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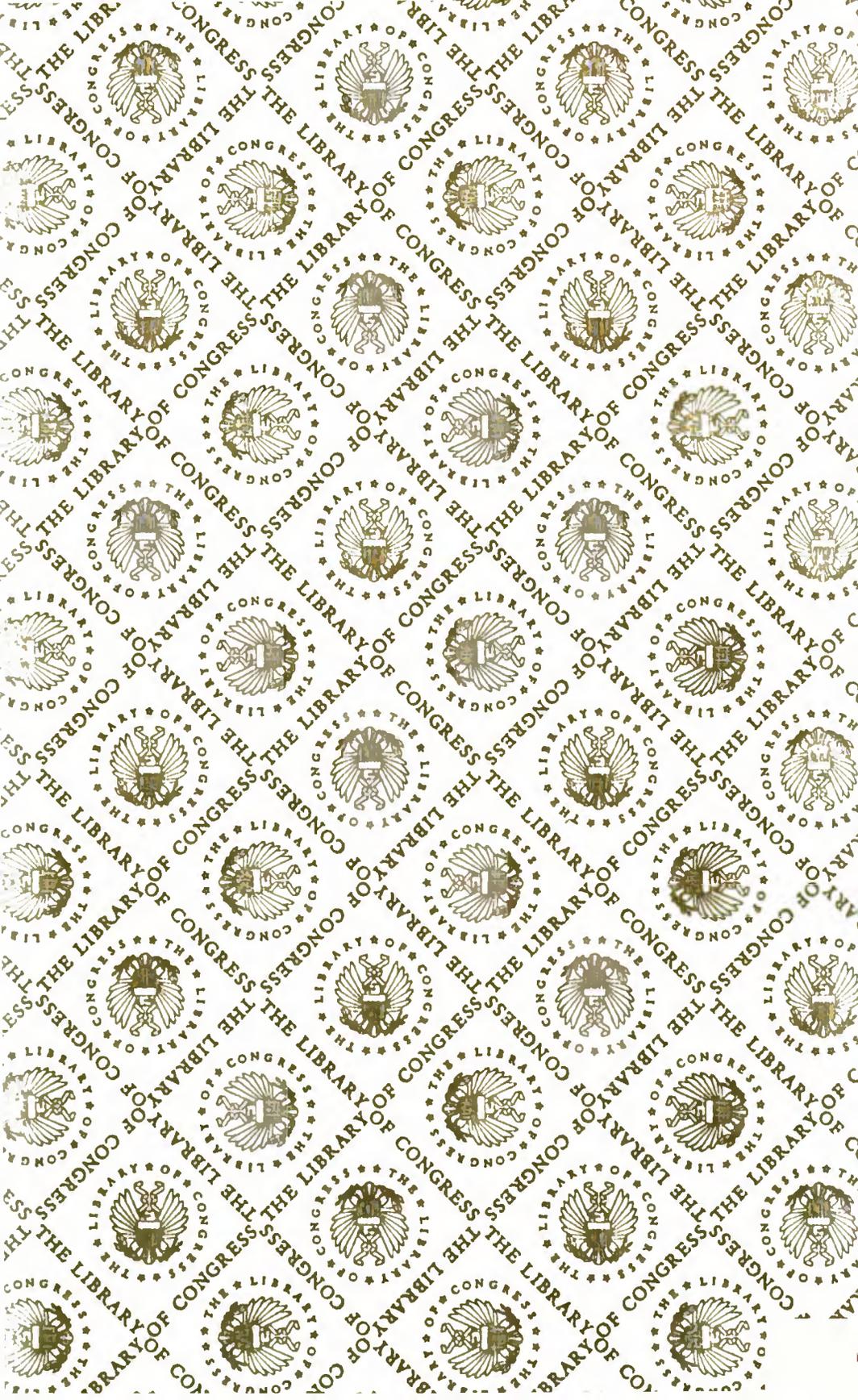
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**INTERNET FREEDOM ACT AND INTERNET
GROWTH AND DEVELOPMENT ACT OF 1999,
PART II**

HEARING

BEFORE THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 1686 and H.R. 1685

JULY 18, 2000

Serial No. 46



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INTERNET FREEDOM ACT AND INTERNET GROWTH AND DEVELOPMENT ACT OF 1999, PART II

TUESDAY, JULY 18, 2000

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

The committee met, pursuant to call, at 9:33 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, George W. Gekas, Howard Coble, Bob Goodlatte, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Edward A. Pease, Chris Cannon, James E. Rogan, Mary Bono, Spencer Bachus, Joe Scarborough, David Vitter, John Conyers, Jr., Howard L. Berman, Rick Boucher, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Robert Wexler, Steven R. Rothman, and Tammy Baldwin.

Staff Present: Thomas E. Mooney, Sr., general counsel and chief of staff; Diana Schacht, deputy staff director and chief counsel; Daniel M. Freeman, parliamentarian and counsel; Joseph Gibson, chief antitrust counsel; Becky Ward, office manager; Amy Rutkowski, staff assistant; Samuel F. Stratman, communications director; and James B. Farr, financial clerk.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order.

Today the committee holds a second 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. We held our first hearing on these bills June 30, 1999.

Let me repeat what I said at our first hearing. 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 these issues will have profound consequences for the future of the Internet, and, more broadly, the ways that we will communicate in the future.

Having said that, it is important to point out that the environment in which these issues are debated has changed dramatically since our hearing last year.

AT&T has announced its intention to open its cable lines in 2002.

America Online and Time Warner have announced their intention to merge and to open Time Warner's cable lines.

The United States Court of Appeals for the Ninth Circuit has decided that local governments may not force cable companies to open their lines as a condition of their local franchise agreements.

Two of the regional Bell operating companies, Verizon and SBC Communications, have obtained approval to enter long distance in New York and Texas, respectively.

Finally, WorldCom and Sprint have abandoned their attempt to merge in the face of concerns from both American and European antitrust enforcers.

Thus, much has changed and much remains unclear. I called this hearing because I thought it would be helpful to committee members to get an update on these changes and their effects on these bills.

I do not believe we have sufficient support within the committee to move forward on these bills today; however, I remain open to the idea if sufficient support develops. A number of members remain undecided, and perhaps this hearing will help us to understand these issues better.

I want to note that I am especially pleased to have two distinguished members of the Commerce Committee testifying before us today, Representative Billy Tauzin of Louisiana and Representative Anna Eshoo of California. Although we often disagree with our Commerce Committee colleagues over jurisdictional issues, more often than not we end up working together with them to produce worthwhile legislation, including the Telecommunications Act of 1996, so it is an honor to have the two of you to lend us your expertise and we look forward to hearing your testimony.

I also want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their usual outstanding work in keeping these issues before us. They often take the lead in high-technology issues and they are a real credit to this committee, as well as their home State, Virginia.

Let me mention one other topic that is not directly involved in the bills we are considering but is closely related—cable rates. My constituents have recently seen 10 percent increases in their cable bills. When I suggested extending regulation a couple of years ago, the cable industry expressed vehement opposition to that idea and extended many promises of good behavior. I am now wondering whether we made a mistake in deregulating this industry. I know we now have satellite television as a more or less viable competitor, and in a few cases, new entrant cable companies. However, they don't seem to be enough to restrain these increases, so later today I will be writing to FCC Chairman Kennard to ask him to look into the state of competition in the cable industry in my region and give me recommendations as to whether we should consider reimposing rate regulation. Something has to be done to restrain these increases.

With that, let me say I appreciate all of the witnesses coming today. We look forward to your testimony.

I now turn to the ranking member, Mr. Conyers, for an opening statement, then I will recognize the sponsors of these bills, Mr. Goodlatte and Mr. Boucher, for their opening statements.

Mr. Conyers?

[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. 106. 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 reasonable 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. 202. 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 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 of return, and profit regulation. Upon a determination by the State commission that a local exchange is served by an

other 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) SUPERSESION 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:

²(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.

[The prepared statement of Mr. 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 second 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. We held our first hearing on these bills on June 30, 1999.

Let me repeat what I said at our first hearing. 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.

Having said that, it is important to point out that the environment in which these issues are debated has changed dramatically since our hearing last year. AT&T has announced its intention to open its cable lines in 2002. America Online and Time Warner have announced their intention to merge and their intention to open Time Warner’s cable lines. The United States Court of Appeals for the Ninth Circuit has decided that local governments may not force cable companies to open their lines as a condition of their local franchise agreements. Two of the regional Bell operating companies, Verizon and SBC Communications, have obtained approval to enter long distance in New York and Texas, respectively. Finally, WorldCom and Sprint have abandoned their attempt to merge in the face of concerns from both American and European antitrust enforcers.

Thus, much has changed, and much remains unclear. I called this hearing because I thought it would be helpful to Committee Members to get an update on these changes and their effects on these bills. I do not believe that we have sufficient support within the Committee to move forward on these bills today. However, I remain open to that idea if sufficient support develops. A number of Members remain undecided and perhaps this hearing will help them to understand these issues better.

I want to note that I am especially pleased to have two distinguished Members of the Commerce Committee testifying before us today, Representative Billy Tauzin and Representative Anna Eshoo. Although we often disagree with our Commerce Committee colleagues over jurisdictional issues, more often than not, we end up working together with them to produce some excellent legislation, including the Telecommunications Act of 1996. So, it is an honor to have the two of you to lend us your expertise, and we look forward to hearing your testimony.

I also want to commend my colleagues, Mr. Goodlatte and Mr. Boucher, for their usual outstanding work in keeping these issues before us. They often take the lead on high technology issues, and they are a credit to the Committee.

Let me mention one other topic that is not directly involved in the bills we are considering, but that is closely related: cable rates. My constituents have recently seen 10% increases in their cable bills. When I suggested extending regulation a couple of years ago, the cable industry met me with vehement opposition to that idea and many promises of good behavior. I am now wondering whether we made

a mistake in deregulating this industry. I know that we now have satellite television as a viable competitor, and in a few cases, new entrant cable companies. However, they do not seem to be enough to restrain these increases. So later today I will be writing to Chairman Kennard to ask him to look into the state of competition in the cable industry in my district and give me recommendations as to whether we should consider reimposing rate regulation. Something has to be done to restrain these increases.

With that, let me say that I appreciate all of the witnesses 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. Thank you, Chairman Hyde. I want to wish my friends a good morning on the Commerce Committee, Anna Eshoo and Billy Tauzin. We have worked together on lots of technology issues, and we welcome you here today.

You know, sometimes we ought to go before the Commerce Committee. They always come before us.

Mr. HYDE. We would need to have the Capitol Police with us. [Laughter.]

Mr. CONYERS. Maybe that is why we haven't been going before them.

But, at any rate, we are all here. We welcome also William Kennard, the Chairman of the FCC, and other distinguished witnesses that will be following very shortly.

It has, of course, always been my position to support competition in all sectors to give consumers access to the greatest selection of options at the best prices. Of course, that applies to the area of telecommunications. Unfortunately, so far it has not been an impressive record of competition within the telecommunications industry. Cable rates, which are now essentially deregulated under the 1996 law, have gone up 20 percent. Instead of innovation and competition, we have seen a wave of mergers and consolidations. The seven Bells have already shrunk to four. And the cable industry is in the process of being nearly swallowed whole by the long-distance and high-tech industries. If we had only known. If we could have only foreseen.

And the bill of my Judiciary colleagues, Representatives Boucher and Goodlatte, brings two critical issues before the committee. The first is whether Congress should impose open access requirements on high-speed cable access to the Internet.

Now, part of this issue comes down to whether high-speed access is a monopoly service which can't be duplicated or whether it is one of the many equally-good routes to the Internet. As of now, cable broadband can't be said to be a monopoly.

Although some analysis might say that cable is the superior broadband pipe, right now cable companies have only a small fraction of the broadband market, and this is not a situation that would normally allow a per se violation of the Sherman Act to be found.

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 competes with the Bells.

And the final consideration is how regulation could slow the deployment of cable broadband, and relieve competitive pressure on the Bells to roll out their digital subscriber lines, DSL technology.

You know, the second question, my friends, is whether we should relax the statutory restrictions on long-distance service by the Bells so they could enter the field of long-distance data transmission. And so the question is whether the Bells should fully open up their networks to local competition before they can enter long distance for both voice and data.

The current requirements of the 1996 act serve two purposes: they ensure that the Bells can't use their local phone monopoly to create a monopoly in long distance, and they create a financial incentive for the Bells to open up their own networks to competition.

Now, data transmission represents half of all traffic on the telephone network and will soon go up to 90 percent, and if we are to abandon the market-opening test for data, then I think we ought to be able to see very strong evidence that doing so will not harm competition and will not negatively impact consumers.

While increased competition in the backbone market is a laudable goal, it seems to me that the greater problem is with the monopoly local loop. Right now the Internet backbone can take information from one end of the country to the other instantly, but the "World-Wide Wait" occurs when a person tries to download that information onto his or her PC. It is like taking a fire hydrant hose and hooking it up to a straw so that no matter how fast the fire hydrant delivers the water, the straw will limit the amount of water that gets out. Right now the local loop is that straw, and we need policies that will continue to open up that last mile.

So I think this is an important hearing. I praise my colleagues on the committee who have come up with a reason for a second hearing on this subject. But remember, the telecommunications industry was literally 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, just in case you didn't have any idea of what I was thinking about this morning on the subject, now you have it, and I will be delighted to listen to our colleagues that are with us.

Thank you.

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 on an issue that, as evidenced by the size and diversity of the audience here this morning, continues to become increasingly important to more and more Americans.

I think we would all agree that, however you define it, bridging the digital divide, providing digital opportunities, or ensuring that the digital revolution leaves no American behind, encouraging the roll-out of high-speed Internet access to inner city, rural, and under-served areas remains our greatest challenge.

Much has happened since we last examined this issue, but I am hopeful that, as members listen to the testimony from our witnesses this morning, it will become evident that, although industry has made great strides in rolling out high-speed Internet access, the administration continues to hinder this roll-out in the areas that need it most by hiding behind misinterpreted portions of the Telecommunications Act and ignoring others it does not agree with.

Congressman Boucher and I introduced legislation last year to take action where the FCC would not. Our legislation focuses on two issues that remain critical to the successful closing of the digital divide.

First, the bill removes regulations from the incumbent phone companies that were never intended for the Internet.

The Telecommunications Act of 1996 laid out what was at the time an appropriate plan for introducing competition to the local and long-distance telephony markets; however, the plan was not designed for the Internet and it has not worked for the Internet. Instead, the Internet marketplace has been negatively affected, perhaps permanently, by the misguided application of these ill-fitting telephony regulations.

Starting with the concentration of market power and the backbone market and leading to the lack of competition in the residential Internet market, these regulations have led to limited choices and inflated prices for consumers. Meanwhile, the FCC has stood by and watched as the Internet gradually loses those characteristics that have made it such a revolutionary tool for home, work, and play.

Not only is FCC inaction resulting in a slower roll-out of broadband Internet service, but the move to broadband without adequate FCC oversight has raised the question: what will the Internet look like when it finally gets there?

In districts like mine, where there are few, if any, competitive providers of high-speed Internet service, the ability of consumers to choose the kind of content traveling over the pipe becomes more important. In places like the Silicon Valley or northern Virginia, there are a variety of ISPs and content to choose from. In rural and inner city districts, however, there may be only one provider or none at all.

How do we ensure that local providers and the communities they serve, including those focused on rural or urban culture, get their chance to participate in the new economy?

Closed access is a logical extension of the digital divide. When an ISP that targets a specific community or group is discriminated against by a technology in their ability to reach their target audience, the community suffers.

I look forward to hearing from witnesses like Mr. McCurry, who represent content from sites like NetNoir or portals like Toto Latino. We need to have access to the greatest number of ISPs and the largest variety of technologies to reach the widest audience possible.

This is not an issue of Government intervention, as many of our witnesses will warn against this morning. Our antitrust laws are meant to protect against anti-competitive behavior by monopolistic providers.

I, too, share the concern of many that, of all the Federal agencies out there to enforce anti-discriminatory rules, the FCC is probably the least preferable. That is why the approach that Congressman Boucher and I took in our legislation was to clarify that, for the purposes of existing antitrust law, cable providers are currently operating as monopoly platforms for Internet service providers. They only allow one ISP, theirs. And if they allow more than one, you

have to buy theirs first before you can buy a competitor. This is classic monopolistic behavior, and our legislation would keep enforcement of antitrust laws where it belongs, with the Justice Department.

So we may hear scary scenarios painted this morning about an FCC run amuck applying common carrier status to cable lines, and we may even hear frightening stories about regulatory proceedings coming from the FCC chairman, himself. But I would caution my colleagues on the committee to look closely at the legislation, because open access should not mean FCC intervention. The antitrust remedies in this legislation require no new bureaus, no new divisions, no new funding, and no new employees. In fact, it relieves the FCC of even having to initiate proceedings in this area. Our legislation relieves the concerns of so many that open access must be accompanied by heavy Government regulation. It doesn't. It simply asks us to think outside the box for a moment by clarifying existing law.

While the lines of the phone companies are already open to competing ISPs by law, other technologies are at a competitive advantage. Because they are not required to grant nondiscriminatory access to other ISPs, the different technologies, whether cable, wireless, or satellite, can provide their Internet service provider at a rate that is below cost or at a speed that is faster than competing ISPs, if allowed on their lines, or that has fewer restrictions on content downloading than other ISPs they might allow on their lines.

Just last year, one company marketed cable routers that enabled the cable company to cash their own ISP, the services provided by their Internet service provider, at a quicker rate than their competitors.

Mr. HYDE. Could the gentleman bring his remarks to conclusion?

Mr. GOODLATTE. I am almost through, Mr. Chairman.

Mr. HYDE. Thank you.

Mr. GOODLATTE. For more than 6,000 ISPs that do not own a cable company or any kind of transport platform other than the phone line, they are out of luck. Isn't it ironic that the most important thing in the information age isn't information?

Since introducing our legislation last year, we have seen a theoretical acceptance of open access by the cable industry. Not surprisingly, the strongest supporter of open access, America Online, has been the most active since announcing its merger with Time Warner. The two companies issued a joint memorandum of understanding outlining their commitment to open access. In fact, over the past year five of the six largest cable companies endorsed open access of one form or another. However, while the changes in the marketplace are admirable, seeing is believing.

Mr. Chairman, I look forward to hearing from our witnesses this morning. In particular, I welcome my colleagues from the Commerce Committee. I have worked with Ms. Eshoo on many issues, and, while we differ on this one, I look forward to working with her on many other issues in the future, and I particularly welcome the chairman of the Telecommunications Subcommittee, Mr. Tauzin, who, despite the complaints of the ranking member, has invited me to testify before his committee on four separate occasions in this

Congress, and I very much appreciate the work that we have done together.

Mr. HYDE. The gentleman's time has expired.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. HYDE. I am sorry to cut short this interpersonal discussion. It was fascinating. [Laughter.]

The gentleman from Virginia, Mr. Boucher, is recognized for 5 minutes.

Mr. BOUCHER. Mr. Chairman, thank you very much for conducting this second in-depth examination of the proposals that my colleague from Virginia, Mr. Goodlatte, and I have put forward to deregulate the Internet backbone, and in so doing to encourage the provision of backbone services in regions of the Nation, including many rural areas, such as those that Mr. Goodlatte and I represent, that are under-served by high-speed backbone services today.

Our measure would also assure that all customers of Internet services have a choice of Internet access providers without regard to the platform for Internet transport that a particular customer uses. I very much appreciate, Mr. Chairman, the careful attention this committee is paying to these recommendations.

Open access for Internet service providers is a very familiar concept. It is the law today for Internet connections over telephone lines. But that law at the present time does not extend to the other platforms for Internet transport—to the cable modem platform, to the satellite platform, to the wireless platform, all of which will be providing new broadband alternatives for consumers in the not-too-distant future.

I believe that the principle of open access, just as it has worked well for the telephone platform historically, should now be applied to the other platforms that are coming into use for broadband Internet transport.

Open access produces a range of benefits. First, it provides choice to customers in the Internet access provider that will give service to them. Secondly, it promotes competition and innovation in the offering of Internet access, and many commentators have suggested that, in fact, the major benefit of open access is the innovation that it will bring.

It promotes regulatory parity. Today, we have regulatory disparity. The law treats in one way the telephone platform, but treats in another way the other platforms for Internet transport.

In my view, the law should be neutral in its application to providers of identical services and should not discriminate among them based on what kind of company they happen to be. We have disparity today. Our measure would promote regulatory parity.

It also offers an opportunity for the Nation's approximately 6,000 unaffiliated independent Internet access providers to be able to follow their customers when their customers migrate from the telephone company transport platforms they are using today to the other broadband platforms which, for whatever reason, they may find to be attractive. And, in fact, the very survivor of many of those 6,000 unaffiliated independent Internet access providers may depend upon their ability to follow their customers. Today they

don't have that ability. We hope that, through the passage of this bill, it will be provided.

While we still do not have a national policy on open access, it is the law today within the States within the Ninth U.S. Circuit Court of Appeals, which has declared cable modem service to be a telecommunications service. As such, cable modem services are now subject to the regulations that are applicable to telecommunications services, including open access.

In the wake of the ninth circuit decision, Chairman Kennard has announced that the Federal Communications Commission will commence a proceeding on open access. In that proceeding, I urge the Commission to make universal open access the law, not just in the ninth circuit but throughout the Nation.

As we construct a national open access policy, the Time Warner Company has presented to us a useful set of standards that, in my opinion, should guide our national decision-making. These basic elements of the Time Warner policy are essential and should, in my view, be a part of any national open access policy.

First, there should be no limit on the number of Internet access providers that can attach to the cable company's facilities.

Secondly, they should be able to attach at the cable head ends, and in so doing be able to obtain a competitive alternative for transport between the cable head end and the Internet backbone. That opportunity will favorably affect pricing for the ultimate Internet user.

The connection should be on nondiscriminatory terms and conditions, with all of the ISPs being treated exactly on the same terms that the cable company treats its own affiliated Internet access provider.

And there should be the opportunity for a direct customer relationship between the unaffiliated Internet access provider and the ultimate customer, with the cable company not interfering in that relationship.

I would welcome comments from today's witnesses on these and other elements that should be a part of our national open access policy.

We should also deregulate the Internet backbone and allow all companies that desire to do so to offer backbone services. The greater competition which would result would lower backbone service pricing, with a benefit for all Internet users. Deregulation would also bring the lower-priced high-speed services to rural areas that today have an insufficient number of access points to the high-speed backbone.

In its suit to block the WorldCom-Sprint merger, the U.S. Department of Justice made the point that the tier one Internet backbone market is highly concentrated. It made the point that one backbone provider, alone, is approaching a point of market dominance in the Internet backbone market.

