST SESSION

## H. R. 1685

To provide for the recognition of electronic signatures for the conduct of interstate and foreign commerce, to restrict the transmission of certain electronic mail advertisements, to authorize the Federal Trade Commission to prescribe rules to protect the privacy of users of commercial Internet websites, to promote the rapid deployment of broadband Internet services, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1999

Mr. BOUCHER (for himself and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee

on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

## A BILL

To provide for the recognition of electronic signatures for the conduct of interstate and foreign commerce, to restrict the transmission of certain electronic mail advertisements, to authorize the Federal Trade Commission to prescribe rules to protect the privacy of users of commercial Internet websites, to promote the rapid deployment of broadband Internet services, 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 "Internet Growth and Development Act of 1999".

## TITLE I—AUTHORIZATION OF ELECTRONIC SIGNATURES IN COMMERCE

### SEC. 101. DEFINITIONS.

For purposes of this title, the following definitions shall apply:

(1) **ELECTRONIC COMMERCE.**—The term "electronic commerce" means the transaction or conduct of any business that is in or that affects interstate or foreign commerce and that is in whole or part transacted or conducted by electronic means.

(2) **ELECTRONIC MEANS.**—The term "electronic means" includes all forms of electronic communication mediated by computer, including telephonic communications, facsimile, electronic mail, electronic data exchanges, satellite, cable, and fiber optic communications.

(3) **ELECTRONIC AUTHENTICATION.**—The term "electronic authentication" means any methodology, technology, or technique intended to—

(A) establish the identity of the maker, sender, or originator of a document or communication in electronic commerce; and

(B) establish the fact that the document or communication has not been altered.

(4) **ELECTRONIC SIGNATURE.**—The term "electronic signature" means any electronic symbol or series of symbols, created, or processed by a computer, intended by the party using it (or authorizing its use) to have the same legal force and effect as a manual signature.

### SEC. 102. VALIDITY OF ELECTRONIC AUTHENTICATION.

(a) **VALIDITY OF ELECTRONIC SIGNATURES.**—All electronic signatures that have been authenticated through the use of a means of electronic authentication that complies with subsection (d) shall have standing equal to paper-based, written signatures, so that—

(1) any rule of law which requires a record to be in writing shall be deemed satisfied; and

(2) any rule of law which requires a signature shall be deemed satisfied.

(b) **VALIDITY OF ELECTRONIC RECORDS.**—Electronic records shall not be denied legal effect, validity, or enforceability solely because such records are in electronic form.

(c) **VALIDITY OF STATE LAWS.**—Nothing in this section shall be construed to preempt the law of a State that enacts legislation governing electronic transactions that is consistent with subsections (a) and (b).

(d) **MEANS OF ELECTRONIC AUTHENTICATION.**—

(1) **IN GENERAL.**—For purposes of this title, a means of electronic authentication complies with the requirements of this section if it—

(A) reliably establishes the identity of the maker, sender, or originator of a document or communication in electronic commerce; and

(B) reliably establishes the fact that the document or communication has not been altered.

(2) **METHODS OF PROOF.**—A person may demonstrate compliance with the requirements of paragraph (1) by demonstrating that a means of electronic authentication—

(A) uses an identification methodology that is unique to the person making, sending, originating a document or communication;

(B) the identification methodology shall be capable of verifying the identity of such person; and

(C) the identification methodology is linked to the data or communication transmitted in such a manner that if such data or communication has been altered, the authentication becomes invalid.

## **TITLE II—ELECTRONIC MAIL ADVERTISEMENTS**

### **SEC. 201. UNSOLICITED ELECTRONIC MAIL ADVERTISEMENTS.**

Title VII of the Communications Act of 1934 is amended by adding at the end the following section:

#### **\*SEC. 715. UNSOLICITED ELECTRONIC MAIL ADVERTISEMENTS.**

“(a) **COMPLIANCE OF REGISTERED USERS WITH PROVIDER POLICY REQUIRED.**—No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider’s equipment in violation of that electronic mail service provider’s policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.

“(b) **COMPLIANCE BY SENDERS WITH PROVIDER POLICY REQUIRED.**—No person or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider’s equipment in violation of that electronic mail service provider’s policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users.

“(c) **PROVIDER POLICIES NOT REQUIRED.**—An electronic mail service provider shall not be required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements.

“(d) **CONTINUED PROTECTION FROM BEING TREATED AS PUBLISHER.**—Nothing in this section shall be construed to limit or restrict the rights of an electronic mail service provider under section 230(c)(1) of this Act, or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function.

#### **“(e) REMEDIES.—**

“(1) **PRIVATE ACTIONS BY PROVIDERS.**—In addition to any other remedy available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of \$50 for each electronic mail message initiated or delivered in violation of this section, up to a maximum of \$25,000 per day, whichever amount is greater.

“(2) **ATTORNEY FEES.**—In any action brought pursuant to paragraph (1), the court may award reasonable attorney’s fees to a prevailing party.

“(3) **NOTICE OF POLICY REQUIRED.**—In any action brought pursuant to paragraph (1), the electronic mail service provider shall be required to establish as an element of its cause of action that prior to the alleged violation, the defendant had actual notice of both of the following:

“(A) The electronic mail service provider’s policy on unsolicited electronic mail advertising and

“(B) The fact that the defendant’s unsolicited electronic mail advertisements would use or cause to be used the electronic mail service provider’s equipment.

#### **“(f) DEFINITIONS.—As used in this section:**

“(1) **ELECTRONIC MAIL ADVERTISEMENT.**—The term ‘electronic mail advertisement’ means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other commercial distribution of goods or services to the recipient.

“(2) **UNSOLICITED ELECTRONIC MAIL ADVERTISEMENT.**—The term ‘unsolicited electronic mail advertisement’ means any electronic mail advertisement that meets both of the following requirements:

“(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

“(B) It is not sent at the request of or with the express consent of the recipient.

“(3) ELECTRONIC MAIL SERVICE PROVIDER.—The term ‘electronic mail service provider’ means any person or other entity that provides registered users the ability to send or receive electronic mail and that is an intermediary in sending or receiving electronic mail.

“(4) INITIATION.—The term ‘initiation’ of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message.

“(5) REGISTERED USER.—The term ‘registered user’ means any person or other entity that maintains an electronic mail address with an electronic mail service provider.”.

## TITLE III—ONLINE PRIVACY PROTECTION

### SEC. 301. ONLINE PRIVACY PROTECTION.

(a) INFORMATION COLLECTION REGULATIONS.—Any person operating a commercial Internet website shall clearly and conspicuously provide notice of its collection, use, and disclosure policies with regard to personally identifiable information, including—

(1) the personally identifiable information that the website operator collects from individuals visiting the website; and

(2) the uses that the website operator makes of the personally identifiable information, including whether the operator makes the information available to any third parties.

(b) ENFORCEMENT.—Any knowing violation of the requirements under subsection (a) shall be treated as an unfair or deceptive act or practice under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

## TITLE IV—BROADBAND DEPLOYMENT

### SEC. 401. ACCELERATED DEPLOYMENT OF INTERNET BACKBONE.

(a) INTERLATA INTERNET SERVICES.—Paragraph (21) of section 3 of the Communications Act of 1934 (47 U.S.C. 153(21)), relating to the definition of interLATA service, is amended by inserting before the period the following: “, except that such term shall not include services that consist of or include the transmission of any data or information, including any writing, signs, signals, pictures, or sounds related to the transmission of such data or information, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology”.

(b) VOICE INTERLATA INTERNET SERVICES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide, by means of the Internet or any other network that employs Internet Protocol-based or other packet-switched technology, two-way voice-only interLATA telecommunications services originating in any of its in-region States until such time as the Federal Communications Commission approves the application of such company for such State pursuant to section 271(d) of the Communications Act of 1934. The terms in this subsection shall have the same respective meanings given such terms in sections 3 and 271 of such Act.

### SEC. 402. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

Title VII of the Communications Act of 1934 is further amended by adding at the end thereof the following new section:

#### “SEC. 716. ACCELERATED DEPLOYMENT OF BROADBAND SERVICES.

“(a) BROADBAND SERVICES PLANS.—

“(1) PLAN REQUIRED.—Within 180 days after the effective date of this section, each local exchange carrier shall submit to the State commission in each State in which such carrier does business a plan to provide broadband telecommunications service in all local exchange areas in which such carrier has telephone exchange service customers as soon as such broadband telecommunications service is economically reasonable and technically feasible. The plan shall include all terms and conditions, including pricing, under which the serv-

ices shall be provided. The test of economic reasonability and technical feasibility shall be made separately by the local exchange carrier for each local exchange, and the plan shall be considered certified 45 days after submission unless the State commission rejects the plan within such 45 days. Upon rejection of a plan, successive plans shall be submitted until approval is obtained. The plan shall be implemented within 180 days of the certification of the plan in each local exchange in which the provision of the service is both economically reasonable and technically feasible. Upon certification of its plan, the carrier shall be obligated by terms of the plan (including any modifications that it requests that are thereafter certified) but shall otherwise provide such services free of Federal and State price, rate, rate of return, and profit regulation. Upon a determination by the State commission that a local exchange is served by another provider of broadband telecommunications services, or any broadband Internet access transport provider, or upon a determination by such State commission that the local exchange carrier makes broadband telecommunications services available to 70 percent of the access lines in an exchange, a local exchange carrier shall no longer be obligated by the terms of any such plan in such local exchange.

"(2) STATE MODIFICATIONS PROHIBITED.—Except upon request of the carrier, the State commission shall have no authority to modify any plan submitted pursuant to paragraph (1).

"(3) NO COMMISSION AUTHORITY.—The Commission shall have no authority with respect to the terms of any plan and shall have no authority with respect to the approval or rejection of any such plan.

"(b) SUPERSESSION OF OTHER REQUIREMENTS.—An incumbent local exchange carrier's provision of broadband local telecommunications services shall not be subject to the requirements of sections 251(c)(3) and 251(c)(4) of the Act in any State in which that carrier certifies to the State commission that—

"(1) in central offices in which it provides local loops that are conditioned for broadband services, it provides such loops to other carriers at least as quickly as it provides them for its own customers;

"(2) in central offices in which it does not currently provide local loops that are conditioned for broadband services, but in which such service is economically reasonable and technically feasible, it will provide such loops within 120 days of a request for such conditioning from another carrier; and

"(3) conditioned loops are provided upon such prices and other terms and conditions as the parties shall agree, or in any event of disagreements, as are determined through commercial arbitration, in which the commercial arbitrator shall establish the price based upon the cost of the loops and the costs for such conditioning that have been incurred by the local exchange carrier plus a reasonable profit."

## **TITLE V—ANTITRUST AND CRIMINAL PROVISIONS**

### **SEC. 501. PROHIBITION ON ANTICOMPETITIVE BEHAVIOR BY INCUMBENT LOCAL EXCHANGE CARRIERS.**

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that an incumbent local exchange carrier that has market power in the broadband service provider market has willfully and knowingly failed to provide conditioned unbundled local loops when economically reasonable and technically feasible under section 716(a) of the Communications Act of 1934, or restrains unreasonably the ability of a carrier to compete in its provision of broadband services over a local loop, shall be sufficient to establish a presumption of a violation of such section 1, 2, or 3 of the Sherman Act.

### **SEC. 502. PROHIBITION ON ANTICOMPETITIVE CONTRACTS BY BROADBAND ACCESS TRANSPORT PROVIDERS.**

In any civil action based on a claim arising under section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, 3), evidence that a broadband access transport provider that has market power in the broadband service provider market has offered access to a service provider on terms and conditions, other than terms justified by demonstrable cost differentials, that are less favorable than those offered by such operator to itself, to an affiliated service provider, or to another service provider, or restrains unreasonably the ability of a service provider from competing in its provision of

broadband services, shall be sufficient to establish a presumption of a violation of such section.

**SEC. 503. PROHIBITION ON ANTICOMPETITIVE OR DISCRIMINATORY BEHAVIOR BY BROADBAND ACCESS TRANSPORT PROVIDERS.**

It shall be unlawful for a broadband access transport provider to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to discriminate in favor of a service provider that is affiliated with a broadband access transport provider or to restrain unreasonably the ability of a service provider that is not affiliated with a broadband access transport provider from competing in its provision of any of the services provided by a service provider as set forth in section 505(3).

**SEC. 504. PROTECTION FROM FRAUDULENT UNSOLICITED E-MAIL.**

Section 1030 of title 18, United States Code, is amended—

(1) in subsection (a)(5)—

(A) by striking “or” at the end of subparagraph (B); and

(B) by inserting after subparagraph (C) the following new subparagraphs:

“(D) intentionally and without authorization initiates the transmission of a bulk unsolicited electronic mail message to a protected computer with knowledge that such message falsifies an Internet domain, header information, date or time stamp, originating e-mail address or other identifier; or

“(E) intentionally sells or distributes any computer program that—

“(i) is designed or produced primarily for the purpose of concealing the source or routing information of bulk unsolicited electronic mail messages in a manner prohibited by subparagraph (D) of this paragraph;

“(ii) has only limited commercially significant purpose or use other than to conceal such source or routing information; or

“(iii) is marketed by the violator or another person acting in concert with the violator and with the violator’s knowledge for use in concealing the source or routing information of such messages;”;

(2) in subsection (c)(2)(A)—

(A) by inserting “(i)” after “in the case of an offense”; and

(B) by inserting after “an offense punishable under this subparagraph;” the following: “; or (ii) under subsection (a)(5)(D) or (a)(5)(E) of this section which results in damage to a protected computer”;

(3) in subsection (c)(2), by adding at the end the following new subparagraph:

“(D) in the case of a violation of subsection (a)(5)(D) or (E), actual monetary loss and statutory damages of \$15,000 per violation or an amount of up to \$10 per message per violation whichever is greater; and”;

(4) in subsection (e)—

(A) by striking “and” at the end of paragraph (8);

(B) by striking the period at the end of paragraph (9); and

(C) by adding at the end the following new paragraphs:

“(10) the term ‘initiates the transmission’ means, in the case of an electronic mail message, to originate the electronic mail message, and excludes the actions of any interactive computer service whose facilities or services are used by another person to transmit, relay, or otherwise handle such message;

“(11) the term ‘Internet domain’ means a specific computer system (commonly referred to as a ‘host’) or collection of computer systems attached to or able to be referenced from the Internet which are assigned a specific reference point on the Internet (commonly referred to as an ‘Internet domain name’) and registered with an organization recognized by the Internet industry as a registrant of Internet domains;

“(12) the term ‘unsolicited electronic mail message’ means any substantially identical electronic mail message other than electronic mail initiated by any purpose to others with whom such person has a prior relationship, including prior business relationship, or electronic mail sent by a source to recipients where such recipients, or their designees, have at any time affirmatively requested to receive communications from that source; and

“(13) the term ‘Internet’ means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.”.

(5) in subsection (g), by inserting "and reasonable attorneys' fees and other litigation costs reasonably incurred in connection with civil action" after "injunctive relief or other equitable relief".

#### SEC. 505. DEFINITIONS.

For purposes of this title:

(1) **BROADBAND.**—The term "broadband" refers to a transmission capability in excess of 200 kilobits per second in at least one direction.

(2) **BROADBAND ACCESS TRANSPORT PROVIDER.**—The term "broadband access transport provider" means one who engages in the broadband transmission of data between a user and his service provider's point of interconnection with the broadband access transport provider's facilities. Such term shall also include a service provider who provides to itself, over facilities owned by it or under its control, the broadband transport of services between itself and its users.

(3) **SERVICE PROVIDER.**—The term "service provider" means a person who provides a service that enables users to access content, information, electronic mail, or other services. The term may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.

(4) **INTERNET.**—The term "Internet" means all computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(5) **BROADBAND SERVICE PROVIDER MARKET.**—The term "broadband service provider market" includes the provision of broadband services over a single broadband access transport provider's facilities.



Mr. HYDE. I want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their excellent work in bringing these issues before us. They are both well versed in high technology issues and they are a real credit to this committee.

I appreciate all of you coming today, and we look forward to your testimony. I now turn to the ranking member, Congressman Conyers, and then I will recognize the sponsors of these bills, Mr. Goodlatte and Mr. Boucher, for their opening statements.

Mr. Conyers.

[The prepared statement of Chairman Hyde follows:]

#### PREPARED STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Committee holds a hearing on H.R. 1686, the "Internet Freedom Act," introduced by Congressman Goodlatte, and H.R. 1685, the "Internet Growth and Development Act of 1999," introduced by Congressman Boucher.

These two bills seek to enhance the growth of the Internet. They involve two related issues. The first has to do with cable broadband lines and whether their owners will be required to grant access to them on nondiscriminatory terms. The second is whether the regional Bell operating companies will be able to transport data over long distance lines within their regions—something they are currently prohibited from doing. The resolution of both of these issues will have profound consequences for the future of the Internet, and more broadly, the ways that we will communicate in the future.

This Committee has a long and proud history in shaping telecommunications policy, and we were instrumental in passing the landmark Telecommunications Act of 1996 into law. We intend to continue that proud tradition in our consideration of this legislation. We are the Committee responsible for competition policy throughout the economy, and I cannot think of a set of competition issues that is more vital to our nation's future.

At the time that we were considering the 1996 Act, the Internet was in its infancy. In a little over three years, it has gone from a technological marvel to a near necessity for millions of Americans. That tremendous growth has dramatically

changed many of the assumptions we held when we were considering the Act. That may mean that we need to reopen the Act, but it may not.

It does, however, mean that we ought to take a look at that question, and that is what we are here to do. Several of the contending parties have visited with me in the last several weeks, and I will say publicly what I have said to them. I come to these issues with an open mind. I have taken no position on either of the bills before us, but I am very interested to hear the arguments of all the witnesses today.

I also want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their excellent work in bringing these issues before us. They are both well-versed in high technology issues, and they are a credit to the Committee.

I appreciate all of you coming today, and we look forward to your testimony. I will now turn to the ranking member, Mr. Conyers. Then, I will recognize the sponsors of these bills, Mr. Goodlatte and Mr. Boucher, for their opening statements.

Mr. CONYERS. Good morning, Mr. Chairman, and my colleagues and all of the distinguished witnesses that are here. This is an important matter. And I would like to begin by reminding the members of the importance of this hearing. This represents one of the most critical segments of our economy, nearly a seventh of our entire gross national product, affecting everyone in every business thereby.

It has always been my position to support competition in all sectors to give consumers access to the greatest selection of options at the best prices. Unfortunately, to date I have not been impressed with the state of competition in the telecommunications industry.

The fact of the matter is that cable rates essentially deregulated under the 1996 act have gone up over 20 percent in 6 years, and the competition and innovation among the Bells have resulted in a wave of mergers and consolidations. Seven Bells to four. And the cable industry is in the process of being swallowed whole by the long distance and software industries.

The bill of my colleagues on the committee—and I too commend them—brings two critical communications issues before the committee. The first question is whether Congress should impose open access requirements on high-speed cable to the Internet. Part of this issue comes down to whether high-speed access is a unique monopoly service which can't be duplicated or whether it is one of many equally good routes to the Internet.

In addition, we need to consider what impact, if any, regulating high-speed cable will have on the ability of the cable industry to convert the technology into two-way telephone service which, of course, competes with the Bells.

The other huge question before us is whether we should relax the statutory restrictions on long distance service by the Bells so they can enter the field of long distance data transmissions. On this point, there seems to be some clarity in the observation that the Bells should fully open up their networks to local competition before they should be able to enter long distance.

The statutory requirement serves two purposes: first, it ensures that the Bells can't use their local phone monopoly to create a monopoly in long distance, and it creates a strong financial incentive for the Bells to open up their own networks to competition.

Data transmission represents half of all the traffic on the telephone network and will soon go beyond 90 percent.

So if we are to abandon the long distance entry tests for data, we will have to see very strong and compelling evidence that doing

so will not harm competition and will not negatively impact consumers.

And so I approach this hearing subject to these observations with great interest in the comments that will come from a very distinguished panel.

The telecommunications industry was, frankly, born into monopoly. And it took three antitrust suits to finally bring some semblance of competition to Ma Bell. Competition and antitrust were also at the heart of the long distance restrictions included in the 1996 Telecommunications Act.

So let's have at it, but let's remember that the consumers and our citizens should be predominant in the concerns that we resolve here this morning. Thank you very much.

Mr. HYDE. Thank you, Mr. Conyers. Mr. Goodlatte, the gentleman from Virginia.

Mr. GOODLATTE. Mr. Chairman, I want to thank you for holding this hearing today. Clearly the turnout that we have is evidence that either this is perhaps the most important issue related to the future of the Internet or at least we have struck a nerve. I want to welcome everybody today.

In my opinion, this is a tremendous issue and does very much relate to the future of the Internet. The promise and potential of the Internet is boundless, and we are just beginning to understand and realize how fundamental the Internet's impact on society will be. I hope that this will be the first of many Judiciary Committee hearings that will take a long-range view of the development of the Internet and our future as both a Nation and as an increasingly connected global electronic community.

Mr. Chairman, the legislation we hear testimony on this morning was introduced by Congressman Boucher and myself earlier this year because we felt we had no alternative. As we move from the current world of narrow band or slower speed Internet service, into the world of high speed or broadband Internet service, we recognize that the Internet is at a crossroads. One path continues to encourage the qualities that have made the Internet the revolutionary technology we enjoy today, freedom, competition, and consumer choice.

The other path is characterized by limited competition and higher prices, followed by inevitable attempts at burdensome regulations by aggressive Federal Government agencies. This path results when a company can abuse its market power to restrict the ability of businesses to compete on the Internet and restrict the ability of consumers to access the Internet provider and content of their choice.

The Internet as we know it, open, competitive and easily available to consumers, will cease to exist. That path, unfortunately, is the path we are on right now.

Congress must act now to ensure that the qualities that made the Internet a revolutionary tool for both business and users, deregulation, competition, and easy consumer access remain fundamental components of the Internet for future generations.

The first goal of our legislation is deregulation. The bill gets the FCC out of the business of regulating the Internet. It accomplishes this by eliminating existing FCC regulations that are inhibiting the

development and roll-out of certain types of broadband Internet service in nonurban and rural areas.

The second goal of our legislation accomplishes—the second goal our legislation accomplishes is to ensure consumer choice through open competition. Through the clarification of current antitrust law and the deregulation of restrictive regulations on the ability of phone companies to compete in the provision of nationwide data services, our legislation provides competition in both the Internet service provider and the Internet backbone markets.

Finally, our legislation encourages open consumer access for consumers by encouraging the roll-out of high-speed Internet service into rural and nonmetropolitan areas more quickly. The relaxation of existing regulations on the phone companies would allow them to more quickly enter the backbone market, rolling out high-speed service to more and more rural areas.

The bill also rewards the phone companies from meeting certain roll-out requirements by removing rate and price regulations. These requirements include conditioning local loops for high-speed service by competitors and filing plans with their State regulatory agencies for the predicted roll-out of broadband service.

The principles of free market competition, low government regulation, and open consumer access have guided the growth of the Internet. The environment that has nurtured this early growth must be preserved and strengthened to spur continued innovation and ensure that the Internet and information-based economy continue to flourish.

Our legislation will ensure that this environment continues to thrive in a way that avoids the heavy hand of government regulation while applying current antitrust law to ensure competition and protect both consumers and small businesses as we move into the 21st century.

Mr. Chairman, I think it is especially important that the Judiciary Committee has taken the lead on this issue in addressing it from an antitrust stand point because I think this is a place where we can truly speak for a competitive environment and work to continue to see the Internet grow. But in order to accomplish that, we must make sure that no company, no industry, dominates this market.

Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. It has been my pleasure to work with my Virginia colleague, Mr. Goodlatte, in authoring two items of legislation which are the subject of our hearing today which taken together address the major challenges that confront the Internet in our time. If enacted into law, the legislation that we have put forward will strengthen the Internet and will assure its growth and development. And I want to thank Chairman Hyde for assembling today's discussion, which is focused on these two items of legislation.

Until the present time, congressional debate on matters that affect the Internet have been ad hoc. They have been for a single purpose only. The bills that Mr. Goodlatte and I have put forward provide the first comprehensive framework for debate by the Con-

gress of the major current Internet policy challenges. And I hope that today's hearing will be but the first formal step in a process that will lead to passage of these measures by the Congress during the course of this Congress.

These are the goals that we are seeking to achieve. First, we want to assure that all people who connect to the Internet can select the Internet access provider of their choice, whatever platform they have chosen for transport service. This open architecture is the model to which Americans have become accustomed. Most people connect to the Internet today using telephone lines. And under current law they can choose among an array of Internet access providers. If the telephone company that offers transport services also offers an Internet access service, the customer may choose the telephone company's Internet access service. But he is equally free to choose to purchase Internet access from some other provider.

Unfortunately, that requirement does not extend at the present time to the cable industry. And as cable companies deploy high-speed cable modem services, they are requiring that their cable modem transport customers purchase either @Home or Road Runner, their affiliated Internet access services. This arrangement threatens to close an Internet architecture that because of its previous openness has enabled the Internet to grow and develop. This arrangement will deny customers a free and fair choice. And this arrangement threatens the very existence of many of the some 5,000 Internet access providers found across the Nation today.

The legislation we propose would keep the Internet architecture open, would assure customer choice, and would enable Internet access providers to continue to reach their business base of customers.

As a second major purpose, our legislation will assure greater competition in the offering of Internet backbone services by permitting the Bell operating companies to provide data across LATA boundaries as long as the data does not consist of a voice-only long distance service. This provision is essential to assure adequate backbone services in many rural areas of the Nation and to protect the peering arrangements that keep Internet traffic flowing without charges among the various segments of the Internet backbone today. This insurance policy against a very real threat of concentration in the offering of backbone services will help to keep the prices for Internet connections for all Americans reasonable.

Our comprehensive legislation will also achieve these additional goals. By deregulating DSL services, we will strengthen the financial case for the deployment of this broadband offering to homes and to places of work across the Nation by telephone companies. This provision will help to increase the speed of Internet connections and address one of the major policy challenges that confronts Internet consumers today.

We propose to give new legal tools to Internet service providers to protect their facilities from onslaughts of spam. We propose to authorize digital signatures for all commercial transactions so that no party to a commercial transaction can disavow that transaction due to the absence of a physical written signature.

We propose new guarantees for the competitors of telephone companies in offering DSL services by making available to them recon-

ditioned loops at an earlier time so that they can in a more efficient way offer a competitive DSL service. And we propose a new right of privacy assuring that all Internet users will know what information is collected from them by Web sites, how that information is disseminated if at all by the Web site, and then have an opportunity to opt out of visiting the Web site without any information about them being collected.

These measures are carefully balanced. They are integrated each with the others, and together they will keep the Internet open and encourage its development.

Mr. Chairman, I thank you again for organizing today's discussion, and I look forward to hearing from our distinguished witnesses.

Mr. HYDE. Thank you, Mr. Boucher. Before I introduce the panel, Mr. Bryant, a member of our committee has been drafted by the Commerce Committee and apparently became a free agent and signed with them and is no longer with us. However, we came out number one in the draft, and we have his replacement.

So I would like to introduce the newest member of the committee, Representative David Vitter of the First District of Louisiana. Mr. Vitter is a graduate of Harvard University and the Tulane University Law School. He was also a Rhodes Scholar at Oxford. He practiced law for many years in Louisiana; he also taught law at Tulane and Loyola Law Schools. He served 7½ years in the Louisiana State legislature, where he was a champion of lower taxes, smaller government, and swifter punishment for criminals. We welcome him to the committee today. Mr. David Vitter.

Mr. VITTER. Thank you very much, Mr. Chairman.

Mr. HYDE. Our first and only panel today consists of 11 witnesses who have various perspectives on the bills we are considering. Our first witness is Mr. Bill Barr, the executive vice president and general counsel of GTE Corporation. Mr. Barr has a bachelor's and a master's degree from Columbia University and a law degree from George Washington University. After law school, he clerked for Judge Malcolm Wilkie of the D.C. Circuit. He has a long and distinguished career in public service, both at the Central Intelligence Agency and the Department of Justice, culminating with his service as Attorney General from 1991 to 1993. Before coming to GTE, he was in private practice with the Washington law firm of Shaw, Pittman, Potts and Trowbridge.

Our next witness is Mr. George Vradenburg, the senior vice president of America Online. Mr. Vradenburg is a graduate of Overland College and Harvard Law School. He has been a partner at the law firm of Latham and Watkins and has served in the legal departments of CBS and Fox. He joined AOL as its general counsel in 1997 and has been with the company ever since.

Our next witness is Mr. Ken Wasch, the president of the Software and Information Industry Association. Mr. Wasch, I hope I am pronouncing it correctly—is it soft, Mr. Wasch?

Mr. WASCH. Yes.

Mr. HYDE. Mr. Wasch is a graduate of Lehigh University and the State University of New York at Buffalo Law School. After law school, he spent 8 years with the Department of Energy. In 1984, he founded the Software Publishers Association; and he led that as-

sociation until this year, when it merged with the Information Industry Association. He is now the leader of the newly merged association that he represents here today.

Our next witness is Mr. Erik Sten, the commissioner of public works for the City of Portland, Oregon. Commissioner Sten is a graduate of Stanford University and served for many years as chief of staff to a city commissioner in Portland before being elected in his own right in 1996. During that time he became recognized for his work in the field of housing. As commissioner of Public Works he is responsible for, among other things, the city's Office of Cable Communications and Franchise Management.

Our next witness is Mr. Scott Cleland, managing director of the Legg Mason Precursor Group. Mr. Cleland has a bachelor's degree from Kalamazoo College and a master's degree from the University of Texas. He has a long career in government, serving in the State Department, the Treasury Department, and the Office of Management and Budget. He also has extensive experience in the private sector working with Booz Allen and Hamilton, Charles Schwab and Company, and Legg Mason.

Our next witness is Mr. Mark Rosenblum, the vice president for law of AT&T. Mr. Rosenblum is graduate of the University of Maryland and the University of Michigan Law School. Mr. Rosenblum practiced with the law firm of Sullivan and Cromwell before joining AT&T in 1984. He has been with the company since that time, rising to his current position last year.

Next Mr. Mike Salsbury, the executive vice president and general counsel of MCI Communications. Mr. Salsbury is a graduate of Dartmouth, and he has a JD and an MBA from the University of Virginia. He was previously the managing partner of the Washington office of the law firm of Jenner and Block. He came to MCI as its general counsel; and after its merger with Worldcom, he has had the same role with the newly merged company.

Our next witness is Mr. Tim Boggs, the senior vice president of Time Warner. Mr. Boggs is a graduate of the University of Wisconsin. He is also a veteran of the staff of this committee, and we extend to him a special welcome in that regard. He joined Warner Communications in 1982 and has been with the company in its various forms since then.

Our next witness is Mr. John Windhausen, the president of the Association for Local Telecommunications Services. Mr. Windhausen is a graduate of Yale University and the UCLA Law School. He has had a distinguished career in government, serving at the Federal Communications Commission and the Senate Commerce Committee. Since leaving the committee, he has worked at the Competition Policy Institute as well as teaching at Georgetown university.

Our next witness is Mr. Tod Jacobs, the senior telecommunications analyst at Sanford C. Bernstein and Company. Mr. Jacobs has a bachelor's degree from Northwestern University and a master's from the Columbia University Journalism School. Before becoming a securities analyst, he had a career in journalism and was nominated for a Pulitzer Prize and an Emmy Award. He joined his current company in 1989 and became a partner in 1995.

Our final witness is Mr. Gene Kimmelman, the codirector of the Washington office of Consumers Union, the publisher of Consumer Reports. He is a graduate of Brown University and the University of Virginia Law School. He served 2 years as the chief counsel of the Senate Judiciary Committee's Antitrust Subcommittee. He also has worked with the Consumer Federation of America and Congress Watch. He is recognized as a leading consumer advocate on telecommunications issues.

We welcome all of you and look forward to your testimony. And I would request that you try to confine your remarks to 5 minutes. The entirety of your statement will be received into the record and, of course, will be read and studied. But because we have so many witnesses it would be helpful if you could abbreviate your comments in general and leave time for questions.

Mr. CONYERS. Mr. Chairman, might all the members have an opportunity to submit any written introductory statements that they may not have made?

Mr. HYDE. Absolutely. Anyone who has an introductory statement it shall be received into the record at this point without objection.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I would like to thank Chairman Hyde and Ranking Member Conyers for convening this important legislative hearing on two bills, H.R. 1685 and H.R. 1686, both of which touch upon broadband telecommunications issues that are one of the driving forces behind our thriving economy.

Before we can come to a resolution on these two bills, I believe it is in the interest of the Committee to examine how it is that we got here. *Simply said, what we are grappling with here today is the question of what Congress should do for an industry whose competition is technology-based, but where the technologies that drive competition are in a state of convergence.*

In a recent conversation I had with Federal Communications Commissioner William Kennard, we spoke of what it was that would bring us back to the Telecommunications Act of 1996, which I proudly worked on as a Freshman Member in this House. What would it take to make us revisit some of the principles that were laid down in that important piece of legislation? His answer was clear, and one with which I wholeheartedly concur—convergence would bring us back.

By convergence, I am describing the phenomenon that moves even as we sit in this Chamber. It brings together the technologies that bring moving pictures to our television sets and that allows us to speak with each other over the telephone. Both technologies have the capacity to carry high-speed data over the Internet, one through the use of cable modems, and the other through a technology known as DSL. And now, what we thought were disparate systems are competing directly with each other—one technology versus another.

The ramifications of this convergence are startling and have caused the business community to rethink what it means to be called a telecommunications company. It also gives Congress pause to think about whom should we think should be treated as a telecommunications company under the law. These bills will allow us to focus our discussions on these profound legal questions.

To me, these bills do not represent a radical departure from current policy. What they do, however, is expand the scope of our policies to uncharted territories. Part of the reason for that, and one of the honest impetuses for these bills, is the fact that, for now, cable systems are developing to be the platform-of-choice for broadband services.

If this trend continues, to the point where we no longer have technology-based competition—then I would not think it unconscionable that we apply some of the same regulations that currently exist on the phone networks to the new technology. I understand that this will have a significant impact on those who have invested a great deal of capital into cable and whom originally thought that their investment would give them the right to exclusively capture the Internet business of their cus-

tomers. But that is part of the reason why we are having this hearing here today—to gauge the magnitude of that impact.

Another aspect of this legislation that we will be looking into is whether Section 271 of the Telecommunications Act needs to be retooled in order to deal with the convergence of technologies that I described earlier. Part of the debate will focus on to what an exemption from Section 271 of the Telecommunications Act for data transmission would do to the delicate balance that I believe we achieved between local and long-distance phone companies in 1996. We need to know whether we will be allowing an end-run around the Act, or whether we are truly creating an opportunity for investment in our Internet backbone.

We also need to investigate the current status of the Internet backbone. Is its bandwidth adequate for the near and distant future? Do too few parties control it? Is there an adequate reason to prohibit local-access providers from purchasing segments of the backbone? Will new technologies rely on the backbone?

The bottom line is that whatever decisions we make, we must try to keep our eye on the best interest of consumers. We want to make sure that we are not making choices between factions of phone companies for their sake, but that we are making smart choices for our constituents.

I hope that the testimony today will allow us to make informed decisions on these bills as we move forward, and I look forward to working with all of you on this important issue. Thank you.

Mr. HYDE. Mr. Barr.

**STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT  
AND GENERAL COUNSEL, GTE CORPORATION, WASHINGTON,  
DC**

Mr. BARR. Thank you for the opportunity to testify today, Mr. Chairman. And I would like to commend Congressmen Goodlatte and Boucher for their leadership on this critical issue. You know, when you think about it, there is no institution that is potentially as central to our economic and communal life as the Internet. It is more than just a method of communication; it is really a marketplace where buyers find sellers and commercial transactions are executed. And it is more than an entertainment media. It has become the primary means of the dissemination of opinions and ideas. It has really become very much a comment, a public comment and a public forum.

Now the principal constraint that has been operating on the Internet today is that, while the backbone of the Internet can carry rivers of data, the pipeline to the house can only carry a trickle. And there have been two solutions that have been developed, one by the phone companies, and one by the cable companies. These are technological solutions that can transform those pipes into high bandwidth pipes capable of pumping rivers of data into the home.

Now, this will effectuate the promise of the Internet. And people are desperate for it, desperate to get that high band width, because that is when video can come over, video, incidently, which competes with cable. That is how you can have real-time teleconferencing and other things like that.

How do we get that out to people as quickly as possible? Everyone here says we are for competition. Well, let that be the benchmark. We should be for anything that maximizes competition on the Internet because that ensures the widest and the quickest deployment of this technology; but it also ensures that the Internet will be diverse, will be innovative, and will continue to grow.

And that is what the Goodlatte-Boucher bill does. It maximizes competition on the Internet. This is the key point. The status quo is not full competition or competition. There are obstacles in place

today that constrain and limit competition. And what the Goodlatte-Boucher bill does is it eliminates those obstacles and it unleashes the forces of competition. I can't imagine a more deregulatory procompetitive approach to dealing with the Internet than this bill. It basically says that the Internet is a regulation-free zone; let the competition begin.

Now, what is the first obstacle? I said there were two. The first obstacle is that the cable companies are asserting that they have the unique right—no one else has this in the telecommunications industry—to engage in a grossly anticompetitive practice that violates a basic tenet of open access which has been the bedrock of maintaining competition in telecommunications industry.

And what this is is a simple tactic. It says if we own the local wire, then we can dictate to you what services you get over it and we can require that you only get our services over it. This is a form of improper tying that has historically curtailed competition in telecommunications markets. If a person has an advantage in one market and seeks to leverage it into another by saying if you buy product A from me, I am going to force you to buy product B. That is anticompetitive. That is not procompetitive, because you curtail competition in market B and you limit consumer choice.

If all the electric utilities today got together and said, hey, it is our electricity you are using, and if you want to use our electricity you have to buy your appliances from our subsidiary, you can't use any other appliances, that curtails competition in the appliance market. That is anticompetitive and has always been found anticompetitive.

Now this bill prohibits this tactic by requiring open access. And that open access is born of bitter experience over the past century.

These telecommunications industries of the past were not born into monopoly. What happened was at the beginning of the century, AT&T tried exactly the same tactic. They bought up the local pipeline and said if you want to get long distance, you have to buy our long distance product. And that led to a monopoly. We have been spending decades trying to undo it.

Same thing happened in cable. The cable companies in the 1980's said we own the pipeline; we are going to control the content. And that eliminated virtually the independent video programmers. And in both cases open access was approved by Congress but after the fact, after the damage was done. And what is stunning here is that the same two players, AT&T and the cable companies, are trying to do exactly the same thing in the Internet market, say we control the pipe, you have to use our content, you have to use our transportation system.

The second obstacle is that there is a direct prohibition, a direct prohibition and burdening of the telephone company's ability to come in and compete and provide their high bandwidth service. And just look at this—and this is how I will conclude—just look at this difference. AT&T is saying we need—if we are restricted to the revenue from local transport, then we have no incentive to invest in high bandwidth. We have no incentive.

So we not only need to compete in the vertical stream, but we have to capture that through a compelled tie-in with our customers. We have to say we need to force the customers to get into

our ISP, we have to get the backbone revenue, otherwise we don't have the incentive to deploy. But look what the rules are doing to the telephone company. The rules for the telephone company say you can't even compete, much less lock in.

All we are saying is let us compete in those markets. We are not asking for a lock-in; we are asking to compete in those markets. The bottom line is this: when AT&T and the cable companies say they want free competition, they want to compete but they want their competitors burdened so they can't compete. And second when they say they want competition, they want to be insulated from the traditional free market rules that apply to everybody else in the telecommunications industry.

Thank you.

Mr. HYDE. Thank you.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, GTE CORPORATION, WASHINGTON, DC

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Bill Barr, Executive Vice President and General Counsel for GTE.

Within the near future, high-speed or broadband Internet access will become the most important communications medium in the country. As a result, the Internet soon will become central not only to our economic vitality, but to our communal life. It will be the public commons, a forum for ideas, a marketplace, a medium of entertainment, a vast public library, and the primary means for the dissemination of news, opinion, and information.

The Internet market currently suffers, however, from severe constraints on competition caused by *ad hoc* and irrational government regulation that has been lifted from the telephone and cable television markets and haphazardly applied to the very different Internet market.

*First*, existing law prevents one set of competitors—local telephone companies—from competing freely in the Internet market, thus insulating cable companies from full competition.

*Second*, exploiting their insulation from full competition, cable companies are engaged in a classic anticompetitive tactic—tying their services together, which permits cable companies to leverage control from one market into others. Specifically, AT&T and the cable giants are requiring consumers who want broadband access transport also to purchase the cable company's affiliated ISP instead of the ISP of the consumer's choice.

The bills introduced by Congressmen Goodlatte and Boucher deal directly with these problems and are highly pro-competitive. The bills would break down the existing barriers to telephone company competition and simultaneously prevent improper cable company leveraging—and thus would ensure free, equal, and open competition on the Internet, which would greatly benefit consumers.

*First*, the bills would allow the local telephone companies, including the Bell companies, to compete freely in the Internet transport markets. I want to stress, however, that the bills would not in any way remove the requirements on the Bell companies to open their local telephone markets to competition in order to enter the long-distance phone market, but would simply free them to participate fully in the Internet market. *Second*, the bills would prohibit the cable companies' current anticompetitive practice of tying and would impose open-access requirements on all broadband access transport providers, cable companies and telephone companies alike.

I. GUARANTEEING OPEN ACCESS AND FREEDOM OF CHOICE

Let me turn first to open access.

The principle of open access is not newly minted: It has been the central tenet of the telecommunications industry for the last 15 years. The notion has been a simple one: You can install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.

That fundamental principle has been applied to open up the telephone markets and to protect independent programming in the video market.

That's why consumers today can choose their long-distance carrier. It's not dictated by the local company. Consumers have a choice. That's open access.

That's why cable company operators are not allowed to favor video programmers owned by the cable company in providing cable television service.

And that's also why consumers have a choice today when they use the telephone line to get to the Internet. They can choose their ISP—whether America Online or GTE Internetworking or Mindspring or one of the other ISPs in operation. Again, open access.

This policy of open access was not dreamed up in some utopian classroom. Rather, it is the product of bitter experience over the twentieth century. Twice in this century, large corporations successfully came to dominate key parts of the telecommunications industry through a simple two-step strategy. First, buy up a large percentage of the local pipelines into the home. Second, close off consumer access to any other provider of services—forcing the consumer to do business only with companies affiliated with the owner of the pipeline into the home.

In the first decade of this century, as the newborn telephone industry was exploding, AT&T bought up the bulk of local exchanges and forced its consumers to choose AT&T as the long-distance provider. Competition quickly withered away, and AT&T succeeded in establishing its monopoly.

Similarly, in the 1980s, cable companies used their control over cable access to try to take over video programming and content. The cable companies used their ownership of the wire to get a piece of the action on content and to require that content providers be affiliated. The Congress finally took steps to curb this practice in 1992 and require nondiscriminatory access.

In both of these cases, regulators *eventually* stepped in and required open and equal access. But the key point is that the regulators stepped in only *after* the damage had been done—*after* competition had been thwarted. Through a series of regulatory devices over the past 15 years, regulators have been struggling to recreate competition and to return to open access principles in these markets.

It's therefore ironic that the same companies that tried these tactics earlier—AT&T and the cable giants—are now combining into one huge firm and putting the same tactics into effect to try to dominate the Internet, which is the telecommunications marketplace of the 21st century. AT&T is buying a large percentage of high-speed Internet lines into the home and is also seeking to close off the consumer's ability to choose any ISP other than one controlled by AT&T.

Many cable companies, in offering Internet access, are compelling their customers to sign up for, pay for, and use their ISPs if they want to use a cable modem. Basically, customers do not have a choice. If they obtain cable modem service, they must choose the cable company's ISP.

The cable companies are enforcing their lock on the customer with three penalties. First, they are telling customers who want to use another ISP that they still have to pay for the cable company's ISP—in other words, a consumer who wants choice has to pay twice.

Second, beyond this financial penalty, they impose a performance penalty. They provide a direct connection to their own ISP, but the traffic of customers who want to reach another ISP travels on the public Internet, leading to a lower-quality connection. This is discrimination pure and simple.

Finally, by making customers go through their ISP, the cable companies can block competitive products from reaching their customers. A perfect example is the cable companies' anticompetitive limit on video streaming over the Internet—a restriction obviously designed to insulate their own television product from competition.

All that is required to end the cable companies' current monopoly leveraging is a simple legal mandate that cable operators deliver traffic on an open and non-discriminatory basis to other ISPs. The bills offered by Congressmen Goodlatte and Boucher would accomplish that goal and thus would greatly promote competition and consumer choice.

Cable companies respond that, regardless of the policy justifications, it is not technically feasible for them to provide open access to other ISPs. But GTE has proved just the opposite in trials recently conducted in Clearwater, Florida. Open access to the cable system is technically feasible.

Open access is not regulation of the Internet, as some opponents suggest, but simply ensures *access to the Internet* and Internet *interconnection* to guarantee competition on the Internet and freedom of choice for the consumer. The principle of open access is a free-market principle that if imposed now, will avoid the need for truly massive regulation later. In that regard, recall that the Telecom Act of 1996 was largely necessary because of the failure to impose open-access requirements at the dawn of a previous communications medium: the telephone.

The policy of open access thus not only is necessary, but is necessary *now*. Those who are taking a "wait and see" attitude with respect to open access to the Internet are wrong. Once a firm gets a head start in closing off competition—as AT&T is attempting to do in the Internet access and ISP markets—the results can take years to undo. In fast-growing, network industries, anticompetitive tactics can lead to disastrous results very quickly. It is therefore imperative for legislators and regulators to act now to ensure open access.

## II. REMOVING RESTRICTIONS ON LOCAL TELEPHONE COMPANIES IN INTERNET TRANSPORT MARKETS

Existing government policies are also hindering competition by crippling the ability of local telephone companies *even to compete* in the Internet market.

*First*, the FCC is interpreting the Telecommunications Act to prohibit the Bells from transporting data to the Internet backbone. The Bells' inability to compete in these Internet transport markets creates powerful disincentives for the Bells to deploy broadband DSL service. Many rural areas of the country have no nearby connections to the Internet backbone. In these areas, interLATA restrictions aimed at long-distance voice services have had the inadvertent effect of preventing the Bells from providing high-speed Internet services, including DSL access. The reason is elementary: There is little reason that a company would invest to provide DSL in a remote area if the company is blocked from carrying traffic on its own high-speed lines to the Internet. If the existing interLATA restrictions did not apply to IP data, the Bells would be able to bring high-speed Internet access to rural areas much sooner.

AT&T contends that, in order for it to have incentive to deploy cable modem broadband service, it needs not only to *compete* in all of the various Internet markets, but also to tie together its services in vertical markets, to leverage its power from one market to the next. All that the Bell companies seek, by contrast, is the ability simply to *compete* in the Internet markets.

The existing prohibitions on the Bell companies in carrying Internet traffic also prevent full competition in the backbone market. There is a strong public interest in competitive parity among major backbone providers. Indeed, it is only because of competitive parity that the major backbone providers have had an incentive to maintain high-quality peering arrangements with each other. Competitive parity among backbone providers is in serious peril, however. The Big-Three long-distance companies could soon dominate the market, discriminate against other backbone providers, and drive customers to their own backbones. This would enable the backbone provider to leverage downstream its backbone market power into the ISP and content markets.

Bell entry into the Internet backbone market would preserve competitive parity, however. With their resources, the Baby Bells could rapidly enter the backbone market and be treated as peers by the existing major backbone providers.

*Second*, under existing law, there is a regulatory overhang on all local phone companies because the FCC is threatening to impose the entirety of telephone regulation, including unbundling requirements, on telephone companies engaged in the Internet market. This is a further deterrent to investment in DSL: If a company cannot recover any meaningful profit from its investment because of onerous unbundling rules that were designed for an entirely different medium, common sense tells us that will deter investment. The existing regulatory posture yet again highlights the gross regulatory disparity that currently exists between cable companies and telephone companies and that thwarts the kind of real competition on the Internet that would benefit consumers.

In the end, the fundamental issue with respect to the Internet, as with all telecommunications, is how to allow the consumer to communicate with and obtain information from anyone anywhere in the world. There are only two ways this can occur: either (i) monopoly control of the entire network of wires and connections, or (ii) a network of networks governed by principles of interconnection, open access, and free competition. The choice between those two approaches for the Internet now faces this Congress. The choice must be made, and inaction itself will be a choice. Will Congress side with AT&T and the cable giants and allow a replay of the 20th century—this time in the Internet market rather than the telephone market? Or will the Congress heed the lessons of history and ensure open access, freedom of choice, interconnection, and competition on the Internet? We believe that the right decision is clear, that Congress should ensure open access and free and fair competition on the Internet.

Thank you.

Mr. HYDE. Mr. Vradenburg.

**STATEMENT OF GEORGE VRADENBURG, SENIOR VICE  
PRESIDENT, AMERICA ONLINE, DULLES, VA**

Mr. VRADENBURG. Thank you, Mr. Chairman, Ranking Minority Member Conyers. And I too want to commend Congressman Goodlatte and Boucher for introducing this legislation which addresses what we at AOL think is perhaps one of the most important issues regarding the future development of the Internet.

I want to take up on the theme, Mr. Conyers, that you raised, the consumer. One of the most remarkable things about what has happened on the Internet is the extent to which the consumers are taking on board this Internet phenomenon. They are adopting the Internet, far outpacing the predictions of anyone a few years ago; and they are adopting the Internet at a rate which exceeds the adoption of television, of radio, of any other medium in history. Every month 1.5 million Americans are joining the online world, bringing the percentage of the U.S. population now using the Internet from zero in 1990 to over 30 percent today.

In addition to the number of consumers coming online, businesses are going online as well. And with each new business comes some more competition in this space. What is remarkable is that there is competition at every level of the value chain. There is competition among 6,000 Internet service providers. There is competition among a variety—scores of portals and their millions of Web sites. And there is competition at a fierce level, a primitive level at every level of this value chain.

This competition has spurred enormous innovation and has brought consumer prices down. And attached to my testimony you will see exactly what the product has been for American consumers: falling prices, improving service.

Amazingly, all this power, all this competition and choice today is coming to residential consumers through one telephone line, a voice telephone system built for another purpose in another age. But all of this competition is coming through that one telephone line and that, Mr. Chairman, is the secret sauce of this Internet.

The single telephone line on which the Internet rests is open to all competitors on the same terms. As a result, there are virtually no barriers to entry into this marketplace. There are no last mile gatekeepers deciding who can get in and not get into the Internet business. The appeal of a product in the marketplace rather than who owns the wire is what determines success. And consumers can select the Internet service of their choice rather than the one chosen for them by the wire line carrier.

Now, the reason that the wire is open is a series of decisions in an antitrust context that the courts have made and this Congress has made over the last 30 years to assure that that infrastructure is open to all comers. And as a result, consumers are the drivers and the beneficiaries of this fierce, competitive, and open environment. The government has simply kept the playing field open and level. Soon the Internet is going to be available to broadband capacity, as Mr. Barr noted.

And in that world, Internet services are going to include voice, video and data services, all three of them in a convergent mix. And while today's broadband services—excuse me, narrowband services run over a single telephone wire, it is possible in the future that

these broadband services will run on a tapestry of multiple systems including telephone, cable, satellite, and wireless.

Yet over the next few years, the most likely carriers of these services are going to be our telephone and our cable systems. Yet those two systems have different histories, subject to different regulatory treatment by the government. Telephone system is open and transparent, pursuant to policies of antitrust courts and this Congress, and cable remains a regulated monopoly closed to competitive forces and notwithstanding the best efforts of this Congress to the contrary.

In an age of convergence when the Internet's digital technology is illuminating the historic distinction between voice and video and data, we can no longer pursue a fundamentally schizophrenic attitude between these two historic voice and video items. We must choose between competition, the choice of the antitrust courts in the telephone context and the 1996 act and the regulated monopoly, the path taken by the cable industry.

The adoption of an industrial policy specifically favoring one particular competitor or technology such as cable is fundamentally incompatible with a digital convergence that is happening in the Internet as well as the command of our national economic policy. The competitive economic outcomes and not government choice are the best protectors of the consumer welfare.

The bills before this committee go a long way toward remedying the situation. We commend Messieurs Goodlatte and Boucher for their approach. It is one that relies on our antitrust history, is forward looking, and is market driven. It is consistent with the government's policy over the last 3 decades to rely on competition and not regulation to enhance consumer welfare.

Every member of this committee is well aware of the most famous antitrust case in this Nation's history, the *United States v. AT&T*. That consent decree resolved the *AT&T* case and ushered in an era of consumer choice in long distance and telephone equipment that unquestionably has benefited every one of your constituents.

As we even the broadband world, real and substantial threats are emerging to the Internet access market. Strong, immediate, unequivocal congressional action is needed to preserve competition and openness. The Goodlatte-Boucher legislation does this by narrowly prescribing anticompetitive actions in this field. And we urge you to move quickly on that legislation, Mr. Chairman.

Mr. HYDE. Thank you Mr. Vradenburg.

[The prepared statement of Mr. Vradenburg follows:]

PREPARED STATEMENT OF GEORGE VRADENBURG, SENIOR VICE PRESIDENT, AMERICA ONLINE, DULLES, VA

#### INTRODUCTION

Chairman Hyde, Ranking Member Conyers, members of the Committee, good morning. Thank you for asking America Online to testify before the Committee today on two important pieces of legislation:

- H.R. 1686, "The Internet Freedom Act", introduced by Congressman Goodlatte; and
- H.R. 1685, "The Internet Growth and Development Act of 1999", introduced by Congressman Boucher, both Members of this Committee.

These bills, and this hearing, are important parts of Congress' ongoing consideration of issues that are critical to the future of the American economy and society as we move further into the Information Age. We hope you will act swiftly and decisively to prevent certain kinds of anti-competitive behavior that threaten consumer welfare by stifling competition in the market for Internet access.

THE INTERNET TODAY: COMPETITIVE MARKETS BENEFITTING CONSUMERS

*How and Why the Internet Has Grown*

Unlike any other communications technology that has preceded it, the growth of the Internet is a truly remarkable phenomenon. In only a few short years, the medium has literally transformed the way Americans communicate, engage in commerce, educate themselves and even participate in our democracy. An untold number of new entrepreneurs have discovered that if they build something on the Internet—a Website, a business or a new access service—thousands, even millions, will come. Always open for business, always open to new ideas, the Internet is perhaps the most dynamic force in our society and economy today.

It has become a cliché to call the Internet “revolutionary”. But, as we've seen throughout the 20th century, revolutions come and go. The Internet's truly world-changing impact is *evolutionary*; it is quickly causing fundamental and lasting changes in the ways society, and the world economy itself, operates.

The impact of the Internet economy already is stunning. A recent University of Texas study concluded that today's Internet economy, measured by the value of goods and services flowing through it, is valued at \$301 billion. Let me put that figure in perspective. The Internet economy already is bigger than the telecommunications sector (\$270 billion) and is fast closing in on the auto industry (\$350 billion). Yet, the Internet is in its infancy and your policy choices will have an enormous impact on its future.

The most significant aspect of this online phenomenon in many ways is the degree to which consumer choice and competition at all levels of the Internet marketplace have fueled its astounding growth. Consumers' Internet adoption rates are far outpacing the predictions of even the most aggressive analysts only a few short years ago—and far outpace the track record of any other medium in history. More than half of American households—a total of 53 million—now own PCs. And about one-third of American households now have access to the Internet. Every month, nearly 1.5 million Americans join the online world for the first time, bringing the percentage of the US population online from nearly zero in 1990 to over 30 percent today. Indeed, the number of online households in the United States grew by a factor of eight between 1994 and 1998.

In five years, nearly 60 percent of Americans are expected to be online. This same rapid growth path can be seen throughout the world, where the number of online users is expected to reach 250 million by the year 2002. As one would expect from all of these online users, traffic on the Internet is doubling every 100 days. Analysts are predicting that by 2002 consumers will spend nearly \$43 billion a year online, compared to \$8 billion last year.

The Internet often is referred to as a “network of networks”. Its power and strength is rooted in its open architecture, one where all networks are voluntarily interconnected, where each network delivers its traffic to other networks in bartered peering arrangements and where, as a consequence, every person on any network can reach every other person on any other network. As more and more networks, of ever-increasing capacity, are added to this “network of networks”, every consumer and business benefits.

Amazingly, all of this power is today delivered to residential consumers over a single “last-mile” infrastructure consisting of local telephone lines built for an entirely different purpose—namely, local voice service. Through this “last mile,” more than 6000 competing Internet service providers, or ISPs, offer a wide variety of price, feature and service packages to residential and business customers alike. In just five short years, a system has emerged that serves over 90% of Americans with competing ISPs with local dial-up connections.