DOJ confirms that the Internet backbone is congested because of under-investment in some areas.

Mr. HYDE. Could the gentleman bring his remarks to a conclusion?

Mr. BOUCHER. I will be glad to, Mr. Chairman. Thank you.

Mr. HYDE. Thank you.

Mr. BOUCHER. And it states that the networks have been unable to provide high-quality Internet services to customers because of that.

Our legislation provides a remedy. It would inject competition into the Internet backbone market and resolve these critical problems.

The provision of open access as a national policy and the deregulation of the Internet backbone are two of the most important steps that we can take to promote the growth and development of the Internet.

I thank Mr. Goodlatte for joining with me and making these recommendations, and I thank the chairman for this second hearing on our proposals.

Mr. HYDE. The Chair will ask the members who have opening statements if they would offer them for the record, and they will be made a part of the record, without objection.

Mr. Cannon has asked me if he could make an opening statement, and I want to make him feel as guilty as I can.

Mr. CANNON. I promise the chairman that I will keep my eye on the light and try and go shorter.

Mr. HYDE. I wish you would anticipate the light.

Mr. CANNON. There is a yellow light, I shall watch that very carefully.

Mr. HYDE. Then Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I will start out by saying I am a big fan of the 1996 Telecommunications Act. Shortly after being elected in 1996, I held a series of town hall meetings, and in every one of them irate constituents raised the issue of rising costs for cable. I hope wisely, I said, "Wait and see."

Now look what has happened. Many people in America have broadband access. Most people have two or three different cable options, including satellite, now with local news.

I was talking recently with one of the chief technology officers from one of the 10 largest companies in America, and he told me that they had viewed a digital movie, a digital video, on a 600-baud modem. Remember the old days when you had to put a telephone in that little cradle? That is the kind of speed that they watched the digital movie at because someone has come up with a compression algorithm that does marvelous things. So we are seeing this time when really truly remarkable things are happening in the market that we are playing with here. As Mr. Conyers said, if we could have just seen it or if we could have just known what would happen.

I just want the world to know that I believed in the 1996 Telecommunications Act, and it has done remarkable things. We have seen AT&T dive into the cable market at enormous capital investment and risk for the future of that great American company. We have also seen that some of the RBOC have not been very progressive—some of them very progressive, but the RBOC in my area, U.S. West, has a reputation for being the worst player in the market. In fact, the presidents of three of the four major ILECs out there are former U.S. West employees, and the rumor at least is—

proven by at least one of those—is that they are out there because they couldn't stand the way U.S. West had operated.

But, lo and behold, U.S. West has changed. We have a different company there.

You will recall back when Qwest was first rumored to be looking at buying U.S. West that it was somewhat laughed at, and the articles I think were very painful, but if you consider that Joe Nachio, the president of Qwest, is a visionary, a man of great vision and capacity, he has taken that over, and he is now faced with some opportunities and some problems.

On the one hand, he has to divest himself of the quarter of a billion dollars in annual long-distance charges that they pay to the company, and then who knows, but he just may wake up and say, "Hey, we can change the dynamics in the whole industry." Frankly, there are huge resources out there to help him do that.

But I think that tinkering with the 1996 act is not going to help. It is going to put vast investment at risk.

It is okay for competition or innovation to dramatically change the market and create a huge loss or gain in value, but it seems to me—and, Mr. Chairman, I will draw to a close, but it seems to me that we should keep the rules as stable as possible so that the players, the investors, and the risk-takers have the greatest opportunity to succeed within the context of what is before them and that every RBOC and other interested person in this system ought to be taking a look at how they can actually make things work within the rules instead of bringing pressure on Congress to change them.

Thank you.

I yield back, Mr. Chairman, I note before the light is yellow.

Mr. HYDE. Yes. You did very well.

Our first panel consists of two of our colleagues who serve on the Telecommunications, Trade, and Consumer Protection Subcommittee of the Commerce Committee, so they do have special expertise in these areas.

First we have Representative Billy Tauzin from the 3rd District of Louisiana. He is a graduate of Nichols State University and the Louisiana State University Law School. Before coming to Congress, he served with distinction in the Louisiana State Legislature. He was first elected to Congress in 1980 and has been overwhelmingly reelected since that time. He is a deputy majority whip. He serves on the Resources Committee and the Commerce Committee, where he is chairman of the Telecommunications, Trade, and Consumer Protection Subcommittee.

Next we have Representative Anna Eshoo from the 14th District of California. She is a graduate of Canada College. Before coming to Congress, she served on the staff of the California Legislature and as a member of the San Mateo County Board of Supervisors. She was first elected to Congress in 1992. She is an at-large minority whip and she serves on the Committee on Commerce and its Telecommunications Subcommittee.

We will adhere to our usual practice of not questioning Congressional witnesses so you can move on to your other commitments.

We welcome both of you. We look forward to your testimony.

Representative Tauzin, you have 5 minutes.

**STATEMENT OF HON. BILLY TAUZIN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF LOUISIANA**

Mr. TAUZIN. Mr. Chairman, thank you very much. It is, indeed, an honor to be here. You know of my personal respect and admiration of you, and that extends also to your committee, sir.

I do appreciate the opportunity to talk to you about the Goodlatte-Boucher bill, which has many of the same elements of House Bill 2420, the bill that I have introduced with former Chairman Dingell, which deals with the same issue of deregulating broadband services in America. That bill now has 222 cosponsors, and I want to thank Mr. Goodlatte and Mr. Boucher, because I think their efforts here have given a great deal of momentum to the effort we are undertaking over at the Commerce Committee to do basically the same thing.

Let me first say that we have a difference of opinion on the open access issue. I, frankly, think the ninth circuit made a good decision when it said this should be set on the Federal level. My hope, however, is that the FCC, when it looks at this issue, decides to settle it in favor of deregulating—deregulating not only the cable industry, but the telephone industry, as well, so that deregulation, competition, and an open marketplace become the guiding principles by which these services are provided to Americans.

Let me focus, instead, on the second part of the Goodlatte-Boucher bill, which is more consistent with the elements of the Tauzin-Dingell bill at the Commerce Committee.

Let me first ask you to consider the term “digital divide” and what it means and what it could mean to America.

Mr. Conyers, you correctly used the analogy of the fire hose and the straw. In America today, the backbone by which the high-speed digital services are going to arrive or not arrive at our homes and businesses depends upon the extent to which we can access the points of presence, the big hubs, the places we can connect to that high-speed backbone.

I have a map that indicates the points of presence in my home State in Louisiana. Many States in the Nation don't even have a point of presence. You have to go to another State to access the POP. In my State, we are lucky to have two, one in New Orleans and one in Baton Rouge, Louisiana.

Now, if you live anywhere within a 60-mile radius of Baton Rouge and New Orleans you are in good shape because you can generally access those points of presence. You can get on the high-speed highway. You have got a ramp that gets you there. But if you live anywhere else in our State outside those yellow circles you cannot reach those points of presence. You can have high-speed access in your little community. You can have video and high-speed data transmitting the lines inside of Thibodaux, Louisiana, you just cannot connect to the rest of the world. You can have an oasis where you can drink really sweet water, but you cannot travel to the rest of the world because you cannot connect your speed to their speed.

Remember, if you are at a low-speed and you connect to somebody at a high-speed, they are dragged down to your speed all of the sudden, so nobody wants to connect to you if you are not on a high-speed network.

That means if you are a business, if you are a learning center, if you are a medical center, and you cannot connect to the high-speed networks that are becoming available, no one will want to connect to you if you are not high-speed. You are left out. You have two choices: you can either go out of that business and suffer or you can move to the cities and towns where there is high-speed access available.

So we can all either move to New Orleans or Baton Rouge, I suppose, in Louisiana, or we can continue to suffer. Why? Because we are on the other side of the digital divide. Why? Why do we need to be on the other side of the digital divide?

On the next chart I will show you a bunch of lines that exist in Louisiana. Chairman Hyde, I tried to get the Illinois map. I am going to show it to you. It is even more illustrative than Louisiana, believe it or not.

In Louisiana you see all those red lines. Those red lines are high-density fiber lines paid for by people in Louisiana. Every time we pay for a toll on the local telephone exchange to make a call in Louisiana, we help give the phone company the assets to build those fiber networks. You can see they cover all over Louisiana. They would literally be the ramps, the high-speed corridors to get us to those points of presence in Baton Rouge, Louisiana, if only we could use them. But there is one thing standing in the way from us using all that fiber in the ground that we paid for that would keep us on the right side of the digital divide. They are called LATA lines. They are the black lines on the map. Those lines that overlay the red lines on the map are the LATA lines that were put in place by a court here in Washington, DC, to separate local and long distance telephone calls, not Internet services. Those are lines that were put in place to separate local and long—I have a sneaky suspicion, by the way, that this was an agreement, this was a consent decree by the telephone company to come up with a plan of making us pay twice for the same phone call. Just draw a line on the map, and if you cross that line you have got to pay another toll.

The bottom line is that, because those lines are out there, all that fiber cannot be used in my State to keep my citizens on the right side of the digital divide.

And so what does our bill do? It says keep the lines when it comes to telephone calls. Keep the lines, Mr. Conyers, to ensure the telephone companies will, in fact, open up competition in order to get their section 271 long distance relief. Keep that in place. Do not let anybody sell voice communications or market them over those lines until they have gotten permission from the FCC, however long that takes.

But it says for data services, for the high-speed digital stuff that is going to keep my little companies in business and educate my children in Louisiana and keep medical services in my State as efficiently flowing and as inexpensive as we can make them in Louisiana, let those LATA lines free. Turn them loose. Let the companies use them. More importantly, let me use them—me, who paid for them, let me use them to connect to those high-speed hubs so that I can be on the right side of the digital divide. That is what this fight is all about. It is about taking down those lines when it comes to the digital age, the Internet age.

They will tell you, "Wait a minute. You don't want to change the 1996 act."

This is Webster's dictionary published in 1995. You won't find the word "Internet" in it. The Web browser wasn't even marketed until 1995. The act was not about the Internet. It was about telephone service, pure, old voice service, which, in a few years, according to the folks over in Silicon Valley, we will be giving away free if ever we really open up this marketplace.

And so the issue for you, the issue for us in the Commerce Committee, is: Are we going to enter an age where we have to regulate the cable and the other providers of Internet service, regulate them into content and delivery and force people to build lines on top of those lines, or are we going to let people use the lines they already paid for in the ground and remove the Government restrictions that keep me and other people in America from using those lines?

We had some great testimony I just want to cite quickly a little bit for you from people who came before our committee and talked about what it means not to be able to connect.

John Brown of Albuquerque, New Mexico, runs a small ISP called IHIGHWAY. In a recent article he says it costs him \$120,000 a year to lease the pipe running 330 miles to the UUNET hub because he can't get to the hub.

Here is a guy, Shelton Jefferson of Netcom in the New York area. His own testimony, "My company is locked out of the broadband Internet marketplace. I can only get access to local cable facilities and must pay inflated prices for transit to the backbone. Prices are so high, and in the hands of a few long distance and cable companies, I can't afford them."

By the way, you will hear talk about there being a lot more POPs than I describe to you. The POPs they are talking about are those straws. They are at T-1 speed, 1.5 megabits per second, instead of the 45 megabits you should get through a full high-speed pipe, the pipes we are denied in Louisiana and Illinois and across America.

How about David Kushner, Children's National Medical Center in Washington? He testified before our committee that even in northwest D.C. many impoverished residential areas of our country, including poor and rural parts of America and urban minority poor communities in our country, right in D.C., the most wired city in America, he doesn't have access to POP, while there is fiber in the ground in the most wired city in America that the Bell company here could connect him to and could provide services to.

So the issue is simply this: Are we going to keep artificial, Government-imposed barriers in place that were designed for telephone company age? Are we going to keep them in place to restrict the use of that fiber for Americans who don't want to live on the wrong side of the digital age and who could easily connect to these high-speed networks if only we had the good common sense to take those barriers down and let the companies who built those lines with our money turn them loose to service the communities, the businesses, and the residences of America? It is that simple a question.

To that answer, I say absolutely yes. It is time. Let us take down the Government walls that are creating this digital divide so that we don't have to create new Government solutions to provide serv-

ices when we could get them today if we simply use the lines we have already paid for in the ground.

Thank you, Mr. Chairman.

Mr. GOODLATTE [assuming Chair]. Thank you, Mr. Tauzin, for that impassioned appeal, for which I share your passion.

Mr. TAUZIN. Thank you, Mr. Chairman.

[The prepared statement of Mr. Tauzin follows:]

PREPARED STATEMENT OF HON. BILLY TAUZIN, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF LOUISIANA

Good morning, and thank you Chairman Hyde, for inviting me to testify before the full Judiciary Committee today regarding an issue that is very important: Access to high-speed Internet services. I am honored to be here, and I am encouraged that many of my colleagues on this distinguished Committee feel just as strongly about this issue as I do.

My good friends, Messrs. Boucher and Goodlatte, both of Virginia, have really helped John Dingell and I gain momentum in the House for creating full-scale competition in our Internet backbone infrastructure markets as the best way to ensure that the Internet does not further balkanize society into haves and have-nots.

That being said, I am here today to make three simple points which I believe should serve as the guidelines by which Congress adopts broadband-related policy:

1. The federal government should not mandate the terms of open-access. This has been my primary difference with Messrs. Boucher and Goodlatte in this debate, and we are continuing to discuss the issue;
2. The high concentration of Internet backbone control in the US is, as you hold this hearing Chairman Hyde, effectively disenfranchising many Americans, not only in rural areas, but in under-served and poor urban areas as well; and
3. There is a glaring need to update the Telecommunications Act of 1996 in a way that makes our legal framework compatible with technological advances and the pace of business in the new economy.

THE DEBATE OVER OPEN ACCESS

I support H.R. 1685 and 1686, introduced by Messrs. Boucher and Goodlatte respectively, to the extent that both bills call for InterLATA relief for the provision of Bell Company data services. However, I do not support the provisions of these bills which mandate open access to high-speed broadband networks, though I understand that Mr. Goodlatte has changed H.R. 1686 to require only an open-access study. This, of course, brings H.R. 1686 very close to H.R. 2420, the bill I introduced with Mr. Dingell, which does not mandate open-access. This bill, I might add, now enjoys the support of 222 members of the House.

As I have expressed before, government mandated access to broadband networks runs counter to the notion of deregulating our Internet backbone infrastructure market altogether. Let me explain. Because there are so many diverse providers of content and services out there today, the only open-access provision that Congress can realistically pass is one that is broad and general. Passage of such a provision, of course, would only set the stage for the Federal Communications Commission (FCC) to come in, under the Common Carrier banner no less, and set onerous, ad hoc rules for open-access rates, peering agreements and rates, what constitutes a "Telecommunications" service, and preemption of cable franchising authority jurisdiction. You name it, and the FCC will do it!

We saw this happen when we set the terms for interconnection in the '96 Act. We set up a two page 14 point checklist, and the FCC proceeded to produce about 850 pages of regulations . . . which were challenged in the Supreme Court. In the process, the Common Carrier Bureau postured itself as perhaps the most powerful, legislative-type agency bureau that our nation has ever seen. Even Reed Hundt, former FCC Chairman, has publicly stated in his book—and if you don't have a copy, please don't buy one . . . I'll lend you mine—that the '96 Act's generality allowed the Commission to "create its own intent" when interpreting it. Well, the FCC created its own intent no doubt, and as a result the Common Carrier Bureau has more control over the development of local phone service competition than even Congress.

What I urge is that we not make the same mistake in the context of Internet service that we made in the context of local and long-distance voice service. Mandating

open-access in legislation . . . and I can just see it now . . . will lead to the creation of a BACKBONE BUREAU down at the FCC that will mirror the Common Carrier Bureau in every way except with respect to the carriers it regulates. And, in a few years, telecommunications networks will be so dependent upon backbone access/capacity, that such a bureau will have produced reams of regulations making it the central arbiter of telecommunications policy for years to come.

While I appreciate why some may favor open-access preliminarily . . . and I think it's out of fear that the surging consolidation in the content industry may prevent many telecommunications and information service providers from having access to the quality content that their consumers demand . . . I believe that the open-access dilemma will be solved if we simply create more competition amongst backbone providers. Once the backbone industry is fully competitive, carriers, networks, and the like will see the full economic value of providing customers with as broad an array of content as possible. Thus, they will understand the benefits of open-access.

In the last hearing my Subcommittee had on this issue, Mr. Boucher pointed out that Time Warner has already adopted an admirable platform for open-access to its cable system. So we can see evidence that open-access is beginning to take shape without FCC intervention.

So, I urge you all to ask yourselves whether it is wise for us to mandate open-access and subject Internet companies to the cyclical common carrier regulation that has caused us all some heartburn for so many years. We now have our chance to avoid this dire circumstance. But, if we mandate open-access, I fear that we will be headed back down that all too familiar path of common carrier regulation, this time for information-based services. It would be such a shame for us to voluntarily entertain notions again like "interconnection," "collocation," and "reciprocal compensation" when formulating Internet-related policy.

So please, I beg of you, think outside the box with me on this one. We should not regulate the cable industry's provision of high-speed data services. Instead, we should leave these services unregulated while deregulating similar services offered by telephone companies.

CLOSING THE DIGITAL DIVIDE

Turning to the digital divide, it's no secret that a huge sector of our nation is not receiving . . . or is not capable of receiving true high speed broadband services. The reason is because hundreds of communities are not near any of the hubs that enable access to Internet backbones—the real information super highways. Moreover, very few companies are building high-speed gathering lines all the way from the backbone points of access to the rural, remote, and impoverished areas because it is too expensive and not profitable enough.

There is the case of John Brown in Albuquerque, New Mexico who runs a small ISP called IHIGHWAY. To quote a recent article about Mr. Brown in Forbes Magazine:

"He'd like to give his clients the fastest possible link to the rest of the Web world—but he can't. That is because Unet and the few other giant data haulers that dominate Internet traffic don't have the fat, 45-megabit lines in Albuquerque. . . . And Brown can't afford \$120,000 a year to lease a pipe running 330 miles to the Unet hub in Phoenix."

There is also the case of Shelton Jefferson—the CEO of Netcom, an Internet service provider serving residential and business customers in the New York area. To quote from his own testimony given before my Subcommittee:

"My company is locked out of the broadband Internet market via cable. . . . Not only can I not get access to local cable facilities, I must pay inflated prices for transit to the Internet backbone. These prices are so high because of the concentration of ownership of Internet backbone in the hands of a few long-distance and cable companies."

Or, how about Dr. David Kushner of the Children's National Medical Center here in Washington. He testified before my Subcommittee that even in Northwest D.C., many impoverished residential areas . . . including the 100 block of Michigan Avenue . . . just right up the road from here . . . have no direct links to an Internet backbone facility, much less to an Internet point of presence or POP, despite that the nation's capital is the most, and I repeat, the MOST, wired city in the United States today.

What this means, of course, is that those living in areas that are not near POPS, or that are not tied into a backbone facility via a gathering line are being disenfranchised of the fruits of our new economy. Without a high-speed connection

to the Internet backbone, these Americans in our rural areas and inner-cities are relegated to a Narrowband Dirt Road that is so incompatible with the rest of our high-speed infrastructure that the flow of communications across our national web-based infrastructures will be significantly impeded. You see, without a Uunet, Sprint, Cable & Wireless, or AT&T, an email that is sent through standard dial-up access must pass through a poky, congested public access point, rather than zap through a broadband hub. Emails back-up quickly . . . Web pages freeze and fold . . . and you can forget streaming video right now. If we all do not operate at high-speeds, then the Internet cannot evolve into the fluid, nation-wide communications network that all of us are hoping it will be. Instead, ISP subscribers will continue to encounter service disruptions and data-transfer delays in every instance where broadband facilitated, high-speed traffic is thrust upon narrowband, slower-speed infrastructure that was designed to carry only voice traffic for short intervals as opposed to large volumes of data for extended intervals.

So, we have this digital divide in the U.S. because many people don't have access to backbone, because of where they live, and the dial-up access that they are limited to affords them only narrowband Internet services.

Now there are many out there who claim to know how to close the digital divide. The FCC has proposed a few things, like targeted InterLATA relief for the Bells to reach areas that clearly have no high-speed choices. Frankly, there are probably many long-term solutions to the problem that we have not even thought of yet.

But I will tell you right now what will do the most to close the digital divide most efficiently for the short-term: enacting into law the InterLATA relief provisions of H.R. 2420, and 1685 and 1686. Why, you might ask?

Well, today, as this hearing proceeds, the Bell Companies already have a great deal of fiber in the ground extending from most of these rural and inner-city communities to Internet hubs where critical backbone infrastructure exists. The problem is, however, that these fiber lines traverse across these awful 20th Century LATA lines drawn by the courts almost 20 years ago. Those regulations and LATA boundaries were implemented to separate local and long distance calling areas for purposes of regulating VOICE TELEPHONY. They have nothing to do with the data services that are revolutionizing American communications, but nonetheless, the Bells cannot utilize their fiber lines to haul data traffic across these constructed boundaries under the FCC's interpretation of the law.

How extensive is Bell Company fiber in the states? Well let's take a look.[Explain the Louisiana chart—emphasize that none of the fiber, which covers every inch of these states, can be used by Bells because they cross blue-colored LATA lines. Also, point out to Chairman Hyde that there is no better example of how LATA lines carve up a state than in Illinois. Tell him you will get the Illinois chart and submit it into the record.]

Despite the existence of this Bell Company infrastructure in the states, the FCC still treats the LATA restriction as an effective club to use in forcing the Bell Companies to agree to market-opening conditions that are not contemplated in the Act. The FCC seems unconcerned, in the meantime, Mr. Chairman, that many of our constituents in Louisiana and Illinois, are being left out of the broadband revolution. My ultimate fear is that by the time these areas have high-speed access, it will be too late for them when you consider the pace of today's Internet economy.

THE NEED TO UPDATE THE ACT

We are reminded almost daily that privacy and security are matters of paramount concern to users . . . we are also reminded daily that the "digital divide" I've discussed separates huge geographic segments of our nation from the easy and economical access to high-speed services enjoyed by others who are, by design or serendipity, located in strategic proximity to the backbone on-ramps and wired neighborhoods scattered around our cities and states.

Yet, despite these problems, all we hear from those who oppose bills like H.R. 2420, 1685, and 1686 is that the Act is working so we should leave it alone! They are just petrified at the prospect of "re-opening the Telecommunications Act of 1996," as if it were, in fact, the Magna Carta.

They act as if Congress, in its inestimable wisdom, took care of every possible policy nuance that could conceivably arise in this entirely new communications era. To revisit the Act, they contend, would be like some admission that we overlooked something. Never mind the phenomenal growth of the Internet since '96 and its potential to displace or disrupt nearly every other traditional communications delivery medium—including telephone, cable, broadcast, newspaper, movie theatre, and back-fence gossip monger.