Competition among ISPs has been crucially important to the widespread adoption of the Internet by Americans. As explained in the attached charts, competition to offer consumers Internet access has brought prices for Internet access down to a greater degree, and much more quickly, than they ever would have come down in an environment with only a few providers. (See Exhibit A). ISP competition has raised the quality of Internet access service and expanded the range of Internet features available to consumers at all points in the Internet value chain. From the adoption of flat rate pricing to rapid innovation in business models, no ISP has been able to avoid the need to excel in this market.

Consumers are the drivers—and the ultimate beneficiaries—of this fierce competitive and open environment. There are virtually no barriers to entry into the Internet marketplace and no gatekeepers collecting tolls from new businesses. As a result, consumers have seen their product choices expand, have been granted access to a wealth of information historically available only to those with means, and have been empowered to participate in civic life in ways that were previously unimaginable.

#### *The Multidimensional Broadband Future*

Soon, the Internet will be available not only over today's "narrowband" technologies but also through "broadband" connections 100 times faster than today's access speeds. That transition is beginning even now.

As broadband becomes widely available, affordable and easy to use, we would expect all ISPs to use that technology to meet the needs of consumers, small businesses and the entire American population in new ways we have only begun to imagine.

Online shopping—and online selling—will explode as more sophisticated technologies expand the range of products and services available online and make it possible to view, tour, test and even "try on" a range of products.

Beyond online shopping will come the home office. Telecommuting—involving everyone from typists to traders—will come into the mainstream through broadband's capabilities, benefiting cities across the country through reduced traffic and pollution and giving businesses and employees much needed flexibility. One-person Internet-based operations will compete with multinational corporations, creating whole new local industries.

As broadband expands the capabilities of the Internet, its role will expand as society's "great leveler"—putting world-class resources, the widest range of products and services, and even access to the outside world at the fingertips of anyone capable of flipping a switch or dialing a telephone.

While today's Internet is built on a single telephone access platform, broadband Internet has the potential to be built on multiple access platforms—telephone, cable, satellite and wireless. AOL's vision for residential Internet access is one of a true "broadband tapestry." In a multiple-platform environment, consumer choice and competition can and should be enhanced, not limited. Internet rivals should be able to offer a wide range of new Internet applications, using different speeds and platforms. In fact, the consumer need not be aware of which access technology its Internet service provider is using—the consumer cares about service and applications, not technology.

Realistically, however, the next few years will see two-way broadband access to the Internet for the consumer marketplace will be offered primarily through two sources, both wireline—DSL through traditional phone lines and cable modems over cable systems. In the case of DSL, telephone companies offer non-exclusive and non-discriminatory interconnection arrangements for these telecommunications services. We, and our Internet competitors, have entered into such arrangements with the prospect of higher speed Internet services and more robust applications becoming widely available in neighborhoods accessible by DSL by the end of the year. As I will discuss a bit later, cable however, poses some serious problems.

Other broadband access technologies will also become available at some point in the future that will permit Internet customers unprecedented choice and flexibility. In fact, just recently AOL announced an alliance with Hughes Electronics to help bring a hybrid form of high-speed Internet access through satellite to consumers by early next year. As a result, consumers will be able to benefit from affordable, convenient and faster Internet service even if they live in traditionally hard-to-serve communities like rural areas. But even this satellite-based system will continue to partially utilize the telephone network.

#### THE POLICY CHALLENGE: PRESERVING THE COMPETITIVE ENVIRONMENT

As stated above, competition, openness and consumer choice are the essential ingredients of the success of the Internet, whether consumers access the Internet through narrowband or broadband. In the telephone environment, the move from narrowband to broadband will preserve those elements. But the cable industry's intention to close their systems threatens the Internet's success by stifling consumer choice and competition in Internet access. Unlike in other broadband facilities, cable companies do not plan to offer access to Internet services. The cable industry insists that a customer purchase the cable-owned or affiliated Internet service before buying or accessing a competitive Internet service.

Two recent events underline the fact that the "closed system" model has been chosen by the cable industry solely as a means to exercise its market power in broadband to the detriment of competition:

- A GTE test over its cable system in Clearwater, Florida, demonstrates that cable systems are technically able to support competitive Internet access providers—despite cable industry claims to the contrary;
- The general counsel of the Nation's second largest cable company testified before a Congressional committee last week that his own company has the technical ability to offer open Internet access, but will not do so for business reasons.

This practice has at least three adverse consequences.

First, it eliminates competition in the access market, thereby challenging the Internet model that has kept prices falling and service quality rising over the last several years.

Second, it forces consumers to pay twice to get the Internet service of their choice, thus depriving moderate and low income families of the benefits of competition in cable-based Internet service.

Third, it discriminates in service quality between the cable-owned Internet service providers—whose content is directly accessible—and independent Internet service providers—whose content is only indirectly available through the Internet. To make matters worse, the cable companies have even stated their intention to preclude access to content otherwise available to the consumer on the Internet, material with which the cable system does not wish to compete, including video material longer than ten minutes.

### *The Congressional Choice*

With the threat to Internet competitiveness looming, H.R. 1686 and H.R. 1685 mark an important step in ensuring that that Internet of today serves as the model for tomorrow. As both bills recognize, technologies are converging and all services—voice, data, video and others—are beginning to be offered over traditionally distinct voice or video platforms. As a result, old regulatory classifications will not be sustainable. Pro-competitive policies reflecting regulatory parity must become a clear priority. Congress should not favor one technology platform over another through public policy or regulatory disparities, or adopt or acquiesce to policies that hobble Internet deployment and use.

As is reflected in the two bills before this committee, Congress long has believed that its responsibility to preserve competition is broad based: the Nation's legal framework encourages competition at all levels, and ensures that market failures are minimized by proscribing specific kinds of conduct.

The most important way that Congress has acted to encourage competition and prevent market failures is by establishing a broad framework of antitrust laws that have operated for more than a century to preserve competition in all the Nation's industries and to preempt the ability of competitors with market power from exercising that market power to the detriment of consumers.

While the antitrust laws are often invoked to redress market failures after they occur, they are intended to encourage competition in all markets, whether they be emerging markets or mature markets. As the Supreme Court has said, the antitrust laws are "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

The antitrust laws are based on a foundation much more concrete than just a desire to ensure general notions of fairness in the marketplace. The Sherman Act reflects the assumption that competition is the best method of allocating resources in a free market and the Congressional judgment that ultimately, competition will produce not only lower prices but also better goods and services. Neither Congress nor the courts apply different standards to anti-competitive situations based on the age or maturity of the market—evidence of anti-competitive intent remains the touchstone.

Antitrust laws and principles have preserved and enhanced consumer welfare in countless industries, including the telecommunications industry and the mass media. Members with longer memories will recall that the antitrust laws required major changes in the ways that motion picture studios could be involved in the distribution and exhibition of their products. Antitrust concepts were applied to perceived discrimination by broadcast networks in the acquisition of independent television programming. Congress used antitrust concepts to prevent the cable industry from snuffing out emerging competition in satellite programming. The antitrust laws have been applied numerous times to correct real and potential problems with price fixing, technology transfer, and mergers and acquisitions.

And, every Member of this Committee is well aware of one of the most famous antitrust cases in our Nation's history. The consent decree that resolved the AT&T

case ushered in a new era of customer choice in long distance and telephone equipment that unquestionably has benefited every one of your constituents. In fact, Congress has sought to build on the benefits of the AT&T divestiture: the 1996 Telecommunications Act was enacted after a decade of effort to further stimulate competition in the delivery of telecommunications services. In that Act, Congress continued its historical efforts to ensure that all Americans have the best and lowest cost services in telecommunications through various initiatives aimed at promoting competition through open access for competitors. Clearly these principles of openness have enabled the Internet to develop and give in ways that would never have been possible in the closed environment of the pre-consent decree era.

As we move to the broadband world, real and substantial threats are emerging to the competitive Internet access market that necessitate strong, immediate and unequivocal Congressional action to preserve competition and openness in the Internet marketplace across all facilities.

The Goodlatte/Boucher legislation does this by proscribing specific kinds of anti-competitive conduct that would threaten the continuation of today's fierce competition in the Internet access market as we move to the broadband world. The legislation does so for the right reasons: to ensure that consumers have choices in prices and services, and to ensure that Congressional policy to mandate and encourage competition in the delivery of telecommunications services at all levels is not thwarted.

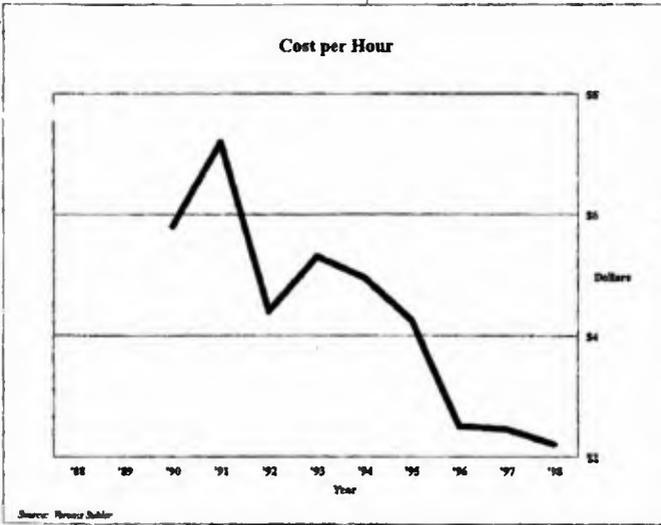
#### CONCLUSION

The goal of Congress in preserving and enhancing competition in Internet markets should be similar to how it is dealing with other Internet-related issues: to rely increasingly on the marketplace, and less on regulation, to provide the greatest consumer benefits. That is one important reason why antitrust policy is the right tool to address these issues: It focuses on existing or threatened market failures and tries to prevent them.

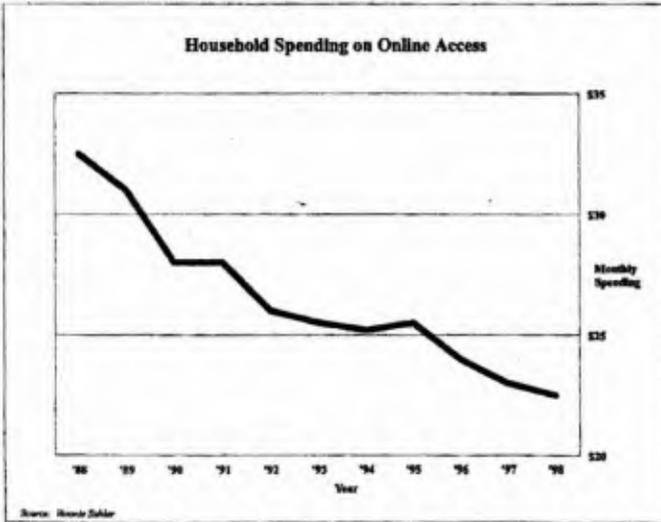
Right now, Internet access is a highly competitive market where entry costs are low and where business success is achieved by better products and services and lower prices. This Internet DNA of choice and competition—not the gatekeeper DNA of vertical integration—should be our guiding star. If gatekeepers want to play in the new Internet game, we should require them to play by Internet rules. We owe consumers no less.

Congress can do that in the best, simplest, and clearest way by passing the Goodlatte-Boucher legislation and establishing principles based on competition and choice for the Internet access marketplace.

Thank you again for inviting me to share our views. I look forward to your questions.



Online costs continue to fall..



...thereby lowering monthly household spending for internet access (despite increased usage).

Mr. HYDE. Next Mr. Wasch.

**STATEMENT OF KEN WASCH, PRESIDENT, SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, WASHINGTON, DC**

Mr. WASCH. Good morning, Mr. Chairman and members of the committee. And thank you for the opportunity to testify before you today. The Software and Information Industry Association was formed in January of this year through the merger of the former Software Publishers Association and the Information Industry Association.

We represent over 1,400 companies who produce valuable information and software products crucial to the growth of electronic commerce. Every few years the computer industry experiences the advent of new technologies that dramatically change how computers are used and how we access information.

While much has been accomplished in the last 15 years in terms of creating and enhancing this crucial infrastructure, the fact of the matter is, Mr. Chairman, that most people today access the Internet through 28.8 baud modems. These connections are much too slow to receive or send robust products such as complex interactive services or further convergence of voice, data, and video products that are in the marketplace today but generally available only to large businesses.

These products could easily be available to smaller enterprises and consumers as well and would ensure that the Internet becomes an even more valuable medium for U.S. consumers and an even greater engine of economic growth.

We are on the verge of a roll-out of broadband Internet services. As the principal representative of the code and content companies, SIIA is concerned that consumers be able to choose how they wish to access the Internet. Consumer choice, not controls by the government or of certain favored players, is the proven way to assure a competitive, vibrant marketplace.

Competition among all segments of Internet transport industries assures that consumers retain the freedom to select both the means by which they access the Internet and the service provider whose offerings of code and content best meets their needs. Internet transport providers such as telephone, cable, wireless and satellite companies should not be enabled—should not be able to engage in anticompetitive practices that frustrate or forestall consumer choice. Predominant carriers that are able to control unfairly the initial access to the Internet by bundling advanced communications services can also limit consumer purchases of Internet services, including the valuable code and content that customers want.

The ability of any provider of broadband services to gain an unfair advantage through a monopoly control of its services and intentionally preclude consumer access to multiple Internet providers is a worrisome development. Consumers may effectively be denied choice in terms of the content that would otherwise be readily and easily available to them. We echo the comments of Mr. Vradenburg, sitting to my left, that consumers will not be served if there are last-mile gatekeepers.

Let me be clear, Mr. Chairman. We are not concerned that certain Internet content will be blocked completely from access. Rath-

er, the industry believes it benefits no one if transport providers through unfair monopoly control can bundle services selectively and hinder consumers from viewing and purchasing online products and services. All ISPs have the ability to cache content so their customers can access it faster. In addition, ISPs frequently customize the first screen customers see when accessing the Internet.

However, we cannot minimize the impact of having content selection by the ISP, especially if the broadband service provider is the only transport service realistically available to the customer that the provider offers no choice.

Any broadband carrier that can exercise unfair market power that adversely affects the consumer choice of Internet service provider can also effectively foreclose the distribution vehicle to code and content products of all types.

Let's consider an example in a situation where, let's say, the opening screen of a favorite ISP promoted Visa instead of Mastercard or American Express as the credit card of choice or Reuters rather than Bloomberg as the favorite news source. The firm not selected for this preferential treatment would not necessarily be blocked from customer access, but it is clear that a tilting of the playing field can have an enormous impact on which products or services are even known to consumers, let alone used by them.

We would not be concerned if there existed a wide range of broadband providers and each makes his own independent selections. Now, the SIIA policy group had a very spirited debate concerning this issue, and we do not at this point take any position on the specific provisions of the Boucher-Goodlatte legislation. We have a series of questions we would like the committee to consider and those are contained within my written—my broader written statement.

In conclusion, the broadband marketplace must be competitive, allowing code and content providers the maximum choice in how they deliver and how consumers access products and services on the Internet. Thank you.

Mr. HYDE. Thank you, Mr. Wasch.

[The prepared statement of Mr. Wasch follows:]

PREPARED STATEMENT OF KEN WASCH, PRESIDENT, SOFTWARE AND INFORMATION  
INDUSTRY ASSOCIATION, WASHINGTON, DC

Good morning, Mr. Chairman and Members of the Committee, and thank you for the opportunity to testify before you today as you consider H.R. 1685 and H.R. 1686. My name is Ken Wasch, and I am President of the Software & Information Industry Association (SIIA).

SIIA was formed in January of this year through a merger of the former Software Publishers Association and the Information Industry Association. SIIA represents 1,400 companies that produce valuable information and software products crucial to the growth of electronic commerce. Our members provide not only the products that ensure the continued growth of the Internet but also the online content and services that assure the Internet will be a marketplace where consumers can obtain the types of high-quality, reliable code and content that they demand. In many ways, the Internet is still in its infancy, and as the medium continues to mature, our member companies will continue to pave the way for every other industry that strives to take full advantage of electronic commerce. As such, SIIA and its members have long had a strong interest in promoting the deployment of competitive services to benefit their businesses and their customers, including competition in the

backbone of the Internet, those lines of communication so essential to the efficient and rapid functioning of networks.

Every few years, the computer industry experiences the advent of new technologies that dramatically change how we use computers and access information. The introduction of graphical user interfaces fifteen years ago made computers much easier for millions of individuals and businesses to use. The mouse was in; the "C" prompt was out. Companies that adapted to this change prospered, those that did not perished. The growth of local area networks ("LANs") in the late eighties and early nineties made it much easier to share information easily among users around the world and created even greater opportunities for both the information and software industries to offer new and more useful products and services. Once again, companies that failed to incorporate networking capabilities into their operational infrastructure were unable to compete with those that had recognized this shift.

The commercialization of the Internet in the mid-1990s marked perhaps the most important paradigm shift in recent memory and was strongly encouraged by our industry. Millions of Americans that had never used a computer now found access to the Internet to be a compelling reason to purchase a computer and get connected. The growth of the Internet has been nothing short of phenomenal, and has had an indelible effect on individuals and businesses alike. It has transformed how we communicate, access information, shop and handle our finances. As this medium continues to evolve and accessibility increases, more and more goods and services, especially information and software products, will be available online to consumers around the world.

Growth of commerce on the Internet has been possible because the government decided to step aside and encourage business to take the lead. Its rapid deployment has been dependent, first and foremost, on the construction and availability of a wide range of lines of communication and points of access. Much has been accomplished in terms of creating and enhancing this crucial infrastructure, but even more advances are on the horizon. The fact of the matter is, Mr. Chairman, that the Internet is still accessed by most people through narrow-band 28.8 baud modems. These connections are much too slow to receive or send robust products, such as complex interactive services or the further convergence of voice, data and video products that are in the marketplace today but generally available only to large businesses. Yet these products could easily be accessible to smaller enterprises and by consumers as well and would ensure that the Internet becomes an even more valuable medium for U.S. consumers and an even greater engine of economic growth.

We are on the verge of the next paradigm shift—the rollout of broadband Internet services. Broadband services hold significant promise, but in order to see the promise realized, it is essential that there be strong competition among those that provide initial points of access to the high-speed lines of communication that are being deployed across the nation. As noted above, the commercialization of the Internet—and the resulting economic benefits—were supported by sound government policies that encouraged competition in the telecommunications market. Likewise, the expansion of high-speed connections to the home can occur only if government acts carefully to assure that there is competition among Internet transport providers as well. As the principal representative of code and content companies, SIIA is concerned that consumers be able to choose how they wish to access the Internet. Consumer choice, not controls by the government or certain favored players, is the proven way to assure a competitive, vibrant marketplace.

SIIA believes strongly that greater broadband deployment and the resulting increase in Internet connection speeds to homes and businesses can only enhance the value of Internet services and products. In fact, without the widespread deployment of high-speed services, the future development of the Internet could easily be stalled. There is a role for both incumbent and alternative local telephone companies to play through more rapid deployment of advanced Digital Subscriber Line ("DSL") services in all areas of the country, both urban and rural. DSL technology offers faster access to the Internet utilizing the existing telephone infrastructure than the common, much slower dial-up services available to most consumers today. The broader availability of DSL services will greatly increase competition in the provision of Internet data transport by those that own or lease these lines, whether they be incumbent or alternative local telephone exchange companies. Expansion of DSL capabilities represents a huge step forward in consumer access to broadband services, just as emerging wireless and satellite services hold the promise of even more capabilities for high-speed Internet access.

This Committee foresaw the wisdom of policies encouraging competition among providers of land-line communications when it helped craft the *Telecommunications*

*Act of 1996.* Although the goals of that legislation have been slower to reach than some had hoped, in the three short years since the Act became law, its framework has encouraged new investment and innovation in a broad-range of communications service offerings. Companies—whether incumbent or local exchange carriers, long distance providers, and even cable, wireless or satellite service providers—see the reality of increased competition a short way down the road and are beginning to position themselves to make the most of rapidly expanding market opportunities.

Our Association agrees wholeheartedly with the approaches taken by Congress in that Act and believes that a similar approach must be taken generally in regard to laws that may affect further development of the communications infrastructure underlying the Internet. Government interference must be minimized so that competition can become even more robust. The information technology industry—and by consequence Internet infrastructure—has grown at tremendous rates precisely because these business sectors have been free to develop without excessive government regulation. This development has, in turn, helped fuel the growth of the information and software industries, encouraging the provision of innovative products and services in even greater numbers to benefit both businesses and the consumer.

Competition among all segments of Internet transport industries assures that consumers retain the freedom to select both the means by which they access the Internet and the service provider whose offerings of code and content best meets their needs. Internet transport providers, such as telephone, cable, wireless and satellite companies, should not be able to engage in anticompetitive behaviors that frustrate or forestall consumer choice. Predominant carriers that are able to control unfairly initial access to the Internet by bundling advanced communications services can also limit customer purchases of Internet services, including the valuable code and content that customers want. The ability of any provider of broadband services to gain an unfair advantage through monopoly control of its services and intentionally preclude consumer access to multiple Internet service providers (“ISPs”) is a worrisome development. Consumers may be effectively denied choice in terms of the content would be otherwise readily and easily available to them. Code and content companies that would otherwise be encouraged to offer greater and more valuable services will be forestalled from creating innovative products.

Let me be clear, Mr. Chairman. We are not concerned that certain Internet content will be blocked completely from access. Rather, the industry believes it benefits no one if transport providers, through unfair monopoly control, can bundle services selectively and hinder consumers in viewing and purchasing online products and services. It cannot be in the interest of our industry or our customers, if the competing, high-speed transport carriers use their position in the market to make decisions on access for the consumer, rather than making it easier consumers to exercise their own choices.

All ISPs have the opportunity to cache content so that their customers can access it faster. In addition, ISPs frequently customize the first screen customers see when first accessing the Internet. Customers can generally modify the first screen, and many do so. However, we cannot minimize the impact of having content selection made by the ISP, especially if a broadband service provider is the *only* transport service realistically available to the customer and that provider offers no choice in the ISP available to that customer. Any broadband carrier that can exercise unfair market power that adversely affects the consumer’s choice of Internet service provider can also effectively foreclose the distribution vehicle to code and content products of all types.

Consider, for example, a situation where the opening screen of the favored ISP promoted Visa, rather than MasterCard or American Express, as the credit card of choice; or Reuters, rather than Bloomberg, as the favored news source. The firm not selected for preferential treatment would not necessarily be blocked from customer access, but it is clear that a tilting of the playing field can have an enormous impact on which product or service is even known to consumers, let alone used by them. We would not be concerned if there exists effectively a wide range of broadband providers and each makes its own independent selections. After all, each restaurant can select whether it serves Coke or Pepsi. Chains normally make those selections for all franchises, and consumers can choose to eat in a particular restaurant or go to another for comparable service. However, it would be intolerable if a single restaurant chain provided the only realistic opportunity for consumers’ patronage and used its position in the marketplace to preclude their ability to choose one soft drink over another. The same holds true for access to information. As the technology paradigm shifts, we must watch closely to ensure that no one firm controls broadband access to American consumers and in doing so precludes choice in ISPs and the code and content services those ISPs offer.

Under current FCC regulations, incumbent local exchange carriers are already prohibited from engaging in such bundling. Congress was purposeful in this approach when it passed the *Telecommunications Act of 1996*, for it recognized that the monopoly controls enjoyed by incumbent local carriers—ones long sanctioned by law and financed by essentially all Americans who constituted the rate payers had to end, if further, innovative infrastructure development was to become a reality. The bills under consideration by the Committee today would apply the same unbundling rules to other providers of Internet transport, including cable, wireless, and satellite services, as a means of further enhancing competition.

In recent weeks, SIIA's policy group has engaged in a spirited and valuable debate on the issues that are the subject of today's hearing. Our members are united in the conviction that the creation of a regulatory system that influences the deployment of broadband services in the wrong way will only slow such deployment. We cannot support a policy that discourages and encumbers those who are making the huge investment necessary to provide such services. Further delays in deployment will only prevent more ubiquitous access to the many valuable information and software products that consumers are demanding in greater and greater numbers. At the same time, however, we cannot risk development of predominant carriers who can and will use their market power unfairly to preclude competition on the Internet. SIIA is not prepared at this time to comment on specific provisions in either bill under consideration today. However, we believe there are several crucial questions that this Committee and your colleagues in Congress must keep in mind in making your decision, and they are similar to the ones faced by you in crafting the *Telecommunications Act of 1996*.

First there is the question of technological capabilities, namely whether cable, wireless and satellite providers have the same capacity as do local exchange carriers to accommodate a multitude of access providers offering similar, competing products and services adapted to high-speed transfer of code and content. The second question relates to the nature and extent of the control over the communications lines that these carriers offer. Is the type of monopoly that local governments have granted to the cable industry, for example, and the manner in which it has been financed, comparable to the situation that Conaress corrected in relation to incumbent local exchange carriers under the *Telecommunications Act of 1996*? Third, Congress must make the determination whether the existence of alternative transport providers—including the whole gamut of telephone, cable, wireless, and satellite services emerging in the marketplace—offers sufficient competition and adequate reach to assure that consumers and smaller businesses have choices in how they achieve high-speed access to the Internet and the software and information services they desire. Finally, Mr. Chairman, SIIA believes Congress should determine whether there has been, or is likely to be, a failure of the Nation's antitrust laws and mechanisms to the point that possible monopolistic behavior in the Internet transport sector cannot be remedied.

In conclusion, let me be very clear that SIIA strongly believes consumers and businesses are best served by having a wide variety of choices for Internet access. We remain committed to the principle of minimal regulation of the Internet and healthy competition as the best means of assuring such choice. Policymakers should encourage the rapid deployment of broadband technology, a goal most easily achieved by eliminating wherever possible regulations that might otherwise reduce market incentives. The broadband marketplace must be competitive, allowing code and content providers maximum choices in how they deliver—and consumers access—products and services on the Internet.

SIIA and its member companies stand ready to assist the Committee in any way possible as you sort through these important issues. Clearly, this debate is one that will have effects reaching further than simply the interests of rival transport carriers, and the code and content industries must be part of the debate. Thank you again for the opportunity to appear before you today, and I will be glad to answer any questions.

Mr. HYDE. Commissioner Sten.

#### STATEMENT OF ERIK STEN, COMMISSIONER OF PUBLIC WORKS, CITY OF PORTLAND, PORTLAND, OR

Mr. STEN. Good morning, Mr. Chairman and members of the committee. My name is Erik Sten, and I am a city commissioner from Portland, Oregon. And under our form of government, I am

the lead elected official on cable and telecommunications matter. I would like to give you a local perspective on these issues.

In December 1998, the city of Portland was asked to approve the transfer, as were hundreds of cities across the country, of the TCI franchise to AT&T. In Portland, that is a two-step process. First, we have a citizens commission that looks at the issues. This is a group of everyday people from across the board who volunteer their time to look at what is in the public interest. They make a recommendation, and that comes to the Portland city council and we ultimately must approve all transfers.

Both our citizens commission and the Portland city council were excited about some of the opportunities that AT&T is bringing to Portland, we think. We are excited to have competition on local phone service that is needed in Portland. We are very excited to have high-speed Internet access available at the home. That is a product we very much welcome. But both our citizens commission and our elected officials came to the conclusion that we thought open access was necessary to provide the kind of service that Portland has become accustomed to.

We believe in competition. We believe in choice. And from our citizens' point of view—and I have talked to hundreds of businesses since this issue has been raging in Portland over the last 6 months—the idea of having one way to access high-speed cable Internet modems is not acceptable in Portland, Oregon. We have gone through the problems with monopolies in our city, and we simply believe that open access is the best approach.

It is a common sense position, and it has been supported across the board in Portland. I have submitted detailed written testimony that outlines our legal arguments and all of the thought we went through, but I wanted to share with you today three or four key points that continue to come up in Portland.

The first is this issue is not going to go away anytime soon. After buying TCI, or merging with TCI, AT&T also gained control of Paragon. So we used to have two cable systems in Portland; now we have one. And they are both controlled by AT&T.

This issue will not be resolved quickly and hundreds of cities across the country have been and will continue to be faced with the same problem Portland has, which is trying to come up with the right approach and trying to enforce local policies for competition and choice when there is no national structure in place. Now is the time for Congress to act, in our opinion, and to put an open access policy in place.

Secondly—and I suspect you have heard and will hear that local governments are trying to regulate the Internet. That is a term that has been thrown around a lot. Simply said, that couldn't be further from the truth. We have no interest in regulating the Internet, never have, never will. None of our regulations have anything to do with content. In fact, by providing open access and choice, we believe we are opening up the Internet and giving people in Portland the chance to subscribe to the kind of Internet provider they want, whatever it is. We have no interest in regulating the Internet, only the public facilities.

Thirdly, we do not favor different technical standards. You will hear the argument—and it has been bandied about—that if local

governments take action on these issues, you will have 30,000 technical standards. We haven't asked for, nor have we regulated, any technical standard. We believe that the technical standard should be decided by the cable industry and by the FCC. Our rule simply says we must have open access in Portland. It is legal and was upheld by a Federal district court after AT&T sued us.

Finally—and this probably the most important point I think for you to consider—this is not an issue that citizens saw coming. Even as the cable commissioner it is not an issue I saw coming, but it has been raging in our paper and our talk radio stations for 6 months. Obviously we were sued. It had a large impact. It has been very, very well discussed, and it is very, very important to local citizens. The more—whenever I am stopped on the street or in the grocery store, the response is always, keep fighting for open access. They have experienced monopolies in the past. They have experienced lack of choice.

And even if, as AT&T has threatened to slow down high-speed Internet access in Portland, people are willing to take a breath and fight to have open access and choice in the years to come, I believe you will continue to hear more from cities, more from constituents and more from your citizens as they begin to understand the importance of this issue.

In conclusion, what I would say is that we just firmly believe in Portland, Oregon, that open access is in the public interest; and we will remain firm despite the tremendous amount of pressure that has been put upon us.

I would like to share two incidents with you—and we have tried hard to work with AT&T. And as I said in my opening, we welcome many of their products and we welcome their investment in our community and have had a good relationship.

After our city council reviewed our citizens' recommendation that open access was the right approach and after we voted unanimously as a five-person city council to require open access when the transfer came before us, an AT&T representative remarked to the local paper and was quoted as saying, "I hope Portland has a very large legal budget." well, we don't, but we do have principles in Portland and we are willing to stand up for those principles.

AT&T sued us over this. We went to Federal district court. I am sure you have a copy. There is a 16-page opinion by a Federal district judge that is clear and unequivocal that we had the authority to do it. Now we are going to spend more and more local taxpayer dollars having this appealed. They will appeal it again after we win that case.

After we won the case, the court case, AT&T put out a written press release that said the real losers in this are the citizens of Portland and Multnomah County.

I will end by saying we believe strongly, as much as we like investing in our community, that no large corporation should be able to hold a community hostage and threaten not to put key public services in place because they disagree with local policy. If you take that as a backdrop, now is the time for you to act; now is the time for congressional policy.

I would like to commend Representatives Goodlatte and Boucher for this bill. This is very important. And it is important that you

act and take us out of this position of AT&T exerting its will on local communities despite local law. Thank you.

Mr. HYDE. Thank you very much, Commissioner Sten.

[The prepared statement of Mr. Sten follows:]

PREPARED STATEMENT OF ERIK STEN, COMMISSIONER OF PUBLIC WORKS, CITY OF PORTLAND, PORTLAND, OR

Mr. Chairman and members of the Committee:

I am Erik Sten, an elected member of the City Council of Portland, Oregon. Under Portland's Commission form of government, I am the lead elected official on cable and telecommunications policy issues. I am happy to be invited to address the important issue of "open access" to cable modem internet services. This is a very important issue in Portland, and I am particularly pleased that Representative Goodlatte and Representative Boucher of Virginia have introduced bipartisan legislation to achieve open access.

The "Internet Freedom Act of 1999" (HR 1686) provides an excellent start for Congressional consideration of this very important issue. In Portland, we have been surprised to find ourselves taking a leadership role on this issue and equally surprised that the FCC and Congress have up to now not been engaged in this critical area of assuring "open gates" to the Internet. Portland is very hopeful that, with the introduction of HR 1686, a strong signal is sent to the cable industry, and to the FCC, that Congress is poised to act on this important issue. This is particularly important if the cable industry continues to deploy cable internet access in an anti-competitive fashion, and if the FCC continues to take a "hands-off" approach in the face of all evidence to the contrary.

BACKGROUND

You may be aware that the City of Portland and Multnomah County have some recent experience deliberating on this issue. In late 1998, Portland and Multnomah County approved a change in control of local TCI cable franchises to AT&T. As one of the conditions of transfer, the City and County required an open cable modem platform, or "open access" provision, that would permit subscribers to use third parties, unaffiliated with AT&T, to obtain high-speed access to the Internet via cable.

"Open access" in essence means that the cable operator's cable modem customers would not be forced to subscribe to the cable operator's own proprietary service, and could instead buy online service from the service provider of their choice. However, as the cable industry has structured the rollout of cable modems thus far, consumers will have to "pay twice" for their internet access if they decide not to use the cable operator's affiliate as their primary gateway. While the City certainly saw some significant benefits to the AT&T/TCI merger, we also concluded that if it was allowed to go forward without conditions, it could reduce competition in the provision of advanced cable services, such as Internet service. The night after we voted, The Oregonian reported that an AT&T lawyer had said he hoped we had a large legal budget.

In Portland, AT&T refused to accept the City and County ordinances containing the "open access" provision, and instead filed a lawsuit against the City and County. On June 3, 1999 we won the first round of that lawsuit.

On that date, Oregon Federal District Judge Owen Panner upheld the authority of the City and County to impose an "open access" condition as part of our cable transfer ordinances. That decision, which will now be tested in the appeals process, has received national attention and deservedly so. We believe strongly that the case was rightfully decided, and that Judge Panner will be upheld by the 9th Circuit Court of Appeals.

AT&T wrote in response to Judge Panner's decision, ". . . the real losers are likely to be the citizens of Portland and Multnomah County." Portland strongly believes that large corporations should not be able to dictate local policies by threatening citizens.

POLICY CONSIDERATIONS

In attaching an "open access" condition to the AT&T transfer, the Portland Council was acting to carry out longstanding pro-competitive policies that to us were just common sense. We did not want to repeat the mistakes of the early 20th century at this dawn of the next and create new monopolies in our rush to develop new technology. We have long understood that national policy in the U.S. directs us to promote competition, deregulation, and an open and accessible marketplace in commu-

nications and Internet access. While cable companies have control over much of the capacity on their system, this Congress wisely, and from the beginning, required operators to set aside channel capacity for use by others. The leased access provisions of the Cable Act are an example of such provisions. What is more, Congress made it clear that additional requirements could be imposed, where appropriate. It made it clear that the provisions of the Cable Act did not immunize operators from the antitrust or unfair competition laws. Localities were authorized to prevent mergers that would result in a reduction in cable service. The legislative history made it clear that localities weren't prevented from establishing third party access requirements for data services. Moreover, these provisions are consistent with a decisions the Congress and the states have made in a number of areas, where one entity controls dominant and critical facilities. So, for example, as states have moved to deregulate electricity, local power companies have been required to open their facilities to others so that competition can proceed fairly at the local level. In passing the 1996 Telecommunications Act, Congress imposed special burdens on incumbent local exchange carriers to open their networks to competitors. By the way, these are not "common carrier" requirements—they are not imposed on all common carriers, after all. Rather, they are requirements imposed given the current, critical nature of the facilities involved. Extending a similar, nondiscriminatory open-access policy to cable services is only common sense at a time when the cable industry, still a monopoly in most markets, has specifically declared its plans to roll out a major new platform for offering customers high-speed internet access.

Moreover, "mega-mergers" in both the cable and telephone industries are creating the specter of dangerous concentration in the ownership of media and technology. This is especially serious if ownership is concentrated among only a few companies who end up being the "gatekeepers" to the Internet. At this time, as you know, by the FCC's own method of counting, AT&T is poised on the brink of controlling almost 65%—nearly two-thirds of the cable TV households in the nation—as a result of its acquisition of TCI and its other pending acquisitions (e.g. MediaOne). Simultaneously, the cable industry has made no secret of its plans to ensure that only "one cable operator per city" will be the rule and not the exception throughout most of the nation. As of June 1, 1999, all cable services in Portland are now controlled by AT&T/TCI. If the cable industry has its way, then by this time next year only New York and Los Angeles will have more than one cable company operating within their borders.

None of this strikes us as in the public interest. This trend in the cable industry also means that an "open access" condition becomes more important than ever before, as HR 1686 properly recognizes. We are very hopeful that Congress will exercise its authority to act in this area. With more than a million cable internet modem subscribers projected by year end 1999, the timing on this issue has never been more important.

The timing is particularly important because of the contradictory messages we have been receiving from the Federal Communications Commission. Many of you are aware that the Chairman of the FCC has criticized the Portland decision. We believe the criticism is wrong, and based on misinformation about how the Portland condition would operate, and based on misinformation about what local governments are doing. We will be working with the FCC, if the Commission will work with us, to clear up these understandings. However, we see little prospect that the FCC will commence a rulemaking to actually investigate open access or that it could complete such a rulemaking in any reasonable time. More importantly, the cable industry has made it clear that it *does not believe that the FCC has legal authority to act in this area*. So, even if the FCC took action, the FCC would be facing some of the same challenges that Portland is facing. Congressional action now can prevent years of delay in opening up the Internet. And, as we all know, allowing AT&T and TCI to have such a headstart has enormous consequences in an Internet economy. One economic analyst, Scott Cleland, has suggested that it could skew investment in the Internet dramatically; that is not surprising, given that the status quo in our Internet economy assumes every competitor has open access to consumers. That is why we are very pleased that HR 1686 has been introduced.

Because the cable industry is widely promoting a number of misunderstandings about the "open access" issue, I thought I would share with you our candid thoughts on the current state of the issue, as follows:

1. *The issue is not going away.* This issue is not going to go away. No matter how much AT&T and the cable industry pursue their strategy of trying to isolate, confine, and minimize the Portland ruling, the issue is already spreading rapidly as governments and consumers realize the stakes. Many jurisdictions around the nation are looking seriously into this issue right

now, and more local action can be expected. Moreover, most knowledgeable and detached analysts agree with us that the 9th Circuit Court of Appeals will uphold Judge Panner's decision.

2. *Open access has nothing to do with "regulating the internet."* The cable industry's arguments that "open access" equals "regulating the internet." are patently wrong. They are wrong because open access is designed to open up, not shut down, internet access. A very dangerous cable industry bottleneck to high speed internet access will occur unless prompt action is taken. This becomes even more urgent when the FCC appears to be standing idly by on this issue. The lack of "open access" on the cable platform could in the long run damage internet development and accessibility far more than any short-term re-engineering necessary to implement open access.
3. *Cable modem internet access is growing dominant.* Cable modem technology has been known and used for more than a decade, by our city and many others. Since the Internet became more widely available in the 1990's, and as internet commerce has grown in the last two years, cable modem technology has now been developed and refined more than ever before to accommodate widescale Internet access. Analysts now project almost a million cable modem users by the end of this year. Yet, unless action is taken, those users and future users will be held hostage to the affiliated internet provider of the cable industry. This cannot be a good result for anyone, since it will naturally stifle innovation, frustrate price competition, and isolate cable modem customers from a truly competitive marketplace. The *Los Angeles Times* in March of this year cited a Forrester Research study that concluded that by 2002, cable modems will occupy 86% of the wireline broadband market, and that the slower and less widely-available broadband access from the telephone industry (known as Digital Subscriber Lines or "DSL") will occupy only 14% of the market. Clearly, the time to act to "open the gates" to the internet, is now.
4. *"Open access" will not impede internet investment in the long term.* Some investor groups led by the cable industry have vastly overstated the "threat to investment" which allegedly will occur if "open access" is required. A number of reputable economic studies have confirmed what common sense tells us: offering consumers a choice of high speed internet services from a variety of Internet Service Providers ("ISPs") should increase demand and enhance the business case for cable operators, not detract from it. Even the staff of the City of Los Angeles, who have initially put forth a slower approach than Portland would recommend, have agreed with us that demand for internet bandwidth is insatiable, and that "it is difficult to imagine how, in the long term, the winners will be anyone other than those who deploy their facilities despite the costs of complying with new regulations." Moreover, most U.S. cable systems are being rebuilt for competitive telephony and internet access even as we speak. This investment is in most cases already committed, and you can ask any Wall Street analyst if there has been caution or reticence in Internet-related investments lately, whatever regulatory environment is projected.
5. *Local governments do not favor differing technical standards.* The allegation by the cable industry that local governments want to impose "30,000 different technical standards" for the internet or for the cable modem platform is simply false, and appears designed to cloak a relentless demand for market domination.. Portland wrote its "open access" provision in a "technology-neutral" manner, as the federal court recognized. We simply required that the industry not discriminate against unaffiliated internet providers, and left the means of implementation to the cable industry and its engineers. We continue to recognize that developing technical standards is the job of the cable industry, and is best overseen by the FCC with assistance from interested local governments. But it is NOT the cable industry's job to—in effect—dictate national communications policy by means of selecting its own self-interested technology designed for maximum profit and monopoly marketplace share. Instead, it is the job of Congress, the FCC, and local government—working together—to support and take action to ensure the continuation of an open and competitive communications marketplace. That is precisely what current communications statutes provide for: authority for federal, state, or local governments to take action to promote competition. This is what Portland did, and this is what the federal court has upheld.
6. *Open access is important to local communities.* Citizens support open access. Nobody wants a monopoly to control high-speed access to the internet. Open

access is important to local businesses. The two largest internet service providers in the state are located in downtown Portland. They provide high paying jobs in an environmentally friendly industry. That's just the kind of business local governments want.

#### CONCLUSION

In the final analysis, "open access" on cable internet modems is not a new form of regulation. Instead, "open access" means open markets—not regulation. Open access means competition—and not monopoly. The essential nature of 'open access' is to encourage the continued growth of an unfettered, unimpeded, vibrant Internet—with many choices available on many platforms. Not only would we oppose any regulation that would produce an opposite result, but we are happy to be joined in this view by members of Congress from both parties, and by many major national industry and consumer groups.

It is my belief that the importance of this issue transcends the business plans of the cable industry, the ISP industry, and the telecommunications industry as a whole. The need for the Internet to remain open and competitive is a fundamental matter of national communications policy. It can and should be addressed both nationally and locally, just as the law now provides. However, because of the current environment, a unique opportunity now exists for Congress to assist local franchising authorities in providing the roadmap for ultimate national action on this critical issue. The Internet Freedom Act of 1999 is a positive step in the right direction.

Ultimately, the need for *Open Internet Access For All* can't be stressed too strongly. Home access to the Internet for most people for at least the next few years will continue to depend on the existing two wires already built to most homes in Portland and everywhere else: the telephone wire (narrowband), and the cable wire (broadband). Despite niche availability of wireless or other options yet unknown in some markets, most folks (rich and poor) will depend on the cable and telephone wires already connected to their homes. And these two wires will continue, in our best judgment, to provide the most common means of mass access to the Internet for most citizens.

Experts have explained to us that broadband cable is particularly suitable in terms of technology, speed, and capacity to carry the ever-more-dense Internet content (particularly multimedia) that is becoming a necessity (by any objective measure) for adequate access to the Internet now and in the immediate future. Oddly enough, however, what AT&T and TCI are telling you is that we should adopt policies under which the slower wire should be open, while the more robust facility should be the private domain of cable providers. I am pleased that Congress has recognized that special requirements should be imposed on incumbent local exchange carriers because of their market position; but I do not believe that we can ignore the market position of the cable industry.

If the current policy pronouncements of federal law have any real meaning, then open access is more than justified. Prompt action by Congress will contribute significantly to ensuring that all of our nation's cable networks are designed, constructed, and equipped for a competitive, open communications platform. In this way, the broad pro-competition policy language of national communications law can truly be fulfilled.

I have this final, substantive suggestion for you: should Congress adopt an "open access" provision, that provision should be as clear and simple as possible. If the provision effectively requires lengthy litigation to implement, many of the potential benefits may be lost.

Ultimately, the principle underlying "Open Access" is simple: *consumers should have choice*. This means choice for the widest possible variety of choices, prices, and providers for increasingly critical high-speed access to the Internet. We hope that Congress will step up and join us in upholding this simple principle.

Mr. HYDE. Mr. Cleland.

#### STATEMENT OF SCOTT CLELAND, MANAGING DIRECTOR, LEGG MASON PRECURSOR GROUP, WASHINGTON, DC

Mr. CLELAND. Mr. Chairman, thank you for the honor of testifying. The views expressed here are mine alone. I would also like to commend Congressmen Goodlatte and Boucher for their bills.

First, I have two brief insights from a market perspective. In general, investors are very wary of any legislation because what it

does is increase uncertainty. And they dislike uncertainty. However, the—and also the proposed legislation, I think, will probably have a marginal effect on the overall level of investment in broadband.

I don't think either open or closed access will substantially slow broadband deployment investment overall. However, it could have a very large effect over how investment moves between industries.

Second, I would like to offer some questions and some comments from the peanut gallery.

Why has cable closed Internet access to competitors and why are they limiting streaming video to 10 minutes? I believe that cable's deregulatory rhetoric is a Trojan horse designed to divert attention from what is really going on, and that is reducing the potential for more competition to cable.

The Goodlatte-Boucher bills recognize that there is more than one threat to the Internet than government regulation. There is also the threat of anticompetitive behavior by owners of scarce broadband conduit. While it is always wise for government to let markets work and not regulate, this committee also regulate—also recognizes that the market works best when everyone is free to compete and innovate. Both bills recognize that you do not have to compromise on competition or nondiscriminatory access in order to deregulate. The bills employ a wise nonregulatory antitrust enforcement approach.

Now, it appears from the tenor of this debate that somehow deregulation and infrastructure deployment are supposed to be more important public policy goals than promoting competition or protecting consumers. Now, I have been trying to find what congressional action or what FCC decision reordered those priorities—I can find none—what decision officially endorsed that the trade-off of the end of deregulation and broadband deployment justify the means of reducing competition and safeguarding consumer interest.

Now, if you listen to this debate a lot, one could get the false impression that cable was already deregulated and cable had no market power. Well, Congress in fact has found that the cable industry has anticompetitively used its scarce conduit control to stifle competition in several markets.

Congress created program access to foster DBS competition. Congress created must-carry access to foster broadcast competition. Congress created leased access to foster video programming competition. Congress created navigation device access to foster cable equipment competition.

Now, cable-open access for Internet, it doesn't appear to be a new or isolated problem.

Now, finally what is at stake in this debate? I think we are at a major fork in the road on this Nation's policy toward competition, toward convergence, toward Internet, and toward electronic commerce. Will the Nation continue down an open procompetitive road it has traversed for the last 30 years or will the Nation now divert to a less competitive road in the future?

In conclusion, I have four more questions. Very important first one is will the Internet technology be allowed to compete with cable? By way of analogy, think of the Internet as the next DBS. Will the government enable Internet competitors to compete

against cable with open access as the government enabled direct broadcast satellite to compete against cable with program access? Without an open access, there can't be competition.

We have 10 million DBS consumers in the last 6 years because of what Congress did in 1992. Open access offers a phenomenal increase in consumer choice for video programming. That is what it is all about. If somebody can be a competitive microprogrammer and offer different programming to consumers, consumers are going to love it.

Another question, will cable be allowed to corner part of the high-end residential e-commerce market? In other words, will scarce conduit market power be allowed to be vertically leveraged into Internet content and into e-commerce?

Third question. Will the government keep the unregulated Internet separated from the regulated infrastructure? Or are you going to allow cable to merge itself with the Internet in order to self-de-regulate?

And the last question is, will the FCC continue a schizophrenic policy of hyperregulating the local telcos' last mile, while taking a look-the-other-way policy toward the cable's last mile? This sends the marketplace very mixed signals and will lead to skewed investment, a broadband duopoly, not a competitive marketplace.

Thank you, Mr. Chairman, for the honor of testifying.

Mr. SMITH OF TEXAS. [Presiding.] Thank you, Mr. Cleland.

[The prepared statement of Mr. Cleland follows:]

PREPARED STATEMENT OF SCOTT CLELAND, MANAGING DIRECTOR, LEGG MASON  
PRECURSOR GROUP, WASHINGTON, DC

Mr. Chairman, thank you for the honor of testifying before your Committee on "The Internet Freedom Act" and the "Internet Growth and Development Act of 1999."

I am Scott Cleland, Managing Director of the Legg Mason Precursor Group<sup>®</sup>. The views expressed here are mine alone. I request that my full written testimony be printed in its entirety in the hearing record.

By way of introduction, I am not a traditional Wall Street sell-side analyst who analyzes companies or recommends the purchase of stocks. For Legg Mason, I run an investment research group that tracks regulatory, technological, and competitive developments in the communications, technology and e-commerce sectors for large institutional investors. Unlike most of Wall Street, we do not focus on what will happen in the next quarter. We focus on trying to anticipate major investment-relevant change coming in the next three-18 months.

In that context, I offer the following insights and observations in hopes that they will be useful to the Committee in its deliberations over "The Internet Freedom Act" and the "Internet Growth and Development Act of 1999."

I. INVESTMENT AND MARKET PERSPECTIVE

In general, investors are wary of almost any proposed legislation or regulation because it increases uncertainty—which investors dislike. However, investors are not much different from the old political adage "where you stand, depends on where you sit." Where investors stand on proposed legislation often depends on what they own in their portfolio. It is important for this Committee to appreciate that its action or inaction on this proposed legislation will have a marginal effect on the overall level of investment, but it could have a large effect on how investment dollars move around within the marketplace.

*Market's Perception of Cable:* I believe that the market's current very positive outlook for the cable industry rests on three primary assumptions at the heart of the open access debate.

- (1) Cable enjoys the best broadband, multiple-service, consumer pipe to the home.
- (2) The cable pipe won't be opened up to competition by the government.

- (3) Cable will be able to vertically leverage its video market power and customer base into the Internet and e-commerce.

Moreover, the market largely assumes the best case right now about cable's story, that all the new proposed services will pan out in full. The market loves a growth story that faces little competition. In other words, the market views cable's glass as half full.

*Market's Perception of Local Telcos:* In contrast, I believe the general market perception of the local telcos has been different. Despite the local telcos' positive financial performance since the Telecom Act passed, investor fears of increased competition continue to cloud the local telcos' overall growth outlook. In other words, the market views the local telcos' glass as half empty.

For very different reasons, this Committee's proposed bills cut to the heart of both these industries' growth outlooks and the market's perception of them.

## II. THE DEREGULATORY "TROJAN HORSE": IT'S ALL ABOUT PREVENTING COMPETITION.

Why has cable closed Internet access and limited streaming video to 10 minutes? Cable's deregulatory rhetoric appears to be a "Trojan Horse" to divert attention from the main event—reducing the potential for more competition to cable.

*A. There's More Than One Threat to the Internet: Both HR1685 and HR 1686 recognize that there is more than one threat to the Internet than just government regulation—but also anticompetitive behavior by owners of scarce broadband conduit.* While it is wise for the Government to let the market work and not regulate, this Committee has also recognized that the market works best when everyone is free to compete and innovate.

*Both HR1685 and HR 1686 recognize that one does not have to compromise on competition and nondiscriminatory access to deregulate.* The bills offer the Bells data deregulation without compromising the procompetitive principle that the Bells must still provide nondiscriminatory access to their "last-mile" facilities. *The Committee's bills take a nonregulatory antitrust approach: "Prohibition of Anticompetitive Behavior or Contracts."* The bills oppose "restraining unreasonably the ability of a service provider from competing."

*Who Decided to put Competition in the Backseat?* It appears from the tenor of this debate that somehow deregulation and infrastructure deployment are now supposed to be more important public policy goals than promoting competition and protecting consumers. Once again, what congressional action or official FCC ruling reordered these priorities? What decision officially endorsed the trade-off that the "ends" of deregulation and broadband deployment "justify the means" of reducing competition and not safeguarding consumer interests?

*B. Deregulatory Misinformation:* If one were to listen to much of the current debate, one could get the false impression that the cable industry already was deregulated and that government did not believe cable had market power. In fact, Congress has effectively found that the cable industry has anticompetitively used its scarce conduit control to stifle competition in several markets.

*Program Access:* In the 1992 Cable Act, Congress found that cable was discriminating anticompetitively against satellite broadcasters, and legislatively obligated cable to provide satellite competitors with nondiscriminatory access and prices to cable programming. That "regulatory" "open access" to cable programming promoted competition and has provided more than 10 million Americans a competitive choice of video distribution supplier in about six years.

*Must Carry and Retransmission Consent:* The 1992 Cable Act policy was to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." Congress recognized cable's market power over local TV stations, so Congress gave local TV stations the legal option to either choose "must carry" of their broadcasts or to choose a commercial negotiation through the legal process of retransmission consent.

*Leased Access:* "To promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public . . ." section 612 of the 1992 Cable Act obligated cable operators to make 10%–15% of their system capacity available for commercial use (resale) because competitors did not have sufficient alternative ways to distribute their product.

*Competitive Availability of Navigation Devices:* In the 1996 Telecom Act, Congress worried that cable's market power over cable equipment was stifling competition and passed section 629 to "assure the commercial availability to consumers . . ." of cable equipment. Cable can still sell equipment to consumers, but it can not charge a price that is "subsidized" anticompetitively by its cable service. Congress effectively created for consumers an "open access" market for cable equipment. It

also created a regulatory sunset of this provision when the FCC finds the market for video programming and video equipment is "fully competitive."

*Continuation of an Anticompetitive Pattern?* Few are now advocating "deregulating" cable from any of these procompetitive cable obligations described above. Is that because consensus still supports procompetition policies which protect against a widely appreciated pattern of cable anticompetitive behavior? Cable open access is not a new or an isolated problem. It is a continuation of a long and clear pattern of commercial behavior to reduce competition.

Internet access is a new market that largely came into being after passage of the 1996 Telecom Act. Both HR1685 and HR 1686 implicitly recognize that this new form of cable anti-competitive behavior may have to be addressed legislatively again.

### III. WHY IS OPEN ACCESS IMPORTANT?

The issue of cable open access is much more than an industry squabble or a regulatory food fight. In fact, whether the cable plant is open or closed to competitive access is a *major fork in the road for this nation's policy towards competition, convergence, the Internet and electronic commerce*. Will the nation continue down the open pro-competitive road it has traversed for the last 30 years, or will the nation now divert to a new more closed and potentially anticompetitive road in the future? This is not just about ISPs and "last mile" access. It is even more importantly about vertical linkage of backbone, access, content, and e-commerce.

#### *What's at Stake?*

*A. Will Internet technology be allowed to compete against cable?* By way of analogy, will the government enable Internet competitors to compete against cable with open access as the government enabled Direct Broadcast Satellite (DBS) to compete against cable with program access in 1992?

In all the hype about the Internet and e-commerce, do not forget that about 99% of cable's revenues are still video-related. Cable does not want more programming competition from Internet players. Open access offers a massive increase in consumer video programming choice as technology develops over time (i.e., enabling users to stream video). Instead of having to buy entire packages of programming from cable, Internet competitors could offer micro-programming packages so consumers could buy only the programming they want, when they want it, and how they want it. Most consumers use and want only a fraction of the channels they are forced to buy in a package. If consumers could choose only what they want to see, ultimately no one would have to pay for programming they do not want or support. If consumers wanted to, they could dramatically either decrease or increase their cable bill depending on their *individual* viewing choices. Almost everywhere else in the economy, the Internet is empowering consumers with more choice. Closed cable access would allow cable video programming to increasingly become an island—impeding outside Internet innovation.

With open access, cable-broadband Internet Service Providers (ISPs) could become a very different industry than their telco-narrowband ISP brethren. *Higher speeds could create an entirely new and more competitive video marketplace*. Look at how the Internet and e-commerce has flourished because of local telco open access. Broadband Internet competitors on cable probably will be less like today's ISPs, which thrive primarily only on Internet access, e-mail, and customer service, but will also offer competitive programming as Competitive Internet Video Programmers (CIVPs).

*B. Will Cable "Corner" the High-End Residential E-Commerce Market?* Will conduit control content and e-commerce?

*Competition Is an Antidote for Market Power:* The government has used the introduction of competition to mitigate the potential for the local telcos to leverage their local market power vertically into adjacent markets.

- The government opened telephone customer premise equipment to competition, leading to a flourishing competitive market of multiple vendors for interoperable devices that hook up to phone lines.
- Since the late 1960s, the government has consistently maintained a policy of keeping the regulated communications infrastructure separate from the unregulated computer, data, and now Internet markets—by ensuring non-discriminatory access to the network. The result is a flourishing competitive market of more than 6,000 ISPs and tens of thousands of e-commerce companies.