Let me take you back to 1995, the year we spent crafting the legislation that would become the Act. Seventy (70) witnesses appeared before the House and Senate Commerce Committees. They represented local and long-distance telephone companies, cable and broadcast entities, think tanks and the federal and state governments.

Not one of those 70 witnesses was a small Internet service provider or a company whose primary business was operating an Internet backbone. Why weren't those providers up here protecting their new growing digital businesses?

It's because they understood that the Act wasn't about them. Instead, the Act's primary purpose was to open the publicly switched telephone network (PSTN) to competition. The Internet was not on our radar screen. When we were debating the Act, there was no AOL, Hotmail, or PSINet. The Internet is only mentioned in the Act a few times, and this Webster's Dictionary, published in 1995, the same year we wrote the Act, doesn't even contain a definition of the Internet.

In light of this, I do not propose re-opening the Act. Rather, I feel that it must be updated to account for the recent explosion of data service provision that is taking the country by storm.

We can learn some lessons from our struggle to produce the Act, however. One of the underlying premises of this historic legislation was that the American public would benefit from more choice and lower prices brought on by competition in all telecommunications service marketplaces.

We need only look at the positive results of the Act with respect to the wireless industry to understand how best to structure the rules of the game for advanced data services.

To our credit, we recognized that wireless networks were different than the PSTN, facilitated multiple providers, and posed no bottleneck to entry by new competitors. We deemed wireless services as "Incidental" because the Bells exercised no monopoly over the wireless marketplace, and we therefore allowed them to immediately begin offering wireless services subject to no InterLATA restrictions. As a result, consumers are now offered more choices, vibrant alternatives, and lower prices for cellular phone services.

In my view, the same tests we employed for the wireless industry apply to the Internet as well—a network of networks that the FCC has deemed "technologically and operationally distinct" from the PSTN. If we had understood the nature of the Internet in '95, it would have been treated more like wireless was in the '96 Act.

If we fail to miss this important opportunity to update the Act properly . . . if we continue to allow our fear of doing anything "BAD" to the Internet prevail at all costs, then we will have kept in place the incoherent and incomplete regulatory structure that has inadvertently created the digital divide, bandwidth capacity shortages, backbone peering problems, open access dilemmas, and an FCC that is entirely out of control.

To that end, the Congress has a great deal of interest in beginning a very specific examination of the Internet, the regulation and deregulation thereof, and the adoption of a coherent high-speed broadband policy for this country that places the consumer on a pedestal.

In the Act we covered everything but advanced services. The Act was enacted to ensure that ILECs no longer exercised monopolies over the PSTN as a condition of providing further competition to traditional IXCs in the InterLATA voice market. Our mission now is to complete the job of full deregulation for data so that the backbone market is fully competitive and serves the entire nation as opposed to only the cherry-picked business markets targeted by the major backbone providers. Only then will we truly be able to say that we carried out the stated purpose of the '96 Act:

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American consumers and encourage the rapid deployment of new telecommunications technologies.

Mr. GOODLATTE. Ms. Eshoo, we are glad to have you with us, as well.

STATEMENT OF HON. ANNA ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Good morning, Mr. Chairman, and thank you for holding this hearing. I thank you also for the kind invitation to come and speak to you this morning. To our distinguished ranking

member, thank you for what you said, and to each of the members of this wonderful committee.

Mr. Chairman, telecommunications in ancient Greece consisted of Greek leaders giving speeches to large crowds of its citizens. I think Mr. Tauzin would have done well in that setting. And when it came to great leaders of Greece, none was wiser or a better communicator than Pericles. In one of his famous speeches, Pericles gave the Greeks some advice that I think applies to our work here today when he said, "Time is the wisest counselor of all."

I had the honor of both serving in the Congress and on the Commerce Committee when the 1996 Telecommunications Act was drafted. I also served as a conferee that helped put all the various pieces, with great difficulty, together between the House and the Senate. My good friend and respected colleague, Mr. Tauzin, was also on the Commerce Committee when the act was shaped.

As you know, when Congress passed the act, we intended that legislation to deregulate a communications industry in which competition had been choked off by years of monopolistic practices.

Mr. Tauzin, Mr. Goodlatte, Mr. Boucher, and I agree that open and rigorous competition among telecommunications companies is the best guarantee that consumers will receive the broadest range of services at the best prices, and, by definition, it is the most effective means to end monopolistic practices.

Since the 1996 act was signed into law, we have seen the telecommunications revolution occur with breathtaking speed. No sooner does one technology seem to offer more speed and capability when along comes another advancement that offers more data faster.

We know the Telecom Act has resulted in a larger menu of broadband delivery options, and it has increased competition and produced lower prices for consumers all over the country.

One of the best examples of this is seen in the development of the competitive local exchange carriers, or CLECs. These companies, companies like Covad, are what I call the "children of the Telecom Act."

Why do I call them that? These companies provide DSL-based access to the Internet through local loops or on their own high-speed fiber networks. Before the Telecom Act, these companies did not and could not exist in a regulated environment. Only the Bells could offer this technology.

It is important to note that the Bells had DSL technology but did not offer it. Instead, they offered the more-expensive T-1 lines to businesses. But the Telecom Act deregulated the industry and allowed these companies to offer the DSL service, and, once the Telecom Act allowed these companies to offer their services, what happened? Telephone companies that before had only offered the more-expensive T-1 lines began to rapidly expand their DSL service, a service they could have offered much earlier. The result was increased broadband services to consumers at a cheaper price. And more dramatic successes are just around the corner.

For example, there is a company in California called Next Level Communications, offering VDSL that is faster than DSL and no more expensive for the consumer.

So, Mr. Chairman, I hope Congress will follow the wisdom of Pericles and let time be our advisor on this issue. We should be patient. We should refuse the temptation to change course in order to meddle in the marketplace while this revolution in telecommunications is happening around us.

I don't believe clear or convincing evidence has been offered that consumers are suffering. Quite the contrary. Consumers are getting more choices and lower prices. Rather, Mr. Chairman, I am concerned that the evidence points to something else, namely, the different segments of the telecommunications industry are using the Internet as a reason to reopen the old debate that long-distance companies and the RBOCs had regarding deregulation.

I believe the Congress decided in 1996 the forum for that debate is in the marketplace and not the legislature. The development of the Internet is not a reason to reverse this decision. In fact, the one way to guarantee harm to the consumer, in my view, is for Congress to try and reinsert itself into this competition.

I also want to try, Mr. Chairman, to put to rest a myth that some parties in the telecommunications industry are working hard to create—and we already have heard it—which is that when Congress was writing the Telecom Act of 1996 no one knew about the Internet and how it would impact the telephone industry. Therefore, goes the argument, we should reopen the act to take the Internet into account.

Let me quote from some of the transcripts of the 1995 hearings before the Subcommittee on Telecommunications and Finance, which I was a member of then and am today. These hearings were conducted for three straight days in May 1995 and they were part of the primary proceedings used by the House in gathering information regarding telephone deregulation on the Telecom Act.

First, I want to quote from the statement of Mr. Ken Oshman, the CEO of Echelon, a Silicon Valley company, who told the committee to be sure and focus on the accelerating convergence between communications and the computer industries. Mr. Oshman said, "Computer and information processing companies, which historically and successfully have operated largely free from Government oversight, are increasingly becoming involved in the communications market. As computing power and innovation continue to increase, we will only see more integration of the computer and communications industries, with applications ranging from the Internet to telecommuting to medical and database retrieval services, all of which will be delivered on a scale that is orders of magnitudes faster and more diverse than today."

Mr. Oshman went on to note that the convergence of computer and communications industries were in the news every day in 1995. Specifically, Apple Computer sought spectrum allocation for wireless mobile computing, and Intel and AT&T joined forces to create a high-speed network technology for personal computer communications.

This is not the only example that was offered to us. Larry Harris, who was with MCI at that time, testified before the committee that, "New fiber optic technologies will soon allow MCI to reach transmission speeds of 10 gigabits and eventually 40 gigabits,

enough for nearly 500,000 simultaneous Internet conversations over a single fiber pair."

Finally, I would like to go to my own opening statement at that time. To the committee I stated the following: "Consider, for example, that in 1972 there were only 150,000 computers in the world, yet this year—" keeping in mind that that was 1995—"Intel Corporation, alone, will sell 100 million small microprocessors, each surpassing the capabilities of those computers sold in 1972."

I went on to say, "Unfortunately, today's twisted copper wire telephone network is unsuitable for modern computers and software applications which can incorporate voice, video, graphic, and data transmissions and send them simultaneously in real-time exchanges."

I submit, Mr. Chairman, that the testimony I have recited above and which we heard on those 3 days in 1995 sounds like the description of today's Internet, and so I would submit the legislation that you are considering may be premature.

The so-called "incentives" for RBOCs to roll out DSL are unnecessary, because clearly there are signals that competition already exists in this marketplace. Cable companies have two-way high-speed cable technology to compete with RBOCs in the local phone business. And, Mr. Chairman, let me lay down what I think is a very important marker by asking this committee how Internet telephony will affect the legislation you are being asked to consider. If you are being asked to reopen the Telecom Act because of the Internet, how will this legislation affect the developing market that allows telephone calls to be made over the Internet? This technology, already in use, could have a dramatic affect on how we define something as basic as what a telephone call is.

Why not take the Periclean approach and see where this technological revolution will lead us? To do otherwise I believe will engender more marketplace disruption through pre-regulation than is ultimately necessary.

Again, Mr. Chairman, I thank you for giving me this time and this opportunity to come before this distinguished committee to offer my testimony, and I hope that we can work together on this issue and the many others that we have already partnered on. So thank you, and I appreciate this.

Mr. GOODLATTE. Thank you, Representative Eshoo.

[The prepared statement of Ms. Eshoo follows:]

PREPARED STATEMENT OF HON. ANNA ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman for holding this hearing and for extending to me your kind invitation to address the Committee. I also wish to recognize and thank the distinguished Ranking Member, Mr. Conyers and every member of the Judiciary Committee.

Mr. Chairman, telecommunications in ancient Greece consisted of Greek leaders giving speeches to large crowds of its citizens. And when it came to the great leaders of Greece none was wiser or a better communicator than Pericles.

In one famous speech, Pericles gave the Greeks some advice that I believe applies to our work here today. He said, "Time is the wisest counselor of all."

Mr. Chairman, I had the honor of serving in Congress and on the Commerce Committee when the '96 Telecom Act was drafted and I served on the Conference Committee that put the Act together.

Our respected colleague, Congressman Tauzin, was also on the Commerce Committee when the Telecommunications Act was shaped in 1996. When Congress

passed the Telecom Act, we intended that legislation to deregulate a communications industry in which competition had been choked off by years of monopolistic practices.

Mr. Tauzin, Mr. Goodlatte, Mr. Boucher and I agree that open and rigorous competition among telecommunications companies is the best guarantee that consumers will receive the broadest range of services at the best prices—and by definition, it is the most effective means to end monopolistic practices.

Since the 1996 Act was signed into law, we've seen the telecommunications revolution occur with breathtaking speed. No sooner does one technology seem to offer more speed and capability, when along comes another advancement that offers more data, faster.

We know the Telecom Act has resulted in a larger menu of broadband delivery options. It has increased competition and produced lower prices for the consumer.

One of the best examples of this is seen in the development of the Competitive Local Exchange Carriers—or CLECs. These companies—companies like Covad—are children of the Telecom Act.

And why do I call them this? These companies provide DSL-based access to the Internet through local loops or on their own high-speed fiber networks. Before the Telecom Act, these companies could not exist in a regulated environment. Only the Bells could offer this technology. It's important to note that the Bells had DSL technology but did not offer it. Instead, they offered the more expensive "T-1" lines to businesses.

But the Telecom Act deregulated the industry and allowed these companies to offer the DSL service. And once the Telecom Act allowed these companies to offer their services, what happened? Telephone companies that before had only offered the more expensive T-1 lines, began to rapidly expand *their* DSL service—a service they could have offered much earlier. The result was increased broadband services to consumers at a cheaper price.

And more dramatic successes are just around the corner. For example, there is a company in California called Next Level Communications offering VDSL that is *faster* than DSL and no more expensive for the consumer.

So I hope, Mr. Chairman, that Congress will follow the wisdom of Pericles and let time be our advisor on this issue. We should be patient. We should refuse the temptation to change course in order to meddle in the marketplace while this revolution in telecommunications is happening around us.

I don't believe clear or convincing evidence has been offered that consumers are suffering. Quite the contrary. Consumers are getting more choices and lower prices. Rather, Mr. Chairman, I'm concerned that the evidence points to something else—namely, the different segments of the telecommunications industry are using the Internet as a reason to reopen the old debate that long distance companies and the RBOCs had regarding deregulation.

I believe Congress decided in 1996 the forum for that debate is in the marketplace, not the legislature. The development of the Internet is not a reason to reverse this decision. In fact, the one way to guarantee harm to the consumer is for Congress to try and re-insert itself into this competition.

I also want to try and put to rest a myth that some parties in the telecommunications industry are working hard to create—and that is when Congress was writing the Telecom Act of 1996 no one knew about the Internet and how it would impact the telephone industry. Therefore, goes the argument, we should re-open the Act to take the Internet into account.

Let me quote from the transcript of the 1995 Hearings before the Subcommittee on Telecommunications and Finance. These hearings were conducted for three straight days in May of 1995. They were part of the primary proceedings used by the House in gathering information regarding telephone deregulation on the Telecom Act.

First, I want to quote from the statement of Mr. Ken Oshman, the CEO of Echelon, a Silicon Valley company, who told the Committee to be sure and focus on the accelerating convergence between the communications and computer industries.

Oshman said, and I quote, "Computer and information processing companies, which historically and successfully have operated largely free from government oversight, are increasingly becoming involved in communications markets. As computing power and innovation continue to increase, we will only see more integration of the computer and communications industries, with applications ranging from the Internet, to telecommuting, to medical and database-retrieval services, all of which will be delivered on a scale that is *orders of magnitude* faster and more diverse than today." (End quote)

Mr. Oshman went on to note that the convergence of computer and communications industries were in the news every day in 1995. Specifically, Apple Computer

sought spectrum allocation for wireless mobile computing and Intel and AT&T joined forces to create a high-speed network technology for personal computer communications.

This is not the only example. Larry Harris from MCI Communications testified before the Committee that, (quote) "New fiber optic technologies will soon allow MCI to reach transmission speeds of 10 gigabits and eventually 40 gigabits—enough for nearly 500,000 simultaneous 'Internet' conversations over a single fiber pair." (end quote)

Finally, I'd like to refer to my own opening statement on May 10, 1995. To the Committee I stated the following: "Consider, for example, that in 1972 there were only 150,000 computers in the world, yet this year [1995] Intel Corporation alone will sell 100 million small microprocessors each surpassing the capabilities of those computers sold in 1972."

I went on to say that, "Unfortunately, today's twisted copper wire telephone network is unsuitable for modern computers and software applications which can incorporate voice, video, graphic, and data transmissions and send them simultaneously in real-time exchanges."

I submit that the testimony I just recited and which we heard on those three days in 1995 sounds like the description of today's Internet.

And so I submit that the legislation being considered by you today may be premature. The so-called "incentives" for RBOCs to roll out DSL are unnecessary because clearly there are signals that competition already exists in this market. Cable companies have two-way high speed cable technology to potentially compete with RBOCs in the local phone business.

And finally Mr. Chairman, let me lay an important marker down by asking this Committee how Internet telephony will effect the legislation you're being asked to consider. If you're being asked to reopen the Telecom Act because of the Internet, how will this legislation effect the developing market that allows telephone calls to be made over the Internet? This technology which is already in use, could have a dramatic effect on how we define something as basic as what a telephone call is.

Why not take the Periclean approach and see where this technological revolution will lead? To do otherwise I believe will engender marketplace disruption through pre-regulation than is ultimately necessary.

Again, Mr. Chairman, thank you for giving me the opportunity to appear before the Committee.

Mr. GOODLATTE. Regrettably, the committee's standard practice is for Members of Congress not to be questioned by the committee. That would, obviously, take a good deal of time. But we do want to thank you for your presentation. We also look forward to working with you. I know I speak for Chairman Hyde and Ranking Member Conyers, Mr. Boucher, and myself, and the other members of the committee, that we do want to work with you and Mr. Tauzin and other members of the Commerce Committee to make sure that the wide array of Internet hubs that are available in districts like yours in the Silicon Valley get to districts like mine and Mr. Tauzin's where this competition yet has not reached us. We look forward to continuing to work with you.

Thank you.

Our second panel consists of one witness. Chairman William Kennard is Chairman of the Federal Communications Commission, the agency responsible for some of the matters that we are considering here today. He is a graduate of Stanford University and Yale Law School. Before becoming Chairman, he was a partner in the Washington law firm of Verner, Liipfert, Bernard, McPherson, and Hand. He joined the Commission first as an Assistant General Counsel, becoming its General Counsel in 1993. He became Chairman in November, 1997, and his term runs until June, 2001.

Chairman Kennard, we are happy to have you with us, and we look forward to hearing your testimony.

**STATEMENT OF WILLIAM KENNARD, CHAIRMAN, FEDERAL
COMMUNICATIONS COMMISSION, WASHINGTON, DC**

Mr. KENNARD. Thank you very much. It is a pleasure to be here.

I very much appreciate the time that you, Congressman Goodlatte, Congressman Boucher, and many other members of this committee and, of course, Chairman Tauzin and Representative Eshoo, have spent in delving into these very, very difficult but important policy issues, and I want to commend you for holding this hearing on this very, very important topic.

My message for you this morning is really a very simple one, and that is that the Telecommunications Act of 1996 is working. It is working well. We have gone through a period of a lot of litigation and confusion, and I believe that it would be wrong not to give the act a chance to continue to work and to bring American consumers the benefits that were promised in that 1996 act.

I think it is very ironic that we sit here today and debate whether we should, in effect, deregulate what I think are the key market-opening provisions of that act by, in effect, eliminating section 271 when just last week the European Commission adopted directives which would replicate, for the most part, what we have done in this country. They issued directives last week which would require unbundling of the local loop, cost-based interconnection, collocation—all of the principal tenets of the 1996 act—and they did that for a very simple reason: because they look at the United States market, they see that we have created in this marketplace a network of telecommunications services and Internet services that are the envy of the rest of the world, and they want to catch up. It is as simple as that. And I think that it would be unfortunate at this time if we were to reverse course just when the act is really kicking in and starting to work.

If you look around the world, you can see many examples of different approaches that have been tried in this area. New Zealand, for example, adopted an approach quite similar to the legislation that you are considering today. They decided not to adopt a regulatory approach. They imported an antitrust approach. After a number of years of massive court litigation that went nowhere, they abandoned that approach, and now they are trying to adopt the American approach, which is embodied in the 1996 act.

And the fact is that broadband employment in this country is exploding today. It is exploding so fast that the service providers can't keep up with the demand for broadband. Just this week there were articles in the "Washington Post" about how difficult it is for Bell Atlantic, now Verizon, to keep up with their requests for broadband connections in the residential market.

The fact is that every one of our delivery platforms in this country is either going digital or has gone digital, and the marketplace is scrambling to roll out broadband for high-speed Internet access products—the wireless industry, the satellite industry, the broadcast industry, and, of course, the cable industry and the wireline phone network.

What makes this marketplace so dynamic and so different on the wireline side is that we have this unique ability to create a powerful incentive for the Bell companies to open up their market as a condition to getting long-distance entry. In fact, when I talk to my

European colleagues, they are envious of what we have. They are envious that we have this tremendous incentive that is pushing the regional Bell companies to open their markets and unbundle and allow competitors to roll out broadband.

I did want to respond somewhat to some of the comments of Chairman Tauzin.

Let me say, first of all, that Chairman Tauzin and I clearly share the same goals. Everybody wants every American to have broadband in their homes and businesses, but we differ pretty profoundly on the means of getting there.

The map that I would like to present to you today—and it is shown here—shows that there is no paucity of long-haul, high-capacity fiber optic capacity in this country. If you look at this map and you look at deployment in Louisiana, in particular, there is plenty of fiber optic capacity in Louisiana. If you look at the cities of—just looking at the map that you have before you—Shreveport, Monroe, Alexandria, Baton Rouge, Lake Charles, LaFayette. That is not our problem. There is plenty of long-haul capacity.

The problem is the last mile. The last mile is not a fully-open, competitive platform, and that is why we have to keep this incentive structure in place.

Chairman Tauzin is also exactly right. Voice will be given away for free. It will be commoditized. But that is exactly why we have to keep the incentive in place for these companies to open their markets as an incentive to getting into the data markets.

I did want to address the cable access question, because it is a very difficult question that is pending before us at the FCC and obviously before the Congress.

This also is a debate about means and not about ends. Everybody agrees that the success of the Internet has arrived because it is an open platform. Nobody can dispute that. The real question here is how do we achieve that same openness on the cable platform.

At the FCC we have not presumed to know all the answers here, and we have given the marketplace an opportunity to work. We have been monitoring closely the economic relationships that are beginning to form between the cable companies and the ISP community. And we have taken this approach, in large part, because this is a very different transition on the cable side than what we have seen on the telephone side in the past.

Much of the history of regulation in this area has basically been the fight over one wire, the one copper telephone wire into the home. Well, that is changing now with the multiplicity of platforms, both wireless and wire, line.

So the question is: How do we create this same open platform in cable without replicating all of the labyrinth of regulation of the phone network that we are really trying to work our way out of with more competition. And so we are really searching for what is a new paradigm.

With all respect, I believe that the paradigm that you have proposed in this bill is not the appropriate paradigm. The antitrust paradigm I don't think will work in this particular marketplace. But I do think that it is important that we continue the focus and, frankly, the pressure on the industry to develop an open platform on the cable side.

And, frankly, we have heard a lot of rhetoric and good intentions from the cable industry—not coincidentally, probably, from companies that have major mergers pending before the Government—but I really don't think that this debate will go away or should go away until we really see a cable company, or many cable companies, actually deploy an open network platform for the cable plant.

We have tried to give this marketplace a little time to work because the technology is still being developed, the relationships are still forming, but, as Congressman Boucher mentioned, we are going to commence the proceeding where we are going to a little bit more aggressively look at the marketplace, evaluate the commercial relationships, and determine whether more needs to be done here.

Let me just sum up by saying that I do believe that this legislation at this time threatens to undermine American leadership in the Internet economy, for the simple reason that other things have been tried around the world and everyone is coming back to what we have done, what you have done in the 1996 act.

I consider myself a veteran of the telecom wars in the wake of the 1996 act. I was general counsel when the act was being debated and written and ultimately passed and when much of the litigation was pending around our implementation of that act. I defended those provisions all the way up to the United States Supreme Court.

The marketplace is settling out now. We have granted two Bell company applications to get into long distance. I am very proud that the FCC unanimously adopted those applications. And if you look at what is happening in those markets in Texas and New York you will see that the blueprint that you gave us is working beautifully. There is robust competition in those States. The incentive structure that you set up is working. So please don't put consumers through the uncertainty of another round of legislation and litigation. If it ain't broke, don't fix it. The act is working. Please give it a chance.

Thank you.

Mr. HYDE [resuming Chair]. Thank you, Chairman Kennard.

[The prepared statement of Mr. Kennard follows:]

PREPARED STATEMENT OF WILLIAM KENNARD, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, DC

Thank you Mr. Chairman and Members of the Committee. I appreciate the opportunity to testify before the Committee this morning.

I would like to state at the outset that I agree wholeheartedly with the objective of speeding deployment of broadband services to all Americans regardless of where they live. Nobody should be left behind in the broadband revolution.

Despite the old saying, however, sometimes you do have to look a gift horse in the mouth, particularly if it is a Trojan Horse. I am afraid that is what this legislation is. It appears to be a gift horse to competition, but it is really just the opposite.

The genius of the Telecommunications Act of 1996 (1996 Act) is the delicate balance it strikes between regulation and deregulation to achieve competition in all forms of communications, and to deploy the fruits of that competition to all of the American people. Indeed, the Judiciary Committee's special role in crafting a dual role for the FCC and the Department of Justice in reviewing Bell company applications under Section 271 deserves mention. The process has worked well, and consumers are better off as a result.

I am sure that increased competition is the well-meant intention of the proposed legislation. Inadvertently, however, I believe this legislation will not only upset the balance struck by the 1996 Act, but it actually would reverse the progress attained

by the 1996 Act. In an effort to move us forward, this bill mistakenly moves us backward.

THE 1996 ACT IS A MODEL FOR THE WORLD

Last week the European Commission (EC) issued a bold package of proposed legislation and directives aimed at bringing the Internet revolution to Europe. It is no coincidence that the EC's initiative looks like a close cousin of our Telecommunications Act of 1996. The European Commissioners have concluded that in order to chart a course towards American-style Internet growth they must build a vessel not unlike the 1996 Act. This course includes such staple items included in our Act as local loop unbundling and collocation.

In fact, government officials from emerging and established nations frequently visit the Commission to study the American network-of-networks that the 1996 Act has created, and how multiple, privately-owned service providers give consumers choices. Increasingly, they endorse the idea of an independent regulatory agency with the power to bust up monopolies, as opposed to relying solely on antitrust litigation to deregulate monopolies. For example, New Zealand is revisiting its efforts to deregulate through antitrust enforcement and considering instead tools similar to those set forth by Congress in the 1996 Act.

We are setting the example for the rest of the world. Changing course midstream by diminishing the BOCs' incentives to open the local markets would not only be detrimental to American consumers, but would also put at risk the leadership role the United States has played in the global telecommunications market.

A FABRIC

The 1996 Act is a fabric, with the thread of each part connected to every other part. Unravel one thread, and you risk unraveling the entire fabric.

That is my concern with the legislation before you.

Pull the thread of data traffic, and the seams of the Section 271 provisions are weakened. Pull the thread of data traffic, and the threads of telephony, video transport, and wireless transmissions will fray. As I tell regulators from other nations, you cannot cherry-pick the 1996 Act. In this age of convergence, no network is an island, and the conduit and content of each is entwined with every other.

Under our system, the 1996 Act had to be carried out in three stages: rules had to be written, the rules were tested in court, and now the rules are being implemented. Now that implementation is fully underway it would be tragic to change directions.

This is not an insignificant exemption. In fact, as I discuss below, data traffic has already surpassed voice traffic on long haul networks. Eliminating data from Section 271 would eliminate a crucial incentive for the incumbent BOCs to open their local monopoly markets. The opening of local markets is absolutely critical for accelerating broadband deployment.

My message to you today is simple: the Telecommunications Act of 1996 (1996 Act) is working. Because of years of litigation, competition did not take hold as quickly as some had hoped. The fact, however, that it is now working is undeniable. Local markets are being opened, broadband services are being deployed, and competition, including broadband competition, is taking root.

The Commission has a long history of fostering innovation and investment in new technologies, such as the Internet. Specifically, we have consistently refused to impose legacy telecommunication regulations on providers entering new markets. For example, in 1983 the Commission declined to subject information service providers to access charges, concluding that such regulation is unnecessary and would be harmful to the development of the industry. More recently, in order not to stand in the way of successful advanced services deployment, we declined to require incumbent LECs to unbundle packet switched and other advanced services equipment. The Commission found that in a dynamic and evolving market, regulatory restraint was the best way to further the Act's goal of encouraging facilities based investment and innovation. Similarly, as I discuss later, we have thus far refused to impose legacy telecommunications regulation on cable broadband service providers.

RAPID GROWTH OF BROADBAND DEPLOYMENT

The Commission's faithful implementation of the Act has resulted in an explosion of broadband deployment. As of the beginning of the year 2000, we estimate there were 2.8 million broadband, high-speed telecommunications lines that deliver service of speeds of at least 200 kbps. Two million of those lines were serving residential subscribers. This is a six-fold increase from the previous year.

The DSL business is growing so fast that the BOCs are struggling to keep up with demand. The Wall Street Journal reported last week that SBC is installing about 3,500 DSL lines each day. At the end of the first quarter of 2000 there were approximately 800,000 DSL lines in service in the United States. About 75 percent of those lines are provided by incumbent LECs and 25 percent by competitive carriers.

These trends show no sign of slowing down. Analysts project that deployment of DSL will increase by 300 to 500 percent over the next year. Analysts also estimate that subscribership to cable broadband services will at least double by the end of this year, and by the end of 2005 will have 20 million subscribers. Incumbent LECs and cable operators are predicted to invest over 25 billion dollars in infrastructure improvements over the next four years to bring broadband services to their customers.

The market-opening 1996 Act sparked infrastructure investment in telecommunications facilities by incumbent LECs as well as competing carriers. For example:

- Incumbent LEC investment in infrastructure was flat or declining until the passage of the 1996 Act;
- After the 1996 Act, incumbent LEC investment jumped approximately 20 percent;
- Aggregate industry investment subsequent to passage of the Act, including both incumbent LECs and competing carriers, nearly doubled, increasing from 30 billion dollars to 60 billion dollars.

These statistics do not paint a picture of incumbent companies prevented by legal requirements from deploying new services to consumers.

The vision of the Act and the vision shared by the FCC—that consumers will have a choice of providers offering a choice of pipes into the home or workplace—is being realized. It is being realized through the opening of markets required by Congress in the 1996 Act. The rapid growth of broadband services is tangible proof that the market-opening requirements of the Act are working.

THE SECTION 271 INCENTIVES TO OPEN LOCAL MARKETS

Simply stated, the Act requires the BOCs to open their local markets to competitors. Section 251 states the rules of the game and Section 271 provides a structured incentive for BOCs to play by the rules. At its core, Section 271 is a simple yet clever proposition: in exchange for opening their local facilities to competitors, the 1996 Act provides the BOCs with the substantial reward of the long distance “carrot.” Altering this balance by exempting data traffic from the restrictions in Section 271 would inhibit, rather than further, the Act’s goal of fostering robust broadband deployment.

As local markets are opened, broadband deployment is both stimulated and accelerated. Specifically, it is the opening of those local markets that is driving broadband deployment and innovation. This is true because nondiscriminatory access to the “last mile” and the ability to collocate—both components of the competitive checklist—are critical inputs for the provision of DSL service.

Unfortunately, the first three years of the implementation of the 1996 Act were characterized not by cooperation but by confrontation. Litigation instead of collaboration. The result was uncertainty, confusion, and delay. We lost valuable time. Then, in January of 1999, the Supreme Court largely affirmed the Commission’s implementation of the market-opening provisions of the Act. Once the smoke cleared, we began to witness a sea change. Finally, the battles began to move out of the courtroom and into the marketplace.

Within approximately the last six months, the Commission has unanimously approved Section 271 applications for both New York and Texas. We need only review the state of competition in New York and Texas to know the Act is working. More activity is on the horizon. The BOCs have indicated that they intend to file applications for numerous states across the nation within the next six to nine months. The Commission welcomes, and looks forward to, these filings.

As I have stated before, opening markets can be difficult work, and establishing competition is not easy or fast. But both Verizon (formerly Bell Atlantic) and Southwestern Bell have shown that it is well within the grasp and control of the BOCs. I commend both of these companies, and the New York and Texas Commissions, for their dedication and hard work in ensuring that the fruits of competition are enjoyed by local and long distance consumers in Texas and New York.

As envisioned by the 1996 Act, the Section 271 carrot has fueled the growth of local and long distance competition. Because Verizon and Southwestern Bell opened their local facilities to competitors in New York and Texas as required by the Act, competition in the local telephone market has flourished in those states. One ana-

lyst estimates that competitors will serve about 20 percent of the local lines (approximately 3 million lines) in New York by the end of this year. That is a substantial increase from the 7 percent of the local lines that competitors served in New York at the end of 1999 (approximately 1 million lines). Verizon is completing over 270,000 local orders each month for competitors in New York. Local competition is thriving in Texas as well. The Department of Justice estimated that competitors served over 800,000 lines in Texas at the end of last year. That is about an 8 percent market share. Competitors' customer base, however, has been steadily increasing. For example, in May—the most recent month for which we have data—competitors added over 170,000 new lines in Texas. And, I am happy to report, that a large portion of the increase in local competition in these states since Section 271 authorization has been in the residential and small business markets.

The hard work of satisfying Section 271 has not only benefited New York and Texas consumers of *local* services. In the first three months after gaining 271 approval, Verizon captured over 400,000 *long distance* customers in New York. Analysts estimate that Verizon will take as many as 1.5 million long distance lines in its first year alone (about 10% of the market)—well ahead of the 1 million lines Verizon set as its goal for the year. Verizon expects to capture 25 to 30 percent of the long distance market within 5 years. Analysts predict that they will meet this goal easily. Many predict that Southwestern Bell will have similar success in Texas. This is no small prize. Texas alone represents about 10 percent of the nation's long distance voice and data market.

The opening of local markets drives competition, innovation, and produces a breadth of offerings. We have witnessed a dynamic market for broadband services develop as a result of the opening of local markets in Texas and New York. Although DSL technology has been available for years, it was not until the passage of the Act that competitive providers—called data LECs or DLECs—specializing in DSL deployment were born and began offering DSL service to consumers. Competitors need to collocate their equipment in BOC central offices and require conditioned local loops before they can even offer facilities-based DSL services. Then, to be competitive, DLECs require timely and cost-based loops and collocation. Once the DLECs had access to the inputs necessary to offer their DSL products to consumers, the threat of such competition spurred the BOCs to develop their own DSL products. Competition from the incumbent monopolies, in turn, is spurring the DLECs to develop even more new and innovative broadband products, services, packages, and prices. It is precisely this sort of competitive cycle that will accelerate the availability of broadband technology for all Americans.

Of course, competition among technologies as well as providers is also driving this investment. Wireless technologies—both terrestrial and satellite—are also on the scene. High-speed Internet service via satellite is available today virtually everywhere in the United States, including rural areas. Analysts project that wireless technologies will have 6 to 12 percent of the broadband market by 2004. Analysts also project that DSL will overtake cable as the overall leading technology for delivery of broadband services as early as 2002, with cable retaining its dominance amongst residential and small business customers until 2004, when cable and DSL will have equal market shares.

I am proud of the FCC's record in holding firm on the requirements of Section 271. As our experiences with New York and Texas have shown, there is no substitute for the hard work of compliance. The rewards of Section 271 compliance are plentiful. For the first time in history consumers are able to choose their local service provider and take advantage of increased competition for their long distance calls as a strong new competitor enters the market. The rewards do not end there. Competitive markets are also bringing consumers new choices in technology for the 21st Century.

REMOVING INCENTIVES BY EXEMPTING DATA

The great competitive success stories we have been witnessing as a result of the incentive structure established by Section 271 would be few and far between if the proposed legislation becomes law. As currently written, Sections 251 and 271 do not draw a regulatory distinction between voice and data services. Carving out interLATA data traffic from the prohibitions in Section 271 would remove a potent incentive from the 1996 Act.

Currently, the majority of traffic travelling over long haul networks is data—as opposed to voice traffic. Indeed, analysts expect that data traffic will comprise approximately 90 percent of all traffic within four years. The wholesale data service market is expected to generate 41.3 billion dollars in 2005, up from 9.9 billion in 1999. In a world where data is experiencing explosive growth and is rapidly out-

spacing voice traffic, allowing the BOCs to carry long distance data traffic before they have satisfied the requirements of Section 271 would severely undermine the BOCs' incentive to open their markets.

Changing the rules of the game at this juncture would also undercut the substantial infrastructure investment being made by competitive telecommunications providers. For example, competing carriers have invested 30 billion dollars in new networks since the passage of the Act and are now investing over 1 billion dollars every month in their networks. In 1999, competing carriers have spent over 15 billion dollars on overall capital expenditures, up from about 9 billion the year before. Investors will cut off the spigot when competitors are forced to try to compete with monopoly incumbent providers without full and fair access to the BOC's bottleneck facilities.

I disagree with the notion that further deregulation is the only way to enable incumbent LEC deployment of broadband services in rural and high cost areas. The BOCs simply do not need to provide access the entire way from the customer to the Internet backbone in order to provide broadband access to their rural customers. Rather, they can provide such broadband services to those customers the same way they serve their urban and suburban customers—by handing data traffic that is headed out of the LATA off to another provider who can carry it across the LATA boundary. That provider then carries the traffic to the Internet backbone.

Is this the most efficient way to provide service to customers? No. Is it the most cost effective? Certainly not. Does it preserve the incentives of the BOCs to open their local monopoly markets to competitors faster than they otherwise might? Absolutely.

The simple reason why rural customers, and other customers in unserved and underserved areas, are not yet being served as robustly as we would like is not caused by legal impediments. Rather it is largely about simple economics. Providing customers with sophisticated services in areas of low density is an expensive undertaking. As such, we are mindful that some rural customers face more limited competitive choices for broadband services at this time. Accordingly, to the extent that there may be instances where a LATA boundary is standing in the way of consumers getting broadband services from BOCs, the Commission has set up a LATA boundary modification process. For example:

- A BOC that provides advanced services to customers within a state may demonstrate that it cannot obtain an interLATA provider to connect its in-state network to the Internet and request a LATA modification to allow it to connect its network to the nearest out-of-state Network Access Point;
- A BOC could also request a LATA boundary modification to allow it to serve a particular customer, such as a hospital or university, where the customer cannot obtain an interLATA connection for its network; or
- A BOC may also demonstrate that it would not be able to deploy xDSL service to a LATA within a multi-LATA state unless the BOC is allowed to aggregate traffic from one LATA to another, or may be the advanced services provider of last resort for residential customers within a particular state. The BOC may then argue that it is uneconomical to deploy advanced services to such customers without a LATA boundary modification.

Notably, we have not received any requests for LATA modification since adopting this procedure in February 2000, and have received no requests to refile prior petitions. It is difficult to understand how LATA boundaries are a barrier to broadband deployment when no BOCs have even attempted to obtain such relief in the past five months. The Commission has stated its commitment to reviewing, in an expeditious manner, all LATA boundary modification requests that would provide consumers with advanced services.

CABLE ACCESS

Another important issue that the proposed legislation addresses, Mr. Chairman, is the question of whether consumers can choose from among multiple Internet service providers (ISPs) independently of how they connect to their ISP. The issue is most often raised in the context of whether cable operators offering broadband access to the Internet. This is often referred to as the "open access" issue, though some call it "forced access." I'll just refer to it as the "cable access" issue.

First, I agree that much of the growth of the Internet can be attributed to the significant choices available to Internet users and the interconnected network of networks that characterize the Internet. Anyone can send an e-mail to anyone else on the Internet. Anyone using an ISP that is connected to the Web can access

websites anywhere in the world. This ability is a core characteristic of the Internet and it should continue.

The issue raised by advocates of cable access is whether regulation is needed to ensure this kind of global interconnectedness by providing consumers choices of ISPs if they connect to the Internet via their cable system just as those who connect to the Internet over their dial-up telephone lines.

Advocates of mandatory cable access want regulators to set rules ensuring competitive access.

I believe that before we impose regulation we should see if a problem develops rather than assume the worst and jump in and regulate.

The Commission has been consistent in its approach to cable access. It examined the issue nearly two years ago in the AT&T/TCI merger proceeding and in the first 706 Report to Congress. In both instances we declined to create a new regulatory regime to address what was only a theoretical problem. The Commission again declined to impose cable access rules in the AT&T/Media One merger earlier this year.

We have adopted this market-friendly approach because we believe that imposing access regulation would impose costs on any new entrants into the broadband conduit business, thereby raising a barrier to entry to potential competitors in this market. The Commission would like to encourage such entry, not throttle it; if the market puts pressure on incumbent cable firms to open up their networks to multiple ISPs, imposing duplicative regulatory costs is simply counterproductive to encouraging conduit competition.

Recent events have been encouraging in this regard. Over the last year, cable operators have made public commitments to allow their subscribers to choose among multiple ISPs. They also have entered into formal memoranda of understanding with ISPs to permit such competitive access. And, AT&T has announced a technical trial in Colorado in which they will provide access to ten ISPs on over its cable network.

These developments support my continued belief that there are powerful market-place incentives to move the cable platform to an open platform permitting access to multiple ISPs. But it also is time to see how these market driven agreements are translated into concrete commercial arrangements.

Last month the U.S. Court of Appeals for the Ninth Circuit in the *AT&T Corp. et al v. City of Portland* case confirmed the FCC's role in establishing a national policy for cable access as well as clearly recognizing the Commission's authority to forbear from regulation in this area. In addition, the court found that the provision of Internet access over cable was both a telecommunications service and an information service. The categorization of "telecommunications" service does not, however, necessarily mean that the service is subject to all of the traditional common carrier regulations that apply to telephone companies. Indeed, the Commission has the statutory authority to forbear from such regulation.

I plan to propose to my fellow commissioners that we initiate a proceeding that will examine the implications of the Portland decision and establish a framework for cable Internet access. While the current indications are positive, the Commission is of the view that in this fast-changing industry, we must constantly reassess our position on this issue, and be prepared to move quickly should industry conditions change for the worse.

Similarly, the policy of relying on market forces in the first instance to create a competitive dynamic in the deployment of advances services is working in the wireless and satellite industries in which new competitive entrants are investing in facilities for high speed Internet access with a minimum of regulation.

This preference for a market-driven approach to cable access is often noted by incumbent local exchange carriers to be in contrast to what they see as requiring access by competitors to their broadband services.

The reality is that we've taken a consistent approach to new broadband advanced services across platforms. In the Commission's Advanced Services Order, the Commission declined to require incumbent local exchange carriers to unbundle their advanced DSL equipment such as DSLAMs as long as competing carriers are able to provide their own advanced service.

The 1996 Act is clear that because of their historic monopoly status, incumbent LECs during the transition to competition must permit competitors to lease local loops in order to connect their own equipment. But, once this is possible, the Commission has chosen to encourage incumbent LEC investment in new advanced technologies and services by not requiring that they make those new investments to competitors on an unbundled or discounted basis.

This policy has been enormously successful. According to industry analyst Telechoice, in the six months ending in March, incumbent LECs more than tripled the number of central offices with DSLAMs from about 1,200 to more than 3,800 while

increasing deployed DSL lines from 220,000 to 563,000 customers. The growth of broadband services is explosive.

CONCLUSION

In conclusion, the 1996 Act is working. The explosive growth in the deployment of broadband services and the vigorous local competition in New York and Texas prove that the Act is working. Passage of the proposed legislation at this critical juncture would disrupt the Act's delicate balance between regulation and deregulation, postpone the benefits of competition to consumers by creating uncertainty and litigation, curtail the flow of investment into new markets, and inhibit the Act's goal of fostering broadband deployment. For all of these reasons, I urge you let the Act continue to work.

POPs Correlated With Economic Ranking

States 1 - 10

States 41 - 50

Average # of POPs per State:	Average # of POPs per State
33.4	2.3
1. Massachusetts	41. Wyoming
2. California	42. Iowa
3. Colorado	43. South Dakota
4. Washington	44. Alabama
5. Connecticut	45. North Dakota
6. Utah	46. Montana
7. New Hampshire	47. Louisiana
8. New Jersey	48. West Virginia
9. Delaware	49. Arkansas
10. Arizona	50. Mississippi

Mr. HYDE. We will now ask questions. Mr. Conyers?

Mr. CONYERS. Thank you for your written statement and your remarks. They were consistent and complemented each other.

Mr. KENNARD. Thank you.

Mr. CONYERS. Let me ask you, Chairman Kennard, you indicated in August, 1999, that you believe the FCC already has regulatory authority to require open access if the market tips toward cable broadband. Is there some number of market share that cable would have to achieve before you were to exercise that authority?

Mr. KENNARD. I think that is one of the things that we will have to evaluate in the proceeding that we intend to have. It is hard for me to say that without having the benefit of a full record, but I think fundamentally we will have to ask the question of whether consumers are able to exercise the choice in an open environment that they have become used to in the narrow band world. I think that is what we owe consumers in all broadband platforms.

Mr. CONYERS. Do you worry about network effects should the market tip toward cable—network effects which might be hard to undo after the fact?

Mr. KENNARD. Yes, I am concerned about that, but I think you have to balance that against the danger of imposing a new regulatory regime in an area that is really quite dynamic and the business relationships are not fully formed, so it is going to be a delicate balancing act that we will have to do.

Mr. CONYERS. I am impressed with your enthusiasm about the success of the 1996 act, but how can you alleviate some of our concerns about the cable rates, which have gone up 20 percent over a 6-year period, that we are still having the Bells merging and getting bigger. It is almost—you know, to talk about Baby Bells, these are the top businesses in America. They are down. The cable industry is in the process of being swallowed up. Are there some pills we should take and see you in the morning about, feel better about all of that? You know, there is another direction here.

Mr. KENNARD. Certainly. Well, I think we have to put all of this in perspective. First of all, we have a tremendous amount of investment in this marketplace. Consumers are using telecommunications services today more than ever before, and rates in many areas of the sector are going down or not going up.

I share your concern about cable rates. This is a very vexing problem for the country. I think that many people would, in looking back at the 1996 act, probably agree that perhaps we acted precipitously in deregulating cable rates at basically a flash cut by saying in March 1999, the FCC would lose its regulatory authority in this area altogether.