- The breakup of AT&T and the associated nondiscriminatory access policy has led to robust long distance competition and more than 10 national Internet backbones.
- The Telecom Act has promoted local competition and nondiscriminatory access, which has led to the creation of dozens of competitive local exchange carriers.

*Bambis in the E-commerce Forest?* Because there are multiple layers of competition and nondiscriminatory access policies between the local telcos' "last-mile" market power and the Internet, to date, e-commerce companies have not had to worry about a fair unfettered access to their residential customers. In other words, there are tens of thousands of e-commerce "Bambi" companies that currently don't worry about conduit players being able to steer their best customer segment away from them to a cable "preferred" provider. They focus on content, commerce and customers, and assume they will always have access to infrastructure and their customers. Most e-commerce "Bambis" are still naively unaware that there is danger in the e-commerce forest that could lead to the capture of their potential high-end customers by locking these customer into infrastructure and exclusive service before these e-commerce companies ever have a chance to sell to them.

*Reducing Competition and Leveraging Market Power:* Contrast the nondiscriminatory competitive approach of the telco "last mile" into 98.5 million American homes with cable's discriminatory attempt to reduce competitive access to the nation's other ubiquitous "last mile" into 66 million homes.

Cable's closed access policy enables cable to vertically leverage its market power more freely into e-commerce. Unlike the telecom competition that is designed to limit a local telcos' market power, cable is limiting competition to leverage its market power. For example, cable has contractually established a monopoly distributor of cable Internet access @Home/Road Runner, to ensure no competition from the 6,000 ISPs or the several dozen competitive local carriers. Cable also discriminates by not allowing competitive backbone providers to carry its Internet traffic. @Home/Road Runner also forecloses Internet video programming competition by limiting any streaming video to less than 10 minutes in duration. The absence of competition in cable's intermediary markets combined with ownership of a preferred content and e-commerce portal (i.e., Excite), provides cable the real potential for exercising its market power into the high-end residential e-commerce market.

If cable:

- (1) continues to enjoy a dominant share of the residential broadband market (currently cable's *broadband* market share is 90%+);
- (2) can prevent intermediary competition for competitive access; and
- (3) can leverage exclusive Internet access with Internet backbone transport to gain a powerful incumbent "default" advantage over competitors;

then cable would be able to substantially lessen competition by effectively limiting their competitors' addressable market. In effect, cable could "corner" a substantial portion of the high-end residential broadband e-commerce market for itself and its "preferred" e-commerce partners.

*C. Will Government Keep the Unregulated Internet Separate From Regulated Infrastructure, Which Has Been Key to its Success and Growth to Date?* In other words, will the unregulated "virtual" world of the Internet and e-commerce remain separate from the regulated physical infrastructure businesses?

*The Internet Is Separate:* The Internet is simply a universal communications language that links any type of electronic device over any carrier's physical infrastructure, to deliver any type of information (text, data, graphics, voice or video). In effect, the Internet "delinks" communications from the physical technology. In the past, communications was driven by the physical hardware technology: phone, radio, TV, cable, wireless, or satellite. The Internet is *not* the physical infrastructure, but the *virtual* and boundaryless world of communications and e-commerce that rides on top of the various technologies.

*Cable Self-Deregulation?* Cable is trying to reverse more than 30 years of communications/computer regulatory separation by self-declaring that cable infrastructure and the Internet are one and the same. Cable is trying to "relink" its infrastructure to the Internet in order to cloak itself in the deregulatory rhetoric of the Internet. However, in Congress' much-touted deregulatory Internet policy statement in the Telecom Act, there is no mention of cable or any other infrastructure player. Despite the current confused debate, I can find no place in which Congress or the FCC affirmatively and officially decided that cable was the Internet and, therefore, cable infrastructure should be "unfettered by Federal or state regulation."

*D. Schizophrenic Infrastructure Regulation Diverts Convergence.* There could not be more of a stark regulatory contrast than the competitive policy the FCC applies to the telcos and to the cable industry. The FCC is polarizing residential broadband investment by hyperregulating the telco monopoly pipe using the broadest regulatory interpretation of the law and taking a laissez-faire approach toward the cable monopoly using the narrowest interpretation of the law. Apparently, the FCC has opposite definitions of competition depending on who is on the receiving end.

- Current "activist" telecom broadband competition policy is to:
  - (1) demonopolize by promoting competition on an open, shared network at wholesale prices;
  - (2) encourage access investment and innovation by Internet competitors; and
  - (3) prevent the incumbent from anticompetitively cross-subsidizing or leveraging market power vertically.
- In contrast the current "look the other way and hope" cable broadband policy is the opposite:
  - (1) it fosters a duopolization by allowing cable a closed proprietary network at retail prices;
  - (2) it discourages competitive investment and innovation by Internet competitors; and,
  - (3) it allows the incumbent to cross-subsidize and leverage market power vertically.

*Long-Standing Open Access Precedent:* Since 1966, the government has had an ongoing regulatory proceeding, Computer Inquiry, whereby it has tried to reconcile the convergence and interdependence of communications transport and enhanced data processing technologies *by keeping them separate* to the extent possible for regulatory purposes. Neither the 1992 Cable Act, nor the 1996 Telecom Act, nor the World Trade Organization Telecom Agreement specifically anticipated the emergence of cable as a primary broadband data "last-mile" carrier. In the absence of specific legal language, cable has lobbied furiously for political self-deregulation from the long-standing, bipartisan and international consensus supporting the promotion of competition to monopolies and the policy of nondiscriminatory access (i.e., open networks). I can find no vote or official policy decision whereby the government decided to reverse its consensus procompetitive, open network access policy and officially and explicitly decided that the cable "last-mile" should be closed to competition in order to spur deployment.

Mr. Chairman, thank you again for the honor of testifying before your Committee on this important subject.

*Attachment:* "Too Rosy an Outlook for Residential Broadband Competition?" and accompanying chart: "Precursor Watch®: Residential Broadband Deployment Outlook."


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Scott C. Cleland

June 28, 1999

## Too Rosy an Outlook for Residential Broadband Access Competition?

**Summary:** TPG suspects that the current rosy deployment outlook for residential broadband access facility choices will fall short of expectations much as residential competition has disappointed since passage of the 1996 Telecom Act. Just as before, there are powerful industry, financial and political interests at play that promote and benefit from a rosy deployment outlook. However, just because the promoters' views are rosy does not make them realistic. There's not a lot of mystery about the prospects for the residential broadband market. All the potential competitors have either a government license or regulated rights of way, and they all have deployment markets and timetables. Attached is a TPG summary of the universe of potential sources of residential facilities-based broadband competition and the likely reach and timetable of broadband deployment. TPG would expect other feasibility surveys of deployment plans to yield healthy skepticism. The cable open access debate largely hinges on the prospects for alternative broadband deployment. The FCC apparently assumes that the market will create enough nationwide competitive alternatives (4 to 5+) to ensure that there would be no anticompetitive effects from a closed cable platform. Federal Judge Panner's recent Portland decision favoring local open access authority declared cable an "essential facility" for competitive ISPs.

**Outlook for Residential Broadband Facility Choice:** Being generous, and using the FCC's "broadband" definition (200+ kbits per second in both directions), TPG believes the best practical broadband deployment case for the next three years is that: about one quarter of the country might enjoy a choice of three broadband options (cable modems, DSL, and fixed wireless); roughly one-half of the country could enjoy a choice of cable modems and DSL; and about three-quarters of the country could have cable modems available. The saddest flip side of this best practical case is that: about one-quarter of the country won't have any broadband offering; about one-quarter will have one option—cable modems; about a quarter will have two options—cable modems and DSL; and about one-quarter will have three options—cable modems, DSL and fixed wireless. TPG suspects actual deployment could be less.

**Red Flags Questioning a Rosy Deployment Scenario:** (1) Where is DSL? After years of hype and rosy projections, currently only about one of 15 residential broadband customers uses DSL. Moreover, the underwhelming deployment experience with ISDN (the telcos' former high-speed service—

128 kbits per second)—roughly 200,000 residential customers over the last 11 years could be a red flag for DSL projections. (2) Iridium? The most recent experience we have with new satellite offerings is Iridium, which may go bankrupt, having spent \$5 billion to attract roughly 10,000 customers worldwide. (3) Fixed wireless? a) The reason Sprint and MCIWorldcom were able to purchase their fixed wireless cable spectrum is that the previous businesses that used that spectrum went bankrupt. b) Current deployment of fixed wireless has been slowed because the industry has had problems securing economical building roof rights to deploy antennae. The problem is serious enough that the FCC recently launched a proposed rulemaking. c) AT&T's \$100 billion investment in cable broadband suggests that AT&T believes cable broadband could be deployed faster and better than its own fixed wireless "Project Angel." (4) Tough questions? a) The official lobbying position of both the local telco and the cable monopolies is that they cannot afford to upgrade their existing facilities to two-way broadband if regulators force them to share their bandwidth with competitors. What does this suggest about the economic viability of a new entrant that has to build facilities from scratch without the cross-subsidy of an existing customer base? b) If AT&T truly believes there are plenty of broadband alternatives, what are AT&T's immediate plans for offering competitive broadband service to the 75% of American households where it claims it will not have cable properties? c) If the FCC truly believes there are going to be plenty of broadband options soon, a "no-opoly," why is the FCC planning to hyperregulate the local telcos' DSL spectrum and DSL offerings? And why is the FCC not trumpeting the benefits of DSL deregulation in order to spur DSL deployment?

**Can't Ignore Economics:** While it is not "politically correct" to still talk of "natural monopoly" economics, the cold reality remains that residential broadband facilities remain simultaneously highly capital-intensive up front and highly capital-inefficient over time because of the lack of geographic density and the lack of high-volume customers. Local residential competitive economics remains dismal unless an AT&T can assume very high penetration rates, cross-subsidize its video monopoly, and vertically leverage market power into e-commerce by preventing competitive Internet access. Ponder how the CLECs have shunned the residential market. Ponder how the FCC manufactured an effective 75% local service resale discount (UNEP); that speaks volumes about how acutely aware the FCC is of the lingering "natural monopoly" economics in the residential market. (See attached chart) \* \* \* \* \*

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Mr. SMITH OF TEXAS. Mr. Rosenblum.

**STATEMENT OF MARK ROSENBLUM, VICE PRESIDENT FOR  
LAW, AT&T CORPORATION, BASKING RIDGE, NJ**

Mr. ROSENBLUM. Thank you, Mr. Chairman, members. It is a pleasure to be here today to discuss H.R. 1685 and 1686. AT&T is investing over \$100 billion in cable systems to transform cable systems into new communications facilities that we think will bring new technology and services to our customers. Our plan is to use these facilities to compete in local telephone markets across the country, offering competition to the incumbent monopoly telephone companies, bringing lower price, better service, and for the first time real choice to millions of residential customers.

One of these new choices is the broadband Internet access service customers will be able to obtain from cable companies in partnership with firms like @Home and Road Runner. These providers have innovated and invested to build high-speed networks and bring new content to cable customers.

Contrary to some rhetoric, these networks are not closed. Customers can and do access any site on the public Internet through these new services. There is no limit whatever on Internet access or where customers can go on the Internet once they get these services. All they do is get an additional choice. And we think they get faster and better service than they could before.

Since AT&T unveiled its investment in cable, deployment of all types of broadband access facilities has skyrocketed. DSL technology, that is the technology that turns a telephone line into a broadband capable pipe, has been available for years, but it has only been in the past few months that Bell companies and GTE began accelerating their deployment and reducing the price for these services; and we think that is in response to the competition they sense coming from companies like AT&T.

Four Bell companies and GTE have announced that DSL service will be able to serve as many as 31 million consumers across the country by the end of this year alone. These emerging competitive forces are really the product of the competition from AT&T. The investment and innovation you see in the industry represent a huge consumer and competition success story made possible by the 1996 Telecommunications Act, of which we think Congress should be very proud.

What we are talking about today is bringing better service, better price, and more choices to customers. This is the promise of the Telecom Act, and I think it is the promise of the Sherman Act. These laws have unleashed the explosion in competitive investment by us and others, and it has made possible the competitive response by the incumbents that is really what is going to drive deployment of these new technologies to all customers.

If the past 3 years have taught us anything, it is that the certainty provided by the Telecom Act has stimulated this competitive investment, without which the competitive response would not have been made possible. We thus oppose allowing Bell companies to provide long distance data services now before they open their local markets to competition as the 1996 act requires.

In addition, we think the bill marks a sharp and unwarranted departure from established antitrust policy. Congress and the courts have uniformly recognized that the Sherman Act is a law of general application and special laws applying to special industries have generally been rejected. This bill, in contrast, would impose a special rule for a single industry creating a narrow inflexible market definition and would bypass relevant case law. It would deem individual broadband providers to have market power over their own facilities, even though broadband competes with narrowband and even though alternative suppliers can and do provide other broadband access capabilities.

The bill's unprecedented presumption of antitrust liability in suits involving broadband Internet access we think would lead to a litigation explosion. This would embroil the Federal courts in setting the rates, terms and conditions for Internet access, leading to regulation of the Internet that would seriously hinder the very innovation the antitrust laws are supposed to foster.

We think the discussion today really is not about whether cable Internet network should be open. The choices and technologies that competition will create assure that all firms have every powerful incentive you can imagine to offer services and features that customers want.

In our case, we have invested over \$100 billion in a new technology to try to bring choice to our residential customers. Virtually all of these customers today, though, are already served by the incumbent telephone monopolies or by the dominant Internet provider, AOL. If we don't offer them the service they demand, they are simply not going to bring their business to us in the first place, and we will never recover on our investment. If we don't meet their needs, they won't come. This market reality should dictate the way that markets and technology and consumer services develop. We submit new laws that are not necessary.

I respect very highly what Commissioner Sten and his colleagues have done in Portland, but other cities around the country considering the same question came to the decision that it would be inappropriate to impose open-access requirements on cable providers preferring instead to stimulate the deployment of our facilities hoping that it would trigger deployment of competing facilities, and that has occurred.

Commissioner Sten says national policy is required. Our reason for opposing what happened in Portland, Mr. Chairman, is not to impose litigation costs on the people of Portland. They are our customers. We just think that we can't afford to have individual cities making individual choices in this very important area. We have got a market, it is working, and we think the customer demand should drive it. Thank you very much.

Mr. HYDE. [Presiding.] Thank you, Mr. Rosenblum.  
[The prepared statement of Mr. Rosenblum follows:]

PREPARED STATEMENT OF MARK ROSENBLUM, VICE PRESIDENT FOR LAW, AT&T CORPORATION, BASKING RIDGE, NJ

It is a pleasure to appear before this Committee today to discuss H.R. 1685 and H.R. 1686. We commend the Committee for the leadership role it has played in the last three years in ensuring appropriate enforcement of the antitrust laws in the telecommunications industry.

Before passage of the Telecommunications Act of 1996 (the "Telecom Act"), investment in the cable and telecom industries was sluggish. Now, with the legal and regulatory certainty the Act provides, investors are flocking not only to cable providers and incumbent monopolies, but also to competitive local exchange carriers, wireless providers, and other telecom companies.

We at AT&T believe that government policies that encourage entry and investment by, and promote competition among, providers of broadband services promise enormous benefits to all Americans. AT&T has embarked on a mission of investing the widest possible deployment of broadband technology and services to consumers. For us, broadband technology is not merely an effort to promote high-speed Internet access, important though that is. Rather, we've always been a communications company, and our plan is to use our broadband capabilities to compete in local phone markets across the country, offering spirited competition to the incumbent monopoly local exchange carriers—all resulting in lower prices, better service, and more choices for millions of residential consumers. Our actions in the marketplace are fulfilling the promise of the Telecom Act. We will use cable technology to provide local phone service. We approach the issue of the proposed Goodlatte-Boucher legislation from this perspective.

If we have learned anything in the few short years that the Internet has become such an important part of the fabric of our national life, it is this: we cannot legislate technology. To do so would distort not only the workings of markets, but the development of technology itself. Further, it would stifle investment—the very investment that permits entrepreneurs to develop and market powerful and innovative new technologies. Competition among technologies, as well as among companies, will lead to the quickest possible deployment of broadband services. We certainly hope that high-speed access to the Internet through cable succeeds in the marketplace, but we know that will occur only through competition among cable, satellite, and DSL providers.

Yet the proposed legislation would violate the most basic antitrust principles by requiring Federal courts to ignore the reality of intense rivalry among alternative broadband technologies. It would thus discourage, rather than encourage, investment and competition and harm rather than help consumers. Of course, any attempt to replace the antitrust laws' traditional focus on case-by-case consideration of the relevant markets and the competitive forces in those markets with inflexible legislative determinations should be approached with great caution. But this is especially true in markets characterized by rapidly evolving technologies. There is simply no reason even to try to do so here. Market forces, buttressed by existing antitrust laws and specially-tailored regulatory protections—in particular, the Telecom Act provisions designed to prevent the incumbent local telephone companies from extending or abusing their monopolies—are a superior approach.

Since enactment of the Telecom Act, AT&T has led the telecommunications and cable industries in investing billions of dollars to upgrade cable facilities to provide Internet and local telephone services—a risky proposition given that the dominant local telephone monopolies and Internet providers have virtually all of the customers today. But we and others are making those investments on the understanding that the national policy embodied in the Telecom Act requires that we do our part to foster the local phone competition that is the central promise of the Act.

Preserving competitors' incentives to make these investments is not simply important in its own right. The mere announcement of our cable upgrades—and particularly AT&T's unrivalled public commitment to short-term and large-scale deployment—have, in turn, spurred the local telephone monopolies and others to finally deploy the broadband technologies they have had sitting on the shelves for years and, equally important, to enter into commercial arrangements with Internet providers (notably AOL) to bring even broader choice to consumers.

The proposed legislation, in contrast, would denying the cable companies that have largely stimulated these vibrant market forces the right to respond to market forces in balancing customer demands, technology constraints, and legitimate network congestion concerns and in pursuing commercially-negotiated arrangements of their own. Ironically, this could only discourage both cable investments and the long-overdue competitive response to those investments by today's dominant providers of Internet and local telephone services.

That would be a very high price to pay, particularly given the reality of the marketplace. Competition will ensure that consumer demands for the services they want are met. Any cable provider that fails to offer customers the services and choices they demand will simply lose in the marketplace. AT&T recognizes this reality, and having committed more than \$100 billion of its shareholders' resources to acquire TCI and MediaOne and upgrade their cable facilities, is fully committed to making sure that consumers are able to access the content of their choice—a point our

Chairman, C. Michael Armstrong, has made publicly on numerous occasions. If we don't give consumers what they want, they will simply go somewhere else—or, more precisely, given that we are just getting started here, *stay* somewhere else, which is with the incumbent local phone companies.

Thus, the question here is not whether cable systems will be “open,” but whether new facilities and services that offer the most viable near-term hope for legitimate local competition should be allowed to develop in accordance with customer demands and market forces—rather than through protracted and costly litigation that will discourage the very investment necessary to generate this rivalry and the ensuing consumer benefits.

The remainder of this testimony is organized in two parts. First, it discusses why we believe existing laws are more than adequate to address potential anticompetitive conduct in the broadband area and that the proposed legislation is fundamentally flawed. No new legislation is necessary to protect consumers of broadband services. Moreover, the proposed legislation is fundamentally flawed from the perspective of antitrust jurisprudence and economics. Second, we believe the proposed legislation would in fact retard the rapid deployment of broadband technologies both by placing unwarranted new regulatory constraints on cable companies and by removing existing protections against anticompetitive conduct by local telephone monopolies. By contrast, the best way to make sure that all consumers have access to a variety of broadband technologies and services, including both cable-based systems and systems provided by the local telephone monopolies, is to allow market forces, constrained by existing regulatory protections, to continue working.

#### *The Existing Antitrust Laws Are Working*

Regardless of one's perspective on the appropriate role of government in the deployment of broadband, there would still remain many reasons to oppose attempting to change the Federal *antitrust* laws in the manner proposed in this legislation. From the perspective of antitrust law and antitrust economics, there are a number of serious shortcomings in this proposed legislation.

First, this bill imposes an inflexible statutory definition of the relevant “market” (the “broadband service provider market”) which is inaccurate at best and more generally inappropriate. In the normal course, under well-developed case law, an antitrust plaintiff must prove that the defendant has the power to control prices and output and exclude competitors in a relevant market. The appropriate definition of the relevant market is thus the starting point of traditional antitrust analysis. To determine what the relevant market actually is, agencies and courts must consider the facts as to whether customers have alternatives that effectively prevent a firm from raising prices or limiting choice without losing business—in antitrust jargon, the “elasticities.”

This bill, in contrast, would foreclose the usual role that economic realities and evidence play in this determination and force an artificial definition of the market. Not only does the bill decree that broadband services are the relevant market—even though broadband Internet access services plainly compete with narrowband services today—the bill further declares that the facilities of a *single* broadband access provider constitute the relevant market. In essence, this bill would bypass relevant case law and deem individual broadband networks to be “essential facilities” (*i.e.*, those that are essential for competition in the relevant market) *without finding any ability to exercise monopoly power and notwithstanding that those seeking access to such a network have alternative suppliers that can provide the same or similar high-speed capabilities*. This ignores long-developed precedent on the essential facilities doctrine by asserting a presumption of a Sherman Act violation based only on a broadband access provider's legitimate business decision.

Problems with this statutorily-mandated definition will grow even worse as technology evolves in the coming years and even more alternative for communications and broadband technology appear in the market. Rather than forcing Congress to perpetually revisit this question of the appropriate market definition, therefore, the easier and more logical course is surely to preserve traditional antitrust principles and analysis by letting administrative agencies and courts determine the relevant market in any enforcement or damages action.

Second, the bill's proposed new procedural rules in antitrust suits involving broadband Internet access threaten to sow considerable confusion and lead to a litigation and regulation explosion. For example, Section 102 of the bill establishes a presumption of a Sherman Act violation any time a cable company that provides broadband Internet access seeks to negotiate terms and conditions for access with one ISP that are in any way different from those offered to any other ISP. But the legislation is silent as to how this would work in practice. What does it mean to say this is a presumption? What evidence would suffice to rebut it? What happens

in Sherman Act cases after the applicability of the presumption has been established. More fundamentally, the procedure envisioned in the legislation would inevitably enmesh the Federal courts in all 50 States in setting, overseeing and administering the rates, terms, and conditions for interconnection between literally thousands of broadband and Internet providers. This is certain to be extraordinarily costly and cumbersome. It would also foreclose the very innovation that the antitrust laws otherwise seek to foster by preventing new firms with new ideas from investing in new approaches that may require different interconnection arrangements.

Stated broadly, we are seriously concerned that the proposed legislation would lead to sharply increased litigation, rather than healthy industry competition. The bill creates the "presumption" of a Sherman Act violation any time a broadband service provider merely offers more favorable terms or conditions to one ISP. This presumption would apply without regard to whether this access was the result of fair commercial bargaining between the parties or the need of broadband service providers to recoup their investments. In effect, the bill would establish a new cause of action for the more than six thousand ISPs every time a broadband provider enters into an agreement with an ISP.

Because the bill gives special advantages to plaintiffs, defendants would have the scales tipped against them. As noted above, the legislation is unclear regarding whether the presumption of a Sherman Act violation is rebuttable and how defendants may challenge the presumption in court. It follows naturally that accepted procedural devices for quick dismissal of meritless litigation, such as motions to dismiss or motions for summary judgment, would be difficult, if not impossible, for defendants to obtain. This would considerably increase the costs of litigation for *all* parties, as even meritless claims could proceed only to trial or settlement.

Finally, this bill marks a sharp departure from the philosophy that has animated antitrust jurisprudence for over a century. The Sherman Act was intentionally written in language that is somewhat simple and general to ensure that courts have adequate flexibility to respond to rapidly changing market conditions and to new economic developments regarding the nature of the competitive process in particular markets.<sup>1</sup> Moreover, courts have uniformly recognized that the Sherman Act is a law of general application and is for the "protection of competition, not competitors."<sup>2</sup> Historically, the Federal antitrust statutes have been laws of general application. Accordingly, courts have generally rejected special, narrow presumptions or exceptions. Similarly, Congress has appropriately rejected prior legislative proposals suggesting specific presumptions or exceptions covering the health care, transportation, and energy industries, even in the face of asserted public health and safety rationales.

In sharp contrast, this bill is written in industry-specific and frankly protectionist terms that are contrary to the pro-competitive spirit of long-standing Federal antitrust laws. Likewise, rather than giving competitors and courts the ability to respond to new market conditions and to economic developments, it artificially dictates the relevant market and decrees that each broadband provider's system is an essential facility. Not only is this approach unprecedented, but the legislation would prevent broadband access providers from demonstrating in court that actual competition exists between or among different broadband companies and technologies. In short, this bill would protect competitors at the expense of competition.

Surely Congress cannot desire this result: to adopt this legislation would retard the competition among technologies that lies at the heart of innovation. Any new technology, by virtue of its newness, its challenge to the established way of doing things, would be seen as a potential monopoly—a strong deterrent to innovation.

#### *Towards the Broadband Future*

Of equal importance to the consideration of the proposed legislation is the question of whether this bill would further or retard an important public policy goal: achieving the rapid deployment of all types of competing broadband technologies to consumers. AT&T has a strong interest, shared by many on this Committee, in ensuring that this broadband technology is deployed quickly and widely to all types

<sup>1</sup>The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, at the lowest prices, of the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions. But even were the premise open to question the policy unequivocally laid down by the Act is competition." *Northern Pacific Railway v. U.S.*, 356 U.S. 1, 4 (1958).

<sup>2</sup>*Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

of consumers. Regrettably, this bill, while intended to spur the deployment of advanced telecommunications services, would actually undermine the pro-competitive policies of the Telecom Act in several important ways.

First, as explained above, competition, not regulation, provides the best incentive for broadband deployment. In fact, had this legislation already been enacted, we would not be witnessing the current dramatic explosion in competition to provide consumers with high-speed Internet access. Since cable companies have entered the broadband market, deployment of all types of advanced broadband services has skyrocketed. While DSL broadband technology has been around for years, the RBOCs and GTE began stepping up their deployment and lowering their prices *only* in response to the emerging competition from CLECs, cable companies, wireless, and satellite providers.

The FCC has noted that investment in broadband facilities by cable operators and CLECs "spurred incumbent LECs to construct competing facilities."<sup>3</sup> Wall Street analysts have likewise observed that competition from cable and CLECs is the primary force spurring incumbent LECs to increase their investment.<sup>4</sup> This appears to be the case in markets around the country, where the ILECs have lowered their prices and expanded their coverage areas in response to the entry of competitors.<sup>5</sup>

Indeed, four RBOCs (SBC, BellSouth, U S WEST and Bell Atlantic) and GTE expect to be able to offer DSL service to over 31 million homes in their regions by the end of *this year*. Competition keeps driving deployment ever faster and prices ever lower. For instance, in January 1999, SBC accelerated its deployment timetable by two years and reduced its price for 384 kbps DSL service about 30% to \$39 per month. Likewise, in May 1999, U S WEST dropped its price for 256 kbps DSL service 25%, to only \$29.95 per month, making it a much more attractive offering.

Particularly since AT&T announced its intent to use cable systems to provide high speed Internet access, deployment of all types of advanced broadband services has skyrocketed. Having amassed a dominant share of Internet subscribers while ignoring demand for broadband Internet access for years, AOL has now announced a series of initiatives with the RBOCs to provide high speed access over telephone lines. Likewise, AOL has just announced a venture with Hughes to deliver broadband service via satellites.

Second, the proposed legislation would directly undermine the pro-competitive policies of the Telecom Act that have accelerated investment in new state-of-the-art local networks. As a direct consequence of the landmark Telecom Act, over 150 competitive local exchange carriers (CLECs) are in business today, providing new jobs and investing billions of dollars in the Nation's telecommunications infrastructure.

This progress, however, has not come quickly or easily and has still not brought meaningful local competition to the overwhelming majority of Americans. Rather than complying with the Act's market-opening requirements, the incumbent local exchange carriers (ILECs) have opted to delay the onset of local competition by challenging the constitutionality of the Act and appealing almost every state and FCC decision adverse to their interests, or by simply refusing to do what the Act plainly requires. The ILECs continue to control 97% of their local markets, and the very popularity of second lines devoted to data services has only served to reinforce this level of market dominance. Thus, new entrants and competitive companies continue to face an uphill battle as they work and invest to make local competition a reality.

After almost three full years of litigation, having now failed in that effort, the RBOCs and GTE are now asking Congress to reward their recalcitrance by making exceptions in the Act for the provision of data services, including across LATA (local access and transport area) boundaries. They claim that this legislative "relief" is needed to foster broadband deployment.

<sup>3</sup> 706 NOI Report ¶ 42 & n.84.

<sup>4</sup> E.g., J.P. Morgan Report titled "DSL: the Bells Get Serious: 1999 Promises to be the Year of DSL Deployment, March 19, 1999: "We detect a dramatic change in the attitude of the local phone companies toward DSL deployment. . . . [T]here are several forces driving the local phone companies to accelerate their DSL deployment. Most notable is the rollout of cable modems by cable companies. . . ."

<sup>5</sup> See, e.g., Mike Farrell, *PacBell to Lower DSL Rates in Calif.*, Multichannel News, November 23, 1998. In other markets where cable operators have initiated broadband service, the incumbent carriers quickly followed suit. For example, @Home launched service in San Francisco in September 1996 and San Diego in May 1997, and Pacific Bell followed in November 1997 and September 1998, respectively. See *Pacific Bell's ADSL-Internet Access Packages Now Available to 180 California Communities* (visited March 18, 1999) <<http://www.sbc.com/PB/News>>. Likewise, after @Home launched service in Phoenix in May 1997 and Denver in June 1998, US WEST followed in October 1997 and June 1998, respectively. See *US WEST Launches Ultra-Fast DSL Internet Service in Twin Cities; Continues Roll Out* (visited March 18, 1999) <<http://www.uswest.com/com/insideusw/news/051398b.html>>.

Yet this claim is based on several false premises.

First, the Act is *technologically neutral*; its pro-competitive policies apply equally to both voice and data. Recognizing that Americans deserve a competitive choice both when they use the phone and log on to a computer, Congress made no distinction between voice and data traffic in the Act. The Act, like the 1984 antitrust decree before it, encompasses *all* telecom services, and already provides the relief the ILECs seek—when they open their local monopolies to competition.

Second, granting “limited” relief covering data is functionally equivalent to granting total, unconditional relief from the requirements of Sections 251 and 271 to the ILECs. Over half of today’s telecommunications traffic is data, and data traffic is growing at 30% per year, according to the Dataquest research firm.<sup>6</sup> Another estimate has data “outgrowing voice 15:1,” noting that “90% of data is long-haul rather than local.”<sup>7</sup>

In addition—as the ILECs well know—with the advent of Internet Protocol (IP) technology, the distinction between “voice” and “data” traffic, already blurred, is quickly disappearing. Indeed, voice and data are transported over the same network, not two distinct networks. As an SBC executive recently stated, “DSL is a bigger deal than high-speed access to the Internet; it’s about renewing our networks.”<sup>8</sup> This view is supported by industry analysis: one report affirms that “[t]he telecommunications industry is making a fundamental shift from circuit switched voice networks with data overlays to packet switched data networks with voice overlays.”<sup>9</sup> Thus, although the proposed legislation would exclude voice-only services from this LATA relief, the reality is that under today’s technology, there may be no such thing as a voice-only service.

Far from fostering broadband deployment in rural and other underserved areas, this legislation would actually hinder it. The ILECs have argued that legislative action is necessary for the deployment of broadband in rural areas. In actuality, however, large incumbent monopoly carriers have been abandoning their rural customers and selling off rural lines. U S WEST and GTE, in particular, have been active in selling off small rural exchanges to concentrate on urban and suburban markets; U S WEST alone has sold over 400 rural exchanges since 1994, while GTE is currently shedding 1.6 million lines, including all of its wireline exchanges in Alaska, Arkansas, Arizona, Iowa, Minnesota, Nebraska, New Mexico, and Oklahoma. Notably, one securities analyst noted observed that “[w]e believe the large ILECs would be inclined to divest more rural properties if they judged that they could do so without political fallout.”<sup>10</sup> All this raises serious questions about the commitment of the RBOCs and GTE to serving rural customers, with or without the relief they seek in this legislation.

Moreover, the scope of this legislation is not limited to rural areas. For example, provisions in the legislation would bar competitors from leasing DSL-equipped lines from the incumbents, limiting their ability to compete at all in rural or other areas.

### Conclusion

In short, the market, properly constrained by *existing* antitrust and regulatory protections, is working. Incumbent carriers are already responding to the pressure of even modest market entry by new competitors, and the benefits of this rivalry can only accelerate as new entry becomes more significant. In these circumstances, the proposed bill can only do harm. Government should not tamper with this evidence of a market that is working. Experience has shown that the best way to encourage broadband deployment is to encourage and ensure competition for local monopolies and Internet giants. In short, the Act is beginning to work just as Congress intended; now is not the time to reopen the Act.

We respectfully urge this Committee to promote quick and wide deployment of broadband technologies in the best way possible: by standing with the Act and existing antitrust laws and opposing efforts such as this legislation to rewrite them in furtherance of narrow interests that are in direct conflict with the public good.

Mr. HYDE. Mr. Salsbury.

<sup>6</sup> Kenneth Kelly, “The Shift to Data by Two Major U.S. Suppliers,” Dataquest, Sept. 14, 1998.

<sup>7</sup> Jack Grubman, “Review of Our Position on RBOCs: SBC & BEL will create most value,” Salomon Smith Barney, March 9, 1999.

<sup>8</sup> Andrew Brooks, “SBC Accelerates Plans for High-Speed Net Lines,” *The Dallas Morning News*, June 16, 1999, at 4D.

<sup>9</sup> Kenneth Kelly, “The Shift to Data by Two Major U.S. Suppliers,” Dataquest, Sept. 14, 1998.

<sup>10</sup> Michael J. Balhoff, CFA, and Tina T. Heidrick, “Harvesting New Value: The Rural Local Exchange Industry,” Legg Mason Equity Research, Spring 1999, at 16.

**STATEMENT OF MIKE SALSURY, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, MCI WORLD COM, WASHINGTON, DC**

Mr. SALSURY. Thank you Chairman Hyde, Congressman Conyers, and members of the committee for the opportunity to speak to you today about these two bills that seek to promote the growth and development of the Internet free from unnecessary regulation.

While MCI WorldCom wholeheartedly supports these goals, we cannot support either of these bills. Why? Not because MCI WorldCom opposes open access on cable TV systems, which we fully support, but because these bills would eviscerate a cornerstone of the Telecommunications Act of 1996, the requirement in section 271 of the act that the Bell operating companies must first open their local markets to competition before they are allowed to offer interLATA services.

Very simply, the threat to the growth and the development of the Internet lies in the ability to use a monopoly in one market, such as cable TV or local telephone service, to control high-speed access to Internet services. Section 271 requires that the Bell company monopolies must be eliminated before they could engage in any such conduct.

I would like to offer a few specific observations for the committee this morning. First, the Telecom Act does not prohibit the Bell companies from offering interLATA data services indefinitely, only until they open their local markets to competition. Once its markets have been open, a Bell company is entirely free to offer any interLATA service. The only reason Bell companies cannot provide interLATA data services today is that they have chosen to delay opening their local markets, prolonging their ability to earn monopoly profits. Congress should not reward this choice, which has cost consumers billions of dollars over the last 3 years.

Second, there is no question that local markets can be opened. Under the leadership of the New York Public Service Commission, we are hopeful that this—that the first State will have its local markets fully opened to competition before the end of this year.

MCI WorldCom has worked very closely with the New York commission to bring about this result. And, we are heavily invested in its success. The message to the other Bell companies ought to be to work to open your markets like Bell Atlantic is doing in New York. Holding out the prospect of legislative relief from section 271 before the Bells open their local markets only encourages further delays by them, and deters additional investment by competitive local exchange companies.

I would add that New York and several other States have required the Bell companies to offer high-speed Internet access facilities as an unbundled network element, something these bills would undo.

Third, there should be no illusion that the interLATA relief these bills would provide to the Bell companies can be limited to data services. Within a few years, all voice and data services will use the Internet protocol and will be indistinguishable to telecom switches. Thus, what these bills propose amounts to a total gutting of section 271 of the act.

Fourth, there is no public policy basis for interLATA relief as sought by the Bell companies. The Internet is vigorously competitive today. Virtually all consumers can choose from among many Internet service providers and connect to them with a local or toll-free call. More than 90 percent of all Americans can choose from four or more Internet service providers today, which is certainly more than you can say about local telephone service.

By the end of this year, estimates are that high-speed Internet access via DSL or cable modems will be available to about half the homes in America. And, while demand for Internet backbone capacity is growing rapidly, there is no shortage of capacity and new competitors like Qwest and Level 3 who are building new networks to meet this demand. Since the Telecom Act became law in 1996, Internet backbone capacity has grown from 1.2 terabits per second to 21.7 terabits per second, a nearly 20-fold increase.

MCI WorldCom is supportive of the other goals of H.R. 1685 and 1686, most importantly insuring that providers of high-speed Internet access via cable modems as well as incumbent local exchange companies offer open and nondiscriminatory access to their local facilities. There is no policy justification for permitting cable television operators to leverage their dominance in the delivery of video services to restrict consumers' ability to choose freely their Internet service provider. But, we cannot support any legislation that effectively would repeal section 271 of the act, the key provision for opening local markets to competition, and section 251 with respect to DSL services. Thank you.

Mr. HYDE. Thank you, Mr. Salsbury.

[The prepared statement of Mr. Salsbury follows:]

PREPARED STATEMENT OF MIKE SALSBUARY, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, MCI WORLDCOM, WASHINGTON, DC

Good morning. Thank you, Chairman Hyde, and members of the Committee, for the opportunity to speak to you today about the far-sightedness of the Telecommunications Act of 1996, why that landmark statute is so much more than just a short-term experiment, and why it should be preserved just as important benefits to consumers are being realized. In particular, the provisions of H.R. 1685 and H.R. 1686 that would permit the Bell Companies to offer interLATA service before opening their local networks to competition would break Congress' 1996 promise to consumers, and to the telecom industry, to bring competition to one of the last remaining monopolies in America—the local telephone market. These bills offer a legislative solution to a non-existent problem, while ignoring the real problem: that three years after the fact, the local markets for voice and data services are not yet open. The solution to that very real problem is vigorous enforcement of the law Congress already has enacted, not new legislation seeking to reverse the pro-competitive provisions applicable to the local telecom markets.

I am the Executive Vice President and General Counsel of MCI WorldCom. In addition to being a large long distance carrier, MCI WorldCom is the largest of the facilities-based competitive local exchange carriers ("CLECs") and, through its UUNET subsidiary, is one of the world's largest Internet Service Providers ("ISPs"). More than anything else, except perhaps the singular vision and concerted efforts of entrepreneurs like Bill McGowan and Bernie Ebbers, MCI WorldCom owes much of its success—and, indeed, its very existence—to this nation's open and competitive telecommunications markets. These markets did not simply spring to life unassisted. It took the hard work of a whole host of policymakers—from Congress, to the Reagan Justice Department, to the FCC, to a tenacious district court judge—to pry open the previously closed, monopolistic markets for long distance services, information services, and telecommunications equipment. If nothing else, this history demonstrates that free markets do not always become free on their own. Often, government has a critical role to play in creating the necessary structure and ground rules that allow previously-closed markets to flourish with full competition.

The Telecommunications Act enhanced this legacy of competitive long distance telecommunications and information service markets by mandating the end to monopoly in the local market as well. Congress could have simply enacted, by itself, what is now Section 253 of the Act, which requires the state and local governments to remove barriers to entry in the telecommunications markets. But Congress wisely chose to go far beyond that simplistic approach. The '96 Act begins, as it must, by acknowledging the fundamental and undeniable advantages of local carrier incumbency—from massive economies of scale and scope, to pervasive company name recognition. In order to break the local phone companies' chokehold over the infamous "last mile" to and from nearly every home and business in America, Section 251 of the Act creates multiple pathways for competitive providers to enter the local market. Whether on a pure facilities basis, or through unbundled network elements ("UNEs"), or through resale, the Act leaves it up to the individual competitor to select the most appropriate business model—and then, simply, compete. The genius of the Act is that, once the incumbent LECs carry out their statutory obligations, many competitors will be able to use these pathways to devise new and innovative ways to provide low-cost, beneficial services to consumers.

Of course, it isn't quite as simple as that. Breaking the entrenched monopoly over the last mile is a formidable challenge to even the most nimble competitor. This is not surprising; after all, stretching back to the early 1980s, when the Reagan Justice Department crafted the landmark antitrust settlement decree that would become the Modified Final Judgment (MFJ), it was well understood that the Bell Companies and GTE, left to their own devices, would do what any other business in their enviable position would do, namely, through a variety of anticompetitive practices, to *first*, foreclose competition in their own markets, while *second*, extend their monopolies into adjacent markets, such as long distance and information services. As a result, the MFJ created a virtual wall of separation between the Bell Companies' monopoly local services—viewed by many then as a natural monopoly—and the newly-competitive world of long distance services, information services, and customer premises equipment. The Bell Companies were forbidden to enter that competitive world unless and until they could demonstrate they would cause no significant harm to competition.

Now, fully fifteen years after the MFJ was first put into place, it is safe to say that the long distance market is robustly competitive. At last count, over twelve hundred companies—from giants like AT&T, to mid-sized national facilities-based carriers, to the smallest resellers—are busily competing head-on to provide every conceivable option in long distance services. Long distance rates have plummeted more than seventy percent in that span, and are falling further all the time. Where the Sunday afternoon phone call to a distant relative once was viewed as a momentous and wallet-sapping proposition, today MCI WorldCom charges only a nickel per minute. Innovations such as competitive collect calling services and "10-10" services also have been developed. It is a similar success story with regard to the telecommunications equipment and information services.

In passing the Telecommunications Act, Congress both recognized the salient pro-competitive lessons of the MFJ, and sought to go beyond them. It was no longer taken as gospel that consumers could never enjoy the fruits of competition in the local telephone market. Instead, Congress directed the FCC to establish rules that would end one of the last remaining monopolies in this country. In return, once the Bell Companies complied with those market-opening rules, they would no longer be limited by the long distance restrictions first imposed on them as part of the MFJ. Instead, the Bell Companies would be permitted to provide all long distance services—including interLATA services—within their home regions. It should be noted that, from day one, the Act has allowed the Bell Companies to provide local and long distance services anywhere *outside* their home regions, a significant opportunity that none of them has chosen to pursue. The Bell Companies hold the keys to long distance in their own hands—once they decide to comply with the law, the remaining interLATA restrictions will be gone.

As with the breakup of AT&T, it has taken concerted action by policymakers to bring competition to a local telephone market where none has existed before. And, while the final battle over monopoly is far from won, at least we can see promise of victory from where we stand. As just one example, today there are 146 facilities-based CLECs, serving some 4.4 million customers. This compares to just 13 competitive local carriers before the Act was enacted into law.

Through the Telecommunications Act, Congress provided the critical tools designed to ensure that access to last mile facilities is made available to competitors. Congress rightly recognized that only competition delivers the best technologies, the best service, and the best prices to consumers. Thus, Section 251(c) requires, among other things, that incumbent LECs provide access to their network elements on an

unbundled basis at cost-based rates. In this manner, the '96 Act ensures that new entrants will be able to use the incumbent LECs' local network where necessary, and that consumers would have the maximum possible competitive choices. Competitors are obligated to pay the ILECs for every element, facility, and service they use. In MCI WorldCom's view, Congress struck just the right competitive balance three years ago. We have endured three long years of protracted litigation, which ultimately has culminated in the U.S. Supreme Court upholding the pro-competitive policy choices made by Congress, and carried out by the FCC. It would be a grave mistake to upset that delicate balance crafted by Congress and the Commission just as consumers are beginning to see the fruits of competition.

Some may be surprised to learn that the Internet is another singular example of government's successful affirmative efforts to create a vibrant free market where none existed before. The federal government, at first unintentionally, laid the groundwork for today's Internet through a variety of government-sponsored programs. In the late 1960s, the U.S. Department of Defense initiated its ARPA project, culminating in the so-called "ARPANET" backbone. Through the 1970s and early 1980s, the Defense Department administered the ARPANET and allowed certain users of other research and academic networks, such as CSNET, to interconnect and utilize the ARPANET resources. In 1986, the National Science Foundation started up its own NSFNET backbone and chose the "TCP/IP" protocol—developed by Vint Cerf, now of MCI WorldCom, and Bob Kahn—the very *lingua franca* of the Internet. The government also ramped up its management role and bore many of the costs of deploying and maintaining the backbone infrastructure. Some ten years later, in 1995, the government officially abandoned its Appropriate Use Policy, under which the NSFNET could not be used for commercial purposes. Instead, the government ceased federal funding and privatized the NSFNET, leaving it open to any consumer or business to begin developing whatever commercial or non-commercial applications they chose. Without those efforts, the Internet would not exist today.

The end results of the government's overt decision to create and nurture the Internet space? The Internet is different from anything else we human beings have ever witnessed before. At some basic level, each of us is aware that the Internet already holds the key to our future. Its ability as a public "network of networks" to ubiquitously reach and connect everyone—from customers, employees, and suppliers to friends and family—is changing how we do everything. Consumer demand for services provided via the Internet appears unquenchable. For example, demand for Internet bandwidth doubles every 3 or 4 months. That is astonishing. The Internet already accounts for 50 percent of the traffic on the world's communications networks. By some estimates, the Internet will soak up 90 percent of all bandwidth by 2003, and 99 percent by 2004. In just a few short years, the Internet has become, in the words of the Council of Economic Advisors, "the engine that drives our economy."

On the supply side of the information services marketplace, business also is booming. For the past three years, MCI WorldCom has increased the capacity of its UUNET backbone by over 1,000 percent each year to handle peak traffic loads. Other backbone providers—from AT&T to Sprint to PSINet to GTE—also have increased their capacity, and still others—such as Qwest, Level 3, and Williams—are building entirely new nationwide networks designed specifically to handle Internet traffic. All in all, some forty-seven different backbone providers now are competing. As a result, all but three LATAs (194 out of 197) are served by 4 or more different Internet backbone providers, and the capacity of Internet backbone networks has exploded from only 1.2 terabits per second in 1996 to 21.7 terabits per second in 1999. You don't have to know what a terabit is to understand that the capacity of the backbone networks have expanded twenty fold.

There also is good news with regard to one's ability to access the Internet. Consumers today reach the Internet almost exclusively through an ordinary telephone call, placed over ordinary copper lines. Because the incumbent LECs are required by the FCC to allow consumers to reach any ISP they choose, competition has flourished. In the case of MCI WorldCom, we offer dial-up access to the Internet through a local call to about 95 percent of the lines in the continental United States. UUNET alone has about 750 local points of presence all over the country. At last count, there were some 6,500 independent providers of Internet access, or ISPs, out there, through which more than 79 million Americans get their Internet service. Well over 90 percent of all Americans can choose from among four or more ISPs for local dial-up access, which is more than you can say for local telephone service. So, thanks again to the government's open market requirements, access to the Internet has become available ubiquitously to virtually all Americans.

The lesson here, regarding the long distance industry, the local marketplace, and the Internet, is what I would call the lesson of open platforms. Where policymakers

create and maintain open markets, where a multiplicity of providers and users can interact in a myriad of mutually beneficial ways, all will derive the full benefits of competition. This openness feeds on itself, multiplying the effect still further. Like the Internet itself, open competition in the Internet backbone and Internet access is in the best interest of consumers and competitors alike. Just imagine, if you could, how history would have been changed profoundly if the two graduate students who created Mosaic—the software underlying the world's first Web browser for Netscape—had been prevented from bringing the fruits of their innovation to the open platform of the Internet. The list of such examples goes on and on.

As I'm sure you are aware, there now is considerable market demand for higher speed access to the Internet, beyond the capabilities of the normal dial-up connections familiar to all of us. The latest telephone capability to be deployed to residential and small business customers is called Digital Subscriber Line ("DSL"), a decade old technology that competition is finally forcing the ILECs to offer consumers. On the cable side, so-called cable modems provide a similar high-speed, broadband connection to consumers. The good news is that both capabilities are being deployed by ILECs, CLECs, and cable companies on an expedited basis. The bad news is that, unless MCI WorldCom and other competitors can buy or lease access to the last mile facilities and services of the incumbent monopolies—both telephone and cable—consumers will have little or no choice for high-speed Internet services. In this regard, MCI WorldCom is certainly supportive of the efforts of H.R. 1685 and H.R. 1686 to ensure that open broadband access is offered by cable providers and by local exchange providers. The lesson of open platforms can be applied to these monopolies by maintaining the pro-competitive provisions of the '96 Act with regard to the ILECs, and applying fundamental nondiscrimination, interconnection, and resale requirements with respect to the cable companies.

MCI WorldCom is certainly doing its part to bring the promised benefits of the Information Age to its customers. For starters, we tripled our local network capacity last year. Where we can reach our customers' premises with our own facilities, we are providing them with high-speed Internet access using DSL technology. UUNET, our Internet company, has mounted the first, and biggest, national deployment of broadband DSL access to data, starting with 400 points of presence (POPs) late last year, with the aggressive goal of reaching at least 1,000 POPs by the end of this year. We are expanding our consumer service trials and partnering with other data CLECs so that we can provide the same innovations to consumers and small businesses. As soon as we can get to them, we can hit the ground running with fast, reliable, affordable service. We are not just limiting ourselves to the telephone network; we are also readying our networks to provide service through cable modems the same way we enable ISPs to do so through DSL technologies. We are also investing in fixed wireless technologies so we can reach consumers in suburban and urban markets.

And it is not just my company that is providing these services on a competitive basis. Data CLECs like Covad, Northpoint, Rythms NetConnections, and others are all at the cutting edge of bring these advanced services to the consumer.

This competition brings with it more good news. Competition is causing the incumbents themselves to deploy broadband services. In fact, the ILECs are accelerating their DSL deployment plans as a result of competitive pressure from cable modems and data CLECs, far surpassing their original intentions and announcements. Wall Street analyst SG Cowen said just two months ago that "if recent activity is any indication, 1999 could be a strong year for last-mile technologies—cable and XDSL. . . . Cable operators have stepped up the pace of deploying high-speed data services, forcing the incumbent ILECs to draw up ADSL plans."

So, despite their protestations that they must have regulatory relief before they can deploy these advanced services in their territories, the Bell Companies are engaged in a massive rollout of these services. The companies' own press releases speak volumes about what is actually happening in the marketplace:

- In April of 1999, following an announcement that it would slash ADSL prices, SBC projected that its DSL deployment would reach 9.5 million homes by the end of this year.
- That same month, Bell Atlantic announced that 8 million homes in its region will have ADSL access in 1999 and increase to 16 million by 2000.
- Ameritech announced that it will have DSL service available to 70% of its customers by 2000.
- BellSouth will reach 5.1 million customers with DSL by the end of this year.
- US West is already offering its self-described "lightning fast" ADSL to 5.5 million customers in 40 cities across 14 states.

Only three years ago, the Yankee Group predicted that ADSL would be available to less than 4 million American homes by the year 2000. But, the above announcements mean that over 25 MILLION homes will be able to utilize DSL services by the end of 1999. That is quite an accomplishment. It is self-evident that competition is forcing the incumbents LECs to deploy DSL throughout their regions. In short, the Telecom Act is working.

Nonetheless, despite about the astounding achievements brought about by competitive markets, and the compelling need to create and maintain open platforms, we are now at a critical crossroads. Much of this hard-fought success hinges on keeping the last mile open to consumers, and open to competition. We have to resist the urge to excuse the incumbents from their competitive requirements under the Act, in exchange for their pie-in-the-sky promises of purported social good. In the past few months, the incumbent LECs have come up with some carefully-crafted myths they would have you believe to justify a rollback of the Telecommunications Act. None of them is true.

For example, the ILECs claim that maintaining and enforcing the Telecommunications Act's local competition provisions is tantamount to "regulating the Internet." This is nonsense. The Telecommunications Act's local competition provisions concern only the local telecommunications facilities and services that form the last mile between a customer and the telecom network. These facilities and services can be, and are, used for a variety of local telecommunications services, including traditional voice service, dial-up Internet access, and DSL service. The local competition provisions of the Telecom Act are necessary to keep Internet access from becoming completely dominated by the ILECs—to the detriment of consumers, and the Internet itself.

The incumbent LECs next insist that competitors shouldn't be permitted to utilize the network elements underlying advanced services like DSL, or subscribe to DSL services from the ILECs at wholesale rates. It is obvious why the ILECs would want to eliminate the UNE and resale pathways—this would force competitors to provide, install, and maintain their own advanced services facilities everywhere, a process that would take decades, cost billions, and strand much of the investment in local networks that consumers have already paid to the Bell Companies. In reality, however, competitors need all three competitive entry pathways promised by the Telecommunications Act in order to provide robust and ubiquitous DSL offerings. In particular, competitors such as MCI WorldCom need the UNE pathway to provide coverage for a nationwide customer base. The ILECs already own and control all central offices and remote terminals necessary to reach all potential customers, and enjoy considerable economies of scale, scope, and density, low-cost collocation in their own facilities, and unique access to Universal Service subsidies for high-cost residential customers. The resale of services and the leasing of facilities were instrumental in paving the way for facilities-based competition in the long distance industry—why would we choose to abandon that successful model now?

The ILECs also argue that they do not possess market power in the provision of "advanced services" such as DSL. The simple truth is that the ILECs have every monopoly-derived advantage in providing DSL service that they also enjoy in providing other local telecommunications services. DSL is a local transmission technology, compatible only with copper loops, and the ILECs obviously possess market power over local telecommunications services provided over copper loops. The infrastructure necessary to deploy DSL is exactly the same as is necessary to provide any other local telecommunications services. The ILECs continue to own and control all central offices needed to deploy DSL equipment and data transport facilities, all local loops needed to deploy DSL services, and all support systems needed to support DSL services. The ILECs also continue to have exclusive access to all residential customers. As DSL could eventually become the basic loop carrier technology of the 21st Century, the ILECs seek to extend their control over today's voice-dominated local loop to tomorrow's DSL-enabled loop.

Perhaps the single biggest myth perpetrated by the ILECs is that the Telecommunications Act of 1996 was only about voice, not data. In reality, the Act includes both telecommunications services and information services, in a technology neutral manner. Indeed, there is no sustainable legal, or logical, distinction between "traditional" local services and "advanced" local services. The Act nowhere makes any such distinctions, and any attempt to define a local service based on the types of technologies it employs, or the types of functionalities it provides, makes no sense. From a technical standpoint, there is no feasible way of enforcing a "data" versus "voice" distinction. Data "bits" and voice "bits" look exactly the same from the network's perspective. As I mentioned previously, data is quickly overtaking voice; today at least half of all traffic on the public network is data. In four years, data will comprise up to 90 percent of all traffic on the public network.

Further, Section 271 of the Act includes an express prohibition on the Bell Companies' provision of interLATA information services, and refers to both telecommunications services and information services. In particular, Section 271(g)(2) grants a narrow exception to the general prohibition by authorizing the Bell Companies to provide Internet services to elementary and secondary schools. This exception would be wholly unnecessary if the Act did not already prohibit the Bell Companies from providing interLATA information services. Significantly, the Bell Companies never contested the FCC's 1996 ruling on this point, or sought review by a federal appellate court.

The Bell Companies also complain that they require interLATA relief in order to be able to provide DSL to consumers, especially in rural areas. In truth, the Section 271 prohibition on the provision of interLATA services is completely unrelated to the Bell Companies' ability to deploy local telecom services like DSL. US West told Congress earlier this year that deployment of DSL capability requires installation of ATM switches, and that the interLATA restriction makes DSL cost-prohibitive because it artificially compels US West to place an ATM switch in each LATA. However, my understanding is that ATM switches are relatively inexpensive, generally on the order of \$20,000 to \$30,000 each. And, if a provider has ten percent or more of the DSL traffic in a LATA, installation of an ATM switch is virtually a necessity. Perhaps for these reasons, US West *already* has either deployed, or announced immediate intentions to deploy, a total of 127 ATM switches, including at least one ATM switch in 23 of 27 LATAs in which US West provides service. US West's own actions show that no interLATA relief is required for US West to do what it is already doing: installing ATM switches to provide DSL services to US West's customers.