The other side of that coin, though, is that the cable rate experience was a difficult one for the country, and I think Congress' faith in competition is ultimately right. The key, of course, is making sure that there is enough competition from new technologies, different technologies like cable over-builds and the satellite industry, to constrain rates. That is ultimately the way we are going to work our way out of this cable rate issue.

Mr. CONYERS. Yes. On a personal note, are there some goals that you set in mind between now and the end of your term? Are there some things you would like to see that you leave behind in your own legacy here as the general counsel and chairman, which is, I think, an extraordinary feat, and that you were here during the be-

ginning of all of this? Is there work left undone that you would like to get into a tidy arrangement on your desk?

Mr. KENNARD. It is not a question I expected this morning, Mr. Conyers. First of all, I am not going anywhere immediately, I want everyone to know, but there is much, much work to be done. I think that we have made a lot of progress in making sure that the benefits of this information revolution touch all Americans, and I, personally, feel very proud at the FCC that we have worked on many aspects of trying to bridge the digital divide by working hard to bring technology into our schools, particularly our poorer schools, bringing technology to our most distressed populations, like our Native American population and rural areas. We have worked very hard to make sure that the 54 million Americans with disabilities have access to this wondrous technology.

I want to continue that work. There is a lot more work to be done. Hopefully in the last few years we will have changed the debate around to some of these issues so that they will be somewhat institutionalized so that it is not a question of whether I or anyone else is in the job, but rather this will be a part of our national mission and it will carry on. That is really my ultimate goal.

Mr. CONYERS. I think you have done an excellent job in your career with FCC.

Mr. KENNARD. Thank you.

Mr. CONYERS. Thank you very much.

Mr. HYDE. The Chair recognizes himself for 5 minutes.

Chairman Kennard, I know the thrust of our hearings today has to do with these two pieces of legislation, but ancillary to that is the subject you just talked about, and that is the escalating cable rates.

I am one Republican—perhaps a minority in my group—who believes in antitrust laws. I think they are good. I think they help the system work, and that monopoly is bad. And we are seeing monopolies develop in the cable business, at least in my part of the country, where AT&T is buying up cable company after cable company, and the rates predictably go up 10 percent.

I am writing you a letter today asking for your help in studying the situation and trying to see what and why and how this is happening.

They tell us that the cost of programming—and they talk about the high cost of sports, which people want. I heard this morning on the radio where some rookie with the Redskins got \$10 million as a signing bonus, so I guess that all gets factored into the cost of programming. But people are really upset about it. We did deregulate. We felt uncomfortable about it at the time, but, as you say, faith in the free market, free enterprise system ought to carry the day, but it doesn't provide much of an answer to my constituents who are really furious about this.

So I guess I will write you more extensively of my concerns and ask you for your analysis, but service upgrades and increased programming costs are the reason that AT&T gives. I have their correspondence here to one of my constituents.

Do you see these as generally valid explanations for the kinds of increases, or is this the inevitable result of monopoly?

Mr. KENNARD. Well, we issue a report every year to Congress which assesses the status of competition in the multi-channel video market, which includes cable, satellite, other multi-channel video technologies. And we did recognize what you point out—that increased programming costs are certainly one reason why cable rates are going up.

However, it is clear to me that, if there were more competition to the cable industry, these rates would be moderated, constrained, perhaps even would go down. And we see that. In markets where there is more competition, you tend to have lower rates. So the ultimate answer here is competition.

I was very pleased when Congress recently passed legislation to allow the satellite industry access to the local broadcast signals, because that will give a little more of a competitive boost to that industry, which appears to be the best prospect of providing real competition to the cable industry.

But we still have a problem, and I look forward to receiving your letter and working with you to see if we can come up with even more solutions to that.

Mr. HYDE. Thank you very much.

Mr. Berman?

[The information referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, July 19, 2000.

Hon. WILLIAM KENNARD, *Chairman,*
Federal Communications Commission,
Washington, DC.

DEAR CHAIRMAN KENNARD: Thank you again for testifying at yesterday's Judiciary Committee hearing on broadband issues. Your testimony was most helpful to the Committee.

As I mentioned at the hearing, I am very concerned about the recent 10% rise in cable rates in my district. (See attached article from the Chicago Sun-Times). Before cable rate regulation expired in March 1999, I proposed extending it. When I did so, I was met with vehement opposition from the cable industry and many promises of good behavior. However, now that regulation has gone away, we are seeing the seemingly inevitable exorbitant increases.

I am now wondering if we made a mistake in letting regulation expire. It is true that satellite television, which can now provide local broadcast channels, is something of a competitor. In addition, a few communities in my district have a new entrant cable company. However, neither of these competitors seems able to restrain these increases.

I would appreciate your doing a brief study of the state of competition in the cable industry in my district. I would be interested in your advice on whether the justifications offered by AT&T—upgraded service, better programming, and more expensive programming—justify the increases. I would also be interested in your advice as to whether we should consider reimposing rate regulation.

My constituents are suffering under these rate increases, and they need answers. I would appreciate any help that you can offer. Thank you in advance for your response and thank you again for testifying.

Sincerely,

HENRY J. HYDE, *Chairman*

Enclosure

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April 13, 2000, THURSDAY, Late Sporta Final Edition

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HEADLINE: AT&T to raise cable rates

BYLINE: BY ROBERT MANOR

BODY:

AT&T, the biggest cable operator in Illinois, plans to raise rates for 1 million Chicago area customers by almost 10 percent in July.

Pat Keenan, spokeswoman for AT&T Broadband, said rates also will go up for customers of TCI and Jones Intercable, which AT&T bought last year.

Keenan said the average customer's bill for expanded basic service, now at \$ 29.59 a month, will rise to \$ 32.40 in July, an increase of 9.5 percent. Those figures vary by community, and do not include taxes, franchise fees, pay-per-view or premium channels like HBO.

"Three-quarters of that increase is attributable to programming costs," Keenan said, adding that about 1 million of AT&T's 1.7 million customers in Illinois will be affected. The company raised fees for 700,000 customers earlier this year.

Federal regulation of cable fees was eliminated in March 1999, and critics at the time warned that charges would go up around the nation -- in part because nearly all cable companies are effectively monopolies.

AT&T does have some competition in the Chicago area, but most customers still have no choice in their cable provider.

"No community enters into an exclusive contract to do business with us," Keenan said. "We don't want anyone to feel captive."

Still, rates are rising here faster than in the rest of the nation. Last year, AT&T raised rates between 5 percent and 6 percent.

The U.S. Bureau of Labor Statistics said cable charges rose 3 percent last year. Paul Kagan Associates, a consulting firm, predicted rates will rise 4 percent this year. The national average cost for expanded basic cable was \$ 28.92 at the start of the year.

It could be worse. AT&T said it is raising cable charges by as much as 21 percent in some parts of the country.

AT&T has been spending heavily to improve the old TCI system so it can offer local phone service and high-speed Internet access. But Keenan said customers

Chicago Sun-Times, April 13, 2000

benefit even if they don't use cable for the phone or Internet.

"Even if you don't take high-speed digital Internet, you are getting improved reception because of improvements in the system," she said. "The reliability has improved."

Keenen declined to say what Chicago city residents are paying for expanded basic service, except to say it will rise 9.5 percent this summer.

Ameritech, which competes with AT&T in the southern part of the city, said AT&T charges \$ 32.99, not counting taxes and franchise fees. After the increase, that would rise to \$ 36.12.

"We are at \$ 30.25," said David Pecholczyk, spokesman for Ameritech. He said the company has no immediate plans to raise its rates.

21st Century competes with AT&T along the northern lakefront, and it charges \$ 29.45 a month.

"We have no plans to raise charges," said Marc Miller, a vice president at 21st Century. But competition is limited in both areas as 21st Century and Ameritech have not completed building their systems and cannot reach all potential customers.

Prime Cable, which serves customers in neighborhoods on the North and Northwest sides, raised its charge in March from \$ 32.95 to \$ 35.25. Prime, which has no direct competition, is reportedly a takeover target by AT&T.

City Cable Commissioner Joyce Gallagher said cable companies are largely free to charge what they want, and will continue to do so until competition is widespread in two years or so. "It's what the market will bear until we have total competition in Chicago," she said.

GRAPHIC: 21st Century competes with AT&T for cable customers along the northern lakefront, but neither company has completed its system, leaving some potential customers without a choice of cable providers. GRAPH; See roll microfilm.

LANGUAGE: English

LOAD-DATE: April 14, 2000

FEDERAL COMMUNICATIONS COMMISSION,
Washington, DC, July 25, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Thank you for your letter expressing concern about cable television rates, and asking the Commission to conduct a brief study of the state of competition in the multichannel video programming distribution industry in your District. I always appreciate the opportunity to assist members of Congress and to provide information on the state of the telecommunications industries.

In some communities, it appears that cable rates have increased at a rapid pace since the Commission's authority to regulate rates terminated. While competitive video programming alternatives continue to develop, cable television remains the dominant technology for delivering multichannel video programming to consumers.

As you requested, I have asked the Commission's Cable Services Bureau to undertake a brief survey to determine the competitive choices available to consumers in the Sixth Congressional District. I also have directed the Bureau staff to identify and analyze any increase in cable television rates since March 31, 1999 in your District. I will report our findings as soon as the Bureau completes its work, which could take a few weeks.

In the meantime, I am providing a copy of the Commission's most recent *Report on Cable Industry Prices*, for your information. This Report compares the prices charged by competitive cable operators with the rates charged by operators that are not subject to competition for the 12-month period ending July 1, 1999. The Commission released this Report last month. I also have enclosed a copy of our *Sixth Annual Competitive Report*, which surveys competitive developments in the market for video programming. These reports contain information that I hope you will find valuable concerning both the pricing structure for cable television service and the development of competition in the video programming distribution industry.

I appreciate having had the opportunity to appear before the Committee on the Judiciary to testify about developments in the broadband industry. I look forward to working with you to promote competition in the multichannel video programming distribution marketplace. Please let me know if you have any further questions or concerns.

Sincerely,

WILLIAM E. KENNARD, *Chairman.*

Enclosures

Mr. BERMAN. Thank you, Mr. Chairman.

Chairman Kennard, there are two aspects to this legislation about which I would like you to comment with some specificity, one question on each aspect.

On the mandated ISP access issue, cable is deploying broadband in certain areas—not mine right now, but in certain areas. What is going on in the real world in terms of people's ability to get other ISPs and favoritism toward an affiliated ISP? What are you seeing out there in the real world where this has been deployed?

Mr. KENNARD. Well, again, I think a lot of these business relationships are still being formed, but as a very general matter what we are seeing is that the large cable operators, the MSOs, have entered into exclusivity arrangements with their own Internet service providers, the two principal ones being Excite@Home and the Roadrunner service. And they are, in effect, bundling the provision of high-speed Internet access service with use of that portal.

Now, it is true that most consumers can still access whatever ISP they want, but this really goes to how much they have to pay in order to access that ISP, in some cases the speed with which they can access that ISP, and who ultimately controls the customer.

A lot of what is happening in this marketplace, both in this area and generally in some of the other Internet areas, like instant messaging, for example, is who is going to control the customer.

We have to be very vigilant to make sure that ultimately customers have choice, that they have the ability to determine what service providers they want to go to over these platforms. That is the issues that we will obviously be looking at as we move forward.

Mr. BERMAN. Just to follow up on this, you have made a number of references to looking at access issues. I take it, in the wake of the ninth circuit decision, you have decided to jump in and what?

Mr. KENNARD. Well, I can't say with a lot of specificity, because we haven't really designed the framework for this proceeding and I need to talk to my colleagues and figure out what makes the most sense. But the ninth circuit decision I think really did tee up an important issue, which we haven't decided, which is whether broadband access over cable, Internet access over cable, is a telecommunications service. The FCC has not decided that issue.

And I have always believed fairly strongly that there should be a national policy here. As you know, some municipalities have taken action, which is why we had the ninth circuit decision. I think the ninth circuit decision appropriately determined that there should be a national policy, and I think it is incumbent on the FCC to speak now on what that national policy should be.

Mr. BERMAN. Alright. On the other aspect of the bill, what did Bell Atlantic do in New York and SBC do in Texas with respect to allowing the kind of competition that the 1996 act designed that isn't going on with the baby Bells in other States that causes you to think that continued adherence to that act will create the dynamic to open up more competition? And are there applications pending and decisions being made in other States that are leading toward approval of long-distance data and telephony by the local Bells?

Mr. KENNARD. Certainly. And, with respect to your first question, what did the companies in Texas and in New York do that the others haven't? The simple answer is that they complied with the law. They were able to realize that they needed to allow their competitors to access their network, to allow their competitors to switch customers over to the competitor's network from the incumbent network. A lot of this revolved on the development of electronic interfaces between the incumbent network and the competitor's network so that there can be a smooth transition, so when you want to switch a competitor from Bell Atlantic to Covad it is a phone call and it happens quickly, just the way you can switch your long-distance service from AT&T to MCI.

I might add that it took a little time to get those systems in place in the wake of the divestiture of AT&T, so you don't wave a magic wand and this happens. People have to invest. They have to train workers. They have to put the interfaces in place.

And I am happy to report that in the wake of those two cases we now have a pretty clear road map that other Bell companies can follow, and those Bell companies can follow in other States in their region.

That brings me to your next question, are there other applications pending. Not at this time, but we expect that there will be

soon. Bell South has announced that they will be filing an application for Georgia next month. There was a story yesterday in Bloomberg where both Verizon and Bell South discussed their plans to file applications. And we expect that we will see multiple applications in the next year or so.

Mr. HYDE. The gentleman's time has expired.

Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman Kennard, to follow up on Mr. Berman's questions, the purpose of the provisions in the Telecommunications Reform Act that require incumbent local exchange carriers and local telephone companies to make their facilities available to competitors is to encourage competition, consumer choice, and price, is that not correct?

Mr. KENNARD. Of course.

Mr. GOODLATTE. Now, if I am reading your testimony correctly, you state that competition would be inhibited if cable were to make its facilities available. Can you explain this contradiction?

Mr. KENNARD. Well, I think it is a question of, again, what I said earlier. It is a different transition now. This is not a fight over one wire. This is the goal of creating multiple broadband platforms competing in the marketplace.

Mr. GOODLATTE. In that regard, let me ask you, one of the companies that is on both of these markets, AT&T, which is an Internet service provider over the phone lines with about four million subscribers, one of the largest Internet service providers, is also now one of the largest cable company owners. They have made the conscious decision—they started out heading toward becoming CLEC and competing on the phone lines, and then switched and went into the cable business instead, and offer that competition on cable.

When we see that kind of dramatic change in the strategy that was contemplated by the Telecommunications Reform Act, why wouldn't we change our strategy in response in terms of opening up the telephone lines for the phone companies to compete in the long-distance market, since we have already effectively accomplished by a different means the intention of the act in terms of opening up the phone lines to competition?

Mr. KENNARD. Well, the marketplace is not monolithic in that there are just one or two players. There are literally hundreds of companies out there who are trying to compete to bring local phone service to competitors, and they have different business plans.

I think Representative Anna Eshoo was exactly right that this act spawned a whole new industry, the CLEC industry, now the DLEC industry, that now has opportunities to provide consumers choice by accessing that local loop. We are not just talking about the cable companies versus the phone companies. There are multiple players out there.

Mr. GOODLATTE. And I agree, and I think that is a good development. We want to encourage those folks. But, at the same time, the dynamic has changed. When the act was written, less than 10 percent of all telecommunications were data and 90 percent was voice. Already, just 5 years later, it is now more than 60 percent data and

about 40 percent voice, and it is rapidly headed toward 90 percent data and 10 percent voice.

We already have that competition on the phone lines for data. That is what those 6,000 Internet service providers are that the phone companies have opened up their lines due to total competition. They compete with Bell Atlantic, which also is an Internet service provider, on their lines.

With that fact being the case that we have opened up that kind of competition, why wouldn't it make sense to encourage the phone companies to get in and build out the Internet backbone by allowing them to get into the long-distance market?

Mr. KENNARD. Well, I think it is apples and oranges, to a large extent.

First of all, when the Bell companies get into long distance, that doesn't necessarily mean that they pour investment into the Internet backbone. In fact, that is not what we are seeing.

When Bell Atlantic, now Verizon, was——

Mr. GOODLATTE. To interrupt for just a second, we don't have Mr. Tauzin's chart here any more, but I think the fact of the matter is that they have already invested billions in building out the capability that can be used for that Internet backbone and it is going to waste in Louisiana and my part of Virginia and a great many other places because it can't be used for this purpose, even though the customers of these companies have already paid for it.

Mr. KENNARD. Well, if the goal of this legislation is to attract investment in the Internet backbone, I really don't think that that is going to happen for a couple of reasons.

One, as I was beginning to say, when Bell companies get into long distance they don't automatically pour investment into the Internet backbone. Indeed, what they do is they look for a partner that has long-haul capacity. Verizon partnered with Sprint, I believe, and SBC has partnered with Williams.

Mr. GOODLATTE. Let me interrupt again, because I am going to run out of time here. Let me ask you about section 706 of the act, what that stipulates.

Mr. KENNARD. Section 706 requires the FCC to ensure that advanced services, including broadband, are deployed to all Americans throughout the country.

Mr. GOODLATTE. Has the FCC used section 706 to remove any burdensome regulations, as it calls for in that section?

Mr. KENNARD. Well, the section doesn't require the FCC to eliminate regulations. What the section says is really quite general. It says that we have to report to Congress on the status of deployment of advanced services and use our regulatory powers to make sure that advanced services are deployed.

Mr. HYDE. The gentleman's time has expired.

Do you want to finish the answer?

Mr. KENNARD. If I might, Mr. Chairman.

In early August we will be sending our second 706 report to Congress, and I am really excited about it because this time we held field hearings all throughout the country, many in rural parts of the country, to determine how advanced services are being deployed, and I think that it is a pretty hopeful story. I mean,

broadband is being deployed in many areas of the country. Some things are working, some things aren't.

Mr. GOODLATTE. But the act has never been used—

Mr. HYDE. Mr. Boucher, the gentleman from Virginia, is recognized for 5 minutes.

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

Mr. Kennard, thank you for taking part in our discussion this morning. We welcome you before this committee, not a customary forum for you.

Mr. KENNARD. Thank you.

Mr. BOUCHER. We hope you will come back on a frequent basis.

Mr. KENNARD. Thank you.

Mr. BOUCHER. I am glad to learn from your testimony that the European Commission has now adopted the same kind of unbundling and interconnection requirements for telecommunications services that we adopted in 1996. I seriously doubt, however, that the European Commission has any restrictions on the long-distance transport of data, as we currently have in section 271.

Let me say that Mr. Goodlatte and I are not proposing any retrenchment, any erosion of the interconnection and unbundling requirements of section 271 and other sections that have promoted local exchange competition. The Europeans, therefore, could take great confidence that the United States is certainly not stepping back from this model that the Europeans have now adopted.

We are also not proposing in our legislation that section 271 be eliminated. You suggested in your testimony that we are. What we are proposing is simply that the Bell operating companies, in order to encourage competition in the offering of backbone services and serve these unserved rural areas that other speakers have identified, be permitted immediately to offer data across LATA boundaries. They would not be permitted to offer voice-based long distance across those boundaries until they get permission under section 271.

Now, you suggested that there would not be adequate incentives for the Bell companies to open their local networks if we take this step. Let me choose to differ with you on that.

The voice-based long-distance market, alone, just the market for voice, is about \$90 billion a year, and you have seen the interest of Bell operating companies in getting permission to enter the market. That has happened now in New York and in Texas. But I would think that a \$90 billion market creates ample incentive for the companies to take whatever steps are necessary in order to enter that market.

The other point that I would make to you is that the section 271 requirements for opening the local exchange will remain in place after our legislation passes, and those provisions require that the local exchange be open, incentive or no. The law requires that that happen.

And so, in my humble opinion, we can take these steps and permit data to be carried across LATA boundaries by Bell companies completely consistently with our national policy of promoting local exchange competition and making sure that competition comes into local telephone markets.

The other point I would like to make to you is with reference to your comments about the pace of the section 271 process.

In my opinion, it is pretty slow. Here we are more than 4 years beyond the time that the 1996 act has passed. Two companies have now been permitted into the interLATA long-distance market, and only from two States. It just seems to me that it is going to be several years, at a minimum, even given the fact that new applications will be filed later this year, before the Commission grants section 271 applications that bring these high-speed transport services and the DS-3 backbone services that we so badly need to the rural areas of the Nation that are under-served today. I think those are the last places where the section 271 applications are likely to be granted.

Well, in the time I have remaining let me just get your response to that. I will give you an opportunity to say what you will.

Mr. KENNARD. Thank you, Mr. Boucher.

First of all, this whole marketplace is going data. We have heard a lot of testimony today about how much data traffic is now moving on our networks. If you, in effect, deregulate 271 and take data out of it—and there are, I think, some difficult technical questions of how you can separate the two technically—then a very simple thing will happen.

Mr. BOUCHER. Mr. Kennard, I can't resist interrupting to say it is very simple. You just look in the phone book and see if they are advertising long distance. If they are advertising voice-based long-distance service, then they are violating the requirement. If they are not, then it ought to be fine.

Mr. KENNARD. But what will happen, Mr. Boucher, is that the Bell companies will just move to IP telephony. IP telephony is a data service and that will eliminate any incentives to move voice traffic over the network at all.

Second of all, if the motivation of the legislation is to ensure that there is deployment of data in rural areas, we have addressed that problem. First and fundamentally, the problem is addressed by requiring the Bell companies to open up their markets. Once they open their markets, they can move data anywhere. There is no restriction at all. That is the beauty of the incentive.

But, second, the FCC has adopted a waiver process so that any Bell company that can demonstrate to us that the only way to get data into a rural area is over their facilities, we will waive the interLATA restrictions and allow them to do it.

Mr. BOUCHER. Have you ever done—

Mr. KENNARD. Not one Bell company has ever asked us for that waiver.

Mr. HYDE. The gentleman's time has expired.

Mr. BOUCHER. Thank you.

Mr. HYDE. The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. No questions.

Mr. HYDE. I really admire the gentleman. [Laughter.]

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

Chairman Kennard, I apologize if the questions I am asking are repetitive of anything you have said, but Mr. Gekas and I and sev-

eral other members were at a subcommittee hearing scheduled at the same time as the committee hearing.

As I understand this bill, it will allow, among other things, cable companies or will mandate that cable companies allow multiple ISPs to use their broadband service; is that correct?

Mr. KENNARD. Yes.

Mr. NADLER. Do you support that, first of all?

Mr. KENNARD. To allow ISPs to use a broadband service?

Mr. NADLER. To mandate that cable companies must allow multiple ISPs to use the broadband service, yes.

Mr. KENNARD. Certainly that is the goal, and I wouldn't dispute that that is what consumers want to have. We want consumers to have a choice of multiple ISPs. The real question is how we get there.