Further, any claims by the Bell Companies and GTE that they will provide advanced services to rural communities seems unlikely. The Bell Companies have always served predominantly urban and suburban markets, leaving most rural exchanges to the independents. This bias against operating in rural markets has only increased recently. In the past few years, US West has sold off over sixty of its local exchanges in the more rural areas of Washington, Nebraska, Wyoming, and Idaho. Last year, GTE announced plans to sell up to 8 percent, or 1.7 million access lines, of its local exchange operations, mostly in low-density rural areas. It is difficult to discern any commitment by these large ILECs to serve rural markets with DSL services. Moreover, in many cases, the smaller independent LECs are well ahead of the larger ILECs in deploying infrastructure and providing advanced services such as DSL. In fact, by the end of 1997, rural LECs had installed over 40,000 route miles of fiber optic cable in states like Kansas, Oklahoma, Texas, South Dakota, Minnesota, and Iowa.

Finally, any blanket exemption from the LATA requirements of the Act for all data transmissions is unwarranted as a matter of national policy. Congress, in crafting the 1996 Act, carefully designed the only legally sanctioned incentives system for the Bell Companies. When the Bell Companies meet their local competition obligations, they are free to enter the in-region interLATA market. Elimination of even intrastate LATA boundaries for data telecommunications would completely undermine Section 271 by stifling the very incentives necessary to compel the Bell Companies to comply with the market-opening provisions of the Act. Excusing the Bell Companies from compliance with the fundamental interLATA requirements of the 1996 Act for data services would ignore the increasing convergence of voice and data, and the inability to exclude voice bits from data bits.

Enough debunking of myths. This country decided three years ago to reject the notion of natural monopolies in the local exchange, and to choose instead the path of free and open competition. In contrast, industrial policy, even in the pleasing guise of "deregulation," does not work. That form of government intervention is precisely what limits or even forecloses the opportunity for competition to develop—hurting the very constituencies it purports to serve. Broadband deployment in all parts of the country—urban, suburban, and rural—can only be accomplished by fostering, not frustrating, the beginnings of real competition.

The way to do that is to make sure that last mile facilities are not closed off to competition. Again, all of the infrastructure advancements I just talked about are irrelevant if competitors cannot reach customers, and customers cannot reach the ISP or telecom vendor of their choice. Competitors like MCI WorldCom must have non-discriminatory access to last-mile incumbent facilities in order to provide advanced, innovative new services and technologies that benefit consumers everywhere. This is not a discretionary item. We have residential long distance customers everywhere in the country. These customers tell us they want new choices for local phone service and Internet access.

The investment community also is counting on Congress not to overturn the '96 Act. Wall Street has come to expect legal certainty to ensure that there is a competitive environment for broadband. Investors know that the Internet is an increasingly central component to business models for carriers, ISPs, electronic commerce, and the information technology industry, and that the ultimate resolution of the broadband access issue will fundamentally impact the way different industries' business plans develop in the Internet space. None of those plans, I assure you, will or can be realized through a closed network. The financial markets need the law to be maintained, just as competitors do.

Reversing the antitrust-based principles, market rules, and safeguards set forth in the Act, and specifically designed to promote the development of competition, will only hinder broadband deployment and allow dominant incumbents, be they telcos or cable providers, to leverage their market power over the last mile to broadband access, and into the Internet.

In closing, I again appeal to you to safeguard the Information Age economy by enforcing the law and the principles of competition. Remember that incumbents have a long history of broken promises in connection with infrastructure programs and regulatory bargains. Nothing is worth the price of competition we have all fought so hard to win for American consumers. The Internet's phenomenal development has already demonstrated that Congress did the right thing in 1996 by focusing on opening up access to monopoly local distribution facilities. Policymakers will continue to play a critical role in enforcing the pro-competitive provisions of the Act, which hold the key to the future of broadband in America. To turn back now, and retreat from all the painstaking advances of the past three years, would be a disastrous blow to the future of telecommunications competition, and to the information economy that depends on it.

Thank you.

Mr. HYDE. Mr. Boggs.

**STATEMENT OF TIM BOGGS, SENIOR VICE PRESIDENT FOR  
PUBLIC POLICY, TIME WARNER, INC., WASHINGTON, DC**

Mr. BOGGS. Good morning, Mr. Chairman, Mr. Conyers. Thank you for your welcome. It is a pleasure to work with the committee from this side of the table today and to discuss broadband technology with you. At Time Warner we have had a long history of technological innovation and leadership, and we have long been interested in providing advance services to consumers over our cable network. Building on that foundation and as a result of the regulatory certainty created by the 1996 act, Time Warner is well into the process of upgrading all of its cable systems to a state-of-the-art hybrid fiber coaxial architecture.

From Greensboro to Cincinnati, Orlando to Milwaukee, from Boston to San Antonio, from LA to New York, when this is substantially completed by the end of the year, Time Warner will have invested over \$4 billion of private capital upgrading its cable infrastructure providing increased capacity for both video programming and other new digital services as well as telephony competition.

Under the law, we are required to upgrade the entire community so rich and poor neighborhoods are reached by this capacity and we also wire all schools and libraries for free in our communities.

To make full use of the potential created by upgraded networks, Time Warner has teamed with Microsoft, Compaq, Media One, and Advance Newhouse to develop Road Runner an independent affiliate which provides an innovative mix of local and national content as well as high-speed connection to the Internet. Road Runner cable operator affiliates including Time Warner Cable, Media One and many, many third-party cable operators such as Media General in suburban Virginia are providing additional local content on the network. Road Runner's local online editors also assist schools,

libraries, and museums in developing their approach to the Internet.

The foundation of our Road Runner service is our upgraded cable fiber coaxial network. This network provides everyone the chance of reliability and capacity of fiber optics and results in an increase in the delivery of content to the PC @Home, at speeds up to 100 times greater than today's residential telephone line. Customers reach our Road Runner service and the Internet over the cable system without any need to dial into a local telephone number and the service is always on.

Of course, Road Runner service must allow customers access to any site on the Internet. Nothing on the Internet is off limits to a Road Runner customer including the sites of Internet service providers. As you know, most content on the Internet is free. But some content providers such as AOL charge for their services. And if a Road Runner customer chooses to subscribe to such service, she need only click on the AOL icon on her computer screen. She will obtain access to all AOL content, web access, e-mail and other services.

Road Runner customers similarly can reach any other ISP posted on the net with a single mouse click, and many of our customers do just that. In fact, if they choose to set up their PC in their home to avoid any interface with the Road Runner icons of any sort, they may simply do that. The service is designed to be customized by the customer.

The development of the Internet is the quintessential example of the power of the free market. It was Congress' respect for market forces over governmental interference that allowed the market to meet the needs of consumers to develop innovative new technology such as we are discussing today, to grow the economy and provide the ultimate forum for communication. No one competitor has the ability to stand in the way of the global phenomenon that is the Internet today.

For some to suggest that might be the case is nothing short of ridiculous. For, although Time Warner and other cable companies are investing billions of dollars in upgrading our infrastructure, cable modem service is still in its infancy with fewer than 1 million subscribers nationwide out of the current total 29 million residential Internet subscribers.

At this early stage in the development of broadband services, it would be a mistake for the government to choose and impose one business model on all broadband providers. Time Warner believes that cable companies and all players, be they satellite, wireless, or telephone companies with their dynamic DSL offerings should be encouraged to invest in the development of these new Internet access services through procompetitive policies that leave each one free to experiment and develop its own business strategy.

History tells us that consumers will be best served by government policies that spur the rapid roll-out of high-speed broadband services by multiple players and multiple technologies rather than by government mandates about business models which should be followed by the players in this field. Those companies that have urged the contrary approach are simply using the tired old Wash-

ington game of seeking to use the government to advance their own competitive advantages.

However, with respect to the FCC, Commissioner Michael Powell wisely stated in a recent speech on the issue, "competition policy should focus on the benefits and harms to consumers, not the effects on firms."

Unfortunately, the bills before you today ignore this advice as well as the procompetitive paradigm set in the 1996 Telecom Act. Rather than rely on the forces of a very dynamic market, these bills attempt to impose a one-size-fits-all platform and encourage companies to go to court rather than to participate in market development.

In order to continue to thrive, this uniquely American, but world-class, Internet market needs more risk takers and innovators, not more litigators and courtrooms. Mr. Chairman, the deployment of broadband services by cable is a wonderful development for consumers. Because of the investment and the risks undertaken by Time Warner, other cable companies, and our competitors the day in which families, schools, and libraries will have high-speed broadband access to anywhere the Internet has become a reality. This should be a call for celebration, not a call for regulation.

Mr. HYDE. Thank you, Mr. Boggs.

[The prepared statement of Mr. Boggs follows:]

PREPARED STATEMENT OF TIM BOGGS, SENIOR VICE PRESIDENT FOR PUBLIC POLICY,  
TIME WARNER, INC., WASHINGTON, DC

Chairman Hyde and distinguished members of the Committee, my name is Tim Boggs and I am senior vice president for public policy of Time Warner Inc. I appreciate the opportunity to appear today to discuss the deployment of our broadband service, known as Road Runner, and to discuss the future of broadband technology. I commend you for holding this hearing as we at Time Warner believe that the procompetitive direction set by this committee in the 1996 Telecommunications Act is critical to the future of our economy and the continued development of broadband technologies.

Time Warner has a long history of technological innovation and leadership and has long been interested in providing advanced services to consumers over its cable systems. In the early 1980s, Time Warner developed QUBE, the first interactive programming service offered over cable. In the early 1990s, Time Warner constructed the first hybrid fiber-coaxial cable network located in Queens, New York, and experimented with a variety of new services through its Full Service Network in Orlando, Florida. These earlier groundbreaking initiatives provided the foundation for the on-line services the company is now introducing across the Nation.

Building on that foundation and as a result of the regulatory certainty created by the 1996 Telecommunications Act, Time Warner is well into the process of upgrading all of its cable systems to a state-of-the-art, hybrid fiber coaxial architecture. When this is substantially completed by the end of next year, Time Warner will have invested about \$4 billion upgrading its cable systems to provide increased capacity for both video programming and other new digital services, as well as telephony. Under the law we are required to upgrade the entire community, so rich and poor neighborhoods are reached by this new capacity, we also wire all schools for free.

To make full use of the potential created by upgraded plant and by digital technology, Time Warner teamed with Microsoft, Compaq, Media One, and Advance Newhouse to develop Road Runner, a new high-speed on-line service that provides local and national content. Road Runner is provided by Service Co., a privately held company headquartered in Reston, Virginia. The Road Runner service is jointly created by the Road Runner venture and its affiliated cable operators. Road Runner provides an innovative mix of local and national content, as well as a high-speed connection to the Internet. The joint venture provides content on a national basis from various sources including CBS Sportsline and Barnes and Noble. Road Runner's cable operator affiliates, including Time Warner Cable, Media One and third

party cable operators such as Media General in suburban Virginia, provide additional local content, among other things our local on-line editors also assist schools, libraries and museums in developing their content.

The foundation of our Road Runner service is our upgraded cable fiber-coaxial network. This network provides the enhanced reliability and capacity of fiber optics and results in an increase in the delivery of content to the PC at speeds up to 100 times greater than today's residential telephone line. Customers reach our Road Runner service and the Internet over the cable system, without any need to dial in to a local telephone number and the service is "always on."

The Road Runner service allows customers to visit *any* site on the Internet. Nothing on the Internet is off limits to the Road Runner customer, including the sites of Internet Service Providers. As you know, most content on the Internet is free, but some content providers, such as AOL, charge for their services. If a Road Runner user has installed AOL on her computer or if her computer came with AOL already installed, she need only click on the AOL icon on her computer screen. She will obtain access to AOL, and thereby obtain *all* AOL content, web access, e-mail and other services. Road Runner customers similarly can reach any other ISP posted on the Net with a single mouse click and many of our customers do just that.

We believe our Internet services provide subscribers with an enormous value. For about the same price as today's dial-up phone line plus an ISP, Road Runner provides consumers with Internet service that is faster and provides more immediate access to on-line services.

The development of the Internet is the quintessential example of the power of the free market. It was Congress's respect for market forces over governmental interference that allowed the market to meet the needs of consumers, to develop innovative new technologies, to grow the economy and to provide the ultimate forum for communications. No one competitor has the ability to stand in the way of the global phenomenon that is the Internet today. For some to suggest that might be the case is nothing short of ridiculous. For although Time Warner and other cable companies are investing billions of dollars in upgrading our infrastructure, cable modem services is still in its infancy, with fewer than 1 million subscribers nationwide out of the current total of 29 million residential Internet subscribers.

At this early stage in the development of broadband services, it would be a mistake for government to choose and impose one business model on all broadband providers. Time Warner believes that cable companies and other players—be they satellite, wireless, or telephone companies—should be encouraged to invest in the development of these new Internet access services through pro-competitive policies that leave each one free to experiment and develop its own business strategy. History tells us that consumers will be best served by government policies that spur the rapid rollout of high-speed broadband Internet services by multiple players and multiple technologies, rather than by government mandates about the business models such entities should employ. Those companies that have urged a contrary approach are simply using the tired old Washington game of seeking to use government to advance their own "competitive advantage". However, as FCC Commissioner Michael Powell wisely stated in a recent speech on this issue: "Competition policy should focus on the benefits and harms to consumers, not the effect on firms."

Unfortunately, H.R. 1685 and H.R. 1686 ignore this advice as well as the pro-competitive paradigm set by the 1996 Telecommunications Act. Rather than rely on the forces of a very dynamic market, these bills attempt to impose a "one size fits all" platform and encourages companies to go to court rather than participate in market negotiations. In order to continue to thrive, this uniquely American, but world-class Internet market needs more risk takers and inventors, not more litigators and courtrooms.

Mr. Chairman, the deployment of broadband services by cable is a wonderful development for consumers. Because the investment and risk undertaken by Time Warner and other cable companies, the day in which families, schools and libraries will have high speed broadband access to anywhere in the Internet has become a reality. This should be a call for celebration not a call for regulation.

As I've stated, upgrading cable plant and developing and deploying advanced services are expensive and risky ventures. Imposing new regulation on companies as some have suggested will not only slow development but will deter further investment of private capital. Therefore, Time Warner strongly urges policymakers to resist those attempts to determine through regulation how this market might develop. Such attempts fly in the face of history of Internet regulation and inevitably result in the freezing or slowing of technological development and would result in a more complex and costly service to consumers.

Time Warner also strongly believes that broadband policy must be set at the national level. As FCC Chairman Kennard, Commissioner Powell and others have

stated, these important policy questions cannot be answered hundreds or thousands of different ways by state and local authorities, and we therefore urge this Committee to keep a watchful eye on such developments.

Mr. Chairman, Time Warner applauds your Committee's interest in these issues and hopes you will continue your tradition of promoting market competition over regulation. I thank you again for giving me the opportunity to share Time Warner's views with you and look forward to your questions.

## INTERNET ACCESS OVER CABLE: A CAUSE FOR CELEBRATION, NOT REGULATION

### A TIME WARNER CABLE WHITE PAPER

#### I. INTRODUCTION

Time Warner Cable ("Time Warner") recently has started to offer consumers an exciting new high-speed on-line service called Road Runner. The Road Runner service provides an innovative mix of local and national content, as well as instant, high-speed access to the Internet. Time Warner's service is the culmination of years of work with technology providers and equipment manufacturers, and billions of dollars of investment in upgraded facilities.

Over the past few months, a number of Internet service providers (ISPs) have argued—to any regulator willing to give them an audience—that a common carrier regulatory regime should be imposed on cable operators like Time Warner when they enter the Internet access market. The technical details of these proposals have been sketchy and not always consistent. Some ISPs argue that cable operators should be required to "unbundle" the transport functions used for high-speed Internet access services. Others argue for so-called "equal access." The ISPs are equally vague when it comes to the legal authority of any regulatory body to impose these requirements. Nevertheless, they have advanced their arguments in every conceivable forum, from the halls of Congress to city councils across the country, hoping that if they repeat the arguments often enough someone might believe them.

The ISPs have launched this attack in an effort to hamper, through intrusive government regulation, a promising new development in the on-line services market. They have attracted attention by predicting that Time Warner and other cable operators will exercise bottleneck control over high-speed access to the Internet, somehow freezing out independent ISPs from that growing market segment. They suggest that enlightened public policy requires common carrier regulation that effectively would place the management of the cable system into the hands of the government, for the benefit of the dominant ISPs.

In this paper we analyze the ISP arguments and demonstrate why, as an economic, technical, and legal matter, the ISP cries for government regulation have no basis. A vibrant, competitive marketplace for on-line services is flourishing in the absence of regulation, with massive investment in new facilities, new services, and new companies. The incumbent ISPs recognize that these developments will create increasing competition and pressure for them to provide greater value to consumers. That is what is behind their efforts—to avoid, or at least delay, this new competition and its inevitable results.

The ISPs have skillfully crafted their arguments to create the appearance that their proposals are fair and equitable. But their position rests on four fundamental assumptions, each unfounded.

First, the ISPs have attempted to create the impression that customers of Road Runner and other cable on-line services cannot access the content provided by ISPs. The facts clearly show this is not the case; any Road Runner customer can obtain access to any content available on the Internet, including that of any ISP. Quite simply, *the system is completely open*. The real debate here is not about restrictions on access, but about ISPs attempting to mandate an inefficient business model that serves only their own commercial purposes.

Second, the ISP arguments assume that policies that benefit ISPs necessarily serve the public interest: what's good for America Online is good for America. But in this debate, the interests of the ISPs are ultimately anti-consumer. Government intervention in the marketplace does not come without a significant price. When the marketplace is working, as it is here, regulating one competitor for the benefit of other competitors harms consumers by increasing the cost of providing service. Moreover, if burdensome regulation is the reward for technological innovation and risky investment, the incentive of cable operators and others to continue investing and innovating will disappear.

Third, the type of regulatory requirements proposed by the ISPs would treat high-speed access over cable systems as a monopoly utility service. It is abundantly clear,

however, that there will be numerous options, high-speed and traditional, available to consumers.<sup>1</sup> Paralleling cable operators' rush to upgrade their networks to support on-line services, telephone companies are scrambling to provide their own version of high-speed access (DSL).<sup>2</sup> Wireless providers, satellite companies and electric utilities also are deploying broadband technology. Nothing about this competitive, constantly evolving market suggests that there would be any public benefit associated with imposing traditional utility regulation. Moreover, cable operators have not invested billions of dollars in facilities, and will not invest billions more, with the intention of becoming public utilities. Cable operators have never been in the business of merely providing a "pipe" through which others can deliver information. To eliminate the cable operator's editorial control over the product that is provided to consumers (whether video or Internet content) would be to destroy the essence of what it means to be a cable operator.

Fourth, the "solution" proposed by the ISPs is highly inefficient and would require ongoing government regulation. Some ISPs have characterized their proposals as merely seeking that the cable operator not discriminate among ISPs, but this benign characterization intentionally conceals the substantial operational and technical deficiencies with their proposals. Any non-discrimination requirement effectively would require Time Warner to provide direct physical connections to hundreds of ISPs. The ISPs fail to disclose that the equipment and software necessary to provide this type of access is just now being tested. And even if the common carrier approach advocated by the ISPs were technically possible, requiring cable systems to be configured in this way would create an operational nightmare. Eliminating the cable operator's control over management of the network would degrade the quality and increase the cost of high-speed access over the cable system.

Apart from the public policy infirmities of their arguments, federal law does not permit the regulatory regime the ISPs seek. The on-line service provided by Time Warner is a "cable service" under the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"),<sup>3</sup> and is subject to regulation only under Title VI of the Act. Nothing in Title VI grants the FCC or a local government authority to impose a direct access or unbundling requirement. To the contrary, these requirements would violate the prohibition on common carrier regulation of cable services, and cannot be reconciled with the federal policy of allowing the Internet to grow "unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

Imposing common carrier regulation on Time Warner's on-line services also would run roughshod over Time Warner's constitutional rights. The Internet is a global medium, and requiring Time Warner and other cable operators to comply with a patchwork of inconsistent local regulation would strangle this promising new service in violation of the *Commerce Clause* of the United States Constitution. In addition, Road Runner and Time Warner are entitled to substantial protection under the *First Amendment* when they provide the Road Runner service to consumers. Finally, imposing an unbundling or direct access requirement would impair existing franchises in violation of the *Contracts Clause* of the Constitution.

In short, the case for mandating "common carrier" style access for ISPs to cable systems has not—and cannot—be made. Rather than paralyzing innovative, competitive new services through burdensome regulation, consumers would be better served if governments promoted further investment in broadband facilities through deregulatory measures.

## II. BACKGROUND

### A. The Development of the Road Runner Service

As the largest cable operator in the United States, with more than 12 million subscribers, Time Warner has long been interested in providing advanced services to consumers over its cable systems. In the 1980s, in Columbus, Ohio, Time Warner

<sup>1</sup> *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*, Report, CC Docket No. 98-146, FCC 99-5 at ¶ 4 (rel. February 2, 1999) ("*Section 706 Report*") ("as the demand for broadband capability increases, methods for delivering this digital information at high-speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based (terrestrial) and satellite wireless, and cable, to name a few").

<sup>2</sup> DSL stands for Digital Subscriber Line. DSL service provides high-speed connections using existing copper telephone wires. Like cable high-speed services, DSL services are "always on" and do not require any dial-up by the customer. The form of DSL service most commonly offered to residential customers is Asymmetric DSL, or ADSL.

<sup>3</sup> Pub. L. 104-104, 110 Stat. 56 (the "1996 Act").

broke new ground with QUBE, the first interactive programming service offered over cable. In the early 1990s, Time Warner constructed the first hybrid fiber-coaxial (HFC) cable network in Queens, New York, and experimented with a variety of new services through its Full Service Network in Orlando, Florida. These earlier groundbreaking initiatives provide the foundation for the on-line services the company is now introducing across the Nation.

Building on that foundation, Time Warner is well into the process of upgrading all of its cable systems to state-of-the-art HFC systems. When these upgrades are substantially completed next year, Time Warner will have invested \$4 billion upgrading its cable systems to provide increased capacity, both for analog video channels and for new digital services.

Recognizing the capabilities of its upgraded broadband plant, Time Warner teamed with Microsoft, Compaq, MediaOne, and Advance/Newhouse to develop Road Runner, a new on-line service that provides local and national content specifically designed for its upgraded cable systems. The Road Runner service is jointly created by the Road Runner joint venture and its affiliated cable operators. The joint venture provides content on a national basis from various sources, including "peering" arrangements with many content providers. These peering arrangements enable Road Runner users to access many of the most popular web sites largely over its own high-speed national network, without any need to use the World Wide Web. Road Runner's cable operator affiliates, including Time Warner's cable systems, provide additional content locally.

High-speed access to the Internet is among the features of the Road Runner service. Road Runner customers can use the service to reach any and all sites on the Internet, including sites of ISPs. *Most sites on the Internet are free.* In some cases, however, a company may charge a Road Runner user an additional fee. America Online ("AOL"), for example, sells a service dubbed "bring your own access" for \$9.95 a month. If a Road Runner user has installed access to AOL on her computer (or if her computer came with AOL already installed), she need only click on the AOL icon on her computer screen. She will obtain access to AOL, and thereby obtain *all* AOL content, web access, e-mail, and other services. Road Runner customers similarly can access any other ISP portal with a single mouse click.

### *B. The ISP Assault*

Time Warner's offering of Road Runner's innovative service provides consumers with an additional choice in the burgeoning on-line market. Incumbent ISPs apparently recognize that cable operators have "built a better mousetrap" for on-line services, compared with the now "traditional" dial-up services. Fearing the impact of this developing competition, the ISPs have launched an all-out assault on the cable industry.

The ISPs understand, of course, that any Road Runner user can readily access any ISP's web site through the Internet. Yet they want more. Specifically, they seek to impose common carrier-style regulatory obligations that would give ISPs a right to physically connect to the cable system. The ISP assault on cable raises an obvious question: Why have incumbent ISPs—normally an entrepreneurial group—chosen to pursue an agenda that relies so heavily on government intervention?

Notwithstanding the ISPs' populist rhetoric, the answer has nothing to do with consumers and everything to do with preserving ISP profit margins. In the narrowband segment of the market, ISPs essentially obtain a preferred rate for the use of local telephone company facilities,<sup>4</sup> and consumers generally pay a flat-rate for unlimited local calling. These pricing constraints on local telephone companies enable ISPs to offer an "end-to-end" on-line service with only a minimal investment in facilities or equipment.

Absent the type of regulatory advantage they enjoy in the narrowband segment of the market, many ISPs fear there may a reduced role for them in the broadband segment of the market. They are undoubtedly worried that some consumers, once they are provided with the content and speed offered by Road Runner and other cable on-line services, will determine that the value added by the ISPs' services is not justified by their price. And even if cable customers choose to pay for content offered by an ISP, as many have, the ISPs fear the financial consequences of not being able to sell "access" that is provided largely on someone else's facilities.

That the ISPs are concerned about their role in the future does not mean that those concerns provide a basis for extending the anomalies of local exchange carrier

<sup>4</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96-98, FCC 99-38 at ¶5 (rel. February 26, 1999) (describing ISP exemption from interstate access charges paid by long distance carriers).

pricing to cable on-line services. The ISPs' fears ultimately reflect a lack of confidence in the value they provide to consumers. To succeed in the broadband marketplace will take more than simply reselling access over someone else's facilities. ISPs will have to develop new services that take advantage of the capabilities of HFC networks. They will have to make a serious effort to market their services to cable on-line customers. They may need to repackage, or reprice, the services they offer to cable on-line customers.<sup>6</sup> They can negotiate arrangements with broadband facilities owners.<sup>6</sup> They can add features to make their existing narrowband services more attractive. All of these approaches potentially benefit consumers because they increase options and avoid the inevitable costs of a regulatory solution.

Rather than rely on their ability to compete in the market, however, the ISPs have turned to regulators for protection. In advancing their arguments for regulation of cable on-line services, the ISPs barely even nod to fundamental policy questions:

- What do the ISPs' proposals do for consumers, as opposed to the ISPs?
- Would the ISPs' proposals reduce the incentives of cable operators and others to deploy high-speed services and to continue developing innovative new technology?
- What effect would a slow-down in the deployment of cable on-line services have on prices for ISP and other Internet services?
- What kinds of complicated, regulatory oversight would be necessary to implement the ISPs' proposals?
- Why is regulation necessary at all when there is no evidence that the marketplace is not functioning effectively?

In light of the ISPs' failure to address, let alone answer, the central questions raised by their proposals, it is easy to understand why the FCC has shown an unwillingness to accept them.<sup>7</sup> The FCC's "hands off" approach is in keeping with the conclusion that has been reached by every federal body that has examined the Internet—that this new medium has flourished because of the absence of regulatory intervention, not in spite of it.<sup>8</sup>

It is difficult to understand why the ISPs' proposals continue to have apparent life at any government level. But despite the FCC's recent determination that no action is required, a few local governments have been led to believe that a regulatory void may exist that they need to fill.<sup>9</sup> That the ISPs' arguments have obtained any traction at all demonstrates only that they have managed to concoct a message with some superficial appeal. Beneath the surface, however, the gaping holes in their arguments cannot be ignored. The Internet is not even remotely threatened by the decisions of Time Warner and other cable operators to provide their own on-line services. To the contrary, the "cure" proposed by the ISPs for this nonexistent market illness would itself seriously threaten the health of this emerg-

<sup>6</sup> Such pricing issues commonly arise in other Internet contexts. For example, the on-line magazine *Slate* recently eliminated subscriber fees and became entirely advertiser-supported, a decision dictated by the market. *Slate* concluded that, given other Internet competition, consumers did not value its product enough to pay fees. No one has suggested that regulatory intervention is appropriate to support *Slate's* original business model.

<sup>7</sup> AOL, for example, has negotiated agreements with Bell Atlantic and SBC Communications to provide its service over their DSL facilities. See, Press Release, *America Online and SBC Communications to Offer High-Speed Upgrade for AOL Members* (March 11, 1999); Press Release, *America Online and Bell Atlantic Form Strategic Partnership To Provide High-Speed Access For The AOL Service* (January 13, 1999).

<sup>8</sup> See Section 706 Report at ¶101; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations for Tele-Communications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, CS Docket No. 98-178, FCC 99-24 (rel. Feb. 18, 1999) ("AT&T/TCI Order").

<sup>9</sup> See The White House, *A Framework for Global Electronic Commerce* (July 1997); United States Department of Commerce, *The Emerging Digital Economy* (April 1998); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30 at 2 (August 1998) ("*Internet Over Cable*") ("Currently the over-arching consensus among domestic policy makers is that the government should recognize the unique qualities of the Internet, and avoid unnecessary regulation and undue restrictions on electronic commerce conducted over the Internet").

<sup>10</sup> For example, the City of Portland, Oregon, and surrounding communities have conditioned the AT&T/TCI transfer on AT&T's compliance with an "unbundling" condition. AT&T and TCI have sought a declaratory judgment from the local federal district court that the proposed condition is unlawful. Other cities, such as Los Angeles, have approved the TCI transfer, but opened proceedings to investigate this issue.

ing segment of the on-line marketplace. The ISPs' pleas for protection from competition must be rejected.

### III. GOVERNMENT REGULATION WOULD DESTROY THE POTENTIAL FOR COMPETITION AND INNOVATION PRESENTED BY CABLE ON-LINE SERVICES.

Essentially, the ISPs' argument boils down to this: Without government regulation, consumers will not have a choice of broadband Internet service providers, and cable operators eventually will exercise bottleneck control in a way that would damage the Internet. The ISPs' plea for regulation is based entirely on speculation about how the on-line services market will develop in the future, and it ignores completely how well that market is working today, without government intervention. Imposing a direct access requirement on cable operators is not necessary to promote competition. Indeed, it would be counterproductive. The ISPs' proposals would raise the cost and diminish the quality of high-speed access over a cable system, with no material benefit to consumers. The ultimate effect of these proposals would be to deter investment in broadband facilities and delay the roll-out of innovative new services. The only beneficiaries of this result would be the ISPs themselves, who would be able to maintain their current dominant position in the on-line market, and thereby shield their prices from the impact of new competition.

#### A. *The Marketplace Is Flourishing In The Absence Of Regulation.*

##### 1. *The Growth of the Internet Has Been Nothing Short of Phenomenal.*

The development of the Internet is the quintessential example of the power of the free market—the power to meet the needs of consumers, to develop innovative new technologies, to grow the economy, to provide the ultimate forum for communication. By any measure, this is a marketplace that is absolutely flourishing.

The ISPs argue that this incredible growth could be hampered by the introduction of cable on-line services because cable operators will become a bottleneck on the Internet. On its face the argument is ridiculous. It is simply impossible for a single company or industry to stand in the way of the global phenomenon that is the Internet today.

The ISP argument is particularly weak in light of the minuscule share of the on-line market held by cable operators. While Road Runner has just over 200,000 subscribers, and all cable on-line services combined have roughly 500,000 subscribers, AOL has 16 million subscribers, and is adding new subscribers at an astounding pace.<sup>10</sup> At its current rate of growth, AOL adds the equivalent of Road Runner's entire subscriber base every three weeks.

The ISPs overstate the minor role of cable operators in today's on-line marketplace by suggesting that broadband over cable will make narrowband on-line service obsolete. As much as Time Warner believes in the power of broadband over cable, to predict that it will be the dominant form of on-line service is pure speculation. Certainly the ISPs are telling the rest of the world a different story than they have told the regulators. AOL's chief executive officer recently predicted that 75 percent of on-line subscribers will still be using narrowband services five years from now.<sup>11</sup> Tremendous investment is being devoted to giving consumers access to the Internet at locations other than the home or the office.<sup>12</sup> Technology undoubtedly will change in other ways that are impossible to predict. And even if today's broadband technology becomes the dominant technology of the future, we explain below that cable is only one of many broadband options that will be available to consumers.

The beauty of the competitive market is that no one can predict how these events will play out. Winners and losers are not preordained. Thousands of companies are working to implement their visions of the on-line future, each striving to provide consumers with services they want at prices they are willing to pay. Left to its own devices, we have no doubt that the marketplace will continue to evolve to serve the needs of the public.

##### 2. *The Absence of Regulation Has Led to Substantial Investment in Broadband Facilities.*

One of the more glaring deficiencies in the ISP argument is the assumption that cable will be the only significant broadband player in the residential market, and

<sup>10</sup>In April 1998, AOL announced that it exceeded 12 million subscribers. Less than one year later, the company announced that it exceeded 16 million subscribers. See Press Release, AOL Surpasses 16 Million Members (February 9, 1999).

<sup>11</sup>Diane Mermigas, *Still a Cyber-Pioneer: AOL Chief Targeting the 75% of Households That Aren't Online*, Electronic Media (November 9, 1998).

<sup>12</sup>See, e.g., Yahoo, *PageNet to Customize Wireless Services*, CNET.com, March 4, 1999 (joint venture to provide e-mail and other personalized content to paging customers).

therefore should be regulated as if it were a monopoly. As described in detail in the FCC's *Section 706 Report*, there is no shortage of players in the broadband marketplace. The Bell Operating Companies and GTE have invested billions of dollars upgrading their networks to accommodate, and capitalize on, the growing consumer demand for broadband services.<sup>13</sup> Bell Atlantic, BellSouth, and SBC, among others, have been aggressively marketing DSL services that will compete directly with cable modem services offered by Time Warner and other cable operators. Numerous competitive local exchange carriers (CLECs) have been building their own broadband facilities that will provide DSL services to consumers, and electric utilities have been aggressively investing in broadband capabilities.<sup>14</sup> Satellite companies already offer high-speed Internet access on a nationwide basis.<sup>15</sup> Wireless companies also have increased their involvement in the broadband segment of the market.<sup>16</sup> The growing competition in the delivery of high-speed data has been spurred, not hampered, by the cable industry's own efforts to be the first to market with these new services.

All this investment led the FCC to conclude that "[b]y the standards of traditional residential telecommunications, there are, or likely will soon be, a large number of actual participants and potential entrants in this market."<sup>17</sup> With respect to residential customers, the Commission found that the "preconditions for monopoly appear absent. . . . Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio."<sup>18</sup> In this competitive environment, cable's development of on-line services should be applauded, not regulated.

### 3. Time Warner and Road Runner Already Have Every Incentive to Provide Services that Meet the Needs of Consumers.

A central theme of the ISPs' argument is that consumers will benefit from common carrier-like regulation of cable on-line services because they will have access to the ISP of their choice. Although the superficial appeal of this argument may explain why the ISPs have attracted the preliminary interest of a few local governments, scratching the surface reveals the false premise on which the argument is based. Simply put, through the Road Runner service, Time Warner provides its subscribers access to all content on the Internet, including any ISP content. Common carrier requirements will not give consumers access to any information that is not already available.

The only conceivable benefit that would justify common carrier regulation would be reduced costs or improved service. However, we explain in Section III below that imposing any type of direct access requirement on cable operators actually would lead to increased technical and regulatory costs for both cable operators and ISPs generally. Regardless who would incur these costs directly, ultimately they would be borne by consumers. In addition, we show below that a direct access requirement would degrade the quality of service provided to consumers.

Nor is the Road Runner service as offered by Time Warner today overpriced. Time Warner's Road Runner service is priced at approximately \$39.95 for residential users. In comparison, a narrowband ISP customer today pays roughly \$15-20 for Internet access, plus another \$15-20 if the customer needs a second telephone line. Bell Atlantic charges \$39.95 for its residential DSL service, and SBC charges \$39.00 for its residential service.<sup>19</sup> Both SBC and BellSouth have promoted a bundled offering of DSL access with their own ISP service for a price of \$49.00 and \$49.95, respectively.<sup>20</sup> Obviously, neither the on-line service offerings, nor their prices, will be static. Time Warner fully expects that competition will force everyone in the marketplace to develop innovative new offerings, to include more functionality in their offerings, and to continue to be sensitive to the price of the finished product. As it

<sup>13</sup> *Section 706 Report* at ¶42 ("BOCs and GTE, for example, have announced plans to offer broadband to approximately twenty million homes this year")

<sup>14</sup> *Id.* at ¶¶55-56. At least some CLECs have made the decision not to offer access to multiple ISPs. See, e.g., Monica Hogan, *New DSL Service Lauches in NYC*, Multichannel News (February 15, 1999) ("We feel that it's very important for us to have the one-to-one relationship with the customer.")

<sup>15</sup> DirecPC, which provides Internet access via satellite, makes a point of noting on its Web site that it is "here today and available to anyone nationwide."

<sup>16</sup> See, e.g., Press Release, *Cisco and Motorola to Form Strategic Alliance to Build Internet-Based Wireless Networks* (February 8, 1999).

<sup>17</sup> *Section 706 Report* at ¶48.

<sup>18</sup> *Id.* at ¶48.

<sup>19</sup> See <http://www.bell-atl.com/adsl/more—info/pricing.html>; Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999).

<sup>20</sup> See Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999); <http://www.bellsouth.net/adsl/cost.html>.

has so far, an unregulated marketplace for on-line services will drive companies to meet the needs of consumers.

*B. The Optimal Business Model(s) For On-Line Services Should Be Determined By The Marketplace, Not By Regulators.*

*1. The Preconditions for Regulation are Absent.*

The heart of the debate over the ISPs' direct access proposals is whether cable operators like Time Warner should have the freedom to determine how to provide services over their facilities, and when and how to make future investments in those facilities. Or, as the ISPs suggest, should these decisions be made instead by regulators or competitors.

Time Warner's single objective is to provide consumers with an attractive mix of services at an attractive price. Time Warner is upgrading its cable systems, and deploying Road Runner, with this goal in mind. Absent evidence of market failure, there is no basis to interfere with Time Warner's choices regarding the services and facilities it deploys.

The incumbent ISPs advocate a fundamentally different approach. The ISPs' basic message—"cable operators cannot be allowed to control broadband networks"<sup>21</sup>—is stunning in the degree to which it seeks to appropriate the cable system for the benefit of ISPs. From their perspective, the cable system is simply a "pipe" that should be designed so that hundreds, or even thousands, of ISPs can obtain access on a regulated, common carrier basis.

But does it make sense for regulators to dictate the business model to be used by cable operators? Regulation is intended to simulate the results that would be achieved in a competitive market. We are not aware of any accepted theory in our society that would trumpet the need for regulation in the absence of a demonstration that the market is not operating properly. Telephone and electric companies have been heavily regulated over the past century, but only because they provided what were considered essential services, and because it was assumed these industries were "natural" monopolies that were incapable of supporting more than one facilities-based provider in a market.

These assumptions now appear to be no longer valid as to the telephone business. Without question they do not apply to high-speed on-line services. High-speed on-line services are offered by multiple facilities-based providers, and investment in new facilities is continuing at a rapid pace.<sup>22</sup> Far from being considered "essential," high-speed on-line services today have been compared to first-class air travel.<sup>23</sup>

Over the past two decades, state and federal regulators in both the telephone and the electric industries have been working to discard the nineteenth century model of public utility regulation, moving from the historically heavily regulated, single provider environment to a deregulated, competitive marketplace. Indeed, one of the primary purposes of the Telecommunications Act of 1996 was to hasten the movement away from regulation toward a fully competitive telecommunications industry. The basis for this transition is the recognition that regulation is always an imperfect substitute for competition, and that facilities-based competition should be encouraged. The 1996 Act was a seminal event in this transition to a deregulated competitive marketplace.

The incumbent ISPs' proposals to impose common carrier regulation on cable on-line services foolishly would reverse this shift away from antiquated regulation. We question whether enlightened public policy would dictate placing regulatory burdens on even the local exchange companies' provision of new high-speed Internet access services. But there surely is no justification to reverse the trend away from government control in order to add new regulations on the cable industry—an industry that has never been subject to the burdens of common carrier regulation.

Imposing an added regulatory burden on the cable industry's offering of on-line services is especially uncalled for in view of the "untouchable" nature of the Internet. To date, the Internet has been virtually unregulated, and both Congress and the FCC have recognized that the lack of government interference is one reason for its fantastic growth.<sup>24</sup> The incumbent ISPs have been vociferous in their arguments that the Internet should not be regulated by government at any level. It is more than a little ironic for them to argue, as they do, that regulators should "respect

<sup>21</sup> This is a direct quote from the web site of the openNET Coalition, a lobbying group of ISPs and others. See <http://www.opennet.coalition.org/what/> (emphasis in original).

<sup>22</sup> Section 706 Report at ¶ 4.

<sup>23</sup> Diane Mermigas, *Still a Cyber-Pioneer: AOL Chief Targeting the 75% of Households That Aren't Online*, Electronic Media (November 9, 1998).

<sup>24</sup> 47 U.S.C. § 230; *Internet Over Cable* at 2.

the mandate of the 1996 Act to rely on market forces" and at the same time launch a no-holds-barred effort to impose burdensome regulation on cable on-line services.<sup>25</sup>

The competitive nature of the on-line services market today indicates that consumers' needs will be met. However, even if it turns out that demand for some services are not sufficiently addressed by the marketplace, the regulatory solution advocated by the ISPs is the wrong approach. Congress already has decided, in Section 706 of the 1996 Act, that any government intervention should be designed to "encourage the deployment" of broadband facilities by "methods that remove barriers to infrastructure investment."<sup>26</sup> The ISP approach directly contradicts the deregulatory approach Congress already has decided on for the broadband market.

## 2. *The Public Interest Is Served when Providers Have the Flexibility to Meet Consumer Needs.*

The ISPs suggest that market forces alone may not produce competition in the broadband segment of the market. In particular, they argue that they are disadvantaged because customers who purchase Road Runner solely for high-speed access will receive additional features that reduce the customer's need for services of another ISP. The argument that the Road Runner service includes too many features ignores the fundamental realities of a competitive marketplace. Time Warner's offering of Road Runner will be competing with DSL and other broadband and narrowband services. Including features that consumers desire is not a scheme designed to frustrate the incumbent ISPs, it is a matter of survival for a new entrant in a vibrant, competitive market.

Road Runner is no different than the ISPs in this regard. All ISPs offer an integrated package of services with different features.<sup>27</sup> Each ISP must make business decisions about whether it will own facilities, what type of browser capability it will offer, whether and how to present content, what type of e-mail functionality will be available, how much customer service support is needed, whether different levels of service will be available, and how to price the service. Each of these individual decisions is vital to the overall composition of the service and how it is perceived in the marketplace.<sup>28</sup>

In a competitive market, there is no reason to deny companies the discretion to make these important decisions, and to make changes as the market evolves.<sup>29</sup> The ISPs would generate a firestorm of protest if any regulator were even to suggest that they be required to offer the components of their services on a piecemeal basis. Yet this is precisely what the ISPs are advocating for cable on-line services. Even worse, the ISP proposal effectively would convert Time Warner from a retail provider of on-line services to a wholesale provider of transmission services. Certainly the ISPs realize that a bare transmission service, with no content or organization to make it useable, would be a far less potent competitor in the retail market.

Nothing taking place in the market suggests that this radical restructuring of cable operators' business plans is warranted. As expected in a competitive market, all providers are experimenting with different business models, and Road Runner is hardly alone in offering an integrated package of services. AOL's deals with Bell Atlantic and SBC allow it to offer a high-speed option for its subscribers. AOL customers who purchase this service will pay only \$20.00 more than AOL's narrowband service, even though Bell Atlantic offers ADSL transmission on a stand-alone basis for \$39.95, and SBC offers its ADSL service for \$39.00. Telephone companies also are experimenting with bundling DSL connections with their own ISP services. SBC, for example, offers a bundled ADSL package with its own ISP service for \$49.00.<sup>30</sup> The availability of all these different pricing options benefits consumers,

<sup>25</sup> CC Docket No. 98-146, Comments of America Online at 4 (Sept. 14, 1998).

<sup>26</sup> 1996 Act, § 706(a).

<sup>27</sup> For example, AOL has many exclusive arrangements with content providers. Customers must take all of the AOL service, even components they have no use for, to get access to this exclusive content. AOL seems to want unbundling only for its competitors, but not for itself.

<sup>28</sup> The FCC has recognized that the regulatory status of on-line services is determined by looking at the whole service, not the individual elements of the service. See *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 at ¶ 79 (rel. April 10, 1998) ("*Universal Service Report*") ("[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status.")

<sup>29</sup> AOL, for example, began as a closed, proprietary system which bundled access service with a range of original and licensed content, and only later decided to provide Internet access as a component of its service. AOL initially owned facilities as well, but later decided to sell its facilities and focus primarily on developing content.

<sup>30</sup> See Press Release, *Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access* (January 12, 1999); <http://public.swbell.net/dialup>.

and there is no reason regulators should deter this type of experimentation by mandating that cable operators or anyone else follow one particular business model.

In the end, the ISPs' complaint is really not about whether they have "access" to cable operators' high-speed data customers. They have that access today, and they will in the future. Their complaint is that Time Warner should not be able to control the services it provides, because those services may be too good. They fear that cable subscribers may choose not to link to their services because the value customers receive from doing so does not exceed the price that the ISP desires to charge. These fears do not justify regulation; they are proof positive that the marketplace is working.

### 3. Regulation Would Introduce Significant New Costs and Chill the Incentive for Future Investment and Innovation.

Replacement of the market mechanism in any situation does not come without enormous regulatory costs, and to suggest that such costs would not be present here is to be either naive or disingenuous. The notion advanced by the ISPs that regulation would be largely self-executing ignores the significant operational issues involved in providing on-line services. Some ISPs attempt to hide these operational issues by arguing for a "simple" requirement that cable operators not discriminate among ISPs. But a non-discrimination requirement effectively would obligate Time Warner to provide direct physical connections to any ISP. And implementing this requirement would necessitate developing a mechanism for comparing the price, terms and conditions under which each ISP connected to the system.<sup>31</sup> ISPs would undoubtedly challenge any kind of restrictions placed on the usage of the cable broadband system by cable operators, and they would expect regulators to be responsive to complaints regarding all manner of operational and pricing issues.

Imposing common carrier regulation on cable operators also would crush the incentive for companies to invest in broadband facilities and innovative services. The tremendous potential of cable on-line services today is not the result of luck or happenstance. It is the result of years of substantial investment and technological innovation by cable operators and their technology partners. To penalize cable operators for this effort, as the ISPs propose, would set a perverse precedent under which anyone who builds a superior network would risk that network being subject to burdensome government regulation.

A policy that penalizes investment and innovation would absolutely chill the incentive of cable operators to continue making these type of investments, and would provide a powerful reason to delay or cancel deployment of high-speed services. Furthermore, the cable industry is not working in a vacuum. To provide today's broadband services, and to continue to develop innovative new technologies and applications, the cable industry is heavily dependent on the continued commitment of technology companies (such as Road Runner partners Microsoft and Compaq) and the continued support of the capital markets. The technology community has made clear that even the threat of burdensome regulation is cause for great concern.<sup>32</sup> And the financial community has stated unequivocally that regulation would diminish the cable industry's access to capital.<sup>33</sup>

Common carrier regulation of cable operators would also reduce the incentives of other facilities-based providers to construct high-speed facilities. Certainly the fear that they too run the risk of burdensome regulation if they succeed in building a better network would be a substantial disincentive to invest and to innovate. The loss of the cable industry's momentum toward providing new high-speed services also would undoubtedly cause a similar slowdown in the efforts of competitors to keep pace.

<sup>31</sup>In the telecom world, for example, tariff filing requirements and complaint procedures are considered essential to enforcing non-discrimination rules. *MCI v. AT&T*, 512 U.S. 218 (1994) ("The provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory would not be susceptible of effective enforcement if rates were not publicly filed") (internal citations omitted).

<sup>32</sup>See, e.g., Letter from John T. Chambers, President and CEO, Cisco Systems, et al., to William E. Kennard, Chairman, FCC, CC Docket No. 98-146 (December 9, 1998) ("It is a simple but undeniable reality that new and unnecessary regulations will diminish the willingness of capital markets to finance the construction of new broadband networks.")

<sup>33</sup>For example, one analyst recently stated that the "remotest threat of success of the AOL argument" would sour Wall Street on the cable industry. See *Communications Daily* (December 21, 1998). FCC Chairman Kennard recently acknowledged the financial community's need for a stable, unregulated environment. See Remarks of William E. Kennard Before Legg Mason (March 11, 1999) ("I expect that you would be much more comfortable putting your money into companies who control their own destiny. Business decisions based on contracts. Not on government fiat.")

*C. The ISPs Have Concealed The Significant Technical Problems With Their Unbundling Proposals.*

The ISPs have failed to identify some obvious, and very significant, technical deficiencies in the common carrier model they are advocating for cable on-line services. It is not clear whether the ISPs' failure here results from a lack of understanding of how cable systems are used in providing on-line services, or simply the knowledge that an accurate explanation of the technical and operational issues would expose the massive level of government intervention that would be needed to implement their proposals.

If from the start someone were to build a network with the intention of providing direct access by hundreds of different ISPs, they would not deploy the same HFC systems that Time Warner is constructing today. More "channels" would be devoted to on-line services, and less to video programming. Different routers would be deployed. Undoubtedly other elements of the network would also be different.

But building a network that meets the needs of hundreds of ISPs would not be in the interests of consumers. The network would be far more expensive than the HFC networks built by Time Warner. *Yet it would provide no additional on-line content or services*, and it would interfere with the ability to provide other services, such as video programming.

If someone were trying to design a network to meet the needs of consumers, on the other hand, they would build an HFC network like those used by Time Warner and Road Runner. Each customer has the ability to use the capacity of the network when he or she needs it, including the ability to access any content on the Internet without hassle or delay. Customers who desire the content or features of AOL or any other ISP can configure their systems to give immediate access simply by clicking on the ISP's icon on their computer screens. So long as the system is properly managed, a shared broadband network is a very efficient way to bring high-speed services to multiple customers, without taking capacity away from video programming services.

The ISPs argue that it is technically feasible to provide direct physical connections to multiple ISPs, even with the HFC systems Time Warner and others are deploying. Even if we assume such a connection is technically possible (and today, at least, it is not), this is not the end of the inquiry. That something is technically possible does not mean it makes sense, either as a business matter or as a public policy matter. The important questions surrounding any technical issue of this nature, after the threshold question of technical possibility, involve how much it will cost, and what types of benefits or detriments it will produce. Here, the cost of regulation is tremendous and the benefits nonexistent.

One way to provide common carrier access would be for every ISP that obtains a customer served by the cable system to be allocated a certain amount of dedicated spectrum for its own use. Where Time Warner now allocates one or two channels to Road Runner, it would be obligated to allocate additional channels to other ISPs. Allocating channels in this way would be highly inefficient—the Internet equivalent of requiring all roads to have separate lanes for each car manufacturer. Whatever amount of spectrum were allocated to an ISP, the ISP rarely would need that much capacity at any point in time. Obviously, there would be questions about how many, and which, ISPs would be given this dedicated capacity, and how much capacity would be dedicated to this use.

However these questions were answered, it is apparent that dedicating network capacity to individual ISPs would require that the cable system allocate a huge amount of its limited channel capacity to high-speed data services, taking a large amount of spectrum away from Time Warner's primary business, delivery of video programming to subscribers. Allocating channels in this way might (arguably) serve the ISPs, but it would be to the detriment of all cable subscribers, including those that choose not to use the cable system for high-speed on-line services.

A second approach to providing direct connections to unaffiliated ISPs would be for each ISP to connect to the router located at the cable system headend. This connection would occur through the addition of a second router at the headend that would direct traffic to the customer's chosen ISP. The type of router needed for this task is still being tested for use with cable modems. The router also would need software that could identify a customer's ISP, much as a telephone switch identifies a caller's presubscribed long distance carrier. The software necessary to perform this function still is under development and has not been proven to work with cable modems.

Even if technology advanced to the point where this approach were technically possible, significant issues still would remain. First, deploying this technology would raise the cost of the service, without any additional benefit to consumers. Second, the number of ISPs that could be accommodated under this approach would be lim-

ited by the capacity of the routers, and the introduction of each additional ISP would create an additional drag on the speed and efficiency of the system. Each ISP's connection would create the equivalent of a separate on and off ramp on an interstate highway. Because there are thousands of ISPs, this would be no highway at all.

In any event, this approach is not technically practical for cable systems because it would jeopardize the cable operator's ability to manage traffic on the network. Cable HFC networks use a single shared distribution system to serve hundreds or thousands of subscribers. Like Local Area Networks ("LANs"), if cable networks are overloaded, they will perform much more slowly than desired, or may even crash altogether. Network usage that may be incompatible with the way the network is designed is likely to cause service degradation—not only to the individual user engaging in incompatible usage, but to *all* users. Applications like Pointcast (a "push" technology that constantly updates users' screen savers with breaking news or other data) have been known to affect the performance of LANs, and have been prohibited by some LAN managers. In a similar way, extensive use of the cable network for home-based Web servers can impact the speed at which other users on the same node are able to send or download information.

Because cable facilities are shared among many different subscribers, it is essential that the distribution on a cable network be carefully managed and controlled. Cable network managers must monitor the build-out and deployment of their systems to ensure that they have sufficient capacity to provide high quality service to the cable modems that have been deployed. The cable operator must make decisions regarding how many subscribers will be served by a particular node, and how many "channels" on the cable system will be devoted to Internet access activity versus other uses.

Technical decisions like these affect the performance of the network, and the consumer's satisfaction with the service. Cable operators make these technical decisions in an environment where they will be competing with other broadband facilities, each with its own unique characteristics. For example, the broadband transmission networks deployed by local telephone companies provide a dedicated circuit to a customer. As a result, a customer's use of that circuit does not impact other customers on the telephone network. Wireless and satellite facilities undoubtedly will have their own pros and cons. Regulation that hampers a cable operator's ability to manage its shared network turns a technical difference between networks into a quality difference between competing services. The important point here is that the free market gives each provider the incentive to develop services that capitalize on the strengths, and minimize the limitations, of its respective technology. Meanwhile, regulators cannot adopt a "one size fits all" mentality that ignores the technical complexities and limitations of different networks.

The Road Runner service has been designed with a full understanding of the capabilities, and the limitations, of the shared cable facility. Working together, Time Warner and Road Runner have the incentive and the ability to maximize the efficiency of the system. Maintaining Time Warner's ability to manage the network is an entirely rational, and perhaps the only, method by which to ensure quality.<sup>34</sup>

In a multiple ISP environment, any particular ISP would benefit from controlling the usage by its customers only if it could be assured that all other ISPs would do the same. Because ISPs would be competing with each other, however, a "tragedy of the commons" would result, where each ISP would have an incentive to overuse the common resource.<sup>35</sup> Each competing ISP would have an incentive to offer its customers an ever-increasing volume of service, including broadcasting of data and streaming video, without any incentive to limit that volume as the system became congested. Without the management provided by a single entity, the system would not be able to provide a consistent high-speed experience for its users.

Because of the incompatible incentives of Time Warner and the unaffiliated ISPs that would use its system, a mandatory direct access requirement necessarily would lead to disputes regarding the type of limitations that Time Warner could place on ISPs and their customers, and how those limitations were monitored and enforced. Cable operators and investors would necessarily face the risk that ISPs would call on regulators to order operators to purchase bigger routers or additional nodes, or to dedicate more capacity to on-line services (to deliver the same content), and less capacity to other services. In an environment where technology is constantly changing and improving, the danger of such an unprecedented intrusion into the business of a cable operator would itself deter investment in broadband upgrades, particu-

<sup>34</sup> See Bruce M. Owen & Gregory L. Rosston, *Cable Modems, Access and Investment Incentives* at 19.

<sup>35</sup> *Id.* at 17.

larly if cable operators were subject to a different set of rules in every local community where they offered on-line services.

IV. THE FCC AND LOCAL FRANCHISING AUTHORITIES HAVE NO STATUTORY AUTHORITY TO IMPOSE COMMON CARRIER REQUIREMENTS ON CABLE ON-LINE SERVICES.

In advancing their proposals for common carrier access to cable on-line services, the ISPs have treated the issue of legal authority to impose those requirements almost as an afterthought. This tactic is perhaps understandable, because no legal basis exists on which the FCC or a local franchising authority could impose these requirements. The Communications Act contains no affirmative grant of authority for these requirements, and the ISPs' efforts to find legislative authority by analogy are plainly insufficient to justify the action they seek. Indeed, the Act specifically precludes common carrier regulation of cable operators when they provide services such as Road Runner.

A. *The Communications Act Does Not Authorize Any Type Of Common Carrier Regulation Of Cable On-Line Services.*

The ISP arguments to impose common carrier regulation on cable operators vary in some ways, but they all share one common characteristic—they provide no comprehensive legal analysis to support their proposals. Some ISPs have suggested that cable operators somehow can be brought under Title II regulation, others have stated that unbundling can be imposed under various provisions of Title VI, and still others have suggested that Section 706 of the 1996 Act provides the necessary authority. All of these assertions are wrong.

On-line services provided by a cable operator are cable services that are subject to regulation under Title VI, not Title II. Title VI provides no basis on which the FCC or a local franchising authority can impose common carrier regulation. To the contrary, Congress has explicitly prohibited common carrier regulation of cable operators when they provide cable services.