Mr. NADLER. Let me just pursue that for a moment.

Mr. KENNARD. Yes.

Mr. NADLER. If that were done and if we accomplished that, that would—and correct me if I am wrong. I want to make sure I understand this—that would mean, in effect, a common carrier obligation so that the cable companies could not use their control of the broadband access to favor their own programming—their own content over somebody else's content?

Mr. KENNARD. That may be one way to do it. My own personal view is that the cable broadband pipe is a new pipe.

Mr. NADLER. Say that again?

Mr. KENNARD. The cable broadband pipe is a new pipe, a new network. And I think we need to be careful about automatically imposing all the legacy regulation that we have developed over the last 50 years in this country and are actually trying to work our way out of, pick it up and drop it wholesale on the new pipe.

My own view is that I don't think that would be the appropriate paradigm for cable. People have offered various ways of doing it, and we are going to look at various alternatives.

Mr. NADLER. But I do want to make sure that—right now, the Internet has been developed in a way that basically there is open access to anybody. Nobody can control the pipes on the Internet. We want to make sure, as a lot of the Internet traffic moves to broadband cable, that that is maintained and that no one gets that control, do we not?

Mr. KENNARD. Absolutely.

Mr. NADLER. And are there better ways to do it than that provision?

Mr. KENNARD. Well, my own view is that I don't believe approaching it from an antitrust perspective is the best way. I think that if you are going to open up that cable pipe, you would have to adopt a regulatory approach. I am not saying that that is necessarily what we should be doing right now.

The FCC has taken the approach thus far that we ought to allow the marketplace an opportunity to develop because we are transitioning from a different place now.

Mr. NADLER. Allow the opportunity for the market to develop until you can see how you must mandate what? Or in the expectation that the market will automatically open up everything? That is something that history says is not very likely to occur.

Mr. KENNARD. Well, we have never seen anything like this period in history. For one thing, people who are likely to go from the narrowband world to the broadband world are migrating from an environment of open access in the narrowband world. Consumers expect access to multiple ISPs.

When cable operators are competing against the DSL platform, an open access platform, we think that there may be some powerful market incentives that will drive them to want to maximize their cable facility by adopting an open ISP environment. That may not be the case. We are going to have to look at it and monitor it.

But my point is that there are costs imposed when we waltz into this marketplace and, in a sort of knee-jerk fashion, say, "Okay, it worked in the wireline world, we are going to import it to the cable world," because that creates a level of confusion and uncertainty in the marketplace that I don't know would be appropriate right now.

Mr. NADLER. Thank you.

Second, I gather, with respect to the other major thing that this bill does—and I gather it is the other major thing that this bill does, which is to open data transmission, which is to say that the local Bells, as the price for competing interstate, do not have to open up their systems to data, as opposed to voice. That is the other major provision. You are not supporting that?

Mr. KENNARD. That is correct.

Mr. NADLER. And do you believe that there is—and that was the fundamental deal in the 1996 act. Do you believe that anything has occurred since then? Mr. Goodlatte says that, since we have seen much more data than happened in 1996, I don't know that we have seen a shift much more than was expected in 1996.

First of all, could you comment on that?

When this bill was passed in 1996—

Mr. HYDE. The gentleman's time has expired.

Mr. NADLER. I ask unanimous consent for one additional minute so he can answer this question.

Mr. HYDE. Without objection.

Mr. NADLER. Thank you.

In 1996, when the bill was passed, was there reason to expect—was there reason to contemplate that a very large share, more than the 5 percent at that time of communication, would be data as opposed to voice?

Mr. KENNARD. Well, I think that Representative Eshoo, who testified earlier about her experience as a conferee on that bill, is exactly right. There was discussion of the Internet at that time. In fact, the Internet is mentioned in the bill. So the movement toward data traffic on the networks was beginning.

I think, realistically, few people predicted the explosion of data on our networks, but, in my view, I think this has been a happy outcome in the marketplace and for the 1996 act because what it has done is it has increased the incentives to get these markets open.

I believe section 271 is the heart and soul of this legislation, because I see it in practice every day. It forces the competitors to sit down at the table with the Bell companies and figure out how they are going to get those markets open to competition.

Mr. HYDE. The gentleman from—

Mr. KENNARD. That is why it is being replicated around the world. That is why my colleagues at the State level support it, and virtually every Government official charged with trying to open these markets believes that this provision is a huge benefit, and it would be tragic to deregulate it or undermine it in any way.

Mr. NADLER. Thank you very much.

Mr. HYDE. The gentleman from Ohio, Mr. Chabot?

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Kennard, I know your expertise is in communications law rather than in antitrust law, but would you give us again your opinion on whether it makes good sense, from either a legal or an economic standpoint, to create distinct classes of industries or companies which would be subject to special treatment under the anti-trust laws? And what is the effect of using antitrust law to regulate in this area? And what are the potential effects of letting the courts make new telecom policy?

Would you again give us your views on that?

Mr. KENNARD. Certainly.

If you look around the world and see how other countries have tried to address this issue of de-monopolizing telecom markets, some have tried, relying on competition policy, antitrust policy, as the principal vehicle. I believe it has been a failure, most recently in New Zealand, when the government there has departed from reliance on antitrust principles.

I believe that there are two fundamental ways that you get these markets open. One is that you use an antitrust approach similar to the approach we used with the divestiture of AT&T, and it worked fairly well. The other is to empower a strong independent regulatory authority with continuing oversight over the market to pry the market open. That is the blueprint of the 1996 act. I think that is working.

I don't believe you can mix and match them very effectively, and I believe that if you gut the market-opening provisions of the 1996 act what you will have is what Mr. Conyers alluded to in his opening testimony—yet another giant antitrust suit to finish this job.

I fear that if we don't stay the course now and be strong and keep the pressure on the incumbents to open their markets for both voice and data, then years from now people are going to say, "Well, the 1996 act was a failure, and, unfortunately, this whole industry is in antitrust court all over again," and that would be a tragic outcome.

Mr. CHABOT. Thank you.

I yield back the balance of my time.

Mr. HYDE. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

I want to go back to the open access question and just ask fundamentally whether a person ought to be required to buy Excite@Home if all they want is AOL.

Mr. KENNARD. Well, I believe that there should be open access. I believe that consumers should get the choices that they want. The real question is: Is the cable industry and market forces affecting that industry going to develop a more open platform to give the consumers a choice that you allude to, or will it require the intervention of regulation?

I think that at this point we haven't decided the answer to that question—at least I haven't.

Mr. SCOTT. Why should the analysis be any different than Microsoft requiring Microsoft Explorer as a condition of getting Windows, giving that away, and what that did to Netscape?

Mr. KENNARD. Well, I am not an expert on that antitrust case and it probably wouldn't be appropriate for me to comment on it.

Mr. SCOTT. Okay. Well, let me ask another question then. In Portland, Oregon, Portland required open access as a condition for the cable franchise. The district court sustained that position. Did other cities take advantage of that law—of course, up until last month when the circuit court reversed?

Mr. KENNARD. The majority of cities, as they have looked at this question, have determined that they are not going to impose an open access ordinance. And many of them, frankly, are looking to the Federal Government for a national policy in this regard. That is what the ninth circuit clearly said in their decision—that there should be a national policy. That is why I believe it is appropriate now for the FCC to commence a proceeding and determine what course we should take.

Mr. SCOTT. In terms of competition for the local dial tone service, if you find there is local competition, obviously there is no problem with the Bell. People can do what they want to do. What progress has been made across the country in developing effective competition for the dial tone service, and what has happened to the price to the consumer as a result of that competition?

Mr. KENNARD. Well, the way markets work, as I know you know, is that most competitors, most new entrants, design their business plans to target the densely-populated customers, the business customers. That has been our experience in long distance. When MCI was a little upstart company in the late 1970's, their business plan was not about residential service, it was about serving the business customer.

Ultimately, as we had more competition, that business migrated into the residential space, and now we have much more competition for residential long distance.

So flash forward to where we are in competition for dial tone service in the local loop. Most businesses today, particularly large businesses, have many options for service, for dial tone service. Our challenge is to bring residential consumers choice in local phone service. That was the promise of the 1996 act, that everyone would have competition in local phone service. And there we still have a lot of work to do, but we are making progress.

I think one of the most significant things that we did in that area was recently the FCC mandated line sharing. It requires the incumbent Bell companies to share their lines so that competitors who want to provide broadband services can use the single line that the incumbent has brought into the home.

So progress is being made, but, you know, frankly, if you look at the progress that we were making in promoting competition in long distance 4 years after the divestiture of AT&T and compare it to the progress that we are making in local phone service 4 years from the 1996 act, we are making much more progress today, relatively speaking, in large part because we have more technologies,

it is a more dynamic marketplace, and because the 1996 act is working quite well.

Mr. SCOTT. What would happen if you removed the incentive that the local phone companies have—that is, to be able to get into long distance—if you remove that incentive for data, what would happen to the progress in competition for the local dial tone service?

Mr. KENNARD. I think it would gut the incentives to open these markets quickly.

Mr. SCOTT. Technologically, can you tell the difference between voice and data? If you allow just data service and not voice, can you appropriately regulate that?

Mr. KENNARD. Well, certainly you can distinguish between analog voice service and data services, packet switched services. The problem is that it is all merging together, and if you, in effect, deregulate data, then all of the voice services will just migrate over to the data platform. That is, I think, the key reason why this particular legislation would gut those incentives to open the markets, because it would just move voice to another place.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Kennard, I appreciate your instructive testimony today. I think I want to ask you, to follow up on your testimony, you indicated, after showing us the map of the backbone across the country—and, looking at Arkansas, there is a good line going through Arkansas, but Arkansas is more than a line. And you pointed out that the problem is not the long-haul routes, but it is the last mile as being the problem.

Describe what you would define as the last mile? Is this a literal mile? Obviously, it is not, but how big is the last mile and what are the obstacles to get to the last mile?

Mr. KENNARD. Well, in the context of this discussion, it is moving the traffic from the Internet point of presence to the customer's home, and this has been our biggest challenge, frankly, of finding a way to allow competitors access to that last mile facility.

Mr. HUTCHINSON. Well, you are speaking of getting it more into the rural areas or more into the less-dense population and giving the companies the incentive to extend Internet broadband services to those areas. Isn't that what we are speaking of?

Mr. KENNARD. That is right.

Mr. HUTCHINSON. And, whether it is Southwestern Bell or someone else, they say it takes them time, they don't have the economic incentives to do that; is that correct?

Mr. KENNARD. Yes. I think they are asking the wrong question. I mean, if you look at the way these markets develop, people who are providing data services, even the competitors—the Covads and the Rhythms of the world—they are not all building long-haul capacity. What they are doing is they are building out local networks, in many cases their own last mile, and then they are handing off traffic to long-haul providers like the Worldcom network and Sprint and Level Three and Global Crossing.

We don't have a paucity of long-haul capacity. It is quite amazing in our country, because data traffic is doubling about every hun-

dred days, mainly as a result of the Internet explosion, and we have been able to keep up with that capacity.

The problem is getting the broadband capacity built out locally.

Mr. HUTCHINSON. Thank you.

I would like to yield the balance of my time to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank the gentleman.

To follow up on that, Mr. Kennard, Covad and Rhythms are two very fine companies, but isn't the competition that they bring primarily to business telecommunications rather than to residential service?

Mr. KENNARD. I can't speak particularly to the business plans of those companies. I do know that, as I mentioned earlier, it is a natural migration to serve the business markets first and then migrate down to residential. We have taken some regulatory actions recently that I think will make it easier for competitors to serve the residential marketplace.

Mr. GOODLATTE. To shift gears, in the merger agreement between AT&T and TCI, Liberty Media was granted preferred provider status. What does that mean?

Mr. KENNARD. I don't know what that means in that context, Mr. Goodlatte.

Mr. GOODLATTE. You don't know if Liberty Media content gets a better price or a better channel placement?

Mr. KENNARD. No, I don't.

Mr. GOODLATTE. Okay. Going back to the section 706 issue that I raised with you earlier and we weren't able to complete, the language of that doesn't require you to deregulate but it does allow you to deregulate, and let me ask you, in that context, the Department of Justice recently entered an objection to the MCI-Sprint merger. Wasn't that, in part, because of a concern for the reduction in competition in the Internet backbone market?

Mr. KENNARD. As I understand the Justice Department's action, they determined that, if that merger were allowed to proceed, then there would be an unacceptable degree of concentration in the Internet backbone market. Yes.

Mr. GOODLATTE. And wouldn't more participants in the market lead to an increase in backbone competition?

Mr. KENNARD. Yes, but, again, if the concern is about more competition in the Internet backbone, our experience with the 271 process to-date is not that the Bell companies pour investment into the Internet backbone when they get into long distance. They, like most of their competitors in that market, hand off traffic to the Internet backbone when you are providing long-distance services over interLATA boundaries.

Mr. HYDE. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt?

Mr. WATT. Thank you, Mr. Chairman.

Mr. Kennard, some of us who are ambivalent about the Goodlatte-Boucher bill or the Tauzin bill or any kind of legislation suggest that our ambivalence has to do with allowing, as you have indicated, the telecom bill to work for some period of time and allowing that process to play itself out.

If you assume that these bills have some merit to them, yet we should still be waiting to allow the telecom bill to play itself out, the questions that I have really are two-fold. Number one, would there be some time frame within which we would be looking to allow the telecom bill and what is happening in the aftermath of that to play itself out? Or, alternatively, would there be some set of triggering devices, evaluative criteria that we might be looking for next year, year after next, 5 years from now, that would either trigger or put to rest the need for additional legislation?

Mr. KENNARD. That is a very good question. I think it is important that we continually assess the progress of this act in a number of respects.

In the area that we are talking about today, deployment of broadband services into rural areas, every year the FCC sends a report to Congress. Our next report will be coming up next month where we will survey the deployment of broadband around the country and probably make some recommendations as to specific actions that need to be taken.

I am very optimistic about the amount of investment that is pouring into this marketplace, and I think that says something about the 1996 act having struck the right balance.

If you look at every sector of the communications economy, investment is pouring in to provide new services, many broadband services—the wireless industry, cable, DSL, across the board.

My view is that our main challenge is making sure that everybody benefits, that all people in the country have access. And oftentimes ensuring that is not a simple question of, well, do you deregulate the big players so that they have more freedom. Oftentimes, when you find that there are distressed areas like terminal lands or remote rural areas that aren't getting service, sometimes it is a different solution—targeted universal service subsidy support, for example. We are working in those areas at the FCC.

So I think it is too easy a solution to say, "If you are not satisfied with the progress, deregulate more." I mean, that doesn't seem to me to be the right approach.

Mr. WATT. Doesn't that leave you with a framework that gives the independent regulatory agency, FCC, substantial authority? I guess that may be making some people uneasy in that we can't find a legislative group of words that solves this problem once and for all and kind of gets the regulation out of it.

What I hear you saying is that there is going to be an ongoing need for substantial regulatory involvement in evaluating the impact of the Telecommunications Act and in pushing and tugging to make sure that the Telecommunications Act yields all of the results that we might have anticipated. Am I correct in that, or would you elaborate on that a little bit?

Mr. KENNARD. Certainly. I think you are fundamentally correct. We are constantly tweaking the implementation of the act. When it appears that arteries are blocked or competitors can't get access to things, we are constantly tweaking it. We are also now looking hard at this cable access issue. But I think there will always be tensions. You know, I spend most of my days meeting with people who are out in the industry in companies, businesses, etc., who want the law changed, the regulation changed one way or another,

and there is a pattern to all these discussions. Almost everybody wants less regulation for them and more regulation for their competitor, and that is how they define a level playing field. This is the way people arbitrage the process.

I think we just have to assume that that is life and continue to do our job.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon?

Mr. CANNON. Thank you, Mr. Chairman, and Chairman Kennard.

I have been thinking here, I often pass the opportunity to ask questions in circumstances like this because it is sometimes better to get on with other testimony, but I think the reason you have had so many questions and the chairman's patience has been so tried is because the issues that you are dealing with are so important to the American people. They are certainly important to people in my district.

We heard from Chairman Tauzin earlier today, and we have compared our districts. While he has more people in his State, my State is much more urbanized than him. You are talking about the seventh most urban State in the country, and I represent a district that contains just about two-thirds of the whole State of Utah, so I have most of the non-urban but heavily-unpopulated areas of the State of Utah.

I might just say that my rural residents don't whine very much. I love them.

On the other hand, I have lots of people who want—I have a large portion of the State. It is also the beautiful portion of the State and many people want to move in. They want to move in when they have access to high band width data. So these issues are important to me and to the people of my State.

I was personally thrilled when AT&T invested in TCI, and you had a couple of questions already on that and you have dealt with those, I think, well.

Let me just ask this first: Do you believe that the provisions of the bill before us would have a tendency to injure or to put at risk the investment that AT&T has made in cable?

Mr. KENNARD. Well, I typically don't—it is hard for me to answer that question, Congressman, because to a large extent it is irrelevant to me because I have to focus on what is best for the consumer. One of the reasons why we approved the transaction to allow AT&T to buy TCI is because we felt that it would create investment for consumers in a new technology. Although we haven't seen that play out fully, I think our instincts were right because we are now seeing some wonderful competition developing between the telephone companies and the cable companies to roll out new services for consumers.

So, from the consumers' standpoint, those sorts of transactions are working. That is not to say that every combination or merger is pro-competitive, but that particular one, where you had a long-distance company combining resources with a cable company to compete against the Bell companies in their back yard, the residential marketplace, it was a good deal for consumers.

Mr. CANNON. Frankly, I think it was a great deal for consumers, and I weighed the risk there, and I think it is important, from our point of view, that we keep the rules stable so that people can make those kind of risky investments and make the world a better place for consumers and everyone else.

I appreciated your comment when you were referring to the provisions of this bill. You said they would gut the incentive to open these markets quickly, and then went on to say that is because voice services would migrate to data services. It seems to me that is really the core of what is going on with this bill. If this bill is passed, the RBOCs will move very quickly to voice over the Internet and not open up their services or their access to their operations to the competitive services. I take it that is where you are headed, right?

Mr. KENNARD. That is correct. In fact, I believe that even if voice doesn't migrate quickly to data, to IP telephony, then it is clear. Everybody knows that data is the high growth area of the industry. Everybody wants data. And if you take away the incentive to open up your markets because they basically don't have to worry about data any more, that incentive is gone.

Mr. CANNON. I am intrigued by your statement that no RBOC has asked for a waiver of the interLATA requirements because of areas that are not receiving Internet services. Could you elaborate a little bit on that? Has there been talk about that? Or are the RBOCs just using that as a lever over the heads of their constituents to create anger that will result in pressure for opening up the whole system?

Mr. KENNARD. It might be better to direct that question to them, and I hope you get an honest answer.

Mr. CANNON. I don't think we would get a straight answer.

Mr. KENNARD. But I think one of the reasons why that provision hasn't been used is because there is a fair amount of long-haul capacity in the country, and we did have a situation in West Virginia not long ago where it was claimed that if we didn't allow the Bell company ability to move traffic over LATA boundaries then people wouldn't get served, and, lo and behold, someone stepped up to provide service, not the Bell company. So there are companies out there that are willing to provide these services.

Mr. HYDE. The gentleman's time has expired.

The gentlelady from California, Ms. Lofgren?

Mr. LOFGREN. Thank you, Mr. Chairman.

And thank you, Mr. Chairman. I really think that you have done a terrific job in your service at the FCC, and really the country is fortunate that you have been willing to put up with the grief that the job sometimes brings.

As you outline the successes that the country has experienced since 1996, it really is—when you step back from it, it is just stunning what has occurred since 1996 in terms of the roll-out of broadband and the reach of the Internet into so many homes. And we are not there yet. We all know that. And sometimes it is hard to be patient because the role that we have here in Congress—really in the country—is not to decide only what, but also to decide when. Sometimes the when question is even more important than the what question.

Mr. KENNARD. Yes.

Mr. LOFGREN. I obviously represent a primarily urbanized area, where there is, interestingly enough, in the heart of Silicon Valley not much competition from cable because of an antiquated cable system, but there has been rapid roll-out of DSL. That is one of the questions that I have for you, not in terms of changing the law, but in terms of implementing and tweaking and utilizing the tools available to you.

I am concerned that, of the DSL roll-out, only 25 percent is currently being provided by upstarts, the Covads and others. And I know that they have had oftentimes rather energizing experiences in dealing with the incumbents. And I am wondering if there are steps that the Commission is considering that might provide for enhanced competition from not just Covad, but many other upstart companies.

Mr. KENNARD. Well, thank you very much for your opening comments. I am happy to address that.

Companies like Covad and Rhythms are really the children of the 1996 act, and we have watched them fairly carefully to assess what they need in order to compete effectively in this marketplace, and we have taken a number of steps over the past few years to enhance their ability to collocate, for example. Line sharing, which I mentioned earlier, I think is a very important development for them.

And I think it is very important for the success of the 1996 act for companies like that to be able to compete in this marketplace.

One interesting outcome of the proposed legislation, if it were to pass, I think companies like Covad and Rhythms would immediately become acquisition targets to the Bell companies, because they can move data across LATA boundaries—and these companies have not really matured yet—then you might see some very, very rapid consolidation in this marketplace, and we might be regretting the fact that we would have lost those competitors, so it is something that we have to watch very carefully.

Mr. LOFGREN. Looking ahead, the chairman indicated his concern with cable fees, not for Internet access but for more-traditional media and the concerns expressed to him by his constituents and I think all of us have experienced that phenomenon at one time or another. I am wondering if you have considered—it is really not the FCC's job, but as we are melding the various technologies in broadband and video and the like—I have recently read an article that there is a small company in Texas that claims that they have broadcast-quality video on DSL as a trial. Looking ahead, we will see, I think, traditional media streaming on DSL. We haven't seen the end of compression technology. So essentially we will have competition not just for what we now use the Internet for, but for movies and TV—TV actually is not the word we will have to use.

How is that going to play into the whole copyright issue that has been recently raised in the Senate? I don't favor the proposal made by the chairman and ranking member of the Judiciary Committee, but, looking ahead at the convergence of technology, is there a role for the FCC to give opinions on the whole issue of copyright and making sure that the convergence of technology continues to be successful?

Mr. KENNARD. Well, you have touched on what I think is one of the most challenging issues facing us as we move into the world of digital content, and I feel very fortunate that, because I have enough problems, I don't have to deal with copyright issues, so whatever observation I gave you would just be a personal observation. I would be happy to give it to you, if you would like.

Mr. LOFGREN. I would love it.

Mr. HYDE. The gentlelady's time has expired.

Mr. KENNARD. Thank God. [Laughter.]

Mr. LOFGREN. Perhaps after the hearing you can give me your opinion.

Mr. HYDE. Just in the nick of time.

The gentleman from Alabama.

Mr. BACHUS. Thank you.

Chairman Kennard, you said data is doubling every 80 days?

Mr. KENNARD. Every 100 days, sir.

Mr. BACHUS. Every 100 days. Everybody wants data. Everybody needs data. It is a matter of being able to compete. It is a level playing field. And I think you said it ought to be a national policy that we get access to everyone as soon as possible. Is that correct?

Mr. KENNARD. That is right.

Mr. BACHUS. Would you agree that allowing the Bells into long-distance data would bring broadband services to the under-served areas and do it quickly?

Mr. KENNARD. No. I think it would have actually the opposite effect because it would eliminate from the marketplace lots of competitors that are trying to serve consumers with data services.

Mr. BACHUS. You mean allowing the Bells to deliver data, long-distance data to under-served areas would actually restrict the amount of services in those areas? How would that eliminate competitors? Or you said let the marketplace?

Mr. KENNARD. Maybe I didn't explain my answer fully. As I have testified earlier—

Mr. BACHUS. Did you say this? I will just maybe pose this question. You are saying allowing the Bells into long-distance data wouldn't speed up the deployment of broadband services to under-served areas? I thought that was a given.

Mr. KENNARD. No. Actually, I don't think that would happen. First of all, I think it is important to note that if any Bell company comes to the FCC and says it has the desire to serve an unserved area with data services and it has not been granted 271 authority and it seeks a waiver to do that and can demonstrate that no one else will serve that community, we will grant the waiver.

Mr. BACHUS. Well, you mean no one else? I thought you were promoting competition. Shouldn't the market create a demand, and if they want to go out and sell to that area that would be an evidence of demand?

Mr. KENNARD. They can. The only thing that is preventing Bell companies today from moving data across these LATA boundaries is the fact that they haven't yet demonstrated to their State regulators and the FCC that they have opened their market to competition.

Mr. BACHUS. I understand that, but you are talking about they haven't done something else they should do, but we are talking

about the narrow focus. There is a great demand out there for broadband services and the Bells can deliver a tremendous amount of that service to under-served areas. I mean, surely you agree with that.

Mr. KENNARD. Of course they can, but what I am saying is that—

Mr. BACHUS. They could do it quickly, and what you are saying is someone else may be able to do that, but then you have talked about the need for competition. Why would you have a national policy to exclude probably the group that could deliver those services quicker than anyone else and maybe cheaper? And, I mean, is it up to the FCC to decide who goes in and who doesn't?

Mr. KENNARD. First of all—

Mr. BACHUS. I mean, you actually said in the statement that we ought to rely on the FCC to make these decisions. Shouldn't we just open it up for everyone?

Mr. KENNARD. I think it is important to note—and it hasn't been said yet today—that most of our rural areas in America are not served by the Bell companies, they are served by small, independent, rural telephone companies. Many of those companies—not all of them, but many of those companies are providing state-of-the-art broadband services in rural communities, and they have developed business plans that allow them to, in part with the help of Federal and State subsidies, which allow them to provide state-of-the-art broadband services, so it is not appropriate to say that the Bell companies are the only companies in America that are going to serve these rural areas.

Mr. BACHUS. But wouldn't you say that the Bell companies do serve a lot of rural areas that need broadband services?

Mr. KENNARD. Some of them do, but I also think that if you deregulate the laws to allow the Bell companies to move data across LATA boundaries, I think you will find that they will target data into large metropolitan areas because that is the main driver for those companies, for every company in this marketplace.

Mr. BACHUS. I understand, but you are not saying they wouldn't also go into the rural areas?

Mr. KENNARD. I am saying that if they want to go into the rural areas and no one is serving those rural areas today, they should come and talk to us. There is a pathway that we have provided for them. Not one has shown up yet.

Mr. BACHUS. Let me ask you this about the city of Portland case. You are for promoting local competition. In the city of Portland they said, "We will give you a cable franchise, but you open up your cable to other content providers." Now, that is something you would like to promote, too, wouldn't you?

Mr. KENNARD. Absolutely.

Mr. BACHUS. So you are a little disappointed with this decision, aren't you? I mean, you say that you like the decision because there ought to be a national policy, but shouldn't the national policy be that these cable systems be open to all content providers?

Mr. KENNARD. My philosophy, Congressman, particularly in this very dynamic, unpredictable marketplace, is that we, as regulators, can't presume to know everything that is going to happen. Many people—

Mr. BACHUS. I would say this. You just said——

Mr. HYDE. The gentleman's time has expired.

Mr. BACHUS. Let me complete this question.

Mr. HYDE. Yes.

Mr. BACHUS. You said you presume the Bell systems might not do this and would do that, which I agree you shouldn't be presuming those things, but let me ask you about the *Portland* case. It ought to be a national policy that these local cable systems open up their cables to all sorts of providers, right?

Mr. KENNARD. Yes.

Mr. BACHUS. Is that correct?

Mr. KENNARD. That is correct.

Mr. BACHUS. And the *Portland* case actually now stops local governments from doing just that, does it not?

Mr. KENNARD. Yes.

Mr. BACHUS. So that is bad news for consumers, isn't it?

Mr. KENNARD. Not necessarily now.

Mr. HYDE. Now the gentleman's time has really expired. [Laughter.]

The gentlelady from Texas——

Mr. BACHUS. I would like to say for the record he said "not necessarily."

Mr. HYDE. Okay. The gentlelady from Texas.

Ms. JACKSON LEE. I thank the chairman very much and I thank the ranking member both for holding a very vital and crucial hearing on legislation that I think we should have the opportunity to review. Juxtaposed to that point, I would say that I am also eager to see how we balance the desires of the present legislative initiatives with what I think have been some very telling comments made by Chairman Kennard.

Allow me also to add my appreciation for the combined service that you have given to American consumers. Particularly let me applaud you for your tenacious fight over the e-rate that I can proudly say to you that there are now some 50,000 schools, and growing, I hope. Of course, we have additional issues of software and training that we have to address, but your tenacious fight put us where we are and I thank you very much for your leadership.

Mr. Chairman, I would like to submit in the record my remarks and ask unanimous consent that my opening statement be submitted into the record.

Mr. GOODLATTE [assuming Chair]. Without objection.

Ms. JACKSON LEE. Thank you very much.

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

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

Chairman Hyde, and Ranking Member John Conyers, I would like to thank both for this opportunity to discuss the most influential development in the history of our nation's economy, the commercialization of the Internet. As a cosponsor of both H.R. 1686, the Internet Freedom Act and H.R. 1685, the Internet Growth and Development Act, I am pleased to see the committee taking up consideration on both measures.

This hearing will provide an opportunity for members, like myself, who have a strong interest in how the commercial phase of the Internet progresses. I have been and will continue to be involved in Congresses efforts to legislate in a manner,

which is expressly designed to avoid the creation of electronic commerce disincentives especially during the early development of the Internet.

As a member of the House Committees on Judiciary and Science, and cosponsor of both pieces of legislation before us today, I have had a great opportunity to participate in the legislative efforts that are designed to encourage the commercial development of the Internet.

The role of the Judiciary Committee is strictly concerned with the legal and policy aspects of the new cyber-commercial environment of the world's first global Internet. Because of the focus of this full Judiciary Committee Hearing I will reframe from discussion of the more technical aspects of Internet commercial development and will limit my observations to those regarding the purview of this Committee.

I would like to state for the record that, although I am a cosponsor of both bills before us today, that I do have questions regarding the ultimate application of these bills in the Internet market place should they become law. H.R. 1686 is described in its official title as a bill to ensure that the Internet remains open to fair competition, free from government regulation, and accessible to American consumers. First and foremost, the Internet would not have been created if its existence had been left solely to commercial sources for funding and development. We should not forget nor minimize the fact that the Internet is a creation of the federal government, which has been freely turned over for the world's business, education, and public entities to develop into a full service medium for the transmission of all forms of digitized information.

In short, the Internet is an international collection of co-operating computer network of computer networks. A network exists when one machine is able to access information on a remote computer without any indication to the user that they are crossing from one computer to another which might be locate within close proximity of the other or hundreds or even thousands of miles away. For this reason no one group, organization, government entity, national, or business owns nor controls the activity, which takes place over the Internet. However, this does not mean that use of the Internet is free, on the contrary the bulk of the cost for the Internet's is borne by universities, national laboratories, high-tech corporations and governments, which includes all of the fifty states and the federal government.

I would caution that this body should not indite all government efforts regarding the Internet as being necessarily bad just because of their origin, after all government's reason for being is the public interest. The government acted in the public's best interest in development of the Internet and once again it acted in the public's best interest by making it freely available to everyone. Further, the sole motivation of private business, as it should be, is profit. This motivation has no public interest incentives other than those spurred by increasing revenue, which does not create a requirement for openness, fairness, nor public interest or rights of any description for the consuming public other than those, which are defined or established through our nation's legal system.

My concerns regarding H.R. 1685, 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 that protect the privacy of users of commercial internet. I would like to make one observation regarding the long title of this bill regarding the word "Internet." The word "Internet" should only be capitalized when referring to the Internet, but should not be capitalized when referencing any other network of computers, which forms an internet. I would assume that we are seeking to develop legislation, which would give direction to any public internet developer. Therefore, I would assume that the word "Internet," which is used in the long title of this bill should start with a lower case "i" instead of the capital letter.

I believe that the goal of H.R. 1685 has merit in that the commercial transactions of the Internet requires the ability of businesses and consumers to agree on the conditions of commercial exchange, and should a difference of opinion arise that the transaction be in such a form that an independent observer may make certain assumptions regarding the conditions which define an agreement between the two parties.

The development and broad use of digital signatures is the single most important advancement in the realization of electronic commerce. Because of the global nature of the Internet it would be very difficult to validate the identity of all persons who seek to engage in commercial transactions over the Internet. Consequently, the requirements of digital signatures offers hope for viable electronic commerce for our nation's businesses and consumers.

For this reason as well as the fact that the Internet reaches far beyond our nation's borders, it is important to develop the conditions, which define what a digital signature is not just in our country, but throughout the world. Therefore, a digital

signature protocol must be able to confirm the originator, date, and time signature of all transactions. Second, the digital signature must be able to authenticate, or affirm without question, the contents of the communications sent by the originator to the business via the Internet. Last, the digital signature must be verifiable by third parties, such as our judicial system, so that differences between parties can be resolved.

An effective digital signature protocol must establish that a particular digital message has: a bit pattern that depends on the message being sent; an easy signature to produce; easily recognized, computationally infeasible to forge, and who's cost of retention in computer storage is low.

Regarding Section 102 of H.R. 1685, the Internet Growth and Development Act, I would like to offer for this body's consideration that the legal strength of the written signatures of millions of American consumers is rapidly being degraded by the business practices of many retail merchants. I am referring to the electronic capturing of the signatures of those consumers who use check cards or credit cards to affect person to person transactions. This is accomplished whenever a consumer signs their name to a receipt, which is positioned over a electronic signature pad. These electronic pad create a computer representation of the customers signature and forever, negates the customers ability control where and how their signature might be used by others. Currently, there is no federal regulation regarding the capture of personal signatures, and I fear that we as legislators will wait until the signature method of authenticating person to person transactions is damaged, which would endanger other forms of non-Internet related transactions.

I look forward to the testimony of those who will come before us today. I thank them for taking time away from their busy schedules in order to enhance congressional understanding of their perspectives regarding public policy developments regarding Internet commerce.

Thank you.

Ms. JACKSON LEE. Let me pose some questions briefly and ask you to use DSL time frame answers because I am chuck full of questions, and I thank you for recognizing how important this hearing is.

You made a statement that the direction that we might be going or the moving of such legislative initiatives, which I know my colleagues have put forward to increase competition—and I have a strong advocacy for that position—but you said something in your remarks that the direction might undermine the U.S. leadership in Internet economy.

Having been involved in local government with the emerging cable technology, primarily hooking up folks' television and hearing all of the complaints of cost, I really thought in the involvement of 1996 act we would see high or speedy competition and diminished rates. I think what you see today in this hearing room is a concern for whether or not the consumer is actually benefiting from such.

Now I will come to my question. Recognized, of course, that the Internet—and I hope this statement doesn't draw some of the smiles of some other statement about the Internet, but it is a creature of the Government. I mean, the research started there and it sort of belongs to us all.

What is your response to that? Or how do you define your statement that you made that it might undermine the U.S. leadership in Internet economy, the direction that we might be going?

Mr. KENNARD. Well, I think it is undeniable at this point that most countries around the world are replicating the 1996 act and the incentives around it, and my concern is that, if we were to gut what I believe are the key market-opening provisions of the act, then we would slow down the deployment of Internet technology on our networks and that would be a tragedy for the American public and for our economy.

Ms. JACKSON LEE. Let me follow up with that and ask the question somewhat that my colleague asked, and also to mention an example, I think, because it is public record now and we are allowed to do so—the SBC request for long distance. That took a period of time.

Some might argue that the delays in that decision augment a decision or the opinion that competition is not moving the way we would like.

How do you answer that question with respect to the processes that the FCC used? I think we got a good product, but I think it is important to respond to how you analyze that and its period of time that it took.

And then I would like to find out whether the 1996 act has given opportunity for startups and minority participation through the dereg that we had hoped that it would have occurred.

Mr. KENNARD. With respect to your question about SBC's application in Texas, I feel very good about voting in favor of the grant of that application. Opening these markets takes time. It doesn't involve just going down and marking off a check list. That is part of the process. But it also involves investing in systems and people to make sure that we can have confidence that the market is open and will stay open.

I was very pleased that in Texas we were able to work with a State regulatory commission that took its job very, very seriously, went to the hard work of working with all of the players in that marketplace to make sure that, by the time the application got to the FCC, it was one that was a solid application.

That wasn't the case all the time. In the applications we denied the main difference is the State regulatory authorities did not do the hard work of presenting that application.

Now, with respect to your question about minority participation, I am very concerned about the lack of opportunities for not only minority companies but all small businesses in this sector. I think we have seen a tremendous amount of consolidation in recent years, some of it triggered by the 1996 act, that has foreclosed opportunities for new entrants.

We are working, notwithstanding the 1996 act, where we can to create more opportunity. We are trying to create a new low-power FM radio service for small community-based organizations, non-profits, churches, schools, community groups, to get access to the air waves as a small but significant antidote to this consolidation.

Mr. HYDE [resuming Chair]. The gentleman from Georgia, Mr. Barr?

Mr. BARR. No questions.

Mr. HYDE. No questions. The gentlelady from California, Ms. Waters?

Ms. WATERS. Thank you very much, Mr. Chairman. I, too, would like to thank you and our ranking member for this hearing. We need more of this. We are all trying to keep up with all of the latest developments in telecommunications, and it is very important for us to have an opportunity to talk with you and others. I thank you for being here too, Mr. Kennard.

I am trying desperately not to get caught up in the market share battles. We watched as AT&T and OAL created this big discussion

about access when AT&T bought up all the cable companies. Well, at one level it looked to me as if AT&T had, indeed, made a very smart move to be able to provide broadband services, and that there is something about the American marketplace that promotes the ability for smart people to get the edge, and it seems as if that is what they did.

The discussion stopped when OAL merged with Time Warner and it found itself in equal position, I suppose, with AT&T, having access, significant cable capability.

Now, having said all of that, and not wanting to get caught up in these fights, I suspect what you are trying to tell us makes good sense—that whatever is going to happen in all of this has not occurred yet, and if we allow it to play itself out that the relationships that can be developed may be relationships that will even a lot of this out rather than trying to regulate so early what takes place, and that is where I think I am at this point.

Even though there are some questions about access—and we all, I think, would like to see access so that we can have the kind of competition that will drive competitive prices, all of that. So I am trying to follow you and wait it out and let it play itself out rather than us getting involved in this kind of legislation.

Now, having said that, I am concerned that when AT&T was a monopoly it did not provide good comprehensive services to inner cities, and I suspect to rural communities, and when the cable companies started to develop their capability they did not provide good services to inner cities, and I suspect rural areas, and it seems to me we still have some questions on the table today that we have had historically.

There are public housing projects that don't have cable even today. There are communities that do not have comprehensive local telephone services. For example, in south central Los Angeles I know I thought that we had moved to a time where, no matter where you lived, you could have the kind of local telephone service that would not cause you to have to pay extra money to maintain a prefix number, for example, but that is not true, and people are still paying to retain their prefix service if they move, extra money. It seems to me we should be much more advanced than that in just basic telephone service.

Also, with this deregulation, some of the local telephone companies have not opened up their lines so that smaller telephone companies can get in there and provide services, so right now what I am interested in is what can you do to continue to work on access at the very basic levels for inner cities and rural communities before we even get into some of this discussion about whether or not the local companies are going to be allowed to provide data services? I want to know what they are going to do to improve their services to the local communities that are unrealized.

I will just leave it with that.

Mr. KENNARD. Thank you.

Many of these issues of the actual deployment of networks at the local level are dealt with by State regulators. We do have a role, however, and a role that we take very seriously.

Oftentimes, in the context of these major mergers that have come before us, we have pressed the companies on their plans to roll out

services, particularly advanced services, to rural areas and low-income inner city areas, and if you look at the mergers that we have approved in recent years—AT&T/TCI/SBC/Ameritech, and others—we have, as a condition to our approval, insisted that these companies demonstrate that they are going to roll out services in these historically under-served areas.

I do think it is one of the most important things that we do as a government, which is to make sure that everybody has an ability to participate in this growing sector of the economy. Our view, though, is that we have to make sure that we match the regulatory incentives, the statutory incentives, with the goals.

Much has been said about this proposed legislation as solving the so-called “digital divide” issue. I don’t think that it will, because the issue, and particularly in rural areas, is not so much deregulating the big players, but rather it is targeting subsidies to companies, oftentimes smaller companies, that are willing to provide service in those distressed areas.

Mr. HYDE. The gentlelady’s time has expired.

The gentleman from Florida and the gentleman from New Jersey, Mr. Kennard has an appointment; however, I am sure if you will be extra brief he will be able to accommodate you, if you don’t mind.

Mr. KENNARD. Mr. Chairman, I will stay as long as it takes.

Mr. HYDE. Will you?

Mr. KENNARD. Yes.

Ms. WATERS. Okay. Very well.

Mr. Wexler?

Mr. WEXLER. Thank you. I will be brief.

I, too, want to thank the chairman and the ranking member for having the hearing, and I want to commend Chairman Kennard for bringing what seems to me an extraordinary amount of integrity to this process.

Mr. KENNARD. Thank you.

Mr. WEXLER. And I think that consumers all across America benefit from your objectivity.

Having said that, I am baffled as to your response to the gentleman from Alabama, Mr. Bachus. If I understood his question or his inquiry correctly, he essentially inquired of you as to what the benefits would be to consumers if the regional Bells were allowed into the market to provide Internet service, and I assume long-distance market. And if I understood your answer correctly, you basically said none or little because it would inhibit competition with respect to that market.

I would understand your response if you said yes, there would be substantial benefits to consumers if the regional Bells were allowed in to certain markets that they are not in now; however, that benefit must be weighed against any loss of incentive for the regional Bells to open up their local markets. It would seem to me that would be a fairer response, and then it would be up to the appropriate regulators to determine those benefits.

But your response—and please correct me if I am wrong—seems to suggest a bias against allowing the regional Bells to compete where they now cannot compete, and a bias for competition with respect to local services, which I don’t understand.

Mr. KENNARD. Maybe I didn't explain my answer as fully as I should have, Congressman.

I agree with you. This is a balancing of the incentives to open the market versus whatever benefits the Bell companies could bring to serving those rural areas. The point that I was trying to make is, one, ultimately consumers are benefitted primarily by having competition in all these markets in all areas of the country. We have embarked on a very ambitious effort to open these markets to competition by creating this incentive structure in the act, and I fear that if we gut it then, sure, maybe the Bell companies would provide service to those rural areas, but they will be the only choice that the people in those rural areas will ever get, because we will have eliminated the hope of robust competition across the board.

And, second, the point that I was trying to make—which is a balancing act, as you mentioned—

Mr. WEXLER. Could we just stop there for a moment?

Mr. KENNARD. Yes.

Mr. WEXLER. Are you suggesting that simply by regional Bells having permission to operate in markets that they do not have, that that, by its very nature, eliminates competition?

Mr. KENNARD. If it guts whatever incentive they have to open their markets across the board, yes.

Mr. WEXLER. Okay. So then that is a very different answer, unless I misunderstood your answer, than what you gave to Mr. Bachus. And the answer is—and I don't want to put words in your mouth—that yes, there are substantial benefits; however, you have to weigh them with other factors.

Mr. KENNARD. Yes. Thank you for clarifying my testimony.

Mr. WEXLER. You know more than me.

Mr. KENNARD. But the second point that I was struggling to make in response to his questioning is that, if there is a situation brought before the FCC where a Bell company can show that it is the only provider or the only prospective provider of service to that rural area, we will be sympathetic, and our rules allow them to get entry. They just haven't come forward.

And I suspect what is happening here is that there is a motivation to create a scare tactic here that the only way to serve rural America is to deregulate the Bell companies, and I have seen this around the world. As governments have tried to open historic monopoly markets to competition, the first response is that your most remote, distressed citizens will go without. Unfortunately, if we buy into that argument, we will lose focus on what is the central goal here, which is to open the markets, all of the markets, to competitors so that people around the country can get service from competitive choice.

Mr. WEXLER. Thank you.

Mr. HYDE. The gentleman from New Jersey?

Mr. ROTHMAN. I thank the chairman and my ranking member for calling this hearing, and I thank Chairman Kennard, as well. All the great things said about you, I agree with.

Mr. KENNARD. Thank you very much.

Mr. ROTHMAN. You know, I have been trying to think of the right analogy for these situations, and I know I don't have a perfect one.

It may not even be a good one, but it is one that amuses me. You know, there is a goal of allowing people to get to the ocean to enjoy the beach, but somebody owns a piece of property on one stretch of the beach and they don't want to let people cross their property all the time, only under their conditions.

Mr. KENNARD. Yes.

Mr. ROTHMAN. And so some people say, "Well, make that person allow us to cross his property to get to the beach." I suppose if that were the only access point to the ocean, there would be a public purpose in condemning the property that that person worked so hard to buy.

I sound like a Republican, don't I? [Laughter.]

But, you know, it depends on—where you stand depends on where you sit, right? You said that earlier, in essence.

So I find it amusing that those who were so intent on protecting private property—and I voted for the Private Property Rights Act, by the way—would ignore the tremendous investment by a certain segment of the industry. It is now 1 percent, the cable's share of this market, and certainly I would want all Americans—I wouldn't want to wait until it had 99 percent.