1. *Title VI Provides No Authority for the FCC or a Local Franchising Authority to Impose Common Carrier Regulation.*

a. *Cable on-line services are subject to Title VI regulation.* Cable services are regulated under Title VI of the Act. Prior to 1996, the Act defined the term "cable service" as "(A) one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service."<sup>36</sup> Under this definition, a cable service could include only subscriber interaction that was necessary to select programming. If a cable operator provided a service with more interactivity, it would not be considered a cable service, and would not be subject to the burdens, or the protections, of Title VI.

In the 1996 Act, Congress amended the definition of cable service to include subscriber interaction required for the "use" of programming. The legislative history indicates that Congress intended this amendment "to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."<sup>37</sup>

As noted in a recent FCC paper, there is ample support for the idea that Congress intended to include cable on-line services within the new, expanded definition of cable service.<sup>38</sup> Certainly, the on-line service offered by Time Warner fits within this expanded definition of cable service. The Road Runner service includes a mix of national and local content specifically designed to be provided over cable systems, and is properly considered an "other programming service"—"information [made] available to subscribers generally."<sup>39</sup> Treating services like Road Runner as cable services under Title VI is entirely consistent with the manner in which those services have been developed by, and are offered by, cable operators.

Some parties have argued that cable on-line services are telecommunications services, and therefore subject to common carrier regulation under Title II of the Act. Whether directed at the cable system or at the Road Runner service, this argument is baseless. The term "telecommunications" is defined as "transmission, between or

<sup>36</sup> "Video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally." *Id.*, § 522(14).

<sup>37</sup> See H. Rep. No. 104-458, 104th Cong., 2d Sess. at 169 (1996) ("1996 Conference Report").

<sup>38</sup> *Internet Over Cable at 88*; see also *Implementation of Section 703 of the Telecommunications Act of 1996*, CS Docket No. 97-151, FCC 98-20 at ¶33 (rel. February 6, 1998).

<sup>39</sup> 47 U.S.C. § 521(14).

among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43). The Road Runner service clearly does not fit within the definition of telecommunications because it is primarily an editorial product that includes local and national content chosen by Road Runner and the cable system. In addition, the FCC has concluded that the provision of Internet access, one of the functions provided by Road Runner, is not a telecommunications service.<sup>40</sup>

The argument that a Time Warner cable system provides a telecommunications service when it offers Road Runner also fails. Time Warner's agreements with Road Runner are comparable to the agreements it has with video program providers. Time Warner creates a service together with Road Runner and sells it to customers. Time Warner does not offer telecommunications to Road Runner or to its customers under this arrangement.<sup>41</sup>

*b. Nothing in Title VI authorizes the imposition of common carrier requirements on cable on-line services.* The FCC only may regulate to the extent it has been granted authority by Congress.<sup>42</sup> When Congress authorizes the FCC to regulate, the FCC must comply with the language of the statute.<sup>43</sup> In the absence of a statute giving the FCC the authority it needs to act, it has no authority. And Congress alone has the power to grant that authority.<sup>44</sup>

With respect to cable services, the FCC's authority is limited to the authority granted under Title VI of the Act. Title VI provides no basis for imposing a mandatory access or unbundling requirement on cable on-line services. Although provisions of Title VI require cable operators to provide access to unaffiliated parties, such as commercial leased access under Section 612 and program access under Section 628, the nature and extent of access that may be required is limited by the terms of the statute.<sup>45</sup> The statute does not include any unbundling or access requirements for on-line services.

Local franchising authorities also are constrained to regulate cable operators only to the extent permitted under Title VI. Section 636 of the Act specifically preempts "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act." 47 U.S.C. § 556(c). Title VI contains no grant of authority to local franchising authorities that would provide a basis on which to impose access requirements on cable on-line services.

The ISPs argue that the access requirements they are proposing are consistent with the access requirements already imposed under Title VI. But *consistency* with other requirements does not provide a statutory basis for the requirements proposed by the ISPs. The ISPs' attempt to find authority by analogy underscores that the requirements they are advocating *do not fit within any of the existing access requirements*—direct access by ISPs is *not* PEG, it is *not* leased access, it is *not* program access and it is *not* must carry. All the existing access requirements relied on by the ISPs as "analogous" or "consistent" with the access they seek were explicitly

<sup>40</sup> See, e.g., *Universal Service Report* at ¶80.

<sup>41</sup> Furthermore, Title II applies only to telecommunications carriers, a term the FCC has interpreted to mean entities that offer telecommunications on a common carrier basis. *Universal Service Report* at ¶124. Even if Time Warner is considered to be providing telecommunications to Road Runner, it is doing so on a private carrier basis only, and cannot be forced to provide service if it chooses not to. See *Southwestern Bell v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (If a carrier "chooses its clients on an individual basis and determines in each case whether and on what terms to serve, and there is not specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service, and the Commission is not at liberty to subject the entity to regulation as a common carrier.").

<sup>42</sup> See, e.g., *FCC v. Midwest Video*, 440 U.S. 689, 695 (1979) ("The Commission derives its authority from the Communications Act of 1934"); *Louisiana PSC v. FCC*, 476 U.S. 355 (1986) (FCC has no authority to regulate intrastate depreciation rates); *Bell Atlantic v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (FCC had no authority to require local exchange carriers to provide competitors with physical collocation in central offices).

<sup>43</sup> See, e.g., *MCI v. AT&T*, 512 U.S. 218 (1994) (authority to "modify" tariff filing requirements does not include authority to forbear from enforcing those requirements).

<sup>44</sup> See *MCI v. AT&T*, 512 U.S. at 234 ("our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the federal Communications Act of 1934"); *Midwest Video*, 440 U.S. at 709 ("We think authority to compel cable operators to provide common carriage of public-originated transmissions must come from Congress.").

<sup>45</sup> See *Sierra East Telecom v. Weststar Cable Television*, 776 F.Supp. 1405 (E.D. Cal. 1991) (cable system with less than 36 channels has no leased access obligations under Section 612); *Echostar Communications Corp. v. Comcast Corp.*, Memorandum Opinion and Order, File No. CSR 5244-P, DA 99-235 (rel. January 26, 1999) (rejecting program access complaint based on finding that programming at issue was not satellite programming, or equivalent to satellite programming)

adopted by Congress, not by the FCC or local franchising authorities. Past attempts by the FCC to impose access requirements without statutory authority have been rejected by the courts.<sup>46</sup>

Analogies to the unbundling requirements imposed on local exchange carriers under Section 251(c) are equally flawed. Congress has specifically imposed unbundling requirements only on incumbent telephone companies, while refraining from imposing comparable requirements on any other type of entity.<sup>47</sup> The Supreme Court recently confirmed in *AT&T v. Iowa Utilities Board* that the FCC cannot ignore the language used by Congress in implementing unbundling requirements.<sup>48</sup> The unbundling requirements of Section 251(c) apply to incumbent local exchange carriers only when a failure to provide a particular unbundled network element would "impair" the ability of a requesting telecommunications carrier to provide service,<sup>49</sup> and they do not apply at all when a telephone company is providing cable service. 47 U.S.C. §571(b). Given the clarity with which Congress has expressed itself on the issue of who should be required to unbundle their networks, and when, it is clear that if Congress also believed an unbundling requirement should be imposed on cable operators, it would have made that explicit.

## 2. A Mandatory Direct Access or Unbundling Requirement Would Constitute Prohibited Common Carrier Regulation in Violation of Section 621(c) of the Act.

The essential premise underlying the ISPs' proposed unbundling and access requirements is antithetical to the structure of the Cable Act. Section 621(c) of the Act provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. §541(c). Any requirement that cable operators provide direct physical connections to ISPs would clearly be in the nature of common carrier regulation, and finds no basis in Title VI. A fundamental principle underlying Title II is that telecommunications networks can, and should, be interconnected.<sup>50</sup> In contrast, Title VI contains no interconnection requirements. The FCC recently reaffirmed "the distinctions Congress drew between cable and common carrier regulation" in rejecting arguments that AT&T should be subject to new access requirements following its acquisition of TCI.<sup>51</sup>

The ISPs have suggested that an unbundling requirement would not violate Section 621(c) because the imposition of such a requirement would be less extensive than the type of common carrier regulation that would be imposed if on-line services were fully regulated under Title II. The Fifth Circuit recently rejected an almost identical argument in striking down the FCC's requirement that Open Video Service (OVS) operators obtain pre-construction certification.<sup>52</sup> In *City of Dallas*, the court noted that the statute provided that an OVS operator would not be subject to the requirements of Section 214 of the Act. The court held that the Commission "should not be able to deny the regulatory relief these sections provide merely by pointing out that there are some differences between its new [rule] and the old one it is expressly forbidden to impose."<sup>53</sup>

The situation here is similar. Although it is true that a mandatory direct access requirement might not mirror Title II regulation in all respects, it inevitably would include a requirement to serve all ISPs indifferently, as well as regulatory oversight of the price, terms, and conditions under which cable operators would provide the access component of Internet access. A regulatory body would, at a minimum, have to establish complaint procedures, and basic principles on which to resolve complaints.<sup>54</sup> The ISP proposals could not be implemented without massive government intervention that would include many of the key elements of Title II regulation.

<sup>46</sup> See *Midwest Video*, 440 U.S. at 708-09.

<sup>47</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), reversed in part, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), reversed in part sub nom. *AT&T Corp. v. Iowa Utilities Board*, Case No. 97-826 (January 25, 1999).

<sup>48</sup> *AT&T Corp. v. Iowa Utilities Board*, slip op. at 21-24.

<sup>49</sup> *Id.*; 47 U.S.C. §251(d)(2).

<sup>50</sup> See, e.g., 47 U.S.C. §201(a) (requiring common carriers to establish physical connections with other carriers); *Id.*, §251(a) (requiring telecommunications carriers to interconnection with other carriers).

<sup>51</sup> See *AT&T/TCI Order* at ¶29.

<sup>52</sup> See *City of Dallas v. FCC*, Case No. 96-60502 (5th Cir. January 19, 1999).

<sup>53</sup> *Id.*, slip op. at 18.

<sup>54</sup> If a cable operator were not permitted to charge a price sufficient to recover its investment and earn a reasonable return, any requirement to provide unbundled access would violate the

The ISPs also ignore that the exemption in Section 621(c) covers more than just requirements imposed under Title II. When Congress has intended a statutory exemption to cover only specific provisions of the Act, it has explicitly stated as much.<sup>55</sup> In contrast, Section 621(c) is not a limited exemption from Title II regulation. It covers "regulation as a common carrier or utility," clearly indicating a much broader exemption that includes not only federal regulation under Title II, but also state and local common carrier regulation.

The legislative history of Section 621(c) confirms that Congress intended a broad exemption. The House Report prepared in connection with the 1984 Cable Act explains that a cable operator may not be "subject to rate of return regulation, or to the traditional common carrier requirement of servicing all customers indifferently upon request (except as otherwise provided in Title VI), to the extent the cable system is providing cable services. Nor would a cable service be subject to the regulation of rates, terms, or conditions, except as provided in Title VI."<sup>56</sup> As this passage illustrates, when a cable operator is providing cable services, it cannot be subject to any common carrier regulation—whether that regulation finds its source in Title II of the Act, the FCC's rules, or state law. Congress intended that any regulation of the rates, terms and conditions for cable services be based on Title VI, and nothing else.

The Supreme Court interpreted comparable language in *FCC v. Midwest Video*.<sup>57</sup> In that case, the Court struck down PEG and leased access requirements the FCC imposed on cable operators prior to the 1984 Cable Act. At the time, Section 3(h) of the Act provided that "a person engaged in . . . broadcasting shall not . . . be deemed a common carrier."<sup>58</sup> Although the Court had determined in a prior case that the FCC had Title I authority to regulate the cable industry because of cable's impact on the broadcasting industry,<sup>59</sup> it found in *Midwest Video* that Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems."<sup>60</sup>

The ISPs also have argued that a direct access requirement would not violate Section 621(c) because it would be consistent with other mandatory access requirements imposed on cable operators (e.g., PEG access under Section 611, commercial leased access under Section 612, program access under Section 628) that have not been deemed to violate the prohibition on common carrier regulation. But their direct access proposal does not fit within any of the existing access requirements contained in the Act. These existing requirements, as well as the general prohibition on common carrier regulation, are part of a comprehensive scheme of access requirements that has been established by Congress. Only Congress has the authority to alter this regime by adding new access requirements (within constitutional limits).<sup>61</sup> Any imposition of access requirements beyond those expressly authorized under these provisions would impermissibly frustrate the decisions Congress has made in establishing this regulatory regime.<sup>62</sup>

### 3. Neither Title I of the Act Nor Section 706 of the 1996 Act Grants Authority to Impose Common Carrier Requirements on Cable Operators.

In the absence of explicit authority under Title VI, the only possible sources of authority to impose access or unbundling requirements would be Title I, or Section 706 of the 1996 Act. As we show below, neither of these statutory provisions authorizes the FCC to impose common carrier regulations on cable on-line services.

Takings Clause of the Fifth Amendment, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

<sup>55</sup> See, e.g., 47 U.S.C. § 541(b)(3) (exempting telecommunications services provided by cable operators from Title VI requirements); 47 U.S.C. § 573 (exempting OVS providers from certain requirements of Title II and Title VI).

<sup>56</sup> H. Rep. No. 98-934, 98th Cong., 2d Sess. 60 ("1984 House Report").

<sup>57</sup> 440 U.S. 689 (1979).

<sup>58</sup> *Id.* at 699.

<sup>59</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>60</sup> *Midwest Video*, 440 U.S. at 704; *Id.* at 707 ("That limitation is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions.")

<sup>61</sup> *Id.* at 709 ("We think authority to compel cable operators to provide common carriage of public-originated transmissions must come from Congress.")

<sup>62</sup> See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion."); *Echostar Communications Corp. v. Comcast Corp.*, (rejecting program access complaint based on finding that programming at issue was not satellite programming, or equivalent to satellite programming); *Time Warner Cable v. City of New York*, 943 F.Supp. 1357 (S.D.N.Y. 1996) (prohibiting use of PEG channels for non-PEG purposes), *aff'd*, 118 F.3d 917 (2d Cir. 1997).

Section 4(i) gives the FCC authority to perform any act "not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). But Section 4(i) "is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory authority."<sup>63</sup> The provisions of the Act are sufficiently specific with respect to the type of access requirements that may be imposed on cable operators, and with respect to the type of companies that are subject to unbundling requirements, that no ancillary jurisdiction exists to expand those provisions without violating the regime established by Congress.<sup>64</sup>

Nor is there support for the exercise of Title I jurisdiction over cable operators under the theory that regulation is ancillary to the Commission's Title II regulation of telecommunications used by ISPs. Congress has explicitly provided that cable operators cannot be subject to regulation as a common carrier when they provide cable services. 47 U.S.C. § 541(c). The FCC cannot defeat the purpose of that prohibition by imposing common carrier regulation under the guise of Title I.<sup>65</sup>

Imposing an unbundling or mandatory access requirement under Section 4(i) also would be prohibited because it would be inconsistent with Section 230(b)(2) of the Act. Section 230(b)(2) provides that it is "the policy of the United States to preserve the vibrant free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*"<sup>66</sup> Time Warner is providing an "interactive computer service," and therefore the national policy established by Section 230 constrains the FCC's authority to regulate pursuant to Section 4(i).

Section 706 of the 1996 Act also provides no basis on which to impose unbundling and mandatory access requirements. Section 706(a) authorizes the FCC and the states to "encourage" the deployment of advanced telecommunications capability through "methods that remove barriers to infrastructure investment."<sup>67</sup> The methods urged by the ISPs would be completely inconsistent with congressional intent. Rather than encouraging deployment of advanced capabilities by removing barriers, a mandatory access or unbundling requirement would discourage infrastructure investment by imposing *new* regulations restricting a cable operator's ability to recover that investment and earn a return.

Section 706(b) requires the FCC to report on the deployment of advanced telecommunications capability, and to take action to accelerate deployment if it finds that deployment is not timely. The Commission recently released the report required under Section 706(b), concluding that "deployment of broadband capability is reasonable and timely."<sup>68</sup> With respect to access to cable systems, the FCC concluded that there was "no reason to take action on this issue at the present time."<sup>69</sup> Given these findings, Section 706(b) obviously provides no basis for imposing an unbundling requirement on cable operators.

#### 4. Additional Provisions of Title VI Restrict Local Authority to Impose Common Carrier Regulation on Cable Operators.

Because Congress has established that a cable operator cannot be subject to common carrier regulation, any attempt by a local government to impose common carrier requirements on a cable operator's on-line services would be preempted.<sup>70</sup> Notwithstanding the clarity with which Congress has spoken on this issue, a few local governments have suggested that various provisions of Title VI can be read to give them the authority to impose the type of requirements proposed by the ISPs. These arguments are wrong.

a. *Local governments are restricted in their ability to impose access requirements under Section 612.* A direct access or unbundling requirement would be inconsistent with the commercial leased access provisions of Section 612 of the Act. 47 U.S.C. § 532. Under Section 612(b)(1), cable operators are required to set aside channel ca-

<sup>63</sup> *California v. FCC*, 905 F.2d 1217, 1240-41, n.35 (9th Cir. 1990).

<sup>64</sup> *AT&T v. Iowa Utilities Board*, slip op. at 21-24.

<sup>65</sup> See *Midwest Video*, 440 U.S. at 708-09; *City of Dallas v. FCC*, slip op. at 18.

<sup>66</sup> 47 U.S.C. § 230(b)(2) (emphasis added). The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(e)(2). This definition is not mutually exclusive with the definition of cable service, *i.e.*, a service can be both a cable service under Title VI and an interactive computer service under Section 230.

<sup>67</sup> 1996 Act, § 706(a).

<sup>68</sup> *Section 706 Report* at ¶16.

<sup>69</sup> *Id.* at ¶101.

<sup>70</sup> 47 U.S.C. § 541(c); *Id.*, § 556(c).

capacity for "commercial use" by persons unaffiliated with the cable operator. For purposes of Section 612, "commercial use" is defined as the provision of video programming. Under Section 612(b)(3), Congress explicitly prohibited local franchising authorities, "as part of a request for proposals or as part of a proposal for renewal," from requiring a cable operator to "designate channel capacity for any use (other than commercial use by unaffiliated persons under this section) except as provided in sections 611 and 637." 47 U.S.C. § 532(b)(3) (emphasis added). Cable operators are free, however, to "offer in a franchise, or proposal for renewal thereof, to provide, consistent with applicable law, such capacity other than for commercial use by such persons." *Id.*

The mandatory access requirements of Section 612(b) cover only video programming; there are no requirements imposed on cable operators with respect to "other programming." Two consequences flow from this provision. First, it is clear that Section 612 provides no affirmative basis upon which a local authority may impose a mandatory access or unbundling requirement. Second, any attempt by a local franchising authority to impose a mandatory access or unbundling requirement in connection with a franchise award or renewal would be prohibited under Section 612(b)(3). Any argument that the language in Section 612(b)(3) permitting a cable operator to "offer . . . capacity other than for commercial use" somehow authorizes a franchising authority to require additional capacity obviously ignores the plain meaning of the statute and would not withstand judicial scrutiny.

*b. Mandatory access or unbundling may not be imposed as a condition of a franchise transfer pursuant to Section 613.* Local governments have in a few cases suggested that they have broad discretion to impose conditions in connection with local approval of a transfer, particularly under Section 613(d)(2) of the Act. This position also is without merit.

Section 613(d) generally prohibits a franchising authority from preventing a person from owning a cable system based on that person's ownership or control of other media of mass communications. Section 613(d)(2) reserves local authority to prohibit a person from owning a cable system where the acquisition of the system "may eliminate or reduce competition in the delivery of cable service." Assuming a franchising authority could make the requisite finding that a particular transfer will reduce competition (a finding that seems highly unlikely in the typical transfer situation), any conditions imposed by a local franchising authority pursuant to Section 613(d)(2) must be consistent with the Act.<sup>71</sup> Because Congress has specifically prohibited common carrier regulation of cable operators when they provide cable services, there is no basis for imposing a common carrier access requirement on cable on-line services as a condition of approving a transfer.

*c. Section 624 severely restricts local authority over cable on-line services.* Section 624 of the Act establishes the parameters for local regulation of services, facilities, and equipment provided by a cable operator. The ISP proposals raise concerns under three different provisions of Section 624.

First, Section 624(b)(1) provides that a local franchising authority may not "establish requirements for video programming or other information services" in a request for proposals for a new franchise or a renewal franchise. 47 U.S.C. § 544(b)(1). The intent of this provision is to make clear that it is the cable operator that gets to decide what programming is provided to subscribers. A local franchising authority cannot interfere with that discretion by establishing requirements in a request for proposal.<sup>72</sup> The prohibition contained in Section 624(b)(1) eliminates any discretion on the part of a local franchising authority to impose any type of direct access or unbundling requirement in the context of granting a new franchise or granting a renewal franchise.

Second, Section 624(e) provides that a local franchising authority may not "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or transmission technology." 47 U.S.C. § 544(e). Congress adopted this provision to "[prohibit] States or franchising authorities from regulating in the areas of technical standards, customer equipment and transmission technologies."<sup>73</sup> A mandatory direct access or unbundling requirement would violate Section 624(e) because it would

<sup>71</sup> See *Cable Alabama v. City of Huntsville*, 768 F.Supp. 1484 (N.D. Ala. 1991) (City had no right to block transfer because Congress "has denied to local governments the authority to regulate ownership or control of cable systems where ownership or control of any other media of mass communications are a concern").

<sup>72</sup> 1984 House Report at 68 ("The cable operator may not be required, either directly or indirectly, as part of the franchise renewal or for a new franchise to provide particular video or other information services, or even a broad category of video or other information service.").

<sup>73</sup> 1996 Conference Report at 168.

effectively dictate that a cable operator deploy equipment capable of providing access to multiple ISPs. When Time Warner provides on-line services today, critical network management functions are handled by a router at the cable system headend. Under a mandatory direct access regime, the cable system would have to add a second router to direct traffic to ISPs, and it likely would be required to deploy bigger routers, or additional routers, than it otherwise would. The broad language of Section 624(e) plainly indicates that Congress did not intend local authorities to adopt this kind of intrusive regulation.

Third, Section 624(f) provides that a local franchising authority "may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. §544(f). As explained above, nothing in Title VI expressly (or even implicitly) provides for the unbundling or direct access requirements advocated by the ISPs. Section 624(f) makes clear that without express authority, these requirements may not be imposed by a local franchising authority.

V. THE UNITED STATES CONSTITUTION DOES NOT PERMIT THE FCC OR LOCAL FRANCHISING AUTHORITIES TO IMPOSE A MANDATORY ACCESS OR UNBUNDLING REQUIREMENT.

A. *The Commerce Clause Prohibits A Local Franchising Authority From Requiring Mandatory Access Or Unbundling.*

Local regulation of cable on-line services would violate the Commerce Clause of the United States Constitution. The Commerce Clause grants Congress the power "to regulate Commerce . . . among the several States."<sup>74</sup> It is well-established that this clause not only gives Congress broad authority to regulate interstate commerce, but the "dormant" Commerce Clause prevents state and local governments from imposing requirements that unduly burden interstate commerce.<sup>75</sup> A state or local requirement may violate the dormant Commerce Clause if the burden on interstate commerce is "clearly excessive in relation to putative local benefits."<sup>76</sup>

Local regulation of the Road Runner service is fundamentally incompatible with the national and international nature of the service. The Road Runner service includes both local content produced by the cable system, and national content that is available over the nationwide Road Runner network. Road Runner also enables consumers to access the Internet, and thereby communicate on a nationwide and worldwide basis. There can be no doubt that the Road Runner service is an instrument of interstate commerce protected by the dormant Commerce Clause. As one court has stated, "the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations."<sup>77</sup>

The burden of any local requirement that Time Warner provide direct access to other ISPs would be "clearly excessive in relation to putative local benefits."<sup>78</sup> If this type of requirement could be imposed at the local level, the interstate services provided by Time Warner and Road Runner would be subject to a patchwork of disparate regulatory requirements. It would be virtually impossible for Time Warner to offer the service under these conditions.<sup>79</sup> Moreover, the common carrier-style regulation the ISPs seek to impose on Time Warner would constitute a fundamental change in the way the company does business. Time Warner would be required to invest in additional facilities to accommodate unaffiliated ISPs, and the features of

<sup>74</sup> U.S. CONST. Art. 1, §8, cl. 3.

<sup>75</sup> See, e.g., *Oregon Waste Systems v. Dep't of Environ. Quality*, 114 S.Ct. 1345 (1994); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

<sup>76</sup> *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (requirement to package fruit in state where it is grown "put a straitjacket on the . . . company with respect to allocation of interstate resources"); see also *Pioneer Military Lending, Inc.*, 2 F.3d 280, 283 (8th Cir. 1993) ("The burden a state regulation places on a single firm's interstate activities can be excessive under the Commerce Clause.").

<sup>77</sup> *American Library Association v. Pataki*, 969 F.Supp. 160, 173 (S.D.N.Y. 1997); see also *American Civil Liberties Union v. Johnson*, 4 F.Supp.2d 1029 (D.N.M. 1998) ("The Internet is an instrument of interstate commerce"); *GTE Telephone Operating Companies*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. October 30, 1998) (finding that telephone company ADSL service is jurisdictionally interstate).

<sup>78</sup> *Pike*, 397 U.S. at 142.

<sup>79</sup> See *Cox Cable Communications v. Simpson*, 569 F.Supp. 507, 522 ("It is one thing to exempt intrastate services from Federal jurisdiction. It is quite a different matter to argue that by virtue of this exemption plant used in common for both intrastate and interstate services . . . can be subjected to a melange of regulations, determined by each of the 50 separate jurisdictions," citing *Teletel Leasing Corp.* 45 FCC 2d 204, 219-20 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

the service offered by Time Warner would be adversely affected by multiple, unmanaged service providers accessing the cable operator's shared network.

The burden on Time Warner from this type of requirement would far outweigh any arguable benefit that local communities would receive under the ISP proposals. An unbundling requirement would not make available any information that is not already available because Time Warner's Road Runner service is completely open today, offering access to any Internet site. Furthermore, even if Time Warner could provide direct physical connections to multiple ISPs, doing so would result in significant costs. Regardless who incurred these costs directly, ultimately they would be borne by consumers. In the absence of any tangible consumer benefit, there is no justification for the substantial burden on interstate commerce presented by the ISP proposals.

## *B. Unbundling And Mandatory Access Requirements Cannot Be Justified Under The First Amendment.*

### *1. The Provision of Cable On-Line Services is Protected by the First Amendment.*

Unbundling and direct access requirements would seriously intrude upon the editorial autonomy of cable operators. The Road Runner service is an editorial product. Road Runner is entitled to substantial First Amendment protection in creating the service, and Time Warner is entitled to substantial First Amendment protection when it provides the service. By requiring cable operators to make their facilities available to unaffiliated ISPs, common carrier access requirements would impose a form of forced speech or association on the cable operator. Common carrier regulation of cable on-line services also presents the potential to interfere with Time Warner's provision of video programming services. If the purpose of such requirements is to override the editorial choices of Time Warner and Road Runner, strict scrutiny applies. Even if evaluated under the "intermediate" First Amendment scrutiny applied to such requirements as broadcast "must carry" rules, imposing common carrier requirements on cable on-line services would be unconstitutional.

The Supreme Court has made clear that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."<sup>80</sup> Any access requirement would implicate the First Amendment to the extent that it "reduce[s] the number of channels over which cable operators exercise unfettered control."<sup>81</sup> The Court has explained that a cable operator's editorial discretion logically extends to its choice of which services to offer—or not to offer. "Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."<sup>82</sup> As Justice Breyer explained, "compulsory carriage . . . exacts a serious First Amendment price. . . . This "price" amounts to a "suppression of speech."<sup>83</sup>

The burden of proof to support any new access requirements is particularly heavy where, as here, unbundling proponents are seeking to impose new requirements without any evidence that the free market is not working. Not only are there no congressional findings that a problem exists, the FCC recently found the marketplace is working to provide multiple broadband options to consumers. In this competitive environment, there simply is no basis for intruding on the First Amendment rights of Time Warner and Road Runner.

### *2. Common Carrier Regulation of Cable On-Line Services Would Not Withstand Even Intermediate First Amendment Scrutiny.*

As the Supreme Court made clear in its review of broadcast must carry rules, the government faces a significant burden to justify even content-neutral regulations that divest cable operators of control over their capacity. To justify any such requirements, the government must demonstrate that the "recited harms are real, not merely conjectural," and that any such rules will serve the stated interest "in a direct and material way" and the rules cannot restrict more speech than necessary to serve the stated interest.<sup>84</sup> After years of FCC and congressional investigations and litigation, the Court just barely found that the burden was met with respect

<sup>80</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*").

<sup>81</sup> *Turner I*, 512 U.S. at 637.

<sup>82</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995). See also *Pacific Gas & Electric Co. v. Public Utility Comm'n of Cal.*, 475 U.S. 1, 11 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>83</sup> *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174, 1204 (1997) (Breyer, J., concurring in part) ("*Turner II*").

<sup>84</sup> *Turner I*, 512 U.S. at 664.

to must carry.<sup>85</sup> But here, there is nothing to support the demands of unbundling or access for ISPs.

Proponents of unbundling face their greatest challenge in addressing the threshold question of any constitutional inquiry—whether the “need” for such access is based on anything other than speculation. The Supreme Court has made clear that the “mere assertion of dysfunction or failure in a speech market” is not sufficient to “shield a speech regulation from the First Amendment standards applicable to nonbroadcast media.”<sup>86</sup> Alleging market dysfunction is virtually impossible in the case of Internet access services, especially since the FCC has already concluded that the market is served by a multitude of players who are developing diverse technologies for serving their customers.<sup>87</sup> The conjectural loss of competition is all the more striking here, where the principal proponents of unbundling are the dominant players in the market for Internet access.

It also would be very difficult for the advocates of unbundling to demonstrate that ISP access requirements would serve their asserted interests in a “direct and material way,” as established precedent requires. Because Road Runner already provides customers with access to all content that is available on the Internet, including access to AOL and other ISPs, there is no information that would be made available through an unbundling requirement that is not already available without that requirement. There is no public interest to be served by unbundling or mandatory access requirements; there is only the special pleading of the policy’s proponents. Existing market participants “have no entitlement that permits them to deflect competitive pressure from innovative and effective technology.”<sup>88</sup>

Finally, unbundling advocates bear the burden of demonstrating that access requirements do not burden substantially more speech than necessary to further the stated interests.<sup>89</sup> Mandatory access requirements for cable on-line services would be both excessively burdensome and unnecessary. The impact of an unbundling or mandatory access requirement would be far greater than any existing access requirements imposed on cable operators. For example, while a cable operator must set aside capacity for must carry channels, the number of channels is limited, both by the terms of the Act and by the limited number of stations eligible for must carry status. In contrast, a requirement to provide direct access to ISPs creates the possibility of hundreds, or even thousands, of ISPs using Time Warner’s facilities. Not only would this interfere with Time Warner’s ability to provide on-line services, the extra bandwidth necessary to meet ISP demand potentially threatens Time Warner’s ability to provide video programming services.

Any burden on speech is excessive if non-regulatory means are available that would serve the asserted interest.<sup>90</sup> In this case, Section 706 identifies a number of far less intrusive methods by which regulators may encourage deployment of high-speed Internet access services, such as regulatory forbearance (e.g., limits on franchise fees for cable on-line services) and removing barriers to infrastructure investment. Any regulator serious about promoting the development of high-speed services should pursue these types of policies, rather than punishing innovation and investment through burdensome government regulation.

### C. Imposition Of An Unbundling Or Mandatory Access Requirement By A Local Government During An Existing Franchise Term Would Violate The Contracts Clause.

It is well-established that a franchise is a contract that is protected from impairment by local government under the Contracts Clause of the United States Constitution.<sup>91</sup> As one court has stated, “[f]ollowing necessarily from the accepted doctrine that a franchise constitutes a contractual right is the inescapable conclusion that those contract rights are constitutionally protected from subsequent impair-

<sup>85</sup> See generally, *Turner II*, 117 S. Ct. at 1189–1196.

<sup>86</sup> *Turner I*, 512 U.S. at 640.

<sup>87</sup> Section 706 Report at ¶4.

<sup>88</sup> *National Ass’n. of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). The FCC has long emphasized that “it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public.” *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 F.C.C.2d 676, 689 (1982).

<sup>89</sup> *Turner I*, 512 U.S. at 665.

<sup>90</sup> It is noteworthy that must carry rules were upheld based on findings that “[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services.” *Turner I*, 512 U.S. at 633 (quoting Cable Act, §2(a)(17)). Here, however, any subscriber may freely obtain access to AOL or another ISP, either through Road Runner or by other means.

<sup>91</sup> U.S. CONST., Art. 1, §10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”); *McQuillin, Municipal Corporations*, §§34.06, 34.44.

ment by municipal authority. Further, the contract obligation between the parties would of necessity become impaired when an ordinance alters its terms by imposing new duties and conditions."<sup>92</sup>

The existence of a franchise does not preclude a municipality from reasonably exercising its police power to protect the public health, safety and welfare. But the police power is not absolute. There must be a "significant and legitimate public purpose behind the enactment of the regulation, and the regulation must not unreasonably intrude into the parties' bargain to a degree greater than is necessary to achieve the stated public purpose."<sup>93</sup> Among the types of provisions that courts have struck down as unduly burdening an existing franchise are increased fees,<sup>94</sup> imposition of a new permit requirement,<sup>95</sup> a diminution in the service area,<sup>96</sup> and a change in the term of the franchise.<sup>97</sup>

Under these standards, imposition of a mandatory access or unbundling requirement plainly would impair any existing Time Warner franchise in violation of the Contracts Clause. A requirement to offer unbundled transport service or to provide competitors with access to Time Warner's network is fundamentally different than any requirement contained in any Time Warner franchise, and not something Time Warner would have accepted in franchise negotiations.

#### VI. CONCLUSION

It would be a terrible mistake from a public policy perspective to impose any type of mandatory access or unbundling requirement on cable operators that provide on-line services. Common carrier regulation of cable on-line services would increase the cost and degrade the quality of service, while providing no material benefit to consumers.

Not only would mandatory direct access to cable operators' high-speed services be a foolish public policy, there is no legal basis on which the FCC or a local franchising authority may impose it. The Communications Act contains no grant of authority for such a requirement and it specifically prohibits common carrier regulation of cable operators when they provide services like Road Runner. At the same time, intrusive regulation of cable on-line services would violate the Constitution in multiple respects.

For any on-line customer of a cable operator, access to any site on the Internet, including any ISP site, is only a click away today. There is no reason to heed the ISP calls for a new regulatory regime for cable on-line services. Attempting to impose such a regime would stifle innovation, slow investment, and trigger litigation in which the cable industry must ultimately prevail. The downside of regulation is multifaceted, while there is no upside. This tempest exists merely because ISPs want to use an unnecessary and inappropriate regulatory tool for their own competitive ends.

MARC APFELBAUM, *Senior Vice President  
and General Counsel,  
Time Warner Cable.*

JAMES CHIDDIX, *Chief Technical Officer,  
Time Warner Cable.*

Mr. HYDE. Mr. Windhausen.

#### STATEMENT OF JOHN WINDHAUSEN, PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, WASHINGTON, DC

Mr. WINDHAUSEN. Thank you, Mr. Chairman, Mr. Conyers, and other members of the committee. It is a pleasure to be here as well. I am the president of ALTS, which is the Association for Local Telecommunications Services. ALTS is the leading national trade

<sup>92</sup>*Brauer v. Iroquois Gas Corp.*, 381 N.Y.S.2d 166, 171 (1975) (rejecting attempt by city to enforce term limit and gross receipts fee contained in ordinance adopted after grant of franchise).

<sup>93</sup>*Brevard County v. Florida Power & Light Co.*, 693 So.2d 77, 81 (1997) (striking down ordinance that imposed a permit requirement on a franchisee not previously subject to such a requirement).

<sup>94</sup>*City of Hayden v. Washington Water Power*, 700 P.2d 89 (Id. 1985).

<sup>95</sup>*Brevard*, 693 So.2d at 81.

<sup>96</sup>*City of Tukwila v. City of Seattle*, 414 P.2d 597 (Wash. 1966).

<sup>97</sup>*Brauer v. Iroquois Gas Corp.*, 381 N.Y.S.2d 166, 171 (1975).

association representing the competitors to the local telephone companies. We are facility-spaced competitors. We are in one sense the companies who are where MCI was 20 years ago, only we are competing for local telephone service, not long distance. ALTS does not represent long distance companies.

We do not have a position, perhaps the only witness here that does not have a position on the cable open access issue. Our primary and principal focus is on the openness and unbundling of the local telecommunications marketplace. And I would like to state for this committee that our position is that we don't need new legislation to consider efforts to open up or exempt the phone companies from their obligations to open their local telephone network. We don't need new legislation. What we need is stronger enforcement of the existing legislation embodied in the Telecommunications Act of 1996.

ALTS as an association has been around for about 12 years, but it has only really taken off in the last 3 years since passage of that Telecom Act. As an association, we had 12 members in 1996. We now represent over 70 companies competing for local telephone service. And, in fact, there are now over 150 companies nationwide who have entered that market. Most of these companies did not even exist until the Telecom Act passed.

These companies, which I'll refer to as CLECs, competitive local exchange companies, have raised billions of dollars in capital. They have invested in infrastructure, they have invested in deploying their own fiber optic cable and switches, and we are providing new advanced high-technology broadband services to both business and residential consumers. All of this activity has taken place because of the passage of that 1996 act and because of that act's requirement, that is, the local telephone market be opened up to competition.

In fact, we are driving the deployment of broadband technologies in this country. We are the originators of the deployment of DSL services. And it is only because of the competition that our companies are bringing to the marketplace that the Bell companies and GTE are beginning to roll out their own DSL broadband services. They are doing so in response to the competitive threat that they are beginning to feel now from our companies.

Having said that, there is a lot more that can be done. We could do even more if we could truly get the telephone companies to comply with the obligations they currently have under current law to open up their networks. Three years later, 3 years after the Telecom Act passed, not a single one of the incumbent local telephone companies is in compliance. Not a single one of those local telephone companies has opened their networks to competitors. We constantly encounter systematic operational difficulties in obtaining access to that local telephone company network.

And as a result, our market share today is still small. We have approximately 5 percent of that local telephone marketplace. We are growing. We have doubled our market share each of the last couple of years, but the local telephone market is still very far from being competitive.

Now, we share the objectives of the authors of this legislation to promote broadband deployment. But our concern is that these bills

would, in fact, slow down the deployment of broadband technologies; they would not enhance it.

Why would they slow it down? For two principal reasons: first, they would give the phone companies exemptions from their requirements to open up their local network. They would slow down our ability to compete with them, and then they would slow down the telephone companies' roll-out of advanced technologies because they would not be facing the same competitive threat.

Furthermore, the bill would slow down the deployment of advanced broadband technologies by giving RBOCs, Regional Bell Operating Companies, premature entry into the long distance marketplace. As Mr. Conyers mentioned in his opening comments, about 50 percent of the traffic today is data traffic. If you allow the RBOCs to provide interLATA services for data, that removes a significant incentive for them to open up their networks. The goal of the Telecom Act of '96 was to get those phone companies to open their local networks first before they get into the long distance market.

So my suggestion is if you want to promote broadband deployment, the last thing you want to do is to grant exemptions that would allow the telephone companies to close down their networks. The telcos are not the solution; they are the problem. The solution is to continue to promote competition for local telephone services and to enforce the current act. Thank you very much.

Mr. HYDE. Thank you, Mr. Windhausen.

[The prepared statement of Mr. Windhausen follows:]

PREPARED STATEMENT OF JOHN WINDHAUSEN, PRESIDENT, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, WASHINGTON, DC

Good morning Mr. Chairman and members of the Committee. My name is John Windhausen. For many years, I served on the staff of the Senate Commerce Committee, where I was fortunate enough to play a part in the drafting of the Telecommunications Act of 1996. Today, I am the President of the Association for Local Telecommunications Services ("ALTS"). ALTS is the leading national industry association responsible for promoting facilities-based competition for local telecommunications services. ALTS represents over 70 competitors for local service that build, own, and operate competitive local telecommunications networks. (ALTS does not represent the three traditional long distance companies—AT&T, MCI WorldCom, and Sprint.) In short, ALTS is the association that is trying like mad to bring about all the successful changes to the local telecommunications landscape that Congress intended back in 1995 and 1996.

A. INTRODUCTION

Thank you for the opportunity to discuss the bills sponsored by Congressmen Goodlatte and Boucher. While we share the objective of these bills—to promote broadband telecommunications capability for all Americans—ALTS must strongly oppose them. These bills would not speed up broadband deployment; they would do just the opposite. By exempting the incumbent local exchange companies (ILECs) from the market-opening provisions of the Telecommunications Act of 1996, and by giving the Regional Bell Operating Companies (RBOCs) premature long distance entry for data services, these bills make it substantially less likely that the incumbents will open their networks to competition. As a result, these bills would make it ever more difficult for competitors to raise capital, obtain collocation and other necessary elements from the incumbent local telephone companies, and deploy advanced broadband technologies to consumers.<sup>1</sup>

<sup>1</sup> ALTS has no position on the question of whether cable companies should be required to open their plant to competing internet providers. ALTS' sole focus in this testimony are the provisions affecting competition for local telephone services.

Furthermore, this legislation is likely to slow down deployment of advanced technologies by everybody, competitors and incumbents alike. Robust competition, as envisioned by the authors of the Telecommunications Act of 1996, is the strongest inducement to deployment of these technologies. If competitors are discouraged from investing in these capabilities, the incumbent local telephone companies will have no incentive to deploy them either.

To explain the ALTS position further, let me provide the Committee with some additional background.

#### B. THE TELECOMMUNICATIONS ACT OF 1996: A BRIEF REVIEW

Over the past 25 years, we have learned that monopolies do not best serve the public interest. Monopolies do not respond to customer demand; they offer few service choices; they do not innovate; they do not price competitively; and, they use their market power to squash new entrants. Over 20 years ago, federal policy makers moved to end AT&T's monopoly in the provision of long distance services and the manufacturing of telecommunications equipment. The results have been most impressive: prices have dropped tremendously, new services constantly come to market, and huge amounts of capital are being expended to upgrade plant with the latest technologies.

The Telecommunications Act of 1996, which many of you on this Committee worked hard to shape, sought to bring the same benefits of competition to the local telephone marketplace. After over a decade of work, the 1996 Act passed overwhelmingly, and was supported equally by the RBOCs and other ILECs, the long distance companies, and by the new entrants into local markets—the competitive local exchange carriers (CLECs) who ALTS represents.

The new Act focused on turning the last bastion of monopoly power, the local telephone markets for voice, data, and video services, into a competitive market. The Act thus requires the RBOCs to open the local market to competition first, and then allows them to enter the long distance market. The theory of the 1996 Act was to encourage the RBOCs to open their local networks to competition by granting them the right to enter the long distance market thereafter. Congress realized that, if the RBOCs were allowed into long distance first, they would have no incentive to open their local networks to competitors and the legislation would not achieve its purpose.

#### C. THE STATUS OF LOCAL TELECOMMUNICATIONS COMPETITION

Three years after passage of the 1996 Act, there is substantial real world evidence that it is beginning to work. Well over one hundred and fifty CLECs have entered the local market since the Act's passage. These companies are rapidly building high-speed voice and data networks serving residential and business customers. Collectively, CLECs have doubled their market share each of the past two years. Furthermore, CLECs have already deployed about 17% of the nation's fiber optic cable capacity.

CLECs are making particular progress in deploying advanced, broadband technologies. CLECs expect to deploy advanced DSL service to over two-thirds of the nation's population in the next two years. (DSL, which stands for Digital Subscribe Line, can provide data services to consumers over a copper wire over 100 times faster than a typical 56k modem.) Because of this competitive challenge, all the RBOCs and GTE announced plans to deploy their own DSL services.

Even though the Act is beginning to work, we are still far short of the robustly competitive local telecom marketplace that the authors of the Act envisioned. Collectively, CLECs serve about 3% of all the country's local telephone service customers, and collect about 5% of all local telecom service revenues. ALTS' goal is to garner 25% share of the local telecommunications marketplace by the year 2003. Clearly, our ambition is lofty, but the market is far from competitive today.

There are many reasons why the local telecommunications market still falls short of being robustly competitive. Competitors still encounter excessive and discriminatory regulation by municipalities. Many CLECs have difficulty obtaining access to buildings, which hinders the ALTS companies' ability to bring consumers the choices that are being promised them. Further, the court appeals mounted by the ILECs against the policies of the Federal Communications Commission (FCC) and state regulators have slowed down the implementation process. The FCC has not yet completed its reform of the universal service program that would allow competitors to compete for the subsidies that currently are handed out to the rural telephone companies. Each of these factors affects the pace of local telephone competition.

Perhaps the largest impediment to local telephone competition, however, is the RBOCs' and the other ILECs' refusals to open their markets to competition. To put it simply, they have not fulfilled their part of the bargain. They continue to discriminate against CLECs, often refusing to provide them with the same access to the network that they provide to themselves. *In fact, after three years, not a single telephone company has complied with the market-opening requirements of the 1996 Act. Not a single ILEC provides non-discriminatory treatment to CLECs.* Thus, CLECs continue to have difficulty ordering loops, collocating in central offices, acquiring number portability to allow consumers to switch seamlessly to a CLEC. All these problems delay the growth of competition. This is the problem the Committee should focus on solving. The Committee should not reward the ILECs for fighting the Act in a clear effort to preserve their local monopolies.

D. WHY THE RBOC/ILEC ARGUMENTS FOR AMENDING THE KEY LOCAL COMPETITION PROVISIONS OF THE 1996 ACT ARE WRONG.

Despite their failure to open their networks to competition, several of the RBOCs and GTE are now proposing that they be granted exemptions from the market-opening requirements of the 1996 Act. These companies propose several arguments to support what they call "regulatory relief". ALTS urges the Committee not to accept these arguments at face value. Most of these arguments are specious and simply wrong. The ILEC arguments can be summed up as follows: the Act was not meant to apply to data; the ILECs must be deregulated in order to encourage broadband deployment because broadband is not being deployed quickly enough; and, the RBOCs and other ILECs are in the same market position as new entrants when it comes to deploying data. Let me address each of these in turn.

1. *ILEC Argument:* The 1996 Act was not meant to apply to broadband data services. *ALTS Response:* The authors of the 1996 Act intended to promote competition for voice data and video services, which is why the Act applies to all "telecommunications services."

The allegation that the authors did not intend the new law to apply to broadband data services is sheer nonsense. The Act's definition of "telecommunications services" is unambiguous: there is no distinction between voice, video and data services. Nor should there be. The basic telephone network has been used to provide data services for decades, and the local telephone companies used their network to maintain a monopoly over voice, video and data services. For this reason, the 1996 Act directed the incumbent local telephone companies to unbundle their network into piece parts that could be used by competitors to provide any type of telecommunications services, without regard to content.

Further support for this conclusion can be found in numerous places. First, there are many other provisions of the Act that expressly apply to data and Internet services, including: the Exon indecency provision, the universal service e-rate program for schools and libraries, the section 271 (RBOC long distance entry provision) exception for delivery of Internet services to schools, and the recently used section 706, which requires the FCC regularly to examine the state of broadband deployment. Second, there are a plethora of statements made at the time the bill was passed about the new Act's potential to accelerate broadband deployment. Finally, there is the FCC's decision this past year that the Act applies equally to voice and data—a conclusion not overturned in the courts.

2. *ILEC Argument:* The ILECs need regulatory exemptions from the pro-competition provisions of the Act in order to give the ILECs sufficient incentives to deploy advanced broadband services. *ALTS Response:* In fact, the pace of broadband deployment is accelerating faster than ever before because of the passage of the 1996 Act.

The proponents of the new legislation contend that the nation's customers are being deprived of broadband services. Here again, their argument has no support. The rollout of broadband services is forging ahead just as the authors of the 1996 Act intended. Start-up entities have used the new law to enter markets and interconnect with and gain access to the RBOCs' networks. Companies such as @Link, Logix, and McLeod Communications are rapidly deploying broadband data services in second, third and fourth tier cities and in rural areas. They then have taken technologies that the ILECs have long ignored, refined them, and rapidly brought them to market. In response to this new competitive threat, the risk-adverse RBOCs and other ILECs have finally woken up and responded. They too are deploying broadband. At any of the many Wall Street conferences held this year about the telecommunications industry, you would hear RBOC CEOs line up to tell about

their plans to expedite their broadband deployment. As a result, at the end of the 1st quarter of this year, both the competition and the ILECs were passing over 20 million customers, a huge leap in deployment. It is clear that we are the in the midst of a broadband gold rush all because of the new law.

This viewpoint is supported by statements of CLECs, ILECs, and Wall Street analysts. Here are just a sampling:

We are aggressively expanding our nationwide footprint and adding subscriber lines. The demand for broadband service is very real, and we offer a high-speed alternative to over 11 million homes and businesses we reach today. Robert E. Knowling, Jr., President/CEO, Covad Communications (a CLEC)

Clearly, in the words of one our strategic allies, Cisco's John Chambers, we "get" it when it comes to data. We're in the data game to stay. Our overall data revenues grew 29 percent in 1998 to nearly \$1.3 billion. We expect even more significant gains from the portion of that business focused specifically on Internet-related services.

Sol Trujillo, President/CEO, US West

ADSL [broadband services] to the rescue! All of the large LECs have announced ADSL roll-out plans. Certainly, the explosive demand for high-bandwidth services is motivation enough for large LECs to deploy ADSL quickly. Another important motivating factor is the threat of competition. Prudential Securities, March, 1999

Our industry checks suggest that the rollout of xDSL is proceeding faster than expected.

Morgan Stanley, May, 1999

**3. ILEC Argument:** The ILECs are new entrants in the data market, just as are the CLECs, and thus the ILECs' data services should not be regulated. **ALTS Response:** The incumbent local telephone companies continue to hold a monopoly over the loop and other local network facilities that are used to carry voice, video and data calls.

The RBOCs contend that because no provider has many broadband subscribers, the RBOCs and other ILECs have no market power in broadband and thus should not be regulated. This argument misses the reason why the ILECs are regulated in the first place: their "bottleneck" networks. It is this network—and not the services that ride on the network—that is the key focus of the market power inquiry. The authors of the 1996 Act understood this point in ensuring that the local network would be unbundled into piece parts that could be used for any telecommunications services that customers demand. Allowing the ILEC to exempt the parts of their network from the unbundling requirements will cause two harms: First, it will decimate data competition because competitors need collocation, access to the loop and other network facilities to provide competitive data services. Second, it would decimate voice competition as well, because voice competitors also rely on those same network facilities.

The RBOCs and other ILECs are not constructing new networks that will be used exclusively for data. Rather, just as they have done with previous upgrades of their network to accommodate new technologies, they are using their traditional network to provide broadband. As the RBOC SBC Communications says on its web page: "SBC's competitive advantage lies in the strength of its existing network. SBC's expansion of its data capabilities represents the emergence of packet-switching technology, which the company began implementing years ago into its existing network." The fact that the RBOCs are moving into data using their existing infrastructure should not be surprising. After all, they each have tens of billions of dollars already invested in these networks, and these networks reach every customer.

#### E. THE TELECOMMUNICATIONS INDUSTRY BENEFITS FROM REGULATORY CERTAINTY.

The 1996 Act gives great impetus for investment in advanced telecommunications facilities for two reasons: it opens markets, and it creates certainty. In three years, the Act has produced tens of billions of dollars of new investment. In the three years since passage of the 1996 Act, CLECs have raised more capital than all the previous years combined. Facilities-based CLECs are rapidly building new, sophisticated networks, and ILECs are upgrading their old ones. Those happiest with this development are customers, who finally have suppliers who want to meet their demands, and equipment vendors, who are selling everything they build and bringing out new products every day. So long as competition is allowed to develop and gain greater traction, this investment is sure to continue.

The opposite is also true. It should come as no surprise to the Members of the Committee that legislative activity to alter the Act, especially to roll back pro-competitive rules, will freeze this investment. As everyone knows, investors abhor uncertainty. Thus, there is a real downside to legislative activity so soon after new rules have been put in place.

#### F. SPECIFIC PROBLEMS WITH H.R. 1685/1686

There are at least four major problems with the broadband deployment approach proposed in the Goodlatte-Boucher bills.

First, the bills appear to require all local exchange carriers, incumbent carriers and competitive carriers, to develop plans to provide broadband services on an unregulated basis. The bills thus improperly treat all local carriers the same whether they have market power or not. This is in direct contrast to the 1996 Act, which only requires the incumbent local exchange companies to unbundle their networks because of their monopoly, bottleneck control over necessary facilities. The Goodlatte-Boucher bills would thus underregulate the incumbent provider, exempting them from the market-opening requirements of the 1996 Act, and overregulate the competitive carriers.

Second, the incumbent provider would not be subject to the unbundling requirements of section 251(c)(3) and resale requirements of section 251(c)(4) if it provides or promises to provide conditioned loops. As mentioned above, the ALTS companies are primarily facilities-based providers that depend upon the full range of unbundled network elements. In 1996, the FCC identified seven network elements that must be unbundled, and it may expand this list in the current proceeding undertaken to consider the remand from the recent Supreme Court decision. To exempt the ILECs from providing all the network elements on an unbundled basis based upon their provision of only one of these elements (loops) would deprive competitive, facilities-based companies of several of the necessary elements they need to compete. Furthermore, no exemptions should ever be granted today to the ILECs based upon their promises to provide anything in the future. We have enough experience of ILEC promises to know that these promises are often unfulfilled.

Third, these bills undermine the theory of the 1996 Act by immediately allowing the RBOCs to provide long distance data services. ALTS does not have major inter-exchange carriers as its members. So, we are not attempting to keep the RBOCs out of the long distance market to protect our long distance market share. Our support for section 271 stems from that fact that it is the only provision of the Act that gives the RBOCs an incentive to open their markets. It is common knowledge that today the telecommunications networks carry more data traffic than voice traffic and that the differential is expanding daily. Allowing them to provide long distance data services is thus no "incidental" exception. It goes to the very core of how telecommunications services are provided today. Allow them this "exception", and I can assure you the RBOCs will have almost no incentive to open their markets.

The final problem with these two bills is their effort to amend the antitrust laws. The telecommunications industry is already subject to the federal antitrust laws. These laws are well known and have proven effective. The new provisions proposed in these bills that apply to ILECs would weaken these already existing requirements.

These four problems—in conjunction with the need to enforce the existing Act and promote certainty—lead ALTS to oppose these bills.

#### F. CONCLUSION

This Committee played a lead role in developing the Telecommunications Act of 1996. The Act established the correct, pro-competitive, approach to deploying advanced broadband technologies. After much delay brought about by the reluctance of the ILECs to comply with the 1996 Act, it is producing significant benefits. We are on the verge of the true information superhighway reaching all homes and businesses. All it takes is strict adherence to the 1996 Act. We can then rely on competition to drive investment and innovation. If, however, you decide to undo the Act, there will be a significant cost: capital will dry up and broadband deployment will in fact slow. Don't let this happen.

Finally, to the extent the Committee wishes to take action to advance deployment of broadband services, we recommend the following actions:

1. Give the FCC the resources to enforce its rules; the ILECs should no longer be allowed to ignore them by trying to run out the clock;
2. Expand the FCC's legal authority to impose penalties on the ILECs for failing to open up their local networks;

3. Urge the FCC to complete its universal service proceeding; without subsidies that are explicit and available to competitors, it will be virtually impossible to bring competition to rural areas.

Thank you.

Mr. HYDE. Mr. Jacobs.

**STATEMENT OF TOD JACOBS, SENIOR TELECOMMUNICATIONS ANALYST, SANFORD C. BERNSTEIN & CO., INC., NEW YORK, NY**

Mr. JACOBS. Thank you. Mr. Chairman, Mr. Conyers, members of the committee, let me first give you two words on Sanford Bernstein, the company I work for. First off, we are almost unique on Wall Street in that we don't do investment banking. So my opinions are my own. I only have one set of clients, that is, global money managers. And I only have one mandate, that is, to try to give them good advice.

Now, relative to the debate taking place today, I think one of the problems when you get involved with debates like this is that you tend to get lost in the details and lose sight of the big picture.

What is the big picture? In my opinion, there are basically three related questions. One is what is the path to telecom competition in the local exchange? Two, what is the path to broadband competition? And three, how are those two issues related?

Now, relative to the goals, I think the Telecom Act is relatively clear. If you had a 9-year-old read the act, once he woke up from it, he would basically argue that there are two pieces in the act that are important. One is that the RBOCs are required to accommodate local competition, and two is that if they do so, they get into long distance as a reward.

How are we faring so far? If you look at the exhibit in my written testimony, what you will see is that on average the RBOCs, 3 years after the passage of the Telecom Act, have lost approximately  $4\frac{1}{2}$  to  $6\frac{1}{2}$  points of market share. Now, if you cut in a little bit more finely, what you find is that in residential they have lost only about 1 percent. So really all the action is taking place with respect to business customers. And it is simple to understand why. A business access line is about five times more profitable than a residential access line. They are also much more geographically clustered. It is almost impossible to economically, efficiently, go after the residential marketplace with facilities.

So what most of the carriers had hoped for was a viable resale option. Now, in 1996 the FCC attempted to push a strategy called UNE-P. UNE-P was effectively a very highly discounted form of resale. But the reality was that the RBOCs found UNE-P something that they couldn't accept. So they went to court led by Mr. Barr on this panel, and they were quite successful in overturning legally the mandate that the RBOCs offer UNE-P to their competitors. As a result, there was no effective other way to get into the local markets, especially for residential, other than facilities. Plain old resale, which is what we still have in front of us in most States, simply is not economically viable. That is why all of the long distance carriers pulled out of the residential markets.

Now with respect to all of that, there was only really one company who ultimately still had to make a decision to figure out how to get into residential. That is AT&T. The sad fact for AT&T is that

the company has a \$23 billion portfolio of consumer long distance revenues. They are 60 percent market-share holders in the consumer long distance market. And the ultimate knowledge that AT&T had, was that eventually the RBOCs would get into the business and that since RBOCs will easily be able to bundle long distance service in with local service, and AT&T had no ability to bundle in local with long distance, that meant that AT&T was eventually going to get crushed by the RBOCs when the RBOCs entered those markets.

That sad fact is that's what drove AT&T to acquire TCI. Now, make no mistake about it, the concept of AT&T acquiring TCI is not that AT&T likes the cable business. To the contrary, this was a very expensive, highly dilutive, very complicated transaction for AT&T. Their stock got crushed for a number of months afterwards. The sad fact is, again, that AT&T for defensive reasons has moved into the cable business.

Now step two is AT&T is a national company. TCI is only regional with about 18 million homes passed. So AT&T couldn't stop with TCI if it was going to build out a national footprint to enter the local telephone markets. And thus AT&T pursued a number of resale deals with other cable companies.

Its inability to pursue those deals effectively was what drove the company ultimately to try to merge with Media One, which is pending currently. Media One happens to be a small company; but it is the key in many ways to AT&T's consolidation of a near-nationalwide footprint. That is why the company was willing to overpay for Media One, in our opinion.

So point one in all of this is that in reality if what you are after is local telecom competition, there is only one company that will conceivably bring it to you because there is only one company incented properly to do so and that is AT&T with the cable telephone strategy.

Now, what does all of that have to do with broadband and open cable? The answer is everything. Because when you buy a cable company if you are AT&T, if you spend \$3,300 to \$3,400 per subscriber, then you pay \$150 or \$200 per home passed to upgrade to two-way; and then you pay \$500 on average per home over the next few years to add telecom electronics to add an actual customer, there is no way you are going to get a return on capital just by getting hold of telephone and basic cable revenues. There is no way to do it. The only way you are going to get a return on capital and therefore the only reason you are going to go forward with the strategy and invest is if you are able to turn the platform into a broadband platform for multiple services including high-speed data. And that is exactly what AT&T is attempting to do.

Parenthetically, there are analysts on Wall Street currently who believe that AT&T will not be able to drive an adequate return even with high-speed data and everything that they are involved in.

So I think that the reality here that you are facing is a policy question, not a narrow legal argument. If you want to attain to local telecom competition, the only company that is going to do it for you because they are the only one incented—is AT&T. The only way they are going to be properly incented, because the only way

they will drive a return on capital is if they are incented properly in the broadband space as well.

As investors and as an advisor to investors, the first thing that any investor would do is to attempt to deny capital to AT&T in its strategy if we believed that there was uncertainty as to its ability to get a return on that capital.

The open cable issue, from my stand point, is a policy issue which creates more uncertainty around this build-out; and, therefore, I would be the first one to take away my buy recommendation on AT&T if I believed that the actual economic outcome is going to be an uncertain one.

Now, there are some concerns that other companies have. From AOL's perspective, will they get crushed if they get denied access on demand to the broadband platform on cable? So point one there, I think AOL has about 16 million customers at last count; cable has 800,000, so AOL doesn't seem to be in imminent danger of being wiped out.

Two, the company has successfully negotiated resale deals for broadband ADSL deployment with two RBOCs, and I think more deals are pending. So wherever the RBOCs are able to go, AOL will be able to go. And, three, Wall Street analysts, like myself, are all pushing companies like AT&T to negotiate with AOL because that is the smartest thing that they can do for a number of reasons.

Now, from the RBOC perspective, there is another issue. DSL has been around for a long time. The RBOCs didn't ever begin really pushing it aggressively until now. Why is that? Because cable is building out now. The other issue, since the RBOCs only reach 40 to 50 percent of their homes with DSL for a number of reasons is that they are going to have to spend somewhere—order of magnitude—near \$10 billion or more to get ubiquity. Why would they want to deploy capital to do that? Simple. Because cable is doing the same thing.

So in my opinion, just to finish up, the real issue here is: where do you want the competition and do you want it? Cable will build out because they are incented to build out. If they lose the incentive, they won't build out. If they don't build out, the RBOCs won't build out. So essentially, I think what you are faced with is a policy choice between robust competition and two pipes into the home plus all the other pipes being developed or effectively no pipes.

Thank you very much.

Mr. HYDE. Thank you, Mr. Jacobs.

[The prepared statement of Mr. Jacobs follows:]

PREPARED STATEMENT OF TOD JACOBS, SENIOR TELECOMMUNICATIONS ANALYST,  
SANFORD C. BERNSTEIN & CO., INC., NEW YORK, NY

Mr. Chairman . . . Members of the Committee. Thank you for inviting me here today to address the "Internet Freedom Act" and "Internet Growth and Development Act of 1999." My name is Tod Jacobs, and I'm senior telecommunications analyst at Sanford C. Bernstein & Company. Bernstein is an investment management and research firm; one part of the firm manages about \$90 billion in equity and fixed income funds. The other side, where I work, advises money managers globally on a number of key industries. My job is to forecast the growth and earnings and stock performance of the telecom industry as well as its largest companies, including the Baby Bells (RBOCs, or regional Bell holding companies), the large long distance carriers and several wireless carriers. Our firm is somewhat unique among brokerage firms in that we do not engage in investment banking; that is, we don't work for any of the companies we cover as analysts. We therefore avoid conflicts of inter-

est, and have the ability to speak our minds without fear of repercussion. My only clients are the analysts and portfolio managers charged with investing in telecom stocks. I am neither a lawyer nor regulatory expert nor engineer, but rather deal with all issues relevant to telecom investing. My only mandate is to be right. And for the record, I'm currently favoring long distance companies such as WorldCom, Sprint and AT&T, and have neutral ratings on the RBOCs. And indeed, I was quite bullish on the RBOCs from early 1997 through June of 1998, when AT&T announced its acquisition of TCI—a transaction that brought with it for the first time the specter of facilities-based local residential competition to the RBOCs. Also for the record, my colleague Tom Wolzien, who covers video media and online, currently has buy ratings on AOL and MediaOne, and neutral ratings on Time Warner and Cox

The bills before you have, in my opinion, been defined through three primary goals:

First, to unfetter the RBOCs relative to certain obligations they bear to provide discounted resale and unbundled access to their networks to competitors. Second, to fetter the cable companies with obligations that are quite similar to those that would be at the same time lifted from the shoulders of the RBOCs. Third, to loosen certain business-line restrictions shouldered by the RBOCs in relation to the transport of data services across LATA boundaries.

It's my intention to focus on the issue of open access to cable high-speed transport services, and then to touch on the issue of allowing the RBOCs into inter-LATA data services prior to letting them into inter-LATA, or long-distance, voice.

**Exhibit 1. Resold and Unbundled Lines Lost Summary (000)**

	3Q98	4Q98	1Q99
<b>Bell South</b>			
Resold	443	527	588
Unbundled	29	41	59
Total	472	568	647
Memo: Total Lines	23,595	23,751	24,089
Memo: Implied Share Loss	2.0%	2.4%	2.7%
<b>Bell Atlantic</b>			
Resold	487	619	725
Unbundled	55	69	85
Total	542	688	810
Memo: Total Lines	41,276	41,631	42,133
Memo: Implied Share Loss	1.3%	1.7%	1.9%
<b>Ameritech</b>			
Resold (est.)	390	395	400
Unbundled (est.)	100	105	110
Total	490	500	510
Memo: Total Lines	20,925	20,968	21,146
Memo: Implied Share Loss	2.3%	2.4%	2.4%
<b>SBC</b>			
Resold	748	803	896
Unbundled	47	57	79
Total	795	860	975
Memo: Total Lines	38,378	38,686	37,782
Memo: Implied Share Loss	2.1%	2.2%	2.6%
<b>US WEST</b>			
Resold	205	382	444
Unbundled	5	9	12
Total	210	391	456
Memo: Total Lines	16,408	16,601	16,771
Memo: Implied Share Loss	1.3%	2.4%	2.7%
<b>Total RBOCs</b>			
Resold	2,273	2,726	3,053
Unbundled	236	281	345
Total	2,509	3,007	3,398
Memo: Total Lines	140,582	141,637	141,921
Memo: Implied Total Share Loss	1.8%	2.1%	2.4%
Memo: Estimated Business Share Loss	3.3%	3.9%	4.5%
Memo: Estimated Residential Share Loss	1.1%	1.2%	1.3%

In many ways the problem with discussing these issues is that it's easy to lose sight of the big picture. We get lost in endless legal and technical discussions about the propriety of one set of rules versus another; and special interests tend to create one-sided distortions of the underlying reality. In my opinion, all these issues revolve around one basic question: what is the path toward competition—both with respect to telecom services and broadband services? And why and how are the two related?

Fortunately, we have something of a blueprint of the competitive goal—a fuzzy and at times contradictory one—but a blueprint nonetheless: namely, the Telecom Act of 1996. Despite endless wrangling around its details and implementation, if you had your 9-year old read it, once he woke up he'd tell you that there's a simple goal: the RBOCs need to open up the local exchange to competition. And in return, they'll be let into long distance. The truth is that any of us could this afternoon go and start a long-distance business from scratch in our garage that could easily serve residential and small business customers. It's local that's hard. And that's why the Act of 1996 was about opening local markets. And it appears that Congress believed that the RBOCs would not be properly incented to open up local if they first received approval to offer long distance.

Where are we in pursuing that goal? Not very far—it seems. In Exhibit 1, we present the RBOC lines lost to resale and unbundling as of the most recent quarter. Three years and one month after passage of the act, the highest market share losers so far are BellSouth and US West, with about 2.7% each lost to resale and unbundling, followed by SBC with 2.6%, Ameritech with 2.4% and Bell Atlantic with 1.9%. Not very impressive. What's more, if you cut more finely, you'll find that business line losses are in the 3-4% range, but that residential share loss is holding at about 1%. And while these numbers don't include loss to carriers serving customers on their own facilities, since the RBOCs can't or won't break out the data, we strongly believe that at best you're talking about an incremental 2-4 points of share loss. And at least 95% of that relates to business customers, again leaving residential to about 1%.

Why? First, because while business lines represent only about 35% of total access lines, they nonetheless drive about three quarters of RBOC profit due to the industry's strange and artificial pricing structure. Residential lines are nearly profitless, and are geographically dispersed, while subsidy-laden business lines are extremely rich, and are geographically clustered in small areas. So no one approaching the industry fresh as a competitor would ever try to attack the residential market, especially if it required the deployment of expensive facilities. Second, as we'll see, with the exception of AT&T, no single long distance company has sufficient consumer exposure, and therefore sufficient fear, to make the expensive investments necessary to enter residential on a large scale.

Now, the reality is that the initial market-opening strategy pushed by the FCC in 1996 and 1997—a highly discounted form of resale known as rebundling, or the unbundled network element platform (UNE-P)—would have drawn all of the LD companies into residential since it offered about a 35% average discount, which most could have at least broken even on. That's worth doing if the bundling in of a local service product serves to hang onto profitable long distance customers longer. But the RBOCs believed that even long distance entry wasn't worth the price of UNE-P. So they decided not to pursue it—and indeed had it overturned by the Eighth Circuit in mid-1997. And even though it would cost them long-distance entry, the RBOCs were content to grow earnings in double digits based upon the strength of the local markets. At the same time, numerous strategies were employed to skirt the 271 entry process: the Qwest joint-marketing deals with US West and Ameritech, and the famous "Bill of Attainder" arguments put forth in two circuits that attempted to have the inter-LATA restrictions declared unconstitutional.

For their parts, bereft of UNE-P, each of the major long-distance companies attempted to offer plain vanilla resale of local residential service—at about a third the effective discount of UNE-P—but quickly found that you couldn't lose a bit on the margin and make it up in the volume. So they stopped trying, and the industry entered a two-year truce, particularly with respect to residential.

The one with the problem, though, was AT&T. That is, the company knew well that eventually the RBOCs would enter long distance. When they did, they would easily add a long distance component to the existing local service. And AT&T, with its \$23 billion consumer long distance business—unable to offer a bundle that included local service—would simply get crushed. That simple and sad reality led the company to purchase TCI—a strategy that caused the company to invest \$40 billion and to dilute its earnings severely—in the process crushing the stock for several months—all in pursuit of a path into the home for local service.

Make no mistake about it. AT&T didn't buy TCI because it liked the cable business. It bought TCI for defensive reasons, for fear of getting crushed in consumer long distance by the RBOCs if it couldn't offer a bundle that included local service. Second, because AT&T is a national company and TCI is regional, AT&T couldn't stop with TCI. Thus, the company went about pursuing joint ventures with other cable companies in order to get access to enough homes to make a difference. But those deals were hard to come by, with only Time Warner coming close among large cable companies. And that's despite AT&T's willingness to pay upfront fees for access, and to foot nearly all of the capital expenditures—about \$500 per subscribing home on average over the next 5 years, or somewhere between \$9 billion and \$12 billion, not including the cost of upgrading TCI's lines to support two-way digital services (another \$2–3 billion) to roll out on a nationwide basis.

Moreover, it was the difficulty in clinching cable resale deals that forced the company to again dilute its earnings, this time spending \$60 billion, to acquire MediaOne, which despite its relatively small footprint, nonetheless holds the key to cementing the national footprint, since it will ultimately lead to resale deals with Comcast and a finalization of the Time Warner deal. Taken in sum, the creation of this strategy is plainly and simply the first fruit of the Act of 1996—the only large-scale strategy being pursued by any telecom company that will bring residential competition to the local exchange.

What has this to do with open access to broadband cable? Everything. Because when you spend an average of \$3,300–3,400 a subscriber to acquire cable companies, then add \$150 a home passed to enable two-way services, then spend \$500 a subscriber for those that take local telephone service, you've got to get a return on your capital. And the combination of basic cable and local telephone won't come close to driving that return. Only the inclusion of incremental growth services like high-speed data give you a prayer. And according to several leading analysts, even that won't be enough. So the fate of broadband services is critical. And to the extent that AT&T's ability to drive an adequate return on broadband services is threatened by the unknown economics that regulators and legislators could mandate in open cable access, Wall Street will deny AT&T and all other cable companies the capital to build the broadband pipe. I would be the first to downgrade my buy recommendation on AT&T through the creation of that uncertainty.

How do we respond to the concerns of the major players?

*Argument: AOL could be denied access at will to the cable plant.*

Let's note a few facts:

- The company currently has 16 million online customers versus under 800,000 at the cable companies in total; so clearly it will be some time before the company is marginalized by the activities of cable
- AOL has already struck resale deals for broadband xDSL access on a commercial basis, including volume discounts, with Bell Atlantic and SBC. We believe that more RBOC deals are in the works. So the company will have broadband access to tens of millions of homes over the next 12 months. That's not to mention commercial deals struck with satellite.
- AOL's service is a proprietary one. Customers of other Internet Service Providers (ISPs) are denied access to AOL's content; in addition the company appears to be opposed to any attempt to regulate the internet—except as regards open access to cable plant. So there is an issue of consistency.
- We believe that AOL can and should pursue commercial deals with cable, and that such deals could be extremely beneficial to both sides.
- Finally, any one of the ISPs, including AOL, could elect to invest capital and gain local franchise approval to overbuild the existing cable plants, just as Ameritech has done in parts of Chicago and Detroit and a number of municipalities have done elsewhere in the country.

*Argument: the RBOCs are being treated unfairly since they have to unbundle and resell their plant while cable is not yet subject to similar obligations.*

There is an inequity in the regulation of the two industries. But we would argue that the long-term solution to the problem is the eventual deregulation of the RBOCs in the high-speed data area, not regulation of the fledgling cable high-speed industry.

Several other key points:

- (1) *DSL Deployment Depends on Cable Modem Deployment:* It is precisely the AT&T national cable-telephony strategy, along with the general aggressive investment posture of the other cable companies with respect to high-speed

data deployment that has driven the RBOCs to begin to aggressively deploy xDSL. Indeed that technology has been around for several years and the RBOCs have been very slow to deploy it until recently, especially since it represents the threat of cannibalization of the RBOC's \$5 billion private line business, which offers similar speed services for a fraction of the price.

- (2) *RBOC Push Toward Ubiquity Depends on Cable Modem Deployment:* Only 40–50% of RBOC access lines are currently addressable with xDSL given line lengths and the presence of certain splicing and multiplexing technologies on many access lines that preclude xDSL deployment. To address this problem, the RBOCs will have to spend \$8–12 billion over the next several years to push fiber further down into the neighborhood to enable ubiquitous xDSL deployment. Such investments are only now being announced, and are clearly driven by the desire not to lose the market to cable modems. In the absence of a cable modem threat, these incremental investments are unlikely to be made, certainly not on the accelerated basis now being contemplated. Moreover, more aggressive RBOC spending will be met with further cable investment. Few things will prove better for the consumer than a battle to bring broadband to the home.
- (3) *AT&T & Cable Open to Negotiations:* AT&T and other cable companies have made clear that they are open to commercial relationships with ISPs such as AOL. Indeed they'd be crazy not to strike deals, and Wall Street is pushing them to do so quickly, if only to end the reign of that killer of stocks called "regulatory risk"—but more so because it's good business to have as many people selling your services as possible if the terms are reasonable. A vibrant commercial resale market would obviate the need for regulated unbundling.
- (4) *Why Regulate a Fledgling Industry Now When You Can Do it Later?* The real fear is that cable behaves with respect to broadband services the way it did in programming (where anti-competitive behavior led to regulation in the early 1990s). The FCC policy has been to say: "We'll leave you alone for now . . . but we're watching." This shot across the bow has, in our view, been noted by cable managements. We recognize, however, the need of the FCC to be assured that the technical systems being established today will not practically preclude regulation to counter any actual anti-competitive abuses should they occur years from now. It is in the province of the FCC to be certain that the design of the billions of dollars of hardware and systems being installed by cable now allow for the consideration of regulation of high speed data at the system level in the future if anti-competitive abuses occur. I know my colleague Tom Wolzien will be discussing this issue in his comments at the FCC on July 8th.

At the end of the day, the question comes down to one of a policy choice. In our opinion, the first goal of the Telecom Act is local—and especially residential local—competition. Without an ability to buttress with incremental broadband services the huge expenditures required (mostly of AT&T) to roll out competitive local telephone service, local telecom competition won't ever come. In turn, the presence of a vibrant cable investment posture in broadband services depends upon the perceived ability to generate returns on capital. To the extent that those returns could be curtailed by regulation, cable won't build. To the extent that the cable build is slowed or stopped, the RBOCs will slow their finally-accelerating broadband deployment—that's the rational thing to do. No one wants to deploy capital for the sake of being popular, especially when it dilutes earnings or risks cannibalization of other services. So in many ways, the choice is between two major broadband buildouts in competition (in addition to several niche competing access technologies like MMDS, LMDS and DBS and standard wireless) or no major broadband buildout. And with it, no local telephone competition.

Finally, on the subject of RBOC inter-LATA relief with respect to data services: Again, the question is one of policy goals. For the past 2½ years the RBOCs were mostly content to sit out long distance entry as long as local wasn't threatened. All that changed with the new AT&T cable-telephony strategy, which holds the possibility that AT&T could reach the consumer with a bundled offering (local, long distance, data and video) before the RBOC does. Now, numerous RBOCs have decided that UNE-P might be worth the price of admission to long distance after all.

What's the risk of allowing for an easing of the restriction on data? It depends on what you think is driving the RBOCs toward market opening. In our opinion, over the next 5 years, 60% of the growth in telecom services revenue will be driven by local and long distance data and Internet products. Local and long distance voice

products, on the other hand, will drive only about 15% of growth, despite making up two-thirds of the total telecom pie (Exhibit 2).

	1996	1998	2003E	Average Growth		Contrib. To Growth	
				96-98	98-03E	96-98	98-03E
Local Voice Services	79,330	88,715	95,154	5.8%	1.4%	27%	7%
Local Data Services	5,369	8,391	23,361	25.0%	22.7%	9%	16%
Long Distance Voice Services	72,375	76,181	83,582	2.6%	1.9%	11%	8%
Long Distance Data Services	9,549	15,800	42,294	28.6%	21.8%	18%	29%
Internet Services	1,617	4,430	18,959	85.5%	33.7%	8%	16%
Wireless Services	25,779	35,250	56,594	16.9%	9.9%	27%	23%
<b>Total Domestic Telecom. Services</b>	<b>194,019</b>	<b>228,748</b>	<b>319,943</b>	<b>8.6%</b>	<b>6.9%</b>	<b>100%</b>	<b>100%</b>

More to the point, focusing on inter-LATA services only (including long-distance voice, long-distance data and internet services—which RBOCs are precluded from offering), about 85% of all inter-LATA growth over the next five years is expected to come from data and internet products. Only 15% is expected to come from long-distance voice (Exhibit 3). Thus it should be rather clear that data is the key to inter-LATA growth in the future.

	1996	1998	2003E	Average Growth		Contrib. To Growth	
				96-98	98-03E	96-98	98-03E
Long Distance Voice Services	72,375	76,181	83,582	2.6%	1.9%	29%	15%
Long Distance Data Services	9,549	15,800	42,294	28.6%	21.8%	49%	55%
Internet Services	1,617	4,430	18,959	85.5%	33.7%	22%	30%
<b>Total InterLATA Services</b>	<b>83,541</b>	<b>96,392</b>	<b>144,835</b>	<b>7.4%</b>	<b>8.5%</b>	<b>100%</b>	<b>100%</b>

So the question is rather simple: if the RBOCs are allowed into inter-LATA data, thus gaining access to 85% of all inter-LATA growth even without access to traditional long distance voice—are they likely to be proactive in opening up the \$90 billion local market in order to gain access to the other 15% of the growth? The answer to this question should help you determine the proper course of action toward achieving your policy goals.

Mr. HYDE. Mr. Kimmelman.

**STATEMENT OF GENE KIMMELMAN, CODIRECTOR,  
WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, DC**

Mr. KIMMELMAN. Thank you, Mr. Chairman. On behalf of Consumers Union, I want to thank you, Mr. Conyers, members of the committee for inviting us. I want to particularly thank you for setting up a panel this way. I know it is unwieldy for the members to have this large a panel, but it truly is a democratizing process to have all the points of view present. So I commend you for structuring the hearing this way.

I want to take the opportunity—it doesn't happen very often—to indicate that I agree with virtually everything Mr. Barr said. We haven't often been on the same side of issues. And I find it a unique opportunity to hear Mr. Jacobs' "buy" and "sell" advice at a Judiciary Committee hearing. It certainly is not the norm.

And I concur in what Mr. Jacobs described as what appears to be what happened with AT&T. But I must indicate to you from a consumer perspective there really is something wrong, something fundamentally wrong when, in order for a cable company, whether it is owned by AT&T or anyone else, to move into new markets, to say it must price gouge cable customers or overcharge for high-speed Internet access.

And there is something equally wrong if a local phone company in order to expand into new markets has to say, oops, we can't stand by those obligations in a law passed 3 years ago to open up our networks to local telephone competition which is, I believe, what that whole law was designed to accomplish.

We have heard this morning a lot of very, very eloquent yammering about competition and billions of dollars in capital. But there is something really, really wrong when six of the eight large telephone companies are allowed by our antitrust officials to consolidate into two companies, together serving about two-thirds of all consumers and through acquisitions cable companies united into one company serving almost 60 percent of all cable customers.

And there is something even more wrong when, on the dollar side for the consumers, you see \$3 or \$4 billion of excess charges a year by cable companies above competitive pricing and you see \$5 billion in new charges on people's monthly telephone bills since the Telecom Act was passed. So we believe it is time to revisit this law for consumers to seek modifications in the law, to stop these inappropriate rate hikes, and to correct what is going wrong.

I would suggest one very simple principle, consumer principle, for you as to consider in reviewing this legislation. We believe we need comparable public obligations for the transmission of the most important telecommunications, cable television and Internet services until vibrant competition develops throughout the market, not just for high-end customers but throughout the market for all consumers.

So we look very favorably on the portions of the Goodlatte-Boucher legislation that would subject the cable wire to comparable obligations to the telephone wire, and we believe that there is more that can be done to ensure fair pricing of cable services and high-speed Internet access.

On the other hand, we do have considerable concerns about the provisions in the legislation that we fear could enable local phone companies to circumvent many of the obligations in the 1996 act related to opening up their markets to local competition. I think Mr. Salsbury stated it quite succinctly and with the appropriate analysis.

So we look forward to working with the committee, with the sponsors of the legislation to improve this legislation to make sure it meets consumers' needs. And most importantly, we urge this committee to act to begin addressing the problems with the 1996 act. Please don't wait. With prices going up and up and up and consolidation gobbling up virtually every potential competitor in sight around these industries, we cannot afford to wait longer to address consumers' needs. Thank you.

Mr. HYDE. Thank you very much Mr. Kimmelman.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, CODIRECTOR, WASHINGTON OFFICE,  
CONSUMERS UNION, WASHINGTON, DC

## I. INTRODUCTION

Consumers Union<sup>1</sup> believes it is time for Congress to address the shortcomings of the Telecommunications Act of 1996.<sup>2</sup> With cable television rates soaring and many telephone charges on the rise, the majority of consumers are not receiving the benefits that Congress promised through elimination of traditional ownership and price regulation in telecommunications markets. We therefore welcome Representatives Goodlatte's and Boucher's interest in proposing legislation designed to deal with the realities of today's marketplace.

The Goodlatte and Boucher bills, H.R. 1685 ("Internet Growth and Development Act of 1999") and H.R. 1686 ("Internet Freedom Act") include important consumer protection provisions that would make the emerging world of high-speed Internet services more open to consumer choice and competition. However the bills also contain a number of provisions regarding digital services offered by local telephone companies, which we believe require significant modification to ensure that they do not open the door to anticompetitive or unfair practices. In addition to working with the bills' sponsors to address these concerns, Consumers Union will suggest additional changes to the Telecommunications Act which we believe are necessary to ensure fair pricing for cable and telephone services while we wait to see if these markets become more competitive.

## II. RISING PRICES IN TODAY'S MARKET

Contrary to the goals of the Telecommunications Act, consumers face rising prices and extremely limited competitive choice for numerous television and telephone services. Since passage of the Act in February 1996, cable TV rates have risen about 23 percent, more than three times the rate of inflation during that period.<sup>3</sup> Despite significant growth in the satellite industry, the high price of purchasing a satellite dish, expensive installation charges and the inability to provide local broadcast signals have enabled cable to avoid price competition from satellite providers. On the other hand, the few consumers who have a choice of cable service from two providers (head-to-head competition from two cable companies or one cable and one telephone company) receive approximately the same programming, new services and infrastructure upgrades for about 14 percent less than cable monopolies charge.<sup>4</sup> If cable monopolies were limited to charging these competitive prices throughout the country, consumers would save about a \$4 billion a year.

The picture for some telephone rates is starting to look almost as bad as for cable. Federal Communications Commission (FCC) pricing policies have resulted in new "line-item" charges on phone bills that will cost consumers almost \$5 billion a year starting in July (See Attachment A). New universal service fees, subscriber line charges, federal access fees, and number portability charges are requiring the average single-line customer to pay \$3.01 per month more, and consumers with two lines \$7.39 per month more for phone service, before they place a call. These figures do not include new monthly minimum charges assessed by long distance companies like AT&T and MCI, which require consumers to pay \$3.00 to \$5.00 a month even if they make no calls, or less than \$3.00/\$5.00 worth of calls. While large-volume long distance users are finding competitive options and declining per-minute prices,

<sup>1</sup> Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about good, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from non-commercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

<sup>2</sup> Public Law 104-104, 110 Stat. 56 (1996)

<sup>3</sup> Source: Bureau of Labor Statistics Cable Consumer Price Index and Consumer Price Index—All Urban Consumers

<sup>4</sup> In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, REPORT ON CABLE INDUSTRY PRICES, MM Dkt. No. 92-266, May 7, 1999, at 3

consumers who make less than 30 minutes of interstate long distance calls per month have seen their rates double since passage of the Act.<sup>5</sup>

### III. MARKET CONCENTRATION

Failure of our antitrust authorities to take an aggressive stance against telecommunications and cable mergers has contributed to a bleak picture for the development of local telephone, cable and increased long distance competition. The Justice Department's Antitrust Division is in the process of allowing six of the eight big local telephone companies (GTE and the Bell Companies) to merge into two giant super-regional monopolies. After gobbling up Pacific Telesis and Ameritech, SBC will control about one-third of all telephone lines into consumers' homes. Similarly, with the acquisition of NYNEX and GTE, Bell Atlantic will control another third of the country's local phone lines. These were the companies that, during consideration of the Telecommunications Act, claimed they would be "seven new competitors" in long distance and other markets.

In response to this massive local telephone consolidation, AT&T has purchased substantial ownership stakes in cable television companies that serve about 60 percent of all households in the country. Through its merger with TeleCommunications Inc. and proposed purchase of MediaOne, AT&T will dominate not only the majority of cable wires, but also the major high-speed Internet access providers (@Home and Roadrunner) and control more than 60 cable television channels.<sup>6</sup> Despite AT&T's stated goal of expanding its cable business into the local telephony market, the fact that the underlying cable monopoly is not subject to any limits on pricing (unlike the local telephone monopoly) and is not subject to common carriage/nondiscrimination requirements (unlike the local telephone monopoly), makes this consolidation particularly troubling for consumers.

It is important to note that, while everyone expects the telephone and cable wires some day to offer the same set of services in competition with each other, they do not compete today! Without enormous infrastructure investments, elimination of technical barriers, and experimentation with network management of bundled services, cable and local telephone companies cannot effectively compete against each other. And no one else is even close to them, measured either by technical or financial standards, to serve as a mass market competitor for the most important telephone, television and Internet services. We may therefore be experiencing an enormous consolidation that, at best, yields a duopoly. What does this mean for consumers?

### IV. THE DIGITAL DIVIDE

In a report we released with the Consumer Federation of America in February<sup>7</sup>, we found that at least one-half and as many as three-quarters of all consumer do not generate enough revenue opportunity—because of their small local, long distance, wireless, cable and Internet consumption—to be attractive to the companies seeking to expand into these markets. This fact is unlikely to change in the foreseeable future. Therefore all the talk of deregulation designed to spur investment in new infrastructure and advanced services may do little or nothing for the needs and desires of the vast majority of the consumer market. Our report demonstrates that cable, local phone and long distance companies are only likely to compete for the top 20% of the consumer market. Market forces are not strong enough to prevent a growing world of telecommunications haves and have-nots.

### V. IT IS TIME FOR CONGRESS TO ACT

If neither antitrust officials nor the FCC are willing to stop the telecommunications consolidation juggernaut, it is imperative that Congress step in to establish comparable public obligations for the two wires that may some day be in a position to compete for the most important telecommunications, Internet and television services. We believe the Telecommunications Act should be adjusted to:

- (1) protect against inflated pricing of monopoly telephone and cable services;

<sup>5</sup> Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, REFERENCE BOOK OF RATES, PRICES, INDICES AND EXPENDITURES FOR TELEPHONE SERVICE, June 1999 at Table 2.4.

<sup>6</sup> In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FIFTH ANNUAL REPORT, CS Dkt. No. 98-102, Dec. 23, 1998 at Appendix C and D.

<sup>7</sup> Dr. Mark Cooper and Gene Kimmelman, "The Digital Divide Confronts the Telecommunications Act of 1996," Consumers Union and Consumer Federation of America, February 1999.

- (2) ensure that monopoly telephone and cable services do not subsidize other services;
- (3) prevent either telephone or cable companies that have market power as a result of their transmission facilities from discriminating in any way against consumers or independent vendors who must rely on those companies' transmission facilities to offer services to the public; and
- (4) ensure that low-volume telecommunications users (including long distance customers) are not overcharged for their limited communications needs.

#### VI. THE GOODLATTE AND BOUCHER BILLS

H.R. 1685 and 1686 offer a good starting point to begin addressing inappropriate regulatory advantages the cable wire has over the telephone wire. Consumers Union supports efforts to ensure that cable TV monopolies cannot use their dominance in the transmission of high-speed Internet access to discriminate against particular Internet service providers or inflate prices for consumers. The bills' prohibition on anticompetitive or discriminating behavior begins to address this problem. However, the legislation should be expanded to prohibit cross-subsidization and discriminatory practices by local telephone and other broadband access transport providers in services essential for making broadband access a viable mass market service (e.g., local telephone, video transmission).

The bills' provisions specifically related to broadband and Internet backbone services provided by local telephone companies need significant modification to meet consumers' needs. Despite the convergence of telephone, television, and data (including Internet) services through the enormous growth of digital transmission techniques, the legislation creates an artificial "no regulation" zone for transmission that mixes voice, data and video. This regulatory distinction is simply unworkable in a digital world.

In a world where virtually all service providers are attempting to offer consumers one-stop-shopping for local phone, wireless, long distance, fax, Internet and television services—mostly mixed together in digitized format—it becomes impossible to separate data and voice services for regulatory purposes.

Consumers Union supports preservation of the portions of the 1996 Telecommunications Act that will open local phone markets to competition. We believe that efforts to enhance deployment of broadband facilities by local phone companies must coincide with, and not replace efforts to open the local telephone market to competition. We therefore believe the broadband and Internet backbone provisions of the legislation should be modified to ensure that efforts to enhance local telephone competition would not suffer. And where competition does not develop, the legislation must also ensure that prices for the local phone service that connects Internet and other broadband applications remain reasonable and affordable to all consumers.

Rather than focus modification of the Telecommunications Act on distinctions between services—data, voice, video—that are disappearing, we suggest a different basis for revisiting the Act. It is now obvious that modest users of virtually all communications services—local phone, long distance, cable, Internet—are unlikely to benefit from the deregulatory, market opening provisions of the 1996 Act. In the foreseeable future, competition will not penetrate these low-volume markets, either for individual services or a bundle of these services combined. We therefore suggest modifications to the Act that ensure reasonable prices for local telephone, cable and long distance services where competition does not exist or is insufficient to keep prices down. Such an approach would place greater emphasis on Bell company entry into the residential long distance market, with appropriate public oversight, over deregulation of broadband and Internet backbone services.

#### VII. CONCLUSION

Consumers Union applauds Representatives Goodlatte and Boucher for initiating the process of adjusting the 1996 Telecommunications Act to deal with today's market realities. As consumers experience spiraling cable rates, rising monthly telephone charges, and the restricted choices that result from massive industry mergers, it is obvious that the Act is not meeting its competitive goals. While the Goodlatte and Boucher bills require significant modification, they provide an important starting point for addressing consumer needs in today's market.

June 9, 1999

Hon. THOMAS BLILEY,  
*United States House of Representatives,*  
*Washington, DC*

DEAR REPRESENTATIVE BLILEY: On behalf of Consumers Union, the Consumer Federation of America, and the Texas Office of Public Utility Counsel, we are writing to seek your help in puffing an end to the Federal Communications Commission's misguided pricing program that is driving up consumers' monthly telephone bills. With more than \$1 billion a year in new charges slated to begin on July 1, 1999, added to almost \$4 billion a year that has already been added to consumers' bills, we believe it is time for Congress to reverse these regressive, unfair rate increases that result from the FCC's policies.

Since passage of the 1996 Telecommunications Act, the FCC has embarked on policies that have added \$3 a month to the monthly phone bill of the typical single-line residential long distance customer, and more than \$7 a month to the monthly bill of consumers with two telephone lines. As of July 1, this will amount to a total increase of almost \$5 billion per year on consumers' monthly phone bills, not including new minimum charges of \$3-5 every month assessed by long distance companies like AT&T and MCI.

At the time the Commission initiated this pricing program, then Chairman Hundt stated that: "I don't think that Congress intended to have us raise residential basic dial tone . . . and I think I am reading Congress right on this." We agree with that assessment, and therefore cannot understand how the FCC can justify the fact that its regulatory actions are having the opposite effect—the very effect the agency knows Congress did not intend. This is nothing short of regulatory mismanagement at the expense of consumers and must be reversed.

Contrary to Congressional direction to devise a comprehensive pricing system that preserves universally affordable, reasonably priced telephone service, the Commission has embarked on piecemeal policies that are inappropriately robbing consumers of about \$5 billion a year. Offsetting long distance rate reductions have not only failed to materialize for residential customers as a whole, but for the millions of consumers who make few long distance calls, these increases in monthly charges constitute the lion's share of their bill. And the FCC is likely to increase these charges to expand its universal service program. The Commission's pricing program calls for additional increases in monthly line charges for the next few years as well.

If Congress truly did not want to see monthly phone charges go through the roof, particularly for the majority of consumers who are relatively low-volume long distance users, something must be done to reverse the FCC's wrong-minded pricing program. We therefore ask you to take the lead in moving legislation that would put an end to this pricing program, and would require the FCC to go back to the drawing board and develop a comprehensive proposal to preserve universal service and move prices to cost without adding unfair charges on consumers' monthly bills.

Sincerely,

GENE KIMMELMAN, *Co-Director,*  
*Olivia Wein, Fellow for Economic Justice,*  
*Consumers Union.*

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

LAURIE PAPPAS, *Deputy Public Counsel,*  
*Texas Office of Public Utility Counsel.*

### New Charges on Consumers' Bills

Bottom of the bill price increases in the Federal jurisdiction since passage of the '96 Telecom Act charges as applied on consumer bills (residential customers only)

BASIS FOR ASSESSING CHARGES		CHARGES 96-98		CHARGES 1999		TOTAL 96-99	
Base	Number <sup>1</sup> (million)	Amount Monthly	Annual (million)	Amount Monthly	Annual (million)	Monthly	Annual (million)
Per Account	96	\$0.93	\$1,070	\$0.20 <sup>3</sup>	\$230	\$1.13	\$1,300
Per Line	123	\$0.85	\$1,255	\$0.63 <sup>5</sup>	\$930	\$1.48	\$2,185
	123			\$0.40	\$590	\$0.40	\$590
Second Lines	27	\$2.50	\$810			\$2.50	\$810
Total/Average	123	\$2.02	\$3,130	\$1.18	\$1,750	\$3.31	\$4,885
Typical One Line	69	\$1.78		\$1.23		\$3.01	\$2,490
Typical Two Line	27	\$5.13		\$2.26		\$7.39	\$2,395

1. Line count is mid-year 1999 estimate.
2. Universal service charge is AT&T's since it has the vast majority of residential accounts.
3. 1999 Universal service charge is estimate of new E-rate costs.
4. Presubscribed interexchange Carrier Charge(PICC) is AT&T's charge.
5. PICC estimated for 1999 is weighted average of first and second lines.
6. Number portability is weighted average of all Bell Companies plus GTE.

Mr. HYDE. And before we go on to the questions, I would like to make a prayerful suggestion that we be mindful of the 5-minute limit. We have many members here who want to participate. If you spend your 5 minutes making a statement and then at the expiration ask a long convoluted question, then you have euchred us out of 10 minutes at least. And so again I appeal to the judgment of each member to remember they have 5 minutes and I try to cut you off at the end of 5 minutes, only so we can have maximum participation.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. And I want to thank all the witnesses. I don't think anybody on this committee would try to double 5 minutes into 10 minutes, but I am glad you made that observation anyway.

Gentlemen, there are some problems here that maybe we will need more than 5 minutes a round; we may need several rounds of 5 minutes to get at, because Mr. Vradenburg went to great pains to assure me that if it's competition and consumer protection that I want, that his approach and this bill's approach is the best.

I remain skeptical after having listened to all 11, 12. Mr. Kimmelman, leaves me almost in a state of mild shock, but that we can go into later. But the point here is two-fold. And I am going to direct these comments for as much as my 5 minutes will go to Mr. Jacobs and Mr. Salisbury and Mr. Boggs.

Isn't it true that, first of all, section 271 is going to be compromised? Isn't it also true that we should give enforcement a chance before we start legislating? And how do we have to pass this bill to get to the equality and the fairness in the marketplace and yet give the consumers a shot, which they are not getting now? And there you have it. And let's go at it as quickly as we can.

Mr. SALSBURY. Let me very quickly respond that from MCI WorldCom's perspective, this is not a good deal, trading the clear protection of saying that the RBOCs have to open their networks before they could enter these markets as opposed to having the opportunity to sue them later on if they do something wrong. That is a bad deal for consumers.

So I agree with what you said, Congressman Conyers. But, I would also say that what we are seeing now is we are on the verge of having the benefits of section 271 and the Telecom Act being achieved. And it would be a particularly inopportune time now, I think, to legislate.

Mr. CONYERS. Mr. Jacobs.

Mr. JACOBS. Thank you. When you mentioned section 271 being compromised, I assume you mean if the RBOCs are allowed to do data transport across LATA boundaries. In the written testimony I submitted, I put in two exhibits on the very last page. And these summarize our opinions about what the growth of the industry is going to be over the next 5 years.

What you will see there is that if you actually look at what is driving growth in the telecom industry in general, 60 percent of that growth in the next 5 years is going to come out of data and Internet products, whereas voice is going to drive very, very little growth at all.

And when you then look in more detail at what is going on with interLATA services, you have got voice services and data services and Internet services. If you look there, 85 percent of the growth in all interLATA services is going to be driven by data and Internet products with only 15 percent of the growth coming out of voice products in the next 5 years.

So the question is: What are the RBOCs really after in getting interLATA? Now, yes, you want to get in the voice business, even though it is not growing, because it is large. But if you want to talk about getting a piece of the growth, that is really the data products.

So my question to you is, again from a policy standpoint: If what you are after is trying to incent the RBOCs to open their markets, then the question is do you want to open them up to 85 percent of the growth in the market without having to do so first? That would be my point on that.

Mr. CONYERS. Tim Boggs, last sentence.

Mr. BOGGS. I will try to answer your concern about consumers, which I think really goes to the choice question. If we are concerned here today about the viability of DSL, the reality of opportunities for consumers to choose different options for broadband, different from cable, I would point to three developments in the last week.

One, the chief technology officer of AOL gave a speech in which he pointed to his expectation, strong expectation, that we consumers will face a blend of broadband opportunities: cable, DSL, and wireless. And he is putting his money where his mouth is. They have invested in the latter two, and they intend to see them happen.

Secondly, today, page 1, column 1 of the New York Times reports on the SBC deal with the FCC that permits them to acquire Ameritech. In the conditions of that deal, SBC, a company of market capitalization of \$180 billion, has agreed to set up a separate subsidiary that will offer DSL aggressively to customers, has embraced that business plan. They are not goofing around in their markets. We feel them breathing down our necks.

Thirdly, to quote Commissioner Powell at the FCC, a thoughtful guy—he has looked really carefully at this; he doesn't see that there is any doubt that this is a vibrant and competitive market and in his speech on June 15 to a bar association, he lays out his view of that. It is a dynamic speech. I will send you all a copy of it because he is right on target. This is a competitive market. Consumers are going to have choices.

Mr. HYDE. Mr. Gekas.

Mr. GEKAS. I thank the Chair. It seems that every time we turn around these days, particularly in our committee, we have problems revolving around the role of the FCC in a hundred different ways, including antitrust merger, whole host of things; and I have been personally dissatisfied with the inability to reach conclusions about it. I would like to try to reach a conclusion today on the role of the FCC in the current situation which prompts the gentlemen from Virginia on my right and on my left to proceed along these lines.

General Barr, could you apprise me of what role does the FCC now play, in your view, hindering or putting hurdles in the way of the Boucher-Goodlatte approaches?

Mr. BARR. I think the FCC is contributing to the obstacles for competition in the Internet right now. This is—let me portray it this way: Telephone companies have a traditional market that they are serving. It is about a \$100 billion market, and its share of telecommunications is rapidly declining. Cable has a \$60-plus billion market. But we have both evolved to be able to serve a third and different market and that is the Internet. The Internet is probably around a trillion dollar market in the near future. MCI's own vice chairman says that by 2004, 99 percent of telecommunications is going to be Internet, telephony will be 1 percent.

So we started off as a penguin in our telephone market; they started off as an ostrich in their cable market, but we have evolved into ducks on the Internet. We want more ducks. That is what this is all about.

What the FCC has done is it said, hmm, we are not going to let the telephone companies be ducks. We are going to use this as an opportunity to take the old telephone regulations and apply them to the Internet. And so you cannot compete on an even footing on the Internet with the cable companies.

But then they turn around and say to the cable companies, oh, this is something different than cable. Even though you have open access rules that apply to you, there was supposed to be a design to have diversity of programming. We are going to let you evade those open access rules because we are now going to call this Internet.

So you have this gross disparity of treatment which is frustrating the ability of the only other competitor out there, the telephone companies, to come in and deploy high bandwidths.

Mr. GEKAS. So that when Mr. Goodlatte in his bill actually mandates that the commission will have no authority with respect to this, that it amounts to deregulation, that would take the FCC out of the open access question?

Mr. BARR. Absolutely. Let me just make a comment about this argument on section 271. It presents a very flat policy decision for this Congress. Yes, in our old market, we are still functioning as a telephone company on our public switch network, and we are prohibited by the bill from getting into long distance voice. And we still have those obligations and we are spending hundreds of millions of dollars to try to retrofit our system, so instead of serving one it can serve many suppliers. That, however, is a dwindling market which the long distance companies say themselves is going to be 1 percent of telecommunications by 2004.

And the issue you have to face is to get an extra ounce of leverage to open up this increasingly niched market and get the maximum leverage to have open access here on the old telephony business, you are going to sacrifice competition in the telecommunications market of the 21st century which is going to be 98 percent of the telecommunications.

So let the cable guys run wild with the Internet. Let them forget about open access, because we want to impose the ultimate pressure on the telephone companies to put in open access on the tele-

phone side. Open access is coming on the telephone side. But what can't wait is getting that open access rule today in place on the Internet. You heard them say—you heard them say, you have to have open access to begin with. You can't rely on litigation after the fact. And we agree. You got to have an open access rule on the Internet. Let's not make the same mistake with the Internet we made with telephone and cable.

Mr. GEKAS. Mr. Chairman, I yield back the balance of my time.

Mr. HYDE. I thank the gentleman. Mr. Berman.

Mr. ROGAN. Mr. Chairman, before you recognize the gentleman from California, may I make a unanimous consent request that the members of the panel be allowed to submit questions in writing, and then include those questions and answers in the record? Many of us have to leave before we will have a chance to do questioning.

Mr. HYDE. You mean members of the committee?

Mr. ROGAN. Members of the committee.

Mr. HYDE. Would like to submit questions? Surely. Without objection.

Mr. Berman.

Mr. BERMAN. Mr. Cleland, you said the nature of investments will shift if we pass this bill. How will they shift?

Mr. CLELAND. Well, right now the marketplace has three basic assumptions about the cable industry and that is number one they have the best broadband pipe into the home for data and for video. The second assumption is that they are not going to be open for competition, and the third assumption is that they are going to be able to leverage that power unfettered by any government enforcement.

And so the marketplace right now, I think, assumes that cable is high-growth monopoly and it doesn't get any better than that. So that is the marketplace perception right now. They don't believe that the Goodlatte-Boucher bill will have a chance of passing or that the regulators will ultimately open. So they see a very rosy outlook. And that if there is access required, there probably would be some type of pull-back because those assumptions would be proven to be faulty.

Mr. BERMAN. So that the opponents of that part of Goodlatte-Boucher are correct when they say this will hurt investment in us, but your argument would be is that they have an unfair advantage at this point. And so, yes, it will hurt, but it will hurt because it will equalize things.

Mr. CLELAND. Well, what it is it will shift. And the sense right now is that investment is encouraged by cable operators right now. It is not encouraged by Internet or electronic commerce players. So right now we have a policy that encourages investment by the very few and powerfully discourages investment by the world.

Mr. BERMAN. On the issue of the world that Mr. Jacobs describes where only AT&T can provide the real competition for local phone service, I wonder how does that make Mr. Windhausen feel, but—or I guess maybe Mr. Salsbury, since I understand part of your company is also getting into all of this, by the way. As you get into this and you chip away at this market share, is there anything that obligates you to provide access to all Internet service providers?

Mr. WINDHAUSEN. Well, first off, Mr. Berman, you are correct that Mr. Jacobs' statement that only AT&T is going to be able to be a competitor did not make me feel very good. I represent a lot of companies who are out there competing in that marketplace today. AT&T is certainly a very vibrant and strong competitor, but we have a lot of companies that can go toe to toe with AT&T in that local market place and are doing that today.

As to your substantive question about any obligation that we encounter, the answer is that all of our companies are common carriers. And that means that we have an obligation to serve the public and provide transmission for whatever traffic it is that consumers want to put on our systems.

Mr. BERMAN. And this would be true in DSL as well as in—

Mr. WINDHAUSEN. That is correct. DSL is just one of many data services that are out there—voice and data and video services that are on our network and we provide services to any consumer who wishes to put traffic on our network who wishes to do so, and we are legally obligated to do so.

Mr. BERMAN. I guess my last question, we have heard very little talk, just a brief reference at the end of the whole issue of the satellite role in Internet. And we did notice the AOL investment. And is this the third way? Is this a—tell us what the implications of this are in terms of broadband quick communication, speedy passage of data.

Mr. VRADENBURG. I think, Mr. Berman, that under the current state of technologies, the satellite has got a somewhat clever hybrid capability, that is, fast download speeds; but a telephone return path that does not represent a true two-way capability-like is potentially available on DSL and cable.

I think that potential true two-way capability off the satellite is probably 4 to 5 years away in the consumer marketplace. So I think that it provides a good but not fully comparable service, particularly to rural areas and other areas that may not be served effectively in the near term by DSL and cable modems. And I think in the longer term, there is a real prospect in 4 to 5 years, which is of course the entire history of the Internet to date, but in 4 or 5 years that there will be a two-way capability from the satellite.

Mr. HYDE. Mr. Goodlatte.

Mr. CLELAND. Mr. Chairman, could I add one point I think that would be of very much use to the committee and that is the chart that is at the end of my testimony. We show the whole broadband market, essentially the wire line, wireless, and satellite; and it shows what the opportunities are, where the subscribers are, and when and where it will be available. And that answers your question and also shows us how fast the pipes are and how much they cost. It is on one page. It is a very useful summary to get a big picture of what is going on.

Mr. HYDE. Thank you very much. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I want to commend all of the witnesses today for their contribution. I think this has been an excellent debate and discussion. Mr. Rosenblum, I particularly want to welcome AT&T. I want to make it clear that I welcome AT&T's investment in rolling out broadband services. I think

it is a tremendous opportunity, and I want to see your company and others continue to do that.

But I am very concerned about the model that I perceive that you are utilizing. For years AT&T has been up here on Capitol Hill telling us that local telephone companies should open their lines to foster competition. So how can you come up here today with a straight face and tell us that we should deny—that you should have the right to deny access to Internet service provider competitors, in fact, attempting to destroy competition in the Internet service market?

Mr. ROSENBLUM. Congressman, obviously I understand the question and sort of expected it; but to be honest with you I think there is a huge difference between what we are trying to do and what the incumbent telephone companies are doing.

In general, we have always come before the Congress arguing for competition and market forces. In the case of the incumbent local telephone companies in the 1996 Telecom Act, Congress made a judgment, which we wholeheartedly endorse, that because of the 100-year monopoly history of the local telephone business and the absolute importance to consumers of getting competition going in that market, a special set of rules and tools would be applied to those companies requiring them to unbundle, requiring them to provide access, at least until competition could develop and market forces would then take over to assure that consumers get—

Mr. GOODLATTE. Mr. Rosenblum, cable has not been around as long as telephone has, but as long as it has been around in almost every community in this country that it exists, it exists as a monopoly. So why should there be a distinction between the access to your lines which you want to have an exclusive bundling right and they don't? They have to open their lines up to America Online, they have to open their lines up to Roanoke.com, a small Internet service provider owned by a local newspaper in my district, or thousands of other Internet service providers around the country.

You want to have a completely different model where you say, you want our high-speed access to the Internet which is 50 times faster than what they can offer, great, you also have to buy our Internet service provider, or service @Home.

Why should you be treated differently when you come up here constantly; and, in fact, you are really arguing the same thing today with regards to the phone companies: don't cut them loose; don't let them compete. Make them do certain things to open up their line, but don't make us do it.

How do you defend that?

Mr. ROSENBLUM. Well, Congressman, let me defend it on two levels. First, I think it is not the case today that we are providing a closed platform, nor do we ever want to provide a closed platform. I think, as Mr. Boggs pointed out and as I tried to in my comments, anyone who uses these @Home or Road Runner services today can get on the Internet without any restriction or limitation and from the Internet get anywhere the Internet can take you.

Mr. GOODLATTE. But you have to pay extra.

Mr. ROSENBLUM. Well, you have to pay extra if someone else puts a Web site up that charges money. Some content providers like AOL have established Web sites that charge for access. Other

providers like Yahoo have Web sites that don't charge for access. It is really up to the Internet provider who establishes a Web site to determine whether that charge is imposed. As Mr. Boggs also said our customers can and do design the service—

Mr. GOODLATTE. But Web site operators are not necessarily Internet service providers. If you want to be an Internet service provider and compete head to head with @Home, you have got to compete at the disadvantage of telling your customers that you have to pay extra to do it if you are going to do it on the cable system, which is completely different than the narrowband because it is 50 times faster.

Mr. ROSENBLUM. Congressman, I understand the point. Right now there are literally thousands of Internet service providers of all sizes and shapes and descriptions. What they all seem to have in common is they rely 97 to 98 percent on narrowband dial-up access. A point that really shouldn't get lost here is when we succeed in deploying a telephony capability over this cable platform we are investing in, that will allow customers to have an additional choice of narrowband dial-up access. And that, like Mr. Windhausen's clients, will also be a common carrier service that will give customers choice of all ISP's and will also for the first time have this high-speed broadband choice.

Let me step back a little bit because I said there are two levels on which I wanted to defend this. And AT&T really is kind of a late comer to the cable industry, and we see it a little bit differently. We don't view this as a cable business or a monopoly. We see a cable industry and telephone industry that have spent many, many years assiduously not competing in each other's businesses.

Mr. GOODLATTE. My time is running out rapidly. Let me just say I understand why you would not want to see this as a monopoly. I hope you understand why a great many people in this room do see that as a monopoly and why the access to it being denied to open competition which the phone companies are required to provide and I think have spurred the growth of the Internet has a very different tenor than when you come here and say, well, it is really not a monopoly. It is a monopoly in terms of the access that you have and the bundling that you are attempting to do when you say that other folks can't get on the line with you. You are denying consumers choices when you say they have got to pay extra to get somebody else's service.

Mr. HYDE. Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. I also want to commend all the witnesses who have spoken with us this morning for their very thoughtful and carefully prepared statements. I think this has been a truly excellent opening discussion on the major policy challenges that confront the Internet today.

Mr. Barr, I would like to give you an opportunity and the time that I have, limited as it is, to respond to the statements that were made by a number of the witnesses this morning, objecting to the provisions in Mr. Goodlatte's and my legislation that would create more competition in the offering of backbone services, by enabling the Bell operating companies to offer data across LATA boundaries even in advance of getting permission under section 271 of the

1996 act to offer all services including voice-based long distance across LATA boundaries.

And as you answer that, let me just suggest a couple of areas where I think some information might be helpful. First of all, I am a representative of a rural district. And there are many parts of rural America, including my district, where it is frankly awkward to provide backbone services because of these interLATA restrictions.

How could the ability of Bell operating companies to deliver data across LATA boundaries promote more affordable backbone services and, therefore, more affordable Internet access in rural America?

Secondly, describe for us, if you would, the way in which a concentration and the ownership of the Internet backbone could threaten the peering arrangements that keep Internet traffic flowing for free and without charge among the various segments of the backbone and how our provision is an answer to that challenge.

If you would also please talk about how this provision is entirely consistent with our intent in passing the 1996 act, since we accept from these services across LATA boundaries that are voice-based traditional long distance; and then finally, if you would, comment on how you can segregate for purposes of enforcing our restriction on the offering of voice-based long distance, until section 271 approval is obtained, the data traffic on the one hand, the voice-based long distance traffic on the other. If there is an easy way to do it, we would like your description.

Mr. BARR. Starting with the last part of your question, the Goodlatte-Boucher bill continues to enforce section 271 requirements. But what it does—and this is very important—is it does segregate out the traditional telephone market from the Internet market. And it says that the telephone companies cannot sell voice-only products over the Internet. So it keeps that cabining of these two markets.

Then it brings competition into the Internet market. This is very important for people to understand. Because the heart of competition on the back bone—on the Internet is multiplicity of backbone providers. There are only two kinds of communications systems you can have. You can either have a monopoly, that ubiquity, or you can have a network of networks.

Think about the post office. How do I make sure that I can communicate and send a letter to anybody in the world or anywhere in the United States? You have one monopoly. The other way to do it is to have multiplicity of providers. But if you do that, they have to have agreements to transfer the traffic back and forth, the mail. And they have to have incentive to do that.

If one of them gets too large or if that market gets too concentrated, then they can close off that market and prevent other players from playing. Just think if there were one big 60 percent post office and then three or four 10 percents and that 60 percent post office said I am going to stop delivering mail to you guys. Everyone would then shift over to the big post office. This is the dynamic behind and the need to have many backbones. And this was the whole vision of the Internet.

Well, I tell you what. Because of the restrictions on the bulk of the industry, the local companies, from coming in and providing backbone service on the Internet, we have gone from 30 to five. And guess who the top three are? The IXE's. And, therefore, a lot of communities are not being served with backbone. For example, the whole State of West Virginia, they don't have a pop in it.

The way to get competition on the backbone is to allow the RBOCs into that business, allow them to carry that traffic. And then you will get more competition in the backbone, and that empowers every single level of the Internet to have more competition.

Mr. HYDE. Mr. Hutchinson. I am sorry. Mr. Chabot. I didn't see you down there.

Mr. CHABOT. Thank you, Mr. Chairman. Mr. Vradenburg, if broadband access is truly an essential facility, then shouldn't a garden variety lawsuit brought under section 2 of the Sherman Act solve the problem?

Mr. VRADENBURG. I think, Congressman, that in fact what we are confronted here with is a broader question about exactly how government policy in this area is going to be across these platforms. It does seem to me that we have a demonstrated example in the Internet of how openness has worked, and I think it is quick and easy to extend that.

We are not personally sort of in the litigation game. I mean, AT&T has warned us that, in fact, they may be in the litigation game. We have not been in the litigation game. We think this Congress ought to address this question quickly in a nonregulatory mode with a quick and simple solution to the problem by taking litigation out of the game and the uncertainty associated with that over a number of years.

Mr. CHABOT. You are not saying or are you—do you think anti-trust laws, do you think they function properly? Do you think they need to be changed? If that is not your view of antitrust laws, why are you seeking legislation that would actually amend the Sherman act?

Mr. VRADENBURG. Well, Congressman, as we have indicated, we think that the antitrust act in its broad constitutional kind of scope is certainly adequate in the general proposition, but that, in fact, here we have a very precise question and a very precise problem and I think a fairly simple and clear answer.

This is a situation where the problem is big enough—big enough to be identified but still small enough to be solved. If one waited for several years for a piece of antitrust litigation to wind its way through the court and then tried to address whatever the outcome of that by whoever lost that lawsuit by legislation at that time, we would have passed this problem.

I think the inevitable consequence of Congress not acting quickly and in addressing this thing in a straightforward manner, as Congressman Goodlatte and Boucher have done, is that there will be continued consolidation around the wire line owners, continued acquisitions by AT&T and in the cable industry, continued consolidation in the telephone industry; and we won't have competition for the Internet that, in fact, we will be able to have if there is a quick, simple deregulatory and nonregulatory solution and Congressmen Goodlatte and Boucher have put forward.

Mr. CHABOT. By singling out Internet service providers as a protected class of entrepreneurs, won't the legislation generate momentum for other industries to seek special antitrust status?

Mr. VRADENBURG. Congressman, I think what this bill does is try to set out as a protected class consumers. Because what this will do is permit every Internet service provider, whether it be cable owned, telephone company owned, or independent of either the wire line carriers to be able to access every customer and for every customer in this country who is interested in broadband high-speed Internet service to access every supplier. And in that instance it does seem to me that the solution is straightforward and quick, nonregulatory and, in fact, will protect consumers, not any particular player.

If one looks at the world today and said who is the protected class of companies here, look at AT&T's position. AT&T is in the long distance business and, in fact, is protected by existing laws from any competition from the local telephone companies. And on the other side, AT&T now entering the cable business is protected by the government in its monopoly status. So right at the moment if there is a protected class of person, indeed person, for the existing structure and the asymmetrical structure of the regulatory system, it is one company: it is AT&T.

Mr. CHABOT. Mr. Chairman, if it has already been said—I have got a little bit of time and it bears saying again—I think this panel on all sides has been particularly enlightening here this morning. And I think all have done a very good job in espousing their point of view. I yield back the balance of my time.

Mr. HYDE. Thank you. Mr. Scott, the gentlemen from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Boggs you indicated if you sign up for cable access that you could get AOL. Do you get it automatically, Road Runner service?

Mr. BOGGS. Yes, sir.

Mr. SCOTT. Is there a separate charge for Road Runner?

Mr. BOGGS. If you would like I could go through the charges.

Mr. SCOTT. Well, I am with another cable service, and we get @Home with that service. Now what is wrong with a separate charge for Road Runner? And can you get Road Runner through the telephone high-speed access line?

Mr. BOGGS. The architecture that we have used for this system is designed to try to meet the mix of needs that a consumer in a particular community places on us. Remember first, it is primarily a video service. Congress had pressed us to have a reliable and efficient video service that doesn't present some of the complaints of the past.

Secondly, we are charged by our shareholders and by Congress to some extent with trying to provide telephone service over this same network. We are certainly encouraged by you and Congress to provide high definition television and digital television. So the capacity of this plant that we have built for this community is limited. It has some limits placed on it. We have designed it in such a way that we believe it can handle all of the traffic of the customers of that community, of all neighborhoods in the community for high-speed Internet access.

We do not believe that the architecture will permit us in an efficient and effective way to open up the plant for interconnections right at the head end of the cable system. However, every customer by using the Internet can bypass us entirely, can take all of the Time Warner content and just ignore it and go exactly to where they want.

Mr. SCOTT. I think the point has been made if there is not a separate charge for it, you get it; and if you wanted another service, you would have to pay for that extra.

Mr. BOGGS. Only if the other service provider chooses to charge you for it. Much of the Internet is free, of course.

Mr. SCOTT. Is there any prohibitions, any reason why you can't have a separate charge that you could avoid if you don't want Road Runner?

Mr. BOGGS. If you don't—if you think of Road Runner as both a content and a facility, the content is frankly minimal, and it has little cost associated with it. The expense to us is the building out of this network, maintaining the servers to keep it. Think of Road Runner as an access—

Mr. SCOTT. You can't do a separate charge for Road Runner?

Mr. BOGGS. No, sir.

Mr. SCOTT. This area—I don't know who this is going to be aimed at, but we have a quick-changing technology that requires a lot of research and development and investments in the pharmaceutical area. The way we encourage that investment is to give someone the absolute right to benefit from their investment for 17 years. And after 17 years anybody can copy it and use it. And that is supposed to be in the best interest of the consumer.

How does allowing someone who did not make the research and development investment get into the telephone or cable benefit, how does that encourage a long-term investment in this area? And whether or not the consumer is better off or worse off if you allow people who did not make the investment to get into the—to benefit from the investment?

Mr. KIMMELMAN. If I could just jump in I want to say that I don't think anyone is talking about not allowing people to charge a fair price for use of their facilities. The issue is whether you have the ability to prevent others from having equal access to consumers or consumers to have equal access to different vendors. I don't think there is any question of anyone being denied a fair return on their investment.

Mr. BARR. Can I respond to that? Because it is the same as the separate price issue that you asked. Which is the investment in the local transport. There is no question they are going to get paid for it no matter who uses it. The question is whether they can then leverage from that and say by the way, we have developed—Merck has developed this drug for cancer; and, by the way, if you want to get treated for cancer and want the drug, you also have to go to hospitals in which we have a financial interest.

There is no question they will get paid for the drug. They will get paid for the local transport no matter who uses it. We are willing to pay them the full cost of using that local transport.

Mr. VRADENBURG. Can I offer an additional word. About 40 percent, 50 percent of our costs are payments for infrastructure, that

is, of the 2,195 a significant portion of that we pay to a variety of long-lease line carriers and to the ILEC for business lines or CLECs. So we are every year paying billions of dollars for infrastructure costs.

What will help us drive costs down and consumer prices down is if we have competition in that infrastructure. And the only way to do that since, if we go out today and say we want some high-speed lines, we can go get DSL lines, we can get to the marketplace, but if we can get DSL lines and cable lines competitive with each other, we can drive down those local transport costs, drive down our costs, drive down costs to consumers. But at the moment we don't have any competition in that last mile.

We think we can get it with the Goodlatte-Boucher bill because that will mean that cable will sell us transport lines, telephone companies will sell us transport lines. If we can acquire them elsewhere, terrific; but in the end we get some competition in that last-mile facility.

Mr. HYDE. Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I hope to ask three questions. Let me start with Mr. Jacobs.

Mr. Salsbury testified—I will read his statement and ask you to respond to it. He testified that the real problem is that 3 years after the fact, the local markets for voice and data services are not yet open. The solution to that very real problem is vigorous enforcement of the laws, not new legislation.

Is the problem with the RBOCs and their failure to open up the local market or is the problem the FCC?

Mr. JACOBS. I think that the problem has been that the RBOCs have perceived that for some period of time not to truly be in their interest to proactively open up. If you look at what happened when the FCC tried to push UNE-P—now, without talking about whether UNE-P is reasonable or not reasonable, one thing about UNE-P and, again, that is the highly discounted form of resale, that was going to incent MCI, Sprint, and AT&T all to attack the residential and the business markets. The RBOCs went to court to stop that because they believed it wasn't in their interest to open up the markets in that way.

Mr. HUTCHINSON. How are they doing now?

Mr. JACOBS. Well, now things have changed because now that AT&T is pursuing its strategy rather vigorously having already proposed to invest more than \$100 billion in addition to all the costs of upgrades, etcetera. Now the RBOCs are pushing quite aggressively to get their long distance deals done. It is only within that context that UNE-P has arisen. It has arisen in New York State where Bell Atlantic agreed to UNE-P. And that is why MCI is serving the residential markets.

Mr. HUTCHINSON. Thank you. Same question to Mr. Barr. In your testimony you indicated that if the existing interLATA restrictions do not apply to data, the Bells would be able to bring high-speed Internet access to rural areas much sooner. Yet today the *Arkansas Democrat Gazette* reports that GTE is selling 213,000 phone lines in Arkansas at \$843 million; the article states that GTE, like other major telephone companies, is shedding its less profitable

rural customers and concentrating on business data services, the Internet, and so on to urban customers.

How is this going to help the rural customers? Your vacating the lines in Arkansas, what does it portend for the future if you have this kind of access that you want?

Mr. BARR. The sell-off of some of our rural properties—we are still preponderantly a rural and suburban company. We only have two downtown areas. But that sell-off is because of FCC policies that are not providing for universal service payments. We are expected to serve rural areas below cost, but part of that quid pro quo was that we would get paid out of a universal service fund for the difference. That has been taken away from us and hasn't been replaced.

The Telecom Act said they had to do it very quickly, and they have already postponed doing any universal service reform until 2000. So that is a different issue. But look at the financial incentives for telephone company versus AT&T. We agree on something very fundamental, which is you cannot get a financial return if you can only look to the local transport revenues. You can't get a financial return.

So what is their solution? Their solution is you have to let us mandatorily capture all the vertical stream of revenues, lock in the customer, give them no choice, get all those ISP revenues, lock in the backbone revenues.

Over on the telephone side, though, we are required to look just to the local revenues by the FCC, and to go to Congressman Scott's point, the FCC has promulgated rules that if we make an investment we have to turn over to competitors at steep discounts. In fact, they just came out and said SPC has turn over ADSL at a 50 percent discount to competitors. Those are massive burdens.

Mr. HUTCHINSON. Are you saying that if this legislation passed, you would have a greater incentive to invest in the rural areas?

Mr. BARR. You could make money by building ADSL and also by transporting that data. That is exactly what AT&T is saying. The only difference is we are saying we don't have to lock our customers in. We don't have to guaranty ourselves those revenues. What we want to do is compete. Let everyone compete at every level including us.

Mr. HUTCHINSON. Is that a yes?

Mr. BARR. Yes.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I am reminded of a comment that I made to some of my lawyer friends about the difference between practicing law and being in Congress. And my response to them was in a trial you never ask a question you don't know the answer to. I get to ask questions I don't know even if the question makes sense much less know the answer to. So I am going to ask one here.

It always seems to me to be questionable—I am not saying that—I am not on one side or the other of this issue. But it seems to me to always be questionable to change a legal standard that has been out there for a long, long time. It seems to me that going back to these bills, that is what we are doing. We are changing a

presumption in the law that might or might not be justifiable. The question I have, is there such a changed presumption—would there be such a changed presumption if we were talking about AT&T getting access to DSL? What is the law?

I don't even know what DSL is, but I take it that it is the competitor to what we are here talking about. And it seems to me if it is fair to give this presumption, insofar as broadband is concerned, it would be fair to give the presumption insofar as DSL is concerned.

Now, I have no idea of whether such a presumption exists one way or another, but perhaps I could hear from—let's see. We had a couple of lawyers on this panel—I could hear from Mr. Barr on it. And then I can hear from—who is my lawyer on the other side? Mr. Rosenbaum. Give me your take on that, Mr. Barr, and then I will hear from Mr. Rosenbaum on the other side.

Mr. BARR. Both under existing law and under the Goodlatte-Boucher bill, telephone companies when they install the gizmos that create ADSL, which is the high-speed service, have to make those available to competitors including AT&T. So AT&T—there are two kinds of open access. One is the kind we are asking for them to engage in. It is called—I would call it open access "light," which at least just delivers the traffic to other people. Okay. We have to do that. But we also have an open access requirement; I call it open access "heavy."

Mr. WATT. You are answering a policy question. I am asking a legal.

Mr. BARR. We have the obligation.

Mr. WATT. You have an obligation, but is there a presumption if you don't do it, are you presumed to be in violation of the Sherman Antitrust Law?

Mr. BARR. That was the whole presumption in the Telecom Act of 1996.

Mr. WATT. Is there comparable language?

Mr. BARR. Yes, in this statute there is. In the Goodlatte bill we are subject to the same presumption.

Mr. WATT. Let me hear from Mr. Rosenblum. I am sorry I have been mispronouncing it.

Mr. ROSENBLUM. Congressman, I answer to just about anything. That is just fine.

There is no presumption of antitrust violation that attaches when telephone companies don't live up to their obligations under the Telecommunications Act. And I would respectfully submit that has been a very good thing for the incumbent local telephone companies, I think, as a number of the witnesses have discussed today. There has been a 3-year history of these companies not living up to their obligations under the Telecommunications Act, and there is no presumption of an antitrust violation that applies in that case.

What concerns us about this legislation, exactly as you have identified it, is it does change established laws by creating presumptions of antitrust violations that may not make a lot of sense. Normally in an antitrust case, you first look to see whether there is a relevant market, whether customers have substitute products or services, all of that would be—would be wiped off the books,

frankly, under the legislation; and a presumption of a violation would apply merely because a single broadband provider didn't offer the same terms for interconnection to one ISP. And that is our biggest concern with the antitrust provisions.

Mr. MCCOLLUM. [Presiding.] Thank you, Mr. Watt.

Mr. Cannon, you are recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. While there are some different views here, I am almost ecstatic that we are having this debate and the state of competition has gotten us to the point that we are actually talking about these issues here.

I would like to ask a few questions if the panelists could keep it relatively short and to the point. Mr. Vradenburg, you are company CEO. Speaking in support of the Internet, to the Tax Freedom Act, you said last fall it would be a big mistake to have 30,000 taxing jurisdictions impose their own laws, rules, and rates on the Internet. Why then does AOL believe that it would make sense to have a similar number of jurisdictions impose open-access schemes on the cable industry?

Mr. VRADENBURG. Congressman, we have advocated, as you know, an open-access regime publicly. And in fact, we would hope that an open-access regime would be adopted as the national policy. Failing any national leadership on this subject, it is clear that the consumers out there reflecting their views as citizens are urging cities to take a hold of this issue because they are not getting any response out of Washington. And they want choice and competition in their cable services.

Mr. CANNON. Thank you.

Mr. Jacobs, your firm has suggested that if the cable industry does not build out its broadband pipeline, the RBOCs likely will not meet the competitive challenge. Do you stand behind that assessment? And would the imposition of open cable obligations tend to retard cable's incentive to invest in these new broadband facilities?

Mr. JACOBS. Yes. The problem with open cable is when you have the government stepping in to set the prices, you have total uncertainty and you don't necessarily have the capability to get a return on your invested capital. If you are not going to get a return, your shareholders won't let you invest. If you just look at the plain and simple fact, ADSL is only now being aggressively deployed and further investments are now being made by the RBOCs to make it ubiquitous.

I don't think the time is totally coincidental that it is coming at the same time that cable is now just getting built out.

Mr. CANNON. But it is thrilling that it is coming. It is thrilling from both sides.

Mr. Cleland. I am skeptical of the wisdom of any policy that seeks to increase the regulatory burden on new entrants especially in an industry as complex as high-speed Internet access. Shouldn't our attention be focused instead on reducing regulatory burdens that prevent existing firms from competing in this marketplace?

If you agree, what suggestions would you offer to this committee to help us eliminate burdensome and anticompetitive regulation in the area of high-speed Internet access?

Mr. CLELAND. Well, I think in general we should be focusing on what the goal is and that is a competitive, freely competitive innovative marketplace. And deregulation is a very powerful tool that should be used aggressively in many instances. However, we also have a body of a century of antitrust law which says that there is something else to fear besides government regulation, and that is anticompetitive behavior by companies, by monopolies. So there is a balance.

I am very much, you know, a pro-deregulatory type of person. Let the market work. However, in certain instances small competitors can't compete unless the government enables it. John Windhausen's association would not be an association had the government not enabled the competitive local exchange industry to emerge in a local telco monopoly. The long distance industry would not exist had not the government broke up AT&T. And so they are not mutually exclusive. You need to look at them in tandem.

Mr. CANNON. Mr. Cleland, any legislation that mandates open access is unlikely to achieve that goal unless the law also requires that the price and terms and other conditions of the sale are reasonable. But doesn't that just pave the way for intrusive and burdensome price regulation?

Mr. CLELAND. Thanks for asking that question because everybody thinks that this leads down the line to common carrier regulation. There is a very simple nonregulatory solution, and that is one sentence that says we need open access on a nondiscriminatory basis.

Now, if AT&T did that, it would have to have @Home be charged, just like AOL, just like anybody else. AT&T would have complete freedom if they wanted to set \$1,000 fee for everybody they could. It wouldn't sell any DSL. But if they wanted to sell a \$10 fee, everybody could get it on the exact same terms. That is the issue here, they don't want to be able—you shouldn't allow yourself to self-deal when you are a monopoly. If there is one price, everybody should have the same price.

Mr. HYDE. [Presiding.] The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I have found this panel to be very interesting. I think all of us on both sides of the aisle agree that the best way to deploy broadband is to have vigorous competition in the marketplace. That's how we will deliver broadband. The only question is how to achieve that competition. This has been a very interesting discussion today. This morning the *San Jose Mercury News* had an editorial on this subject. I ask unanimous consent if I may, Mr. Chairman, to make this editorial a part of the record.

Mr. HYDE. Without objection.

[The information referred to follows:]

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## SAN JOSE MERCURY NEWS

### WHY CABLE SHOULDN'T BE SHACKLED IN THE FIGHT FOR INTERNET EYEBALLS

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Memo: Editorial

The opinion of the Mercury News

THE titans of the media are racing to bring you a faster, lusher, video-rich Internet.

It's a full-scale, multibillion-dollar battle for market share and viewers' "eyeballs." The news last week that America Online will invest heavily in the satellite services DirecTV and DirecPC added another megaton to the arsenal of money.

In the next few years, if the competition plays out right for consumers, an army of providers will deliver the Internet by phone, cable or satellite, at speeds of up to 80 times today's 28K dial-up modem.

But if competition fizzles, the public could end up with a monopoly or a duopoly, with a few behemoths controlling the pipes or pathways -- perhaps even the content -- to your home.

That possibility has created a dilemma among regulators, who are split over what to do with cable, the industry that many observers predict will overwhelm the others in the delivery of high-speed data services known as broadband. Some local cable authorities, still scarred from past cable wars, want to clamp down now, on the assumption that cable will become an Internet monopoly. The Federal Communications Commission wants to let cable be until there is evidence of dominance or harm.

We say do both. Set some rules now but leave the market basically alone. Tighten the reins but give the industry enough cable to establish -- or hang -- itself, as it chooses.

Though a tiny player now, the cable industry appears positioned to come out on top. It's got a fat pipe to handle the Internet's voracious appetite for bandwidth, lines that pass by 95 percent of America's homes and businesses, and a large (if largely abused) customer base. It's also now got the might of telecommunications giant AT&T. In buying Tele-Communications Inc., the cable company for San Jose and much of the South Bay, and soon buying MediaOne Group, AT&T will be the nation's largest cable TV company.

AT&T-TCI has slowly begun unrolling its cable Internet service, though it hasn't reached San Jose yet. There's one catch: Customers can buy it only from one cable modem service, Excite@Home, which AT&T controls. Subscribers who want America Online or another Internet service provider (ISP) for e-mail and content must pay their charges on top of Excite@Home's \$40 monthly fee.

Telephonic companies don't have this built-in advantage; by law, they must open up their lines to all ISPs. That's why America Online, with 16 million members, and other ISPs and high-speed providers are flourishing. But Congress exempted the cable industry in the 1996 telecommunications law in order to encourage it to upgrade its system to enter the telephone and high-speed data markets.

The policy appears to be working. Whenever TCI or another cable company announces its Internet service, the local phone monopoly expedites the rollout of digital subscriber lines, or DSL, telephony's high-speed equivalent, and sharply cuts the price. AOL's \$1.5 billion investment in Hughes Electronics' satellites -- a direct response to being shut out of cable -- ensures another market option.

The Federal Communications Commission has taken a wait-and-see stance to regulation. It argues, with reason, that cable has signed up less than 1 percent of Internet users, so for now it obviously has no monopoly. The FCC also buys Wall Street's arguments that regulations would retard investment and slow development.

In response, AOL and the ISPs, armed with dire forecasts of cable's dominance, are waging a campaign in Congress and before local cable authorities. Give us equal access to compete and to preserve an unfiltered Internet, before it's too expensive to modify a built-out system, they argue.

Portland, Ore., was the first to agree and ordered TCI to open the franchise equally to all ISPs, with no price break for Excite@Home. Last month, in a decision that surprised the FCC, a federal district court said that Portland had the authority to act as it did.

We agree with the FCC that it, not Portland and thousands of localities, should set national policy for the cable industry. But we don't think that policy should be hands-off.

Instead, we favor a middle course, like the stance of the Los Angeles Information Technology Agency. Its report, released this month, recommends allowing cable companies to sell Internet linkups through their own ISPs, for now. But it advocates conditions that we believe the FCC should impose nationwide:

(box) Subscribers must have unrestricted access to all content on the Internet; they should be able to choose any site for a home page and, with a single click, get to any unaffiliated ISP. (Excite@Home currently allows this.)

(box) Unless for capacity reasons, there should be no time limits on downloading video. Time limits can be an excuse to ward off programming competition.

(box) There should be benchmarks for the FCC to consider requiring open access, if it appears that cable will establish a broadband monopoly.

The Internet will explode in richness in the next few years. How and who will deliver it to your TV and your computer is up for grabs. The FCC shouldn't pick and choose the winners, but it must protect consumers from dominance

Ms. LOFGREN. The editorial opposes the two bills that are the subject of this hearing. The editorial suggests, however, that there is a middle ground that is reflected in the Los Angeles Information Technology Agency Report and that ought to be pursued. Specifically, the editorial suggests that subscribers to cable broadband should have unrestricted access to all content on the Internet; that they should have the easy ability to choose their own home page; that there should be no time limits on downloading of video unless there is a capacity reason for such time limits; and that benchmarks ought to be set up for the FCC to consider down the line. On this last point, cable now has 1 percent of the market. You are not controlling the market at 1 percent. But at some point, it could be a concern. So maybe we ought to set some benchmarks.

I would like to hear, Mr. Jacobs, if you believe that this kind of a scheme would be a deterrent to the roll-out of broadband through the cable industry?

Mr. JACOBS. I think it is not impossible to assume that that could be helpful. I actually find that I am actually in agreement for once with the FCC and the way that they pursued this policy. I am not usually necessarily in agreement with them. But what they have done in this policy is they have sort of fired a shot across the bow of cable.

They have said, okay, you are incipient. You are brand new. We are going to give you a time to go and try and pursue your investments. But by the way, we always have the ability to come and regulate you if you behave in the Internet space the way you behaved in the programming space. I think that that is a fairly prudent strategy because you can always come in and regulate later. There is legitimate concern that perhaps billions of dollars would be spent creating proprietary systems that you won't be able to go back and reregulate later.

In fact, Mr. Barr has been one of the best proponents of showing that the systems are actually quite easy to open up. So in some sense he has actually argued the cable argument on that one, which I find a bit ironic. But I think the point is that it is in AT&T's and everybody else's interest to have as many people selling the service for them as possible. Negotiations, I believe, in the open marketplace will lead to that if they don't, come back and regulate them in 2 or 3 years.

Ms. LOFGREN. It seems to me as I listen to you, the question is not just where we end up, but also when we end up there. I am quite cognizant of the facts on this issue—as with so many other hi-tech issues—that we are very much in a transition phase. My friend John Dorr describes the Internet as the Big Bang. He says that we are at second 2—following the big bang—and I think that is a quite apt analogy. So what we do on this issue may just help for a short time. I doubt it is going to be the final answer.

The real concern I have is that we not take a misstep, that we not preclude the optimizing of opportunities through market forces, that we not misread the market forces.

I am wondering in terms of DSL—and I find this very frustrating—when it has been so slow to deploy. Only now, in my neighborhood in San Jose, is it being deployed. I am wondering if the deployment of DSL is providing competition. I am interested and en-

couraged that AOL is now pursuing satellite and wireless opportunities. I think this is a good development. I ask whether, in your judgment as a market analyst, Mr. Jacobs, whether this has been spurred, in part, by cable or by DSL?

Mr. JACOBS. I think AOL is a content provider. They are agnostic relative to what channels they get; they've got to get over every channel. The biggest threat to the company long term is that they get marginalized if they don't have broadband access. DSL is broadband access. The only question is: Will it be available to 100 percent of the market or only the current 40 to 50 percent that it can technologically address? That is a question of whether the RBOCs invest incrementally. They are now making such announcements that they are about to invest. I think they are going to wind up doing so as long as they are incented to. And the answer, by the way, technologically, if you offered me the different products, I would prefer DSL. It is a private line.

Ms. LOFGREN. It is a better technology.

Mr. JACOBS. It is a better technology. All of the bands. It is a better technology in the sense that cable technology is a shared medium. If your next-door neighbor is a bandwidth hog, then you won't be able to download your movies or your Web sites. So all things being equal, I think DSL is a better alternative.

Mr. HYDE. The gentlelady from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman, and members. This is a good hearing, and it forces us to have to get involved and to pay attention and to learn all of the new technology so that we can be prepared to assist our constituents in whatever way that we can to make sure that there is easy access, affordability, and that they—well, basically that they have access and it is affordable and it is comprehensive.

I would like Mr. Barr to, again, tell me why there is something wrong with AT&T pursuing its strategy of acquiring cable companies such as Media One and why does that make them more able to provide services in ways that others can't and does this not give them the ability to have access in ways that the local telephone companies may not allow them.

Mr. BARR. AT&T can get access today over the telephone line because the regulatory requirements are that we provide both the line, and the bill provides for us providing condition loops to AT&T. There has been a two-step tactic that has been used twice before in this century: One, buy up a lot of local pipelines into the house; two, get a big footprint, which they are doing now with cable; and then two, adopt a closed system which says that you can only get our services over that system. And they did that in the beginning of this century with telephone.

And that is how you monopolize telephone. They said well, we don't want other people attaching telephones to this line so you have to use our telephone and you have to use our long distance. That is the only way we can get our investment back.

Same thing in 1980 with cable. This time they leveraged their power over the content, and they took control over the content. And there is virtually no independent video programmers around anymore. These guys now have a stranglehold on it. Then once they

get the positions in those markets, they can use it to reinforce their basic privacy over the pipeline.

The key point is—and I think a lesson was learned in the 1996 act and repeatedly in trying to deal with cable companies—is you got to acquire open access at the beginning. If you wait too long, there is an entrenchment and a distortion. Then it takes regulation to get rid of it.

Ms. WATERS. Let me hear from AT&T from that.

Mr. ROSENBLUM. Thank you very much. Apart from the irony of Mr. Barr representing a local telephone monopoly lecturing us on open markets and competition, I think what you have touched upon is absolutely right. As Mr. Jacobs pointed out in his testimony, although I am not sure the colorful rhetoric of AT&T being crushed is exactly the way I would have put it, we have invested a lot of money in cable systems. We are a newcomer to the cable business. We see cable not only as a way of distributing video but as a way of investing and building a brand new communications platform which everywhere we are successful will be no better than the second kid on the block.

We are going to be competing against monopolies who have 99 percent of the residential business today, companies like GTE and the Bell companies. We don't get our money back if we close our systems or if we turn our back on what consumers want. If AOL is able to get DSL service that gives consumers a choice of ISP's and consumers want that, we would be very, very ill-advised not to make sure consumers can also get what they want from us. We have an incentive to do that. I think the question today is not whether open or closed or competitive or noncompetitive, is right; it is do we need more rules and laws to achieve that or do we have the incentives we need already in place.

Ms. WATERS. Finally, Mr. Jacobs said that you are about to invest in ways that you are not going to be able to recoup your investment. Would you do that?

Mr. ROSENBLUM. Well, I guess I would certainly hope that we don't. But I think that the essence of what he said, at least to my way of looking at it, Representative Waters, is that we are taking a very big risk here. We are taking a very big risk to make this Telecommunications Act promise of competition a reality. No one else is investing the kind of money that we are in building the kinds of facilities for residential customers that we are now doing through the cable systems.

We are very optimistic about our ability to recover on our investment if you give us a chance to serve customers, but that means giving them what they want, not giving them what—not giving them what we tell them they want.

Mr. HYDE. The gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. I apologize for missing some of the earlier hearing, but I am fascinated by the subject matter and have certainly perused a good deal of your testimony this morning, gentlemen. I must say that I am open minded about this matter. It is a matter of which both sides of the argument—and maybe there are three sides really—have a lot to say. And being somebody who likes to make the right decision, it makes it more difficult when you have

such good and persuasive advocates sitting here making those cases.

I have one question that probably because I was absent has been touched on briefly before. But I would like to revisit it for my own clarification and maybe ask Mr. Boggs and maybe Mr. Rosenblum to respond to this.

And that has to do with Mr. Barr's testimony and the points that he made that I thought were very explicit. I just would like clarification from your perspective where he says that many cable companies are compelling their customers to sign up, pay for, and use ISPs if they want to use a cable modem; and if they obtain a cable modem service, they must choose the company's cable, the cable company's ISP.

He goes on to say that there are three penalties for not doing this: Customers who want to use another ISP, they still have to pay for the cable company's ISP; in other words, they have to pay twice. Second, there is a performance penalty he says that traffic of customers who want to reach another ISP travels on the public Internet leading to lower-quality connection rather than on yours. And finally, he says by making customers go through the cable company's own ISP, they can block competitive products from reaching their customers.

I suppose, Mr. Boggs, I should direct that to you first. I only mention Mr. Rosenblum because I understand AT&T and Time Warner are kind of together collaborating these days on such matters. And I would like to know what your response is to what Mr. Barr has said. He said it very succinctly. And I don't know how succinct the answer has been to that.

Mr. BOGGS. I think it is a confused picture of what it is that Time Warner cable has built including throughout Florida where we have built a high-powered, high-speed network to serve the customers throughout the communities in which we have franchises.

This network permits our customers through the application of servers and interconnection facilities to get on to the Internet. It is in some ways an ISP itself. It also has local content that is provided by the cable company and by other local institutions: museums, schools and others.

If an individual is a customer of Time Warner cable and subscribes to the extra service called Road Runner, they may get access to anywhere in the network that they choose. If some other ISP or some other information provider, for example, Bloomberg News or some other site on the Internet chooses to permit that customer to get access to them for free, the customer enjoys that access.

If that third party chooses to charge them for that access, that is a choice that the customer can make with regard to that provider. It is not a choice that we have made to charge someone twice for something. We are charging them what we think is a fair price. By the way, it is usually about \$40 per month in the marketplace. It varies somewhat from market to market. And it is a service that customers throng to when we roll it out in the community. We are now feeling some stiff competition from DSL. As Ms. Lofgren said, it is a challenging new service but we are not in the position of charging people twice for anything.

Mr. McCOLLUM. Mr. Barr, do you want to respond to that before my time runs out here?

Mr. BARR. They are trying to confuse a site that you might go to like Yahoo versus an ISP. An ISP performs two functions. One, it is the intermediary that connects you to the backbone and helps you navigate over the Internet; and second, it provides you with content, some of its own content, but then it organizes other content. That is what an ISP is, like Mindspring, AOL, GTE.net.

What they have done is say, if you want to buy high bandwidth, you must pay the cost of our ISP, @Home. If you want to get to another ISP, forget this Yahoo nonsense, they are not an ISP. If you want to get to an ISP like GTE.net or AOL, you have to pay twice for their service. It is a double payment.

Mr. McCOLLUM. Mr. Boggs, is that accurate? Do you dispute the characterization Mr. Barr has just given that?

Mr. BOGGS. No, I don't think it is accurate. I think the—in the provision of Internet services, there are lots of different services that are offered to a customer. There are many that are hybrid services that, in fact, have some ISP functions as well as having some content functions. And customers are free to choose them, using our network in any way that they wish.

People choose to become our customer, they are buying our service, they choose to make that purchase, that subscription, they are then free to make any other subscriptions that they wish to. If they choose not to buy our service and choose to subscribe to some other service, that is their choice. And they are making that choice every day of the week.

Mr. HYDE. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. I would like unanimous consent to submit a full statement into the record.

Mr. HYDE. Without objection.

[The prepared statement of Mr. Meehan follows:]

PREPARED STATEMENT OF HON. MARTIN T. MEEHAN, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman,

I would like to thank you for calling this hearing today. The issues presented by these two bills are very important to consumers and businesses alike as we reflect upon the success or failure of the 1996 Telecommunications Act and as we look forward to the state of the telecommunications industry as it evolves with changing technologies in the coming years.

It is self-evident to say that the telecommunications industry evolves and changes faster and with greater ramifications than any other sector of our economy. Internet use and access is booming; competition among Internet service providers is developing offering consumers real choices; the old phone company is unrecognizable and will become more unrecognizable still; and all of these developments make communications easier, cheaper and more reliable.

The importance of the bills that we are debating today, the "Internet Freedom Act" and the "Internet Growth and Development Act" cannot be overestimated. The two controversial provisions of the bills: allowing the regional bell companies to make long distance data transfers; and forcing the unbundling of the broadband cable lines strike me as watershed events in telecommunications policy if enacted.

My reaction to the two provisions differs. First, I will address permitting the regional bell companies (the "RBOCs") to compete in the long distance data market. Unfortunately, the promised sweeping changes contemplated in the 1996 Telecommunications Act, designed to present more choices, better service, and cheaper prices to consumers have not materialized. The reason for the lack of progress on this front can be and has been debated, but for my purposes, the only relevant point is that consumers have not seen the benefits. It seems that the only beneficiaries

have been the stockholders of the numerous companies who have been bought or who have merged since we passed the Act in 1996.

Permitting the RBOCs the ability to compete in data will spur investment in high speed DSL technology as the RBOCs will have an incentive to upgrade their networks. Consumers will benefit by receiving faster Internet service through a greater choice of providers.

Over half of today's traffic is data transmissions. Providing consumers with the fastest possible method for communicating data traffic is a necessity. This bill will incentivize the RBOCs to do just that.

Exempting data from the requirements of section 271 of the 1996 Telecommunications Act in light of the fact that no single RBOC has fulfilled the requirements of 271 in any single state gives me pause. I appreciate the argument that legislative relief would not be necessary if the RBOCs simply complied with the bill as envisioned.

On balance, however, the importance of consumers to receive better service and more choices outweighs my concerns. It is not wishful thinking to believe that given this relief, the RBOCs will still expeditiously pursue 271 compliance in every state.

Turning to the second major issue presented in this bill, the open cable access provision, my concerns here outweigh the benefits of the bill, at least in the short term. As in the data transmission section of the bill, my analysis focuses primarily on how it will affect consumers and their increased access to better, faster Internet connections.

In order for the companies currently investing in a broadband backbone to continue doing so, there must be a regulatory framework that encourages investment and innovation. At this point, the cable companies have invested untold dollars in providing cable service to their customers. Unbundling that network now when AOL serves millions more customers than its competitors is premature.

The FCC addressed this issue persuasively, when they reported,

"We believe it is premature to conclude that there will not be competition in the consumer market for broadband. The preconditions for monopoly appear absent. Although the consumer market is in the early stages of development, we see the potential for this market to accommodate different technologies."

Congress does not need to wait until a monopoly is present to regulate the industry, but Congressional involvement at this early stage in the development of the Internet would be premature. I will be prepared to advocate opening the broadband backbone when the time comes; that time has not yet arrived.

Congress needs to address the two controversial provisions of this bill with a focus on how to best serve the consumers. Consumers will benefit by creating incentives for the RBOCs and the cable industry to continue deploying better and faster technology.

Mr. MEEHAN. I want to comment on two of the provisions we are discussing today. The first is allowing regional Bell companies to make long distance data transfers. The second is forcing the unbundling of the broadband cable lines. Obviously, these provisions have broad public policy implications. It seems to me—I support allowing the regional Bell companies to compete in the distance data market. Permitting the regional Bells the ability to compete in data seems to me is going to spur investment in high-speed digital subscriber line technology, and the company is going to have incentives to upgrade their networks. Consumers would benefit by receiving faster Internet service through an upgraded choice of providers.

With regard to the open cable access provision, my concerns here, at least in comparison—comparing them with the benefits of the bill, at least in the short term, are we have to develop a regulatory framework that encourages investment and innovation. At this point the cable companies have invested millions of dollars providing cable service to their customers. And if we unbundle the network, what does that mean for the short term? And it seems to be premature at this point.

And we have to look at this as how do we address these two provisions of the bill with a focus on how to best serve the consumer. Consumers obviously are going to benefit by creating incentives for the regional Bell companies and incentives for the cable industry to continue deploying better and faster technologies.

With all of this in mind, the number of mergers and investments in the telecommunications industry obviously are unparalleled in today's marketplace. Consumers in Massachusetts, for example, are impacted by the merger of Bell Atlantic and GTE and by AT&T's pending purchase of Media One.

Mr. Barr, on behalf of GTE and, Mr. Rosenblum, on behalf of AT&T, could you please comment on the impact of these transactions; and I would also like to hear Mr. Kimmelman's response on behalf of the consumers.

Mr. BARR. You are talking about the major mergers?

Mr. MEEHAN. Yeah, at least as they affect Massachusetts and other States.

Mr. BARR. I think that the whole logic of the Telecom Act, really, was to promote some degree of consolidation, because if you tear away geographical restrictions and product line restrictions that have existed in the past—remember we sort of had a siloed telecom industry. Everyone was sort of operating within their own little silo. And the Telecom Act basically wants everybody mixing it up. And, therefore, it is logical that the most efficient way economically for companies to expand their geographic footprint and to expand their product line are through consolidations. That is the most efficient way that brings consumer benefits.

The problem will occur where mergers tend to bring together competing entities, existing competitors, and therefore diminish competition in some markets. But I wouldn't say generally that all mergers are bad. And you have to look at each merger as they come to see what its competitive impact is.

Mr. MEEHAN. Mr. Rosenblum.

Mr. ROSENBLUM. Thank you, Congressman. I guess because we don't favor any presumptions under antitrust laws, we also, like Mr. Barr, think mergers have to be viewed on their individual merits. And some are beneficial; some may not be.

I think, though, that two kinds of mergers you raised are very different in terms of their impact on customers. In the case of GTE and Bell Atlantic or Bell Atlantic and Nynex before, or Ameritech and SBC just in the news now, I think we are disappointed at least because I think the purpose of the Telecom Act was to stimulate competition between firms that had not traditionally competed with one another.

And in the case of local companies that merged, I think you see companies merging instead of competing with each other when they could have been competing.

Our merger and investment in the cable industry is designed to promote exactly I think the kind of competition that Telecom Act envisioned. We are not only using the investment to compete over facilities with the incumbent monopolies, but I would like to think that our participation in cable is turning the cable industry and the telephone industry finally to face each other as competitors.

Mr. HYDE. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. All the questions I had have been asked. I think Mr. Kimmelman wanted an opportunity to respond to my friend, Mr. Meehan's, question.

Mr. KIMMELMAN. Thank you, Mr. Delahunt. I was on a roll with Mr. Barr, but this is when I have to disagree with him. I think every merger should be judged on its own merits, but I think both of these are devastating. I think we are losing potential competitors, as Mr. Rosenblum points out; but unfortunately, I think the AT&T transaction while well intentioned on the telephone side can have devastating effects for rising cable rates and rising high-speed Internet access charges. We are just losing potential competitors to this consolidation.

Back to your original point, though, Mr. Meehan, I think you raised—if we were in a markup setting and not in the context of a hearing, I would suggest that you can phase in obligations. Ms. Lofgren indicated some ideas related to sending clear signals to investors.

Really, for both of the provisions that you are talking about, I think there is a problem, as Mr. Salsbury has pointed out, with in the future segregating data from voice. Everything is being digitized. Nothing is going to be purely one or the other. It is an enormous problem in having separate policy rules for something that can't be separated easily and policed.

So I suggest that you can deal with both of those provisions through transitions. And while there are a lot of people I like to shock—one of the last people in the world I like to shock is Mr. Conyers—but I have to explain that the purpose of the 1996 act was to promote competition for greater choice and lower prices for consumers. We are 3½ years into a law with cable prices soaring, \$5 billion in new telephone charges because of poor antitrust enforcement, horrible regulatory policy at the Federal level. We need to do something here.

So whether it is phasing in some provisions, working them more carefully, we certainly have problems with some of the provisions in this bill. These markets will develop. The fact that data becomes the dominant driving force is interesting, but the fact that people who make less than 30 minutes of long distance calls today according to the FCC are paying twice what they were 2 years ago for those 30 minutes is outrageous.

And we have to do something to make sure we are not giving away all the reasonable prices and affordability of our old system as we try to grow that into a competitive Internet. So we just urge you to step in and put a lid on the ongoing monopolistic pricing practices.

Mr. DELAHUNT. Thank you, Mr. Kimmelman. And I will yield to the gentlelady from California. I do have one question, Mr. Chairman.

Ms. WATERS. Go. Take your question.

Mr. DELAHUNT. I find your analysis interesting because as you say, those who use less than 30 minutes of long distance time are now paying double, which indicates that the burden has shifted in terms of those least able to pay, and the market has become so much more attractive.

All these gentlemen here today are clearly interested in the fastest growing, most lucrative market, which is the transmission of data. I think for those of us who are in a policy-making role here, we ought to reflect on that.

I just have one quick question for Mr. Jacobs. Let me preface it with an observation. I am really interested to see what happens to the market today after your analysis is broadcast on C-Span and all over America. It will be interesting to see how AT&T does. In any event, you made an interesting point about UNE-P. I don't know if I am pronouncing it right. But litigation had commenced.

Can you tell us what happened to that litigation or did the market realities and the aggressiveness of some of the players outpace the litigation in terms of changing the status quo? Because I guess my answer is if we rely on the enforcement of the antitrust provisions, we are talking about an extremely—

Mr. HYDE. Does the gentleman require additional time?

Mr. DELAHUNT. If I could have an additional moment.

Mr. HYDE. An additional moment.

Mr. DELAHUNT. A chairman's moment.

Mr. HYDE. I have been very strict with everybody up until now. And I don't want to incur their wrath, but if unanimous consent is requested for another minute, why, they have a chance to object, and they haven't. So the gentleman has another minute.

Mr. DELAHUNT. Thank you, Mr. Chairman. In any event, if you could just describe the litigation and the changing market conditions and draw a parallel for us in terms of whether this is an efficient mechanism, i.e., litigation through the courts of appeals, et cetera, et cetera.

Mr. JACOBS. Litigation has been a fairly disastrous set of events for the industry. It has wildly delayed the onset of competition. UNE-P was attempted by the FCC as the primary way of getting long distance companies in the market. The RBOCs objected to it. They did the fair thing: They went to court; they had it overturned. That created effectively a 2½-year truce until the Supreme Court ruled on it. The Supreme Court ruled recently and now the components of that issue has been thrown back to the FCC. We haven't yet heard their ruling, so we don't know the fate of UNE-P.

The one place that UNE-P has come up is when RBOCs have decided that they are ready to get into long distance or eager to get in, such as the case in Texas and the case in New York. They have struck separate deals with their State public utility commissions to offer up UNE-P for limited periods of time for specific numbers of customers at these high discounted rates as a way of getting into long distance. So UNE-P is sort of a piecemeal issue right now. The RBOCs have not embraced it wholeheartedly, but they are using it to get into specific States into long distance.

Mr. HYDE. The gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. First I want to associate myself with Miss Lofgren's comments. I thought they were right on the money. The question for me is when does something become an essential facility? And who bears the burden of proving that? This may come as an odd thing for a Democrat to say, but people have described me as an odd Democrat and worse; but why shouldn't the presumption be that this is not an essential facility

yet if it has not yet reached 1 percent of the market? And if 1 percent is the right number, when DSL and wireless achieve 1 percent, are we going to declare them essential facilities also? Is that going to be good for America?

I am always tickled here in the House of Representatives by people who constantly rail against big government when it has to do with health care or food for poor people or public education or cleaning up the environment or, God forbid, gun control or gun safety. The big hand of government is terrible. But when it comes to benefiting their industry or their constituents, big government intervention is the right thing to do.

But I still think the presumption has got to be against calling this an essential facility, certainly at 1 percent. And again it may be an odd thing for a Democrat to say, but I am thrilled that the cable investors have invested all of their billions of dollars to create a system now that everybody wants to jump in on. Because it is going to provide consumers with so many options and opportunities, the same with DSL and wireless.

Will it encourage other entrepreneurs, capitalists, to expand beyond cable DSL and wireless to some unknown technology that we can't even yet contemplate if we at 1 percent of the market declare cable to be an essential facility? I think it might.

I have a question for the gentleman from Portland. If the cable people have to take on these other folks, you know, these paid franchise fees to the cities, will that make them no longer cable companies should they not pay their franchise fees? Or should we require the providers of these broadband services, the phone companies, satellite and wireless to pay franchise fees too or do we remove all of the franchise fees all together?

Mr. STEN. Thank you, Congressman. To address your first question quickly from a local perspective, small government not big government in Portland, Oregon, from our point of view I don't see how we could come to any conclusion except that these are essential. We for many, many years have franchised cable facilities because our citizens don't want 10 cable lines on the streets. We have one set of streets and they want one cable line.

Up until this year we have had two competing companies which both had a franchise geographic monopoly, TCI and Paragon; but by having two, we are able to work with both to see what would one company do for citizens, what would another not do. And we are able to negotiate over time good franchises.

Mr. ROTHMAN. Reclaiming my time. Did you get to the point where you would know when you want to make wireless and DSL essential facilities? Have you figured that out?

Mr. STEN. Well, wireless is a new one for local governments. On your franchise fee question, if I could finish up quickly on the last point, we now have one company that owns all of the cable systems in Portland. We have opportunities to say what we believe should happen. We are laboring under an assumption there is no Federal policy; local governments have the authority to exert open access requirements and we have.

Mr. ROTHMAN. I am just going to reclaim my time. I probably have 10 seconds. Just to say that for me the burden of proof would be on those who at 1 percent feel this is an essential facility and

to prove why this would not have a chilling effect on those who want to create new technologies and make the money the cable folks are presumably going to make now if they discover some other way to transmit data beyond those that we can think of today.

Mr. STEN. I don't mean to take all your time; I mean to answer the question. One hundred percent of the cable still is not 1 percent. In Portland it is 100 percent that is what we are dealing with. We charge a franchise fee on whoever uses the right of way.

Mr. ROTHMAN. So you couldn't give up the franchise fee for cable? Mr. Jacobs, do you have a comment?

Mr. JACOBS. Yeah, I quite agree that to call something an essential facility when it has 1 percent is sort of a misnomer. Secondly, as I understand it, an essential facility is when you don't have an alternative, not just a question of how much market share it has. DSL is an alternative and there are many new alternatives coming on to the market.

MCI WorldCom has, over the last couple of months along with Sprint, invested very dramatically in a technology called MMDS. It is a wireless technology. That is a function of chasing the exact same return on investment that cable is chasing and that the RBOCs are chasing.

Mr. HYDE. I am sorry. Mr. Cleland wants a minute.

Mr. CLELAND. If I could most respectfully challenge the 1 percent assumption. This is just assuming this is one Internet market. A video ISP is very different than a narrowband telco ISP because they offer completely different products. Over a narrowband dialogue, which is 30 million telephone users, you can't pull down TV programming, you can't pull down the Titanic. You can't pull down these multimedia or video things. It just isn't allowed. I mean, it isn't possible. So of the market, of the video ISP marketplace, cable has a 90 percent share of that very different market than the telco market.

Mr. HYDE. The gentleman's time has expired. All time has expired.

I want to congratulate this panel for staying here and for your illumination of a very complicated issue. You may wish to ask if we are going to mark this bill up. I have no answer for that. I don't say yes or no. I say we are going to assimilate all that you have told us today and think about it and talk about it. And the decisions will be made. But there is nothing imminent. So your anxiety quotient can diminish.

Mr. CONYERS. Mr. Chairman, could I add my compliments to this very distinguished panel. Their staying power is enormous. And I am very grateful.

Mr. HYDE. And the quality of their testimony.

Mr. CONYERS. Pretty good too.

Mr. HYDE. Very lofty. The committee stands adjourned.

[Whereupon, at 1:06 p.m., the committee was adjourned.]

## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, DC, January 5, 2000.

Hon. WILLIAM BARR,  
*Executive Vice President and General Counsel,  
GTE Corporation, Washington, DC.*

DEAR MR. BARR: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

Members of the Committee have asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

#### QUESTIONS FOR MR. BARR

##### *Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

##### *Question from Mr. Rothman*

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

GTE CORPORATION,  
Washington, DC, January 31, 2000.

Hon. HENRY J. HYDE, *Chairman,  
Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR CHAIRMAN HYDE: Please find attached my answers to the written questions that you submitted to me by letter dated January 5, 2000, on behalf of members of your Committee in connection with your Committee's June 30, 1999, hearing on H.R. 1686.

Thank you again for permitting me to testify at the hearing.

Sincerely,

WILLIAM P. BARR, *Executive Vice President.*

cc: Hon. John Conyers, Jr.

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

*Answer from Mr. Barr*

(a) The "essential facilities" doctrine is but one of many antitrust tools used to prevent anticompetitive abuses. Stated generally, the doctrine requires that a competitor share a facility with other competitors if (among other things) the facility is essential to competition and the facility is not practically or reasonably available from another source. The question in the context of broadband access, therefore, would be whether, within the relevant geographic market, a broadband access transport provider possessed a facility—a broadband line or network of broadband lines, for example—that provided, during a relevant time period, a monopoly means of broadband access to consumers and that was not practically or reasonably duplicable from another source.

The approach taken in section 102 of H.R. 1686 seems to me to be more analogous to the antitrust doctrine of unlawful tying than to the essential-facilities doctrine. Specifically, section 102 would prevent any broadband access transport provider that has market power from leveraging its power into the adjacent broadband service market and would instead require that that provider not discriminate against other providers of broadband services. As I explained in my testimony, this principle of nondiscriminatory access has been a central tenet of telecommunications regulation for the last 15 years or so. Its application to the newly developed broadband access transport market, far from treating broadband any differently, would be a major step towards consistency and regulatory parity.

(b) I have no particular view on the impact the proposed legislation would have on antitrust litigation. Insofar as increased litigation is necessary to deter or penalize genuine anticompetitive abuses, such litigation should be welcomed. Insofar as certain provisions of H.R. 1686 might be construed overbroadly and could be further refined to focus more clearly and specifically on genuine anticompetitive abuses, I would support any such refinement.

*Question from Representative Rothman*

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

*Answer from Mr. Barr*

With all respect, I must first take issue with the premises of your question. Among other things, I believe that economic analysis compels the conclusion that broadband access constitutes its own market; that H.R. 1686 is better understood by analogy to the antitrust doctrine of unlawful tying than to the "essential facilities" doctrine; and that H.R. 1686's treatment of all broadband access transport providers (not just of the cable industry) is based not on their ability to carry a video broadcasting image but on their having a transmission capability in excess of 200 kilobits per second.

I therefore do not understand H.R. 1686 to declare anything to be an "essential facility". Instead, I understand it to act to prevent abusive coupling of Internet broadband transport with other Internet products or services. DBS and wireless carriers, to the extent that they have market power in broadband access to the Internet, would likewise be subject to such preventive measures.

CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, DC, January 5, 2000.

Mr. TIM BOGGS, *Senior Vice President  
for Public Policy,  
Time Warner, Inc., Washington, DC.*

DEAR MR. BOGGS: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTIONS FOR MR. BOGGS

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

TIME WARNER,  
Washington, DC, March 31, 2000.

Hon. HENRY J. HYDE, *Chairman,  
Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR CHAIRMAN HYDE: Thank you for allowing me to testify before your Committee at the legislative hearing on H.R. 1686, the "Internet Freedom Act", and H.R. 1685, the "Internet Growth and Development Act of 1999" on June 30, 1999. I hope my testimony was of assistance to you and the Committee.

On January 5, 2000, you wrote to ask me to submit a written response to a question posed by Representative Meehan for inclusion in the hearing record. Our response is enclosed.

I also would like to take this opportunity to apprise you and your colleagues on the Committee on some developments which have taken place since your hearing. As you know, on January 10, 2000, Time Warner and America Online announced a strategic merger designed to create this century's first fully integrated media and communications company capable of enhancing consumers' access to the broadest selection of high-quality content and interactive service. At the merger announcement, Steve Case (Chairman and CEO of AOL) and Jerry Levin (Chairman and CEO of Time Warner) also made clear that the new company would be committed to ensuring consumer choice of Internet Service Providers (ISPs) and content. Shortly thereafter, on February 29, 2000, the two companies announced a Memorandum of Understanding outlining the open access business practices under which Time Warner will offer consumers a choice of multiple ISPs, including AOL, on its broadband cable systems.

This announcement together with other recent developments in the marketplace confirm our view that the competitive marketplace is working to provide consumers with the broadest choice of Internet service providers.

Please do not hesitate to contact me with any additional questions or if I can assist the Committee in any other way.

Sincerely,

TIMOTHY A. BOGGS.

cc: The Honorable John Conyers, Jr.  
Joseph Gibson, Chief Counsel

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

*Response*

The "essential facility" doctrine in antitrust law has never been adopted by the Supreme Court, see *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part), and has been harshly criticized by commentators, see 3A Areeda & Hovenkamp, *Antitrust Law* § 771c, at 176 (1996) ("the 'essential facility, doctrine is both harmful and unnecessary and should be abandoned"). Even those courts that have recognized the existence of the doctrine have emphasized its narrow scope. See, e.g., *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1357 (Fed. Cir. 1999) ("the essential facility theory is not an invitation to demand access to the property or privileges of another, on pain of antitrust penalties or compulsion"); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998) ("[a] monopolist has no general duty to share his essential facility").

Nevertheless, to the extent that antitrust liability may be predicated on the essential facility doctrine, the general contours of that doctrine are: 1) a monopolist who competes with the plaintiff controls an essential facility, 2) the plaintiff cannot duplicate that facility, 3) the monopolist denied the plaintiffs use of the facility, and 4) the monopolist could feasibly have granted the plaintiff use of the facility. *Id.*; see also *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). of course, before these factors can even come into play, a court must find that a company is a monopolist, which requires a determination of the relevant market in which the company operates and an assessment of its market power. See, e.g., *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494 & n.11 (4th Cir. 1986). Moreover, the essential facility doctrine does not condemn the company's monopoly itself; rather, it is addressed to the effect of that monopoly on competition in a related market. See 3A Areeda & Hovenkamp, *supra* § 771a, at 172 ("the essential facility doctrine concerns vertical integration—in particular, the duty of a vertically integrated monopolist to share some input in a vertically related market . . . with someone operating in an upstream or downstream market").

Given these principles, it is not clear how the essential facility doctrine, if valid, could have any application to broadband Internet services at all.

The prerequisite for the application of the essential facility doctrine—the existence of a monopoly—is not satisfied. First of all, the vast majority of consumers who use the Internet access it through a narrowband service, and it is far from clear that narrowband and broadband Internet services should be classified as separate antitrust markets. Moreover, even if broadband Internet services do constitute a separate market, that market is characterized by intense and vigorous competition. Cable operators, telephone companies and others, including satellite operators, are aggressively rolling out broadband services all across the country. See, e.g., Roger O. Crockett & Catherine Yang, "Faster, Faster, Faster", *Business Week*, Oct. 18, 1999, at 191. These companies are relying on a variety of technologies and are offering consumers and businesses a variety of service plans. Countless articles have been written comparing the pros and cons of each company's approach. See, e.g., Peter H. Lewis, "Picking the Right Data Superhighway", *N.Y. Times*, Nov. 11, 1999, at G1. Perhaps most importantly, the development and deployment of broadband technologies is in its infancy. In the words of William E. Kennard, Chairman of the Federal Communications Commission:

"The broadband market is fertile, but still undeveloped. The future is bright, but still glimmering in the distance. We are about 50 meters into a race that is sure to be a marathon.

Sometimes people talk about broadband as though it is a mature industry. But, the fact is that we don't have a duopoly in broadband. We don't even have a monopoly in broadband. We have a NO-opoly. Because, the fact is, most Americans don't even have broadband."

William E. Kennard, "The Road Not Taken: Building a Broadband Future for America", Speech before the National Cable Television Association, June 15, 1999, *avail-*

able at <http://www.fcc.gov/Speeches/Kennard/spwek921.html>. In the absence of a monopoly in any relevant market, the essential facility doctrine cannot apply.

On its path to establishing "a presumption of a violation of [the Sherman Act]", H.R. 1685, §502; H.R. 1686, §102, the proposed legislation alters traditional notions of antitrust market definition and market power.

For example, the proposed legislation would require a court to forgo analyzing whether narrowband and broadband Internet services are in the same market. Standard antitrust principles relevant to defining a market, such as substitutability of use and cross-elasticity of demand, *see, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), are dispensed with in favor of a rigid determination that Internet services with "a transmission capability in excess of 200 kilobits per second" are in one market, H.R. 1685, §505(1); H.R. 1686, §105(1), and Internet services with a "transmission capability" that is one kilobit per second slower are in another. As a result, a court assessing a broadband provider's liability under the proposed legislation would not consider the substantial competition posed by narrowband providers, who continue to be the source of Internet services for the vast majority of Americans.

The proposed legislation also departs from traditional antitrust principles in that the relevant market in which to assess a defendant's liability is defined to include "the provision of broadband services over a single broadband access transport provider's facilities". H.R. 1685, §505(5); H.R. 1686, §105(5). Thus, in addition to carving narrowband providers out of the relevant market, the proposed legislation carves all competing broadband providers out of the relevant market as well.

The proposed legislation changes the analysis of competition and transforms by assuming all providers of broadband Internet services are monopolists, regardless of how many consumers they serve and how many other providers they compete with.

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CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
*Washington, DC, January 5, 2000.*

Mr. MARK ROSENBLUM, *Vice President for Law,*  
*AT&T Corporation, Washington, DC.*

DEAR MR. ROSENBLUM: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday, June 30, 1999.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTION FOR MR. ROSENBLUM

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

AT&T,  
*Basking Ridge, NJ, March 6, 2000.*

Hon. HENRY J. HYDE, *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: In response to your correspondence dated January 5, 2000, enclosed is my response to the question submitted by Representative Meehan for the

record of the legislative hearing on H.R. 1686, the "Internet Freedom Act" and H.R. 1685, the "Internet Growth and Development Act of 1999" on Wednesday June 30, 1999.

I greatly appreciated the opportunity to testify before the Committee, and stand ready to provide additional assistance to you or members of the Committee. In addition, please feel free to call J.J. Johnson, AT&T Vice President for Congressional Affairs, at (202) 457-2255 if you have any questions or if you need any additional information.

Sincerely,

MARK C. ROSENBLUM.

cc: Hon. John Conyers, Jr.  
Hon. Martin Meehan

Enclosure

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

*AT&T's Response*

a. Under established antitrust principles, a facility is considered "essential" only if the facility provides a service that itself constitutes a relevant market and permits market power to be exercised in that market. See generally HERBERT HOVENKAMP, FEDERAL ANTITRUST LAW § 7.7 (1994) (citing cases). Further, courts have interpreted the essential facility doctrine to require a showing that no practical alternatives are available. *Id.* § 7.7a. See also *McKenzie v. Mercy Hospital*, 854 F.2d 365 (10th Cir. 1988); *Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991). By contrast, merely showing that alternative facilities are more costly is insufficient to establish that a facility is "essential." Under well-established precedents, there can thus be no finding of an essential facility where there are numerous providers competing for the same customers.

Even if broadband Internet access were the relevant market, it is clear that there is vigorous competition in that "market" and that cable modem service providers such as AT&T have no ability to exercise power in that "market." Accordingly, cable broadband Internet access facilities would not be deemed "essential" under existing law.

Even a cursory summary of the marketplace confirms that there are numerous providers of high speed Internet access. Digital Subscriber Line ("DSL") deployment exploded in 1999, and there are now more DSL-capable residences than cable modem-capable residences.<sup>1</sup> Further, DSL has been growing faster than cable modem service<sup>2</sup> such that (based on current trends and the predictions of some industry observers) DSL subscribership may overtake cable modem subscribership in the very near future.<sup>3</sup> At the same time, DSL prices have plummeted (and continue to fall). Multiple competitively-priced DSL offerings continue to spring up in every geographic area in which AT&T offers cable modem service.

But the ubiquitous telephone networks are not the only source of facilities-based competition to the cable networks owned by AT&T and other companies. RCN and others are overbuilding incumbent cable systems with their own hybrid-fiber coax networks. RCN, for example, recently announced that it will overbuild AT&T's cable systems in Portland and offer local and long distance phone, cable TV, and high speed Internet service over that new system.<sup>4</sup>

MCI WorldCom, Sprint, US WEST, NextLink, Winstar, Motorola, Teledesic, Lockheed Martin, Alcatel Espace, Loral and other industry heavyweights are investing tens of billions of dollars to deploy additional alternative broadband paths to residences that will be in place and offering service by the time broadband providers enjoy a substantial share of the Internet services market. MCI WorldCom and

<sup>1</sup> Announcements by the major DSL network owners confirm more than 50 million DSL-capable homes at the end of 1999, as compared to less than 40 million cable modem-capable homes.

<sup>2</sup> Sylvia Dennis, DSL Taking Off Big Time, Newsbyte News Network (Aug. 17, 1999); <http://www.uswest.com/news/012600.html>.

<sup>3</sup> Vito Racanelli, AOL-Time Warner Deal Leaves Baby Bells Unjustly Shunned, *Barron's* (Jan. 15, 2000).

<sup>4</sup> Building a System to Rival AT&T, *The Oregonian*, B1 (Jan. 13, 2000).

Sprint will rely primarily on fixed wireless networks that can deliver much greater bandwidth than either cable modem or DSL services. With existing licenses, the two companies can reach 60% of U.S. households,<sup>5</sup> and in a recent press conference MCI WorldCom stated that it would begin providing broadband fixed wireless service within a year of closing its merger with Sprint.<sup>6</sup> NextLink, which will be able to reach 95% of customers in the top 30 markets, plans to offer broadband services via fixed wireless this year.<sup>7</sup> Winstar, flush with \$900 million investment from a Microsoft-led consortium,<sup>8</sup> is also aggressively rolling out fixed wireless networks.<sup>9</sup> And US WEST just announced that it will launch a nationwide broadband wireless offering. Industry analysts predict fixed wireless companies to grow to a \$7 billion industry by 2003.<sup>10</sup>

Satellite providers DirecPC and EchoStar already offer Internet service with download speeds equivalent to the speeds shared network cable modem customers often obtain. DirecPC owner Hughes is investing \$1.4 billion in a two-way broadband data satellite network, Spaceway, that will begin providing service in the United States by the year 2002 at multi-megabit speeds.<sup>11</sup> Teledesic, a global satellite concern funded by Bill Gates and Craig McCaw, is spending \$9 billion on its "Internet-in-the-Sky" project, which will provide consumers with affordable, worldwide, ultra-fast Internet access, video-conferencing, and high-quality voice and digital data service beginning in 2003 using a constellation of 288 low-Earth-orbit satellites.<sup>12</sup> Other satellite-based providers, including Motorola, Lockheed Martin, Alcatel Espace, and Loral, expect to invest over \$25 billion to establish broadband satellite services in the coming years.

Moreover, while this analysis establishes that there would be no "essential facility" even if broadband access were a relevant market, the reality is that broadband access is not now or in the foreseeable future a relevant market for antitrust purposes. Rather, broadband access competes with narrowband access, and both are in the same product market. Three key facts make this clear.

First, broadband service is priced competitively with narrowband service. When the Federal Communications Commission examined retail prices last year, it found that the total monthly cost of broadband Internet access via cable modem is *exactly the same* as the monthly cost of narrowband Internet access; moreover, the "total first-year costs" were actually lower with the cable modem.<sup>13</sup> This is no coincidence. Because they must win price-sensitive customers away from existing substitutes, AT&T and other broadband access providers are driven by market forces to price their services to compete with dial-up access.

Second, consumers use both narrowband and broadband for the same core applications. The vast majority of valuable Internet applications, such as e-mail and Web access, are available to users regardless of the specific ISP supplying the application, and the vast majority of content available to consumers over the Internet is not tailored to higher bandwidth speeds. Internet content providers can reach essentially the same set of consumers via narrowband or broadband access, and there is no difference between the Web sites that any consumer can access whether using broadband or narrowband. AOL and other narrowband services are also able to use caching to compete with broadband offerings.<sup>14</sup> Caching content locally reduces congestion and allows customers to access this content much more quickly than having to download the content from the public Internet.

Third, at the present time and for years to come broadband and narrowband will be competing for the same mass market of Internet subscribers. Of course, at one

<sup>5</sup> Kelly Carroll, *Alternative Access: MMDS may become Choice Conduit for Wireless Internet* (Sep. 6, 1999); 1999: *The Year Broadband Wireless Entranced the Industry*, *Wireless Today* (Jan. 6, 2000).

<sup>6</sup> Ebberts Points to Rapid Digital Divide Crossing by MCI-Sprint, *Wireless Today* (Jan. 13, 2000).

<sup>7</sup> See <http://www.redherring.com/mag/issue67/news-feature-du99-nextlink.html>; [http://www.nextlink.com/ra/news/archive/press/xpr\\_corp\\_011200-testing.html](http://www.nextlink.com/ra/news/archive/press/xpr_corp_011200-testing.html).

<sup>8</sup> <http://www.winstar.com/press/1999/Templ.asp?fileid=1223996>.

<sup>9</sup> See 1999: *The Year Broadband Wireless Entranced the Industry*, *Wireless Today* (Jan. 6, 2000); <http://www.winstar.com/press/1999/0930992.asp>.

<sup>10</sup> 1999: *The Year Broadband Wireless Entranced the Industry*, *Wireless Today* (Jan. 6, 2000), 58).

<sup>11</sup> <http://www.mercurycenter.com>.

<sup>12</sup> See <http://www.teledesic.com/newsroom/05-21-98.html>. See also In the Matter of En Banc Hearing on Broadband Services (July 9, 1998), Transcript Comments of Steve Hooper, co-CEO of Teledesic and Chairman of Nextlink Communications at 9-13 (<http://www.fcc.gov/enbanc/070998/eb070998.html>).

<sup>13</sup> See *Report*, *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 14 FCC Rcd. 2398, 2443-2444 (1999).

<sup>14</sup> See <http://webmaster.info.aol.com/caching.html>.

end of the spectrum are some customers who demand high-speed access and are not sensitive to price, just as at the other end there are those who want low-priced access regardless of speed. But both broadband and narrowband providers aspire to more than those "tails" of the distribution, and thus it is the competition for the marginal customer that counts for market definition purposes. Many millions of current narrowband customers might be persuaded to switch to broadband service—if competitive and attractive offerings are available.

For this vast majority of consumers, the choice between narrowband and broadband involves trade-offs that make the two modes of access close substitutes, and confirm that they are in the same relevant product market for antitrust purposes. A person deciding whether to replace dial-up access with a cable modem service will recognize that the cable modem service offers speed and "always on" advantages. But dial-up access has its own advantages: a dial-up customer can access the Internet and use e-mail from remote locations; a cable modem customer cannot. Dial-up service can use existing customer premises equipment. For those dial-up customers who do not purchase an extra telephone line, it is less expensive than cable modem service. And for those who do, although the cost is comparable, they obtain an extra line that can also be used for regular voice communications and faxes.

By contrast, consumers who purchase a cable company's on-line service cannot yet use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server. Given these trade-offs, and the enormous number of Internet subscribers who will be choosing between access modes in coming years, it can hardly be doubted that there is substantial substitutability between broadband and narrowband Internet access services.

In fact, courts have routinely rejected claims that one product is in a separate market from another product just because it enjoys some advantages over that product. In the landmark case of *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956), the Supreme Court rejected the claim that cellophane is in a different market from other wrapping materials because, "despite cellophane's advantages, it has to meet competition from other materials." In *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27 (D.D.C.), *vacated as moot following completion of merger*, 850 F.2d 694 (D.C. Cir. 1988), the court rejected the claim that glass containers were in a separate market from metal and plastic containers. Despite obvious differences in features, and the fact that some customers would only purchase glass, there was enough competition between the different materials to include them in a single market. Similarly, in *United States v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993), the court refused to limit the market to fountain pens. Although some customers were devoted to fountain pens and would purchase nothing else, many other customers would "substitute other modes of writing," and the market was defined accordingly.

This bill would stand these well-established principles on their head. It imposes an inflexible statutory definition of the relevant "market" (the "broadband service provider market") which is inaccurate at best and more generally inappropriate. In the normal course, under well-developed case law, an antitrust plaintiff must prove that the defendant has the power to control prices and output and exclude competitors in a relevant market. The appropriate definition of the relevant market is thus the starting point of traditional antitrust analysis. To determine what the relevant market actually is, agencies and courts must consider the facts as to whether customers have alternatives that effectively prevent a firm from raising prices or limiting choice without losing business—in antitrust jargon, the "elasticities."

This bill, in contrast, would foreclose the usual role that economic realities and evidence play in this determination and force an artificial definition of the market. Not only does the bill decree that broadband services are the relevant market—even though broadband Internet access services plainly compete with narrowband services today—the bill further declares that the facilities of a single broadband access provider constitute the relevant market. In essence, this bill would bypass relevant case law and deem individual broadband networks to be "essential facilities" without finding any ability to exercise monopoly power and notwithstanding that those seeking access to such a network have alternative suppliers that can provide the same or similar high-speed capabilities. This ignores long-developed precedent on the essential facilities doctrine by asserting a presumption of a Sherman Act violation based only on a broadband access provider's legitimate business decisions.

b. The legislation would have a profoundly negative impact on the nature and extent of antitrust litigation in this country. First, the bill would create liability where liability should not and otherwise would not exist. As noted in response to part (a), the artificial and inaccurate legislative pronouncement that the facilities of a single service provider constitute the relevant market would impose antitrust liability and

treble damages on firms that have no market power. And as broadband technology evolves and the number of broadband alternatives continues to expand, this inflexible statutory definition would grow more and more obsolete—but would remain a fixture in the law.

Second, the new procedural rules that the bill would establish in this one type of antitrust case would create enormous confusion. The “presumption” of a Sherman Act violation that would be applied, for example, is entirely undefined. The proposed bill does not explain how this presumption could be rebutted, or how a Sherman Act case would proceed once its applicability is established.

Third, the bill would require the judiciary to assume the rule of regulators. Federal judges would be required to establish (and oversee) the rates, terms, and conditions for interconnection between thousands of broadband and Internet providers. This ongoing obligation would be highly burdensome to the courts and the parties, and would require the judiciary to assume responsibility well beyond its traditional areas of competence.

Fourth, and for all the reasons noted above, the bill would greatly increase the amount and cost of litigation, diverting resources that would otherwise be devoted to serving consumers through competition on the merits. By establishing the equivalent of a new cause of action along with a presumption of liability (notwithstanding the presence of facts that would otherwise preclude liability under the existing antitrust laws), the bill would expand enormously the incentive to litigate. And because the bill gives special advantages to plaintiffs by creating a presumption in their favor, it would be far more difficult to obtain dismissal or summary judgment of meritless cases.

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CONGRESS OF THE UNITED STATES,  
HOUSE OF REPRESENTATIVES,  
Washington, DC, January 5, 2000.

Mr. GEORGE VRADENBURG,  
Senior Vice President,  
America Online, Dulles, VA.

DEAR MR. VRADENBURG: I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1686, the “Internet Freedom Act,” and H.R. 1685, the “Internet Growth and Development Act of 1999” on Wednesday, June 30, 1999.

Members of the Committee have asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record at your earliest convenience.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,

HENRY J. HYDE, *Chairman.*

cc: Hon. John Conyers, Jr.

QUESTIONS FOR MR. VRADENBURG

*Questions from Representative Pease*

1. Please summarize all predictions and/or discussions AOL has made in public during 1999 regarding or reflecting (1) its anticipated number of, or growth in, subscribers over any or all of the next five years; (2) its anticipated number or proportion of subscribers who will continue to use narrowband access; and (3) its anticipated number of subscribers who will use any of the broadband access arrangements in which AOL has announced its participation with local telephone or satellite providers.

2. Given AOL's support for unbundling access to broadband service offered over cable facilities, would you also support unbundling access to services offered via wireless cable or satellite?

*Question from Representative Meehan*

Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an “essential facility.” Included among these factors are a determination of the relevant market and an assessment of market power.

(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.

(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.

*Question from Mr. Rothman*

If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.

AMERICA ONLINE INC.,  
Dulles, VA, March 27, 2000.

Hon. HENRY J. HYDE, *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR CHAIRMAN HYDE: Thank you for the opportunity to appear before the Committee on the Judiciary on Wednesday, June 30, 1999, to testify at the hearing on H.R. 1686, the "Internet Freedom Act" and H.R. 1685, the "Internet Growth and Development Act of 1999." This letter responds to your request that I provide answers to additional written questions for inclusion in the hearing record.

During this hearing, the issue of "open access" was widely discussed. Before addressing the specific questions set forth in your letter, I wanted to also include in the record an update on some important—and positive—marketplace developments related to the open access issue. On January 10, 2000, AOL and Time Warner announced a strategic merger designed to create the world's first fully integrated media and communications company for the Internet Century. At the time of the merger announcement, both Steve Case (CEO of AOL) and Jerry Levin (CEO of Time Warner) made clear that the combined company would support open access and implement it on the Time Warner Cable systems. Since that time, the companies have worked expeditiously to develop further details on how open access would be implemented so that consumers in Time Warner's local cable franchise areas would have choice and competition with respect to cable Internet services. The result of that effort was an 11 point Memorandum of Understanding (MOU), announced by AOL and Time Warner on February 29, 2000. A copy of the MOU is attached.

At the heart of the MOU is the parties' commitment to ensuring that consumers will be able to choose from among multiple ISPs for high-speed Internet service over AOL Time Warner's broadband cable systems. Significantly, consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy broadband Internet service over AOL Time Warner cable systems. The parties also have committed to offer a diversity of ISPs. AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements. Moreover, AOL Time Warner will offer those ISPs the choice to partner on a national (*i.e.*, on all AOL Time Warner cable systems), regional, or local basis, in order to facilitate consumer choice among ISPs of different size and scope. While the MOU is subject to existing Time Warner obligations, AOL Time Warner is committed to providing a choice of ISPs as quickly as possible, and will work to try to achieve that goal even before its current obligations expire.

In short, we believe that our MOU, combined with AT&T's announcement that it also intends to provide consumers with the ability to choose among multiple ISPs over AT&T cable systems, demonstrates real progress in the marketplace. Since the announcement of the AOL Time Warner MOU, press reports suggest that another major cable company (Comcast) is moving toward a policy of offering multiple ISPs over their cable systems. As a result of these positive steps toward cable industry adoption of a multiple ISP model, implementation of open access nationwide is becoming no longer a question of if, but of when. Given this important progress in the marketplace, it appears that government intervention in this area is not necessary at this time. That said, Congress should continue its important oversight role in this area until we arrive at the day when open access is ensured across all platforms so consumers will enjoy the full benefits of competition and choice.

*Questions from Representative Pease:*

1. Please summarize all predictions and/or discussions AOL has made in public during 1999 regarding or reflecting (1) its anticipated number of, or growth in, subscribers over any or all of the next five years; (2) its anticipated number or portion of subscribers who will continue narrowband access; and (3) its anticipated number

of subscribers who will use any of the broadband access arrangements in which AOL has announced its participation with local telephone or satellite providers.

While AOL has not publicly made any recent predictions on these subjects, a number of independent analysts have made general forecasts. For example, Forrester Research predicts the following number of Internet penetrated households over the next several years:

2000	44.396 million
2001	51.254 million
2002	56.021 million
2003	59.808 million

Of these households, Forrester estimates the following number will have broadband service:

2000	4.749 million
2001	9.205 million
2002	15.855 million
2003	22.400 million

With the following number of households using narrowband service:

2000	39.647 million
2001	42.049 million
2002	40.166 million
2003	37.408 million

See Forrester Research; Consumers; Digital Decade (Jan. 1999).

Another analyst, Jupiter Communications, forecasts that in the year 2003, 77% of online consumers will be accessing the Internet through a dial-up connection, representing 52.3 million households. See Jupiter Communications; Trends and Outlook: Bandwidth Access and Strategies (Feb. 2000). Among consumers who were interested in receiving high-speed access, the Yankee Group found that 30% said they would prefer to receive the service from their telephone company, while 20% favored their cable provider. The remaining 50% said they still had no preference. See The Yankee Group, Cable Modems and DSL: High-Speed Growth for High-Speed Access (Jan. 2000).

2. Given AOL's support for unbundling access to broadband service offered over cable facilities, would you also support unbundling access to services offered via wireless cable or satellite.

The principles of consumer choice and competition that have characterized Internet access in the narrowband world can and should be preserved as multiple broadband access platforms emerge. Whether broadband access is provided over cable systems, or through a wireless cable, satellite or DSL platform, consumers should be able to enjoy affordable, convenient and faster Internet service from a choice of Internet Service Providers. AOL does not believe that consumers should be required to purchase service from an ISP affiliated with the owner of the platform over which they receive access. Just as the two largest cable operators have now committed themselves to the path of open access over cable systems, we look for emerging broadband industry leaders in all platforms, consistent with the available technology, to follow suit.

*Questions from Representative Meehan:*

*Numerous antitrust decisions set forth the factors that are to be considered in determining what qualifies as an "essential facility." Included among these factors are a determination of the relevant market and an assessment of market power.*

*(a) Please explain how broadband access would be treated under these precedents, and whether and how the proposed legislation would treat broadband differently.*

While AOL has been, and remains, committed to the goal of open access, AOL has never suggested that cable Internet access service be subjected to essential facilities or common carrier based regulation. We thus have not relied on these precedents regarding essential facilities or common carriers as the model on which open access should be based.

*(b) Please explain what impact you think the proposed legislation would have on the extent and nature of antitrust litigation in this country.*

Although H.R. 1686 and H.R. 1685 would allow a civil action under the Sherman Act, AOL has long hoped that open access would be achieved in the marketplace without the necessity of antitrust litigation. While antitrust laws redress market failures after they occur, the core principles underlying antitrust law seek to encourage competition and to prevent market failures from occurring in the first place.

Antitrust laws have thus sought to preserve and enhance consumer welfare across industries on a forward-looking or prophylactic basis by driving markets toward structures and practices which foster, not retard, competition. The policymakers supporting this legislation have sent a strong and loud message that business models which stifle competition and consumer choices shall not be permitted. By seeking to create procompetitive business models before market failures have occurred, this legislation is designed to reduce the incidence of market failure and to substitute forward-looking pre-market failure remedies in lieu of post hoc market-correcting litigation. And, just in the short time since this legislation was introduced, the marketplace has responded accordingly.

*Question from Mr. Rothman:*

*If the cable industry, which carries data on a broadband network, is to be considered an "essential facility" notwithstanding the fact that they have only 1 percent of the ISP market, but on the theory that they are a medium that can carry a video broadcasting image as opposed to telephone wires, explain why at the same instance DBX (sic?) and wireless carriers should also not be immediately declared essential facilities, because they too can carry a video image.*

AOL has not advocated essential facilities-based doctrine or regulation for the cable Internet access platform. AOL thus would not advance the notion of essential facilities-based doctrine or regulation for other broadband platforms on the basis that they are capable of carrying a video broadcast image. AOL, however, does believe that open access to all broadband platforms is vital for consumer choice and competition.

Again, thank you for the opportunity to participate in this hearing, and do not hesitate to contact me should you have any additional questions.

Sincerely,

GEORGE VRADENBURG, III.

Enclosure (1)

cc: Hon. John Conyers, Jr. (w/encl.)

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
TIME WARNER INC.  
AND  
AMERICA ONLINE, INC.  
REGARDING OPEN ACCESS BUSINESS PRACTICES  
FEBRUARY 29, 2000

1. This Memorandum of Understanding ("MOU") sets out the commitments that AOL Time Warner will make to provide open access (i.e., to make a choice of multiple Internet Service Providers ("ISPs") available to consumers) on its broadband cable systems. It is the intention of the parties to enter into as quickly as possible a binding definitive agreement to provide broadband AOL service on Time Warner's cable systems, which will be used as a model for the commercial agreements that will be available to other ISPs.
2. AOL Time Warner is committed to offer consumers a choice among multiple ISPs. Consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy broadband Internet service over AOL Time Warner cable systems. AOL Time Warner intends to encourage actively other cable operators similarly to provide consumers with a choice of broadband ISP offerings.
3. AOL Time Warner will effectuate such choice for consumers by negotiating arm's-length commercial agreements with both affiliated (such as AOL) and unaffiliated ISPs that wish to offer service on the AOL Time Warner broadband cable systems. Pursuant to such commercial agreements, AOL Time Warner will partner with ISPs to offer consumers a choice of competing broadband Internet service offerings.
4. AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements to provide broadband service to consumers. AOL Time Warner will provide its consumers with a broad choice among ISPs, consistent with providing a quality consumer experience and any technological limitations in providing multiple ISPs on its broadband cable systems.
5. The terms of the commercial agreements between AOL Time Warner and ISPs wishing to provide broadband service will not discriminate on the basis of

whether the ISP is affiliated with AOL Time Warner. Thus, while the economic arrangements reached by AOL Time Warner and ISPs wishing to provide broadband service will vary depending on a number of factors (such as the speed, marketing commitments, and nature and tier of the service desired to be offered), AOL Time Warner will not discriminate in those economic arrangements based upon whether or not the ISP is affiliated with AOL Time Warner. In addition, AOL Time Warner will operate its broadband cable systems in a manner that does not discriminate among ISP traffic based on affiliation with AOL Time Warner.

6. AOL Time Warner will allow ISPs to provide video streaming. AOL Time Warner recognizes that some consumers desire video streaming, and AOL Time Warner will not block or limit it.
7. AOL Time Warner will allow ISPs to connect to its broadband cable systems without purchasing broadband backbone transport from AOL Time Warner.
8. Consistent with technological capability, AOL Time Warner will offer ISPs the choice to partner with it to offer broadband Internet service on a national (on all AOL Time Warner cable systems), regional or local basis, in order to facilitate the ability of consumers to choose among ISPs of different size and scope. AOL Time Warner is committed to bring the benefits of the Internet to all Americans, and will not allow ISPs to offer "redlined" service to only a portion of an AOL Time Warner cable system that is fully enabled to provide broadband service.
9. AOL Time Warner is also committed to allow both the cable operator and the ISP to have the opportunity to have a direct relationship with the consumer. Accordingly, both the cable operator and the ISP will be allowed to market and sell broadband service directly to customers. When AOL Time Warner's cable systems sell broadband Internet service to a customer, they will be entirely responsible for billing and collection. When an ISP sells broadband Internet service directly to a customer, it may, if it so chooses, bill and collect from the customer directly.
10. This MOU represents an initial step by Time Warner and AOL to articulate the terms, conditions and parameters under which a combined AOL Time Warner will offer consumers access to multiple ISPs on its broadband cable systems. It is the intention of the parties to continue to refine those particulars in a manner that is responsive to, and consistent with, the desire of consumers to have a choice among multiple ISPs offering broadband service and the still-evolving nature of the cable infrastructure.
11. All of the foregoing is subject to all pre-existing obligations of Time Warner, including without limitation Time Warner's agreements with Serviceco, LLC (d/b/a Road Runner) and its fiduciary and other obligations to its partners. However, Time Warner will endeavor to reach agreements and accommodations with third parties to which pre-existing obligations are due that would permit the full implementation of the commitments described herein as quickly as possible.

STEPHEN M. CASE, *America Online, Inc.*

GERALD M. LEVIN, *Time Warner Inc.*

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PREPARED STATEMENT OF JOHN W. MAYO

My name is John Mayo. I am the Senior Associate Dean and Professor of Economics, Business, and Public Policy at Georgetown University's McDonough School of Business. For roughly the past twenty years I have studied, taught and written in the field of industrial organization economics, which includes the fields of antitrust and regulation. I have published roughly 50 journal articles, book chapters and monographs on microeconomic policy and have co-authored a comprehensive text on *Government and Business: The Economics of Antitrust and Regulation*. I have also served as an advisor on antitrust matters to both governmental agencies (e.g. the Antitrust Division of the Department of Justice and the Federal Trade Commission) and private corporations (e.g., AT&T, MCI). I was asked by AT&T to provide an independent assessment of H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the Internet Growth and Development Act of 1999." I am receiving no compensation to provide you this assessment.

While the bills are undoubtedly motivated by a goal I deeply share—opening all telecommunications markets to competition—the bills suffer from a number of serious defects that will, I fear, create more mischief than remedy if the bills are passed. To facilitate my discussion I proceed section-by-section through the principal

areas of H.R. 1686 and H.R. 1685. (The section cites are to the identical provisions in each bill).

*Section 101, H.R. 1686, Section 501, H.R. 1685*—This section is well intentioned but suffers in two respects. First, the section relies exclusively on an *ex post* remedy—the imposition of a presumptive antitrust violation—rather than *ex ante* policies designed to eliminate the incentives for ILECs to engage in such antidiscriminatory practices. Economic theory indicates, however, that unless the incentives for discriminatory conduct by ILECs is eliminated by removal of the monopoly over local exchange bottleneck facilities, the ability to eliminate these anti-competitive practices, even with the “sledgehammer” approach being proposed, will be limited. Second, Section 101 (and its companion Section 501) is internally inconsistent with other sections of the bill. Specifically, while Section 101 is meant to address concerns that grow out of the ILECs’ monopoly control over local exchange facilities, Section 102 (and its companion Section 502) acts in direct opposition by permitting firms with monopoly power to be deregulated.

*Section 102 H.R. 1686; Section 502 H.R. 1685*—This section is designed to prevent price discrimination on the part of broadband access transport providers. The specific language is akin to that adopted in the Robinson-Patman Act anti-price discrimination provisions. That Act disallows price discrimination where the effect is to adversely affect competition. Unlike the Robinson-Patman Act, however, the present bill fails to allow for the economically legitimate practice of “meeting the competition” which is a well-established defense in such anti-discrimination cases. The failure in this bill to allow for efficiency enhancing, pro-competitive measures to meet the competition is a serious flaw.

Moreover, the notion embodied in this section that differential “terms and conditions” will trigger a “presumption of a violation” unless “justified by demonstrable cost differentials” is likely to severally strain the ability of any modem corporation to defend itself against charges of discrimination. This may well be the intent of the legislation. Nevertheless, there should be no illusion that the typical cost accounting systems used by modem corporations could satisfactorily be used to extricate the firm from presumptive charges of discrimination even if differential terms and conditions were legitimately based upon cost or risk differentials.

*Section 103 H.R. 1686; Section 503 H.R. 1685*—The goal of this section, to prevent 46 unfair methods of competition” by broadband access transport providers, is unobjectionable. The section is, however, totally redundant. Specifically, it is an industry-specific application of Section 5 of the Federal Trade Commission Act of 1914 [Section 5(a)(1)], which states that “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,, are hereby declare unlawful.” Accordingly, the practices the Goodlatte-Boucher legislation seeks to prevent in the specific instance of Internet access are already covered by general legislation. It seems to make precious little sense to move forward with industry-specific antitrust legislation to block practices that are already covered by general legislation.

*Section 105(5), H.R. 1686; Section 505(5), H.R. 1685*—This section legislatively defines the relevant market for antitrust purposes. This is perhaps the single most troubling feature of the bill. Specifically, there are at least two major problems with this characteristic of the bill. First, it totally usurps the application of sound economic analysis to derive the relevant market. In the context of the goal of promoting and protecting competition, a number of market definition issues would arise, but for the legislative preemption of the market definition embodied in this bill. For example, issues such as whether broadband access and narrowband access are in the same relevant product market are legislatively bypassed in the proposed legislation.

While the application of economic principles to identify the relevant market in antitrust proceedings is less than an exact science, it is a well-established procedure.<sup>1</sup> By legislatively dictating the relevant market, a dangerous precedent is set that runs the prospect of the legislative application of market definition that is inconsistent with sound economic analysis. This is especially serious in markets that are subject to considerable technological change such as telecommunications. Second, the precise language of this section seems to indicate that each provider of broadband access constitutes its own “market.” Thus, each provider is, by definition, a monopoly. This is quite peculiar and contrary to sound application of antitrust economic principles.

<sup>1</sup>See the Department of Justice and Federal Trade Commission Merger Guidelines, April 2, 1992.

*Section 201, H.R. 1686; Section 402, H.R. 1685 (adding new Section 715 and 716, respectively, to the Communications Act)*—This section requires each local exchange company<sup>2</sup> to submit “a plan to provide broadband telecommunications service in all local exchange areas . . . as soon as such broadband telecommunications service is economically and technically feasible.” This feature of the bill is either a gross example of social planning or totally redundant. Specifically, if the bills intend to direct the investment activities of local exchange companies by fiat rather than allowing such companies the latitude to make those investment choices as the market dictates, then the legislative requirement to deploy these assets is contrary to our basic capitalistic principles that individual market agents should be allowed to direct resources to their highest valued use.<sup>3</sup> If, however, the law is meant to be substantially diluted by the qualifier that local exchange companies are required only where “economically and technically feasible” to deploy these resources, what is the need for the requirement at all? That is, if such investments are economically feasible (*viz.*, profitable) and technically feasible, then the firms should have a voluntary economic incentive to make the investments that the legislation directs. Thus, under this interpretation, the requirement is unnecessary.

While the mandatory investment planning dimension of this section is troublesome, it is tremendously exacerbated by the fact that this section ties investment to regulatory treatment of ILECs. This is very poor policy. Either investment is a good idea, or not. (The choice should be made by companies not by legislative fiat.) And deregulation is either a good idea or not. (This should turn on the presence of effective competition in the market.) But the idea of tying these two policies together so that deregulation is contingent upon investment, rather than the state of competition in the marketplace, virtually guarantees poor policy outcomes. Do you really want to create a situation where monopolies can “buy” (through investment) their way out of a regulation even if they retain monopoly power? I suspect not.

Section 715 (b) H.R. 1686; Section 716 (b) H.R. 1685 exempts ILECs from the pricing standards of the Telecommunications Act wherever a carrier meets relatively modest antidiscriminatory standards in the provision of conditioned local loops and where conditioned loops are provided “upon such prices and terms and conditions as the parties shall agree.” While I fear the antidiscriminatory standards in this section are relatively toothless, my biggest concern lies with the exemption of the pricing standard and the replacement, if parties cannot agree on a price, with a “price based upon the cost of loops and the costs of such conditioning that *have been incurred* by local exchange carriers” (emphasis added). This reliance on historical costs as the basis for establishing future prices has been rejected by virtually all credible economists. Prices should reflect the forward-looking costs, not historical values. This is particularly true in markets such as telecommunications that have historically been monopoly-supplied and where historical costs are likely to be inflated. Prices that reflect historical costs are likely to send incorrect price signals to consumers for retail broadband services and will surely act to delay or deny entry to new rivals.

*Section 202, H.R. 1686; Section 401, H.R. 1685*—This section, which purportedly deals with “Accelerated Deployment of Internet Backbone” is in essence simply an exemption of the ban on the provision by RBOCs of interLATA telephony until such time as the RBOCs have fully satisfied Section 271 of the Telecommunications Act.<sup>4</sup> At least two serious problems arise with this proposed section. First, it is a gross misnomer. There is simply no evidence that prematurely granting the RBOCs interLATA authority will accelerate the deployment of Internet backbone facilities. Indeed, the recent rapid deployment of Internet facilities has occurred within the structure and confines of the Telecommunications Act with its requirements for interLATA re-entry for RBOCs. Second, the section essentially disembowels Section 271 of the Telecommunications Act. But Section 271 of the Telecommunications Act is based on sound economic principles that recognize that until the local exchange

<sup>2</sup>As written, this section appears to apply to all local exchange companies, including CLEC which have essentially no facilities in place. Imposition of a deployment plan for DSL for CLECs is perhaps an oversight and could be remedied through appropriate editing. If this language is not an oversight, then the Committee should know that the imposition of an investment plan on new entrants is likely to create considerable barriers to entry on new carriers in direct opposition to Section 253 of the Telecommunications Act of 1996.

<sup>3</sup>Note that in the presence of price cap regulation (predominant among larger ILECs), the fact that ILECs have a monopoly position should not distort their incentives for efficient investment (which could perhaps then warrant the bill's intrusion into the investment decision).

<sup>4</sup>In a world of digital telephony, any attempt to distinguish between data and voice telephony as exists in H.R. 1686 is at best likely to prove to be pure folly and, at worst, a gaping loophole in provisions of Section 271 of the Telecommunications Act.

market is open to effective competition, RBOCs will have both the incentive and wherewithal to engage in anticompetitive discriminatory practices against their interLATA rivals. Thus, the bill would, if passed, prematurely grant the RBOCs with interLATA authority even if they have significant amounts of monopoly power over the provision of local exchange bottleneck facilities. This would constitute very poor public policy.

I hope that these thoughts help you as you deliberate the merits of telecommunications policy. Naturally, I am happy to provide further assistance to the Committee if you find that desirable.

Washington, DC, July 29, 1999.

Hon. HENRY J. HYDE, *Chairman,*  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR CHAIRMAN HYDE: I would appreciate your including my attached statement on H.R. 1686 and H.R. 1685, introduced by Congressmen Goodlatte and Boucher, in the record of the Committee's June 30, 1999 hearing on the bills.

Best wishes.  
Cordially,

ROBERT H. BORK

Enclosure

PREPARED STATEMENT OF ROBERT H. BORK

I have been asked by AT&T Corp. to provide the Committee with my views on H.R. 1686, which has been introduced by Representative Goodlatte.

As the Committee knows, Sections 101 and 102 of H.R. 1686 would establish new "presumptions" under the Sherman Act that certain conduct, if engaged in by telecommunications companies or cable companies, violates the antitrust laws. In particular, Section 102 would declare it a presumptive antitrust violation for a "broadband access transport provider" with market power that provides its subscribers with a high-speed Internet access and content service from an affiliated firm not to permit all unaffiliated Internet Service Providers ("ISPs") equally favorable access to its transmission facilities. And although its wording is somewhat unclear, Section 103 would likewise appear to suggest that failing to provide such access to unaffiliated ISPs would or could be an "unfair method[] of competition" and therefore unlawful under that provision as well.<sup>1</sup> Sections 102 and 103 apparently represent an effort to force access to cable facilities for ISPs.

The bill has at least four serious (in my opinion, fatal) defects:

First, it addresses a problem that does not exist and therefore produces unwise policy. The Internet access services market is working well and competition is vigorous.

Second, the bill badly distorts existing antitrust jurisprudence by amending the Sherman Act to substitute unsupported legislative conclusions for judicial trials of facts and law.

Third, the bill, if enacted, would inevitably lead to regulation of the provision of Internet access, regulation that would be conducted by courts, which are wholly unsuited for the task, instead of administrative agencies.

Fourth, the bill would subvert the purposes of the Telecommunications Act of 1996 by permitting Regional Bell Operating Companies ("RBOCs") to engage in long-distance service without first opening their local service monopolies to competition.

The net effect of H.R. 1686 would be to hobble free competition for the benefit of some competitors—the local telephone monopolies and some Internet service providers—to the detriment of consumers.

1. The bill makes the wrong policy choices. Imposing broad new regulatory obligations on cable operators will impede emerging competition both in the provision of broadband services and in the area of local telephony. Requiring cable operators to act as common carriers and carry the services of all ISPs would be profoundly unwise. There is no "market failure" here to correct. To the contrary, the market is working precisely as it should. Cable companies are making substantial investments

<sup>1</sup>H.R. 1685, introduced by Representative Boucher, contains identical provisions. My comments on Sections 101, 102, and 103 of H.R. 1686 apply with equal force to their respective counterpart Sections 501, 502, and 503 in H.R. 1685.

and undertaking significant risk in order to develop and bring to market innovative cable modem services that they believe customers will value. The threat of this embryonic competition, in turn, is speeding the deployment (and dropping the price) of parallel high-speed technologies (DSL) that local telephone companies have had for a long time but until recently have had no incentive to offer to their customers. In addition, a number of companies have begun to provide high speed Internet access using digital satellite transmissions. As a result, consumers today have more options and better and more affordable services from multiple types of providers.

Cable has no bottleneck over Internet access. Indeed, its Internet access services are subscribed to by only a small fraction of cable customers. Imposing this new access regime will not help consumers, but will retard investment, slow the roll-out of new services, and reduce competitive pressure on the telephone companies. Those are hardly worthwhile policy objectives.

2. Quite aside from the demerits of the policy contemplated by this bill, there is no conceivable basis for implementing that policy by effectively amending the Sherman Act. The antitrust laws already apply to telephone companies and cable companies, and there is no evidence that those laws are not functioning properly in this area. Proponents of these bills must believe that the practices they attack could not be shown to violate the antitrust laws as those laws are presently written and construed, else there would be no need for the bills. But that is an admission that those practices do not involve abuses of market power or restrain competition. It is damaging to the very concept of antitrust to include within it a law that is itself designed to inhibit competition and free markets.

Efforts to alter the antitrust laws in order to "tailor" them to particular industries or address specific controversies are almost invariably pernicious. The antitrust laws are written in general terms, and require courts to apply general economic principles to specific controversies in the context of particular litigated cases. They thus enable courts to take into account changing market conditions and evolving economic learning. Attempts to freeze the law by creating special presumptions and legislatively decreeing specific outcomes for particular industries are much more likely to reflect protectionist impulses than sound pro-competitive policies to prevent courts from recognizing unforeseen factual developments, as well as to create substantial implementation problems. That is certainly the case here.

To take a single example, the rebuttable presumptions established by the bill appear nowhere else in the Sherman Act, and would create enormous confusion. Section 102 provides that a "broadband access transport provider that has market power in the broadband service provider market" and that "restrains unreasonably" a competitor's ability to compete shall "establish a *presumption* of a violation" of the Sherman Act. "Market power" is nowhere defined and may, or may not, be the same concept as the Sherman Act concept of monopoly power. In any event, I cannot imagine how such a presumption would actually be applied. The bills are silent on how a court would proceed once the presumption has been established and what kind of evidence a defendant would have to introduce in order to rebut it. The formulation of market power (if that is the same as monopoly power) in a relevant market plus unreasonable restraint on competition is generally the formulation for the completed offense of monopolization under Section 2 if the Sherman Act, not merely a presumption. It is conceivable, therefore, that this aspect of H.R. 1686 would actually weaken the prohibition of the Sherman Act.

However these ambiguities may be resolved in the courts, the real point of the legislation appears to be improperly to establish as a matter of law one view of what are currently highly controverted economic facts. Even with lengthy and thoughtful legislative hearings, the result would be to rule out of court facts and complications that are presently unforeseeable. That is mechanical jurisprudence at its worst. In the ordinary rule of reason case, in order to determine whether conduct will harm consumer welfare, the decision-maker must resolve a number of empirical issues—such as a determination of the relevant market, existing and potential market participants, market structure (i.e., factors that facilitate collusion, predation, restriction of output, etc.), barriers to entry, and any efficiencies produced by the challenged conduct. This legislation would bypass that process by simply declaring that there is a separate "broadband service provider market" and that individual broadband networks are, in effect, "essential facilities." Those are highly controversial (and, I believe, mistaken) propositions, but in all events, they are determinations that should be made based on evidence presented in court, not by statutory decree. Indeed, the problems with making such determinations legislatively, and thereby freezing them into law, are particularly acute here in light of the rapidly changing nature of the technology used to provide Internet access and the intensely dynamic nature of this market.

3. Just as the legislation would require Congress to act beyond the role to which it is institutionally suited, it would at the same time force courts likewise to act beyond their institutional competence and become, in effect, Internet regulators. More specifically, Sections 102 and 103 of H.R. 1686 impose common carrier-type obligations on broadband access transport providers by requiring them to provide reasonable and nondiscriminatory access to any ISP that requests it. This means that courts, and ultimately juries, would be called on to decide—whenever a broadband access transport provider treats one ISP differently from another (including denial of access)—whether this difference in treatment amounts to “undue discrimination.” This in turn requires an assessment of such factors as the cost of providing service to a particular ISP, security risks, financial stability, and technological compatibility. Not only would this thrust courts into the role of regulatory agencies, it would place upon juries tasks of such economic, technological, and financial sophistication that no confidence whatever could be placed on their decisions. Moreover, results would vary from jury to jury and court to court so that uniformity of regulation could be achieved only through review *de novo* by the Supreme Court. The result is certain to be a legal and economic morass that can only inhibit the progress of American firms to the detriment of our ability to compete with European and Asian companies.

Further, as I read H.R. 1686, it would require courts to engage in ratemaking, an area in which courts clearly have no business. The bill requires that a broadband access provider that is affiliated with an ISP provide access on nondiscriminatory terms to other ISPs. But this does not mean that a court can simply require the broadband access provider to charge the nonaffiliated ISP the same rates as the affiliated ISP. There may be, and are almost certainly will be, legitimate cost differences in serving the two companies due to such factors as term commitment, volume, and credit history. Similarly, the ISP may have contributed some of the capital assets that are necessary to provide broadband service in exchange for a lower rate. The access rates that a broadband service provider may charge must be set to reflect these differences.

The legislation appears to acknowledge this general principle by permitting an assessment of “cost differentials.” But that only confirms that it would require courts to act as regulatory agencies rather than as courts, engaged in the ongoing supervision of the rates, terms, and conditions of “nondiscriminatory access” to ensure “fair” treatment at the behest of any and every individual ISP plaintiff. And it further confirms that, if there were any issue here that needs to be addressed, it should be addressed, if at all, under the regulatory statutes and by regulatory agencies rather than under the antitrust laws and by courts. We have had experience with cost justification defenses under the Robinson-Patman Act and the conclusion of almost all informed commentary is that many of the most important costs, not being directly quantifiable, are inevitably left out of the calculation so that discriminations are found where none actually exist. There is no need to plunge into this quagmire when, as I indicated earlier, there is no marketplace problem that requires any legislative or regulatory solution at all.

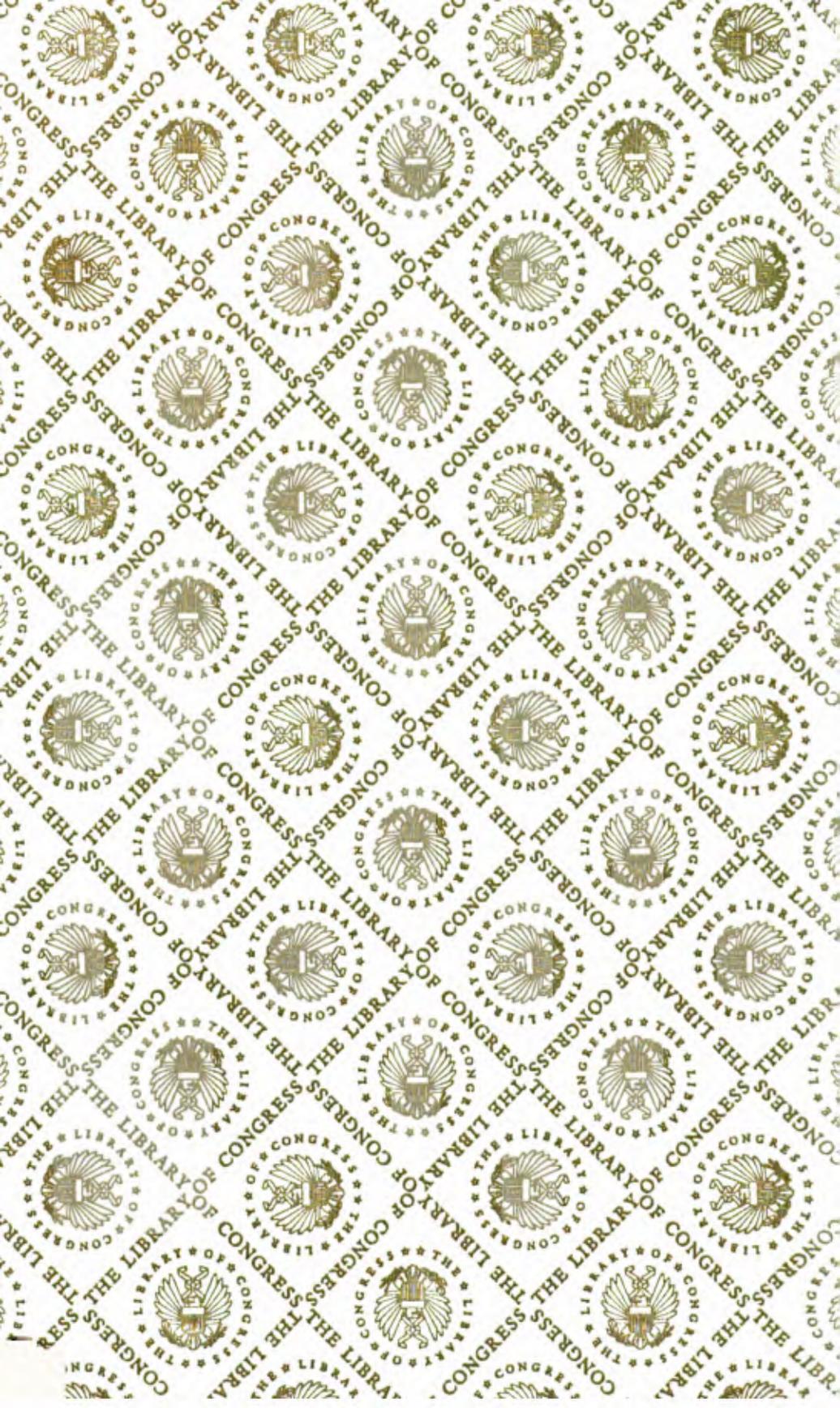
4. Finally, Section 202 of H.R. 1686 is seriously flawed from yet another antitrust perspective.<sup>2</sup> That provision would permit the RBOCs to provide data services across LATA (local access and transport area) boundaries without first opening up their local markets to competition as is required by Section 271 of the Telecommunications Act of 1996. This “limited” relief would swallow the rule. It is my understanding that over half of today’s telecommunications traffic is data and that percentage is growing rapidly. Moreover, with the advent of Internet Protocol technology, the distinction between “voice” and “data” traffic is disappearing. Thus, this bill would allow the RBOCs immediately to capture the majority of the benefits from providing long distance services while having to do nothing to make their local markets more competitive. And given that long distance competitors still need access to the RBOCs’ “last mile” facilities, the result will be less competition in both local and long distance markets.

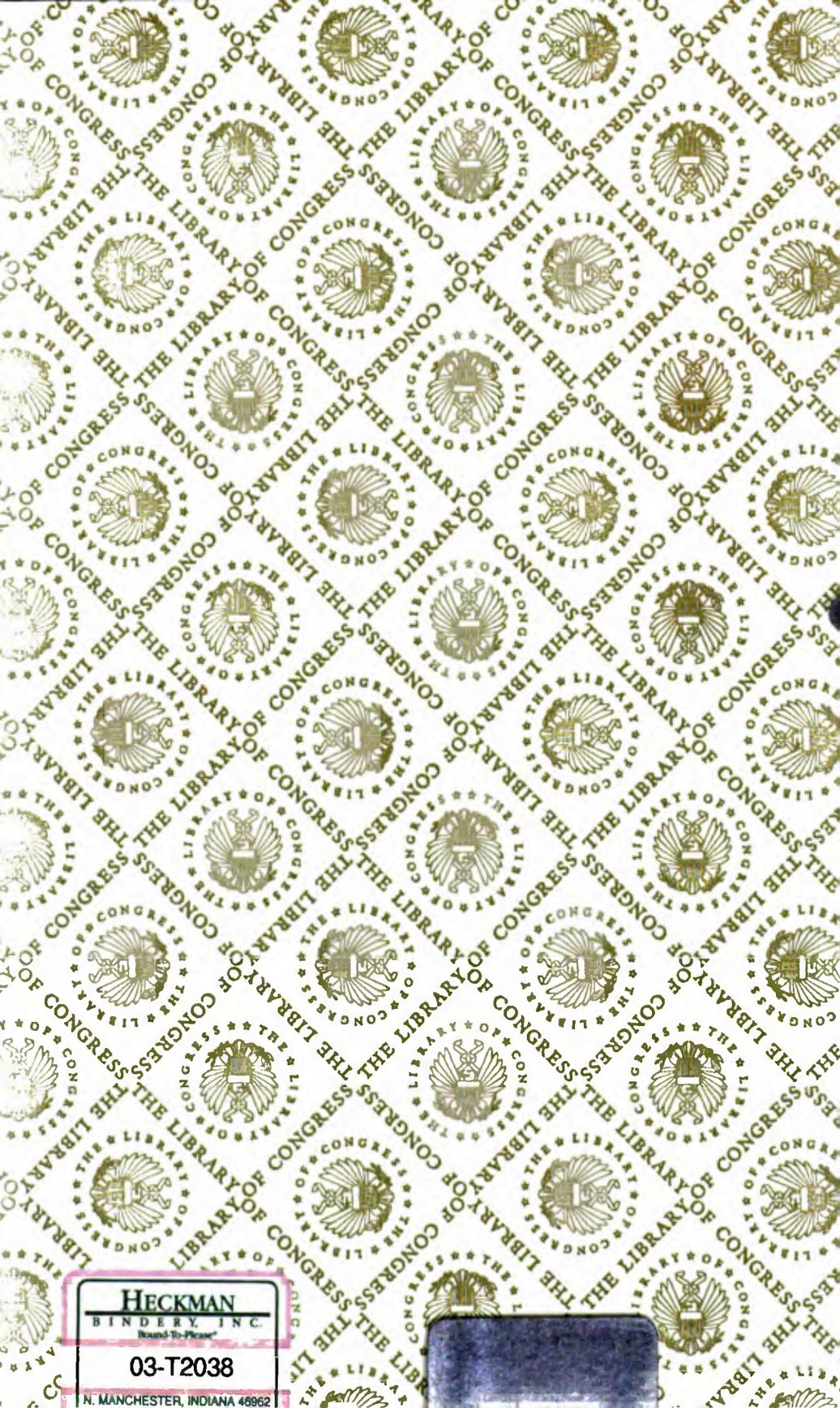


<sup>2</sup>Section 401 of H.R. 1685 contains the same language as Section 202 of H.R. 1686 and is therefore subject to these same criticisms.









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