The question is—and I think my friend Mel Watt asked earlier—when does it rise to the level of real concern where this kind of what you described as antitrust regulation would be appropriate? And you said, "Well, we are working on it and we will see." Is that about right?

Mr. KENNARD. Yes.

Mr. ROTHMAN. That is about right. I don't want to use the phrase "unclean hands," because it is too dramatic and maybe it is excessive, but it seems to me if, under the prior act, the deal was, the quid pro quo was if the local Bells provide greater access to their service they can get something in return. Now they are saying, "We don't want to live up to that, but we want the benefits of this new technology." Doesn't that seem unfair?

Now, I suppose if it were a national emergency or some great national interest involved we would feel the necessity of giving something even though they hadn't lived up to the terms of that precondition imposed in the 1996 act. How does that strike you?

Mr. KENNARD. Well, I am not here to demonize the Bell companies. I mean, they are market actors and their goals as market actors are to maximize their profits. And I think that we saw, in the wake of the 1996 act, a change in philosophy and attitude.

The 1996 act was, I think, a masterful compromise that was struck by the Congress where they basically balanced the incentives. They told the Bell companies that if you open your markets to competition then you will be able to get into long distance, which they want very badly. But when we went to implement that act we were faced with lots of resistance in the courts, before my agency, now in the Congress, in the press.

This is natural. We see it all over the world. Nobody wants to give up a monopoly position in the marketplace if they don't have to.

But my point is that we have one real shot at getting this right, and the whole world is watching us, and I think it is very impor-

tant that we stay the course and keep the incentives in place that the 1996 act—

Mr. ROTHMAN. Let me interrupt you because I see the yellow light.

Mr. KENNARD. Okay.

Mr. ROTHMAN. And, again, I have no wish to demonize my friends in the Bell industry. I think baby Bells provide a wonderful service. But it would make it easier for me to grant relief if I knew that they were living up to the responsibilities of the act.

I did want to echo my distinguished chairman's concerns about cable rates and choice, consumer choice in selecting what programs they see on cable. I mean, I think I have four cooking channels on mine. I have no choice but to take four cooking channels—and not to denigrate cooking or eating, but I wish I could have some other choice.

So, to the extent that you can find a way to give consumers more choice in their cable programming and avoid the kind of excessive fees that many of my constituents have mentioned to me and complained about, that would be great and be very important. So if it was a \$9 million signing bonus I don't imagine it would be a great loss, Mr. Chairman.

Mr. HYDE. We thank the gentleman from New Jersey, whose time has just expired.

Ms. WATERS. Mr. Chairman, I would like unanimous consent to correct America Online. I kept referring to them as something else, and I just wanted to correct that—AOL. I referred to them as OAL in my testimony.

Mr. HYDE. Certainly.

Thank you, Chairman Kennard, for your helpful testimony this morning.

Mr. KENNARD. Thank you very much.

Mr. HYDE. We appreciate your patience.

Mr. KENNARD. It is a pleasure.

Mr. HYDE. Our third panel consists of 10 witnesses from industry who will provide us with a variety of perspectives on these issues.

First we have The Honorable Tom Tauke, the senior vice president for public policy and external affairs at Verizon Communications. He is a graduate of Loris College and the University of Iowa Law School. Before coming to Congress, he practiced law in Iowa and served in the State legislature. He was first elected to Congress in 1978 and served through 1990. After that he went to NYNEX, which in turn became Bell Atlantic, which in turn became Verizon. In addition, he is an old friend and I want to extend to him a very special welcome.

Next we have Mr. Mike McCurry, the co-chair of iAdvance, a coalition of telecommunications and technology companies. He is a graduate of Princeton University and Georgetown University. He served on the staff of the Senate Committee on Labor and Human Resources and on the staff of Senator Daniel Patrick Moynihan. He has also served with a number of Democratic presidential campaigns and is well known to us all as the President's former spokesman, where he served from 1995 until 1998.

Next we have Mr. Randy Lowe, the executive vice president and chief legal officer of Prism Communications Services. He has a long

career in telecommunications, working in the legal departments of AT&T and ITT. He has also worked in private practice for the Washington law firms of Jones, Day and Piper Marbury. He is also widely known as a writer and speaker on these topics.

Next I will turn to Mr. Conyers to introduce Chairman Ivey.

Mr. CONYERS. Thank you, Mr. Chairman.

Glenn Ivey is an old friend of ours. He worked here on the Hill and then became a U.S. attorney. He became a Senate counsel to the Banking Committee, and then later served with minority leader Tom Daschle as chief counsel before Governor Glendening, who appointed him to the Public Service Commission, where he is now chairman. He came through all of those by way of Princeton University and a graduate of Harvard Law School, and we are happy to have him up on the Hill again.

Welcome, Chairman Ivey.

Mr. HYDE. Next we have Mr. Scott Cleland, the chief executive officer of The Precursor Group. Mr. Cleland has a bachelor's degree from Kalamazoo College, 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. He recently founded his own company, The Precursor Group, an independent research company.

Next we have Mr. Preston Padden, the executive vice president for government relations of the Walt Disney Company. He is a graduate of the University of Maryland and the George Washington University Law School. He has been president of Television and News Corporation, the CEO of American Sky Broadcasting, and president of ABC Television. He took his current position in 1998.

Next we have Mr. Dave Baker, vice president for law and public policy of EarthLink. Mr. Baker is a graduate of Johns Hopkins University and the Washington Lee University Law School. Before coming to EarthLink, he was chairman of the Georgia Public Service Commission and took his current position in 1998, and he appears here today on behalf of the openNET Coalition.

Next we have Mr. Len Cali, the vice president for federal government affairs at AT&T. He is a graduate of Fordham University and the University of Michigan Law School. Before coming to AT&T, he practiced law for many years with the law firm of Cadwalader, Wickersham, and Taft. He joined AT&T in 1988, and since that time has served in several positions in its law and public policy group.

And next we have Mr. Tom Wolzien, the senior medial analyst for Sanford C. Bernstein and Company. He is a graduate of the University of Denver. After serving a tour with the Army in Vietnam, he worked as a reporter for local television stations in Denver, Green Bay, and St. Louis, and spent 16 years with NBC in various positions, including helping to found the cable channel CNBC. He joined Sanford Bernstein in 1991.

Finally, we have Mr. Robert Sachs, the president and chief executive officer of the National Cable Television Association. He is a graduate of the University of Rochester, Columbia University, and the Georgetown University Law School. He began his career serv-

ing on the staff of several Members of Congress and in the White House. After that, he worked in a number of positions for Continental Cablevision and took his current position in 1999.

We welcome all of you. We recognize your patience and appreciate it, and we look forward to your testimony.

Mr. Tauke?

STATEMENT OF TOM TAUKE, SENIOR VICE PRESIDENT FOR PUBLIC POLICY AND EXTERNAL AFFAIRS, VERIZON COMMUNICATIONS, WASHINGTON, DC

Mr. TAUKE. Mr. Chairman, I have always had a warm spot in my heart for you, and it is a great pleasure to be here with you and your distinguished colleagues.

I have rewritten my testimony several times while I have been sitting here this morning. Let me take a moment to just try to clarify a few issues.

First of all, when we think about the Internet, it is important to understand that there are three pieces that make up the Internet from the standpoint of the average consumer. The first piece is the last mile, from the home, let us say, or small business to the central office. Then there is the piece that we might call a "regional network," which takes the traffic from a central office to a network access point. Then the third piece is these long backbones that go cross-country.

Now, Chairman Kennard talked about the first piece, the last mile, and he talked about the backbone, and he said there is lots of backbone and the problem is in the last mile. I agree with both of those statements.

But the problem is, as of yet no one has focused on the middle piece, the regional networks. I look at this a little bit the way the airline system works. I, as you know, used to represent the State of Iowa, and all of these flights would be going from New York to Los Angeles. They would all be going over Iowa. Didn't do us a bit of good in the State of Iowa. We could look at maps that showed lots of airline traffic over the State. That didn't help us. What we needed was a regional airport to get us to Chicago and some jets that would make that flight.

That is the same thing here. Those LATA boundaries prevent the creation of the regional networks that carry the traffic for Verizon, for all of the small telephone companies in those regions, which is why the small telephone companies support legislation lifting the restrictions on interLATA data relief, so that those regional networks can be created that will carry the traffic to the main network access points, the hubs, if you will. That is what this legislation is about.

Consumers want that access. They need that access. They need speed, and they need it at a reasonable cost.

Now, what happens when you don't get it? Well, in the State of Wisconsin we have a very good example. There is a south-central Wisconsin library system. It has over 300 libraries. If a library is located within the same LATA as the headquarters for the south-central library system, they pay \$200 a month for high-speed Internet access. But if they are across a LATA boundary, they have to pay over \$820 a month for high-speed access, the same service but

a few miles further. Why? Because the regional Bell companies are unable to construct the network to make that available for the whole system.

Now, Chairman Kennard said, "Well, we have a system. Anybody can come in and apply to provide service if we don't have it—" I will tell you I was outraged. Bell Atlantic filed for the State of West Virginia under 706, and the petition sat at the FCC for 2 years. Then they came forward with a procedure for applying for that relief to serve under-served areas, and they didn't even take into account the price.

So, for example, the library sitting outside the LATA boundary wouldn't be able to say, "Well, we have got to pay over \$800 when we should be paying \$150 or \$200." That wouldn't count.

Well, of course if there is no limit to price it is pretty hard to demonstrate that there is a limit in the ability or the access to the service that is available. This is important not just for libraries and for hospitals and for schools, but it is important for small businesses and communities.

And yes, it is time. We are all going to be into the long-distance market in 3, 4, 5, 6 years. The question for you and for your communities is: Can the Nation afford to have these people sitting there without Internet access, even though the networks are essentially in place but unable to be used? Can the Nation afford to waste those resources and keep people disconnected for 3, 4, 5, or 6 years?

Time is of the essence in this world, and I don't think we have a lot of it to waste.

So I think the bottom line here is that time is not our friend. Time is our enemy. We have huge incentives, which I can get into, to continue to comply with the act. We are required to comply with the act, regardless of 271. The money is in the voice market, not the data market today. And so this act is designed to ensure that consumers who today cannot get high-speed access have the ability to get it tomorrow.

Mr. HYDE. Thank you, Mr. Tauke.

[The prepared statement of Mr. Tauke follows:]

PREPARED STATEMENT OF TOM TAUKE, SENIOR VICE PRESIDENT FOR PUBLIC POLICY AND EXTERNAL AFFAIRS, VERIZON COMMUNICATIONS, WASHINGTON, DC

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Tom Tauke, Senior Vice President for Public Policy and External Affairs of Verizon Communications, the new company formed by the merger of Bell Atlantic and GTE.

Last year, Bill Barr of GTE, one of our predecessor companies, urged you to quickly pass these bills. Nothing has changed in those 13 months to make passage any less important. In fact, recent developments demonstrate that Congressional action is even more urgent.

Last year, we explained how the Internet market suffered 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. These conditions still exist.

First, existing law prevents one set of competitors—local telephone companies like Verizon—from competing freely in the Internet market, thus insulating cable companies, such as AT&T, and the largest long distance companies—again such as AT&T and WorldCom and Sprint—from full competition.

These bills introduced by Congressmen Goodlatte and Boucher deal directly with this problem. They would break down the existing barriers to telephone company competition and would allow the local telephone companies, including the Bell com-

panies, 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 these companies to open their local telephone markets to competition in order to enter the long-distance telephone market, but would simply free them to participate fully in the Internet market.

The Antitrust Division of the Justice Department agrees that the Internet transport market needs more competition. In its complaint to enjoin the WorldCom-Sprint merger, the Department found that the provision of Internet backbone services is a relevant market for antitrust purposes and that this market is "highly concentrated." Verizon wants an opportunity to decrease this concentration by bringing new competition to this marketplace.

The Internet is an end-to-end system based on hundreds of connections between different networks. At the top of this system is the Internet backbone, which links together thousands of web sites and Internet providers and takes traffic back and forth at high speeds across the United States. Internet speed is a very important issue to users. And the faster that data can get to the backbone and the more backbone capacity there is, the better the connection and the higher the quality of the data transmitted.

There are vast areas of the United States that simply have no nearby backbone connections. The largest backbone providers have little incentive to connect their systems with smaller providers or to locate hubs away from major urban centers. Many Internet providers have no way to get their data traffic to the backbone efficiently and without numerous back-ups and delays. Many are simply located too far away from convenient backbone connections. And when they do get to the backbone, they find that the lack of adequate capacity slows their customers' service.

An example is illustrative: an ISP in a community like Shreveport, LA, or Fargo, ND, must buy high-capacity circuits to carry its traffic to the nearest Internet hub. These charges are distance sensitive, so the farther away the ISP is, the more it pays to get to the Internet. And because these links to the Internet are almost always interLATA, the ISP pays the very same long distance companies that operate the Internet backbones.

However, the Bell companies already have high-speed fiber-optic facilities connecting virtually every city and town they serve. A Bell company could use this network to solve this Internet connection problem. That company could provide Internet hubs closer to the ISPs in these communities and use the fiber that is already in place—but which cannot now be used for these purposes—to connect them to the Internet backbone. That same fiber-optic facility could also be used to deliver Internet traffic collected by other hub providers to the main Internet backbone. These options would offer the ISPs in these communities better service at a lower price.

The speed at which a consumer gets her data—a web page being transmitted to her home for example—is only as fast as the slowest link in the communications chain. Moreover, if it is slowed at any point in the transmission, data can be lost, the connection may drop and some of the more exciting applications for education and telemedicine involving video, for example, will simply be impossible.

Whole new industries based on a more advanced Internet will be stymied and the continued development of our high tech and computer industries will be slowed. The Internet has driven the growth of the high tech sector. There is a very real danger that if the Internet does not advance to a new level, one capable of providing higher speed, higher quality connections, the growth our economy has enjoyed because of the explosion of information technology could well be undermined.

Rural areas in particular lack high-speed connections to the Internet backbone. Without these connections, it will be difficult for rural areas to retain businesses or to attract new businesses, especially those in the high growth area of today's information economy.

Companies like Verizon have the resources and the capabilities to make new backbone capacity and interconnection points available quickly to improve Internet services. But, today, the government says we may not do this.

Keeping Verizon and other new entrants out of the Internet backbone business has other harmful effects. In particular, it slows the deployment of high-speed local Internet access technologies (such as DSL), particularly in rural areas. Many rural areas of the country have no connections to the Internet backbone. In these areas, interLATA restrictions aimed at long distance voice services have had the inadvertent effect of preventing Verizon from providing high-speed Internet services, including DSL access. The reason is simple: There is little reason that Verizon or any other company would invest to provide DSL in a remote area if there is no cost-effective way to get the data to the Internet.

Finally, these restrictions do more than merely prevent us from improving the Internet—these restrictions, and the resulting high level of market concentration,

have anticompetitive consequences as well. The Big-Three long distance companies (which includes the number one cable company) can dominate the market, discriminate against other backbone providers and drive customers to their own backbones. This enables backbone providers to leverage downstream their backbone market power into the ISP and content markets. Bell company entry into the Internet backbone market would preserve competitive parity, however. With their resources, Verizon and the other Bells could rapidly enter the backbone market and be treated as peers by the existing major backbone providers.

Second, exploiting their insulation from full competition, some 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 other cable giants are denying access to other providers and requiring consumers who also want broadband access to purchase the cable company's affiliated ISP instead of the ISP of the consumer's choice.

Verizon supports open access. The principle of open access is nothing new: It has been the central tenet of the telecommunications industry for more than 15 years. 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 Verizon.net or Mindspring or one of the other ISPs in operation. Again, open access.

We support the open access requirements for all providers.

Recent legal developments take a major step in the direction of open access. A resounding victory in the fight for open access was won just last month when the U.S. Court of Appeals for the Ninth Circuit ruled that AT&T provides a "telecommunications service"—not a "cable service"—when it provides high-speed Internet service over its cable lines.¹ While AT&T won on its narrow claim that the City of Portland did not have authority to impose open access (because the City had acted only pursuant to its authority to regulate cable services), it lost a much bigger battle. As the Ninth Circuit held, the principles of nondiscrimination and interconnection that apply to common carriers of telecommunications apply fully to cable broadband because it is a telecommunications service.

What this means is that AT&T and other providers of cable broadband service, by force of existing law and without any further action from the FCC, are now subject to open access obligations in all the States in the Ninth Circuit. In particular, providers of cable broadband service must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" (section 251(a)(1) of the Communications Act) and must furnish their services to everyone (including unaffiliated ISPs) on request and without discrimination (sections 201 and 202).

The open access war, however, is far from over. The issue decided by the Ninth Circuit remains to be addressed and decided in other circuits. We, of course, have never advocated a state-by-state, circuit-by-circuit, or other fragmented treatment of open access, believing that a national open access approach of the sort contained in these bills to be the proper public policy outcome.

In light of the Portland decision, the FCC has indicated that it will open a proceeding regarding the appropriate regulatory treatment of cable Internet access. While we welcome this action, there are very significant dangers. First, the FCC could succumb to further delay, which only allows ISPs affiliated with cable operators to lock up market share and lock out independent ISP in the interim. Second, and perhaps more important, we expect AT&T and other cable broadband providers to ask the FCC to forbear from applying to them the provisions of the Communications Act that effectively impose open access on them. But it would be patently unreasonable for the FCC to forbear from applying these provisions to cable broadband providers without also forbearing from applying them to DSL providers. Cable broadband, after all, is the market leader. Congress must, therefore, be vigilant to ensure that the FCC does not try to use its forbearance authority to exercise such arbitrary discrimination.

Some of the opponents of open access claim that open access is "regulation of the Internet." This is dead wrong. It is simply access to the Internet and Internet interconnections 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.

¹ *AT&T v. City of Portland*, No. 99-35609 (9th Cir. June 22, 2000).

The Internet has already become central not only to our economic vitality, but also to our communal life. High-speed Internet access will become the most important communications medium in the country. 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 monopoly control of the entire network of wires and connections, or a network of networks governed by principles of interconnection, open access, and free competition. The choice between those two approaches for the Internet is now before us. The choice must be made, and inaction itself will be a choice. Will Congress side with AT&T and the other 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 free competition by all?

Thank you.

TRUTH-IN-TESTIMONY DISCLOSURE

Part I: Witness Identification

1. Name: Thomas J. Tauks	2. Address: 1300 I Street, NW Suite 400 West Washington, DC 20005
3. Phone Number: 202-336-7904	

Part II: Group Identification

4. Please identify the group(s) or organization(s) on whose behalf you are testifying. If you are not testifying on behalf of any group or organization, please indicate "none." Verizon Communications, Inc.		
5. Are you testifying on behalf of a governmental organization, meaning a federal department or agency, or a state or local department, agency, or jurisdiction? (If "yes," skip to item 7.)	YES	NO
		X

Part III: Federal Grants and Contracts

6a. Have you, or any of the organizations or groups which you may be representing, received any federal grants or contracts (including subgrants or subcontracts) that are relevant to the subject of the hearing during the current fiscal year or any of the two (2) preceding fiscal years?	YES	NO
	X	

6b. If you checked "yes" for item 6a above, please list the source and amount for each grant, contract, subgrant, or subcontract, received within that period. Please attach additional sheets if necessary.

Source	Amount
See attachment	

Part IV: Signature

7. Please sign and date indicating that to the best of your knowledge the information provided on this form is both true and accurate.	
Signature <i>Thomas J. Tauks</i>	Date <i>July 17, 2000</i>

Verizon Communications
Active Federal Contracts
Awarded Fy-97, Fy-98, Fy-99 and Fy-00

Customer	Award Date	Term	\$ Value
Maryland Procurement Office	12/24/96	5 years	\$19M
EPA	12/30/96	1 year w/3 Option years	\$715K
(Sub to GTE)	2/11/97	7/6/03	\$391K
USPS	3/28/97	Indefinite	\$1.4M
GSA	5/12/97	2 years w 3 option years	\$1.2 M/year
FBI	6/23/97	7 years	\$11M
Dept of Army CECOM	6/30/97	10 years	\$27.3M
FEMA	8/8/97	10/1/97-9/30/02	\$12.6M
GAO	2/6/98	5 years	\$269K
GSA (Sub to GTI)	7/9/98	3 years w/ 2 option years	\$6.3M
Dept of Navy (sub to Lucent)	8/14/98	1 year w/ 8 option years	\$4.5M
Maryland Procurement Office	9/30/98	1 year w/ 9 option years	\$610K
Treasury	10/1/98	1 year w/9 option years	\$649K
EEOC	11/1/98	2 years w/ 3 option years	\$375K
FDIC	11/23/98	1 year + 1option year	\$3.5M
Dept. of Navy	12/29/98	Thru 9/30/00	\$217K
Maryland Procurement Office	5/19/99	Thru 9/30/00	\$33K
Dept. of Navy	7/1/99	Thru 9/30/00	\$1.2M
Dept. of Navy	9/9/99	1 year	\$26K
NRC	9/9/99	1 year w 4 option years	\$311K
NRC	9/28/99	5 years	\$175K
INS	10/1/99	10/1/99 - 9/30/02	\$5.3M
DOJ	8/6/1999	3 yrs w/ 7 one yr options	\$125M
GSA	1/24/00	4 years w 4 option years	\$620M
Department of Interior	2/1/00	Thru 9/30/2000	\$52.5K
GSA	2/24/00	4 years w 4 option years	\$13M
Defense Telecom. Services of Washington - Wireless	1998	3 yrs.	\$4 M

(Dept. of Defense)			
Dept. of Justice – Wireless	1996	5 yrs.	\$2.5 M
Social Security Admin. – Wireless	1998	2 yrs.	\$500 K
Dept. of Energy – Wireless	1997	3 yrs.	\$1.3 M
White House Comm. Agency – Wireless	1999	3 yrs.	\$1.3 M
Federal Wireless Telecom. Services Contract (various agencies)	1997	8 yrs.	Open

Mr. HYDE. Mr. McCurry?

**STATEMENT OF MIKE MCCURRY, CO-CHAIR, iADVANCE,
WASHINGTON, DC**

Mr. MCCURRY. Thank you, Mr. Chairman. I will spare you my longer statement and, in the interest of this long panel, make only a few very brief points.

I am here in my capacity as co-chair of iAdvance. I have that position, along with your former colleague, Susan Molinari, and it is a pleasure on behalf of that coalition to represent a range of companies' interest from the high-tech field, the telecommunications field, and those who actually use this amazing technology that we are talking about today. I would like to put on that hat and represent the views of those who really need the extensive resources of the broadband Internet, those who use it, and those who are making the quality of life better in America because of it.

We represent folks who are involved in the fields of telemedicine, those who are now providing distance medicine to people who might otherwise not have access to high-quality health care. We represent those who are bringing technologies in the field of learning to people who would otherwise be under-served. We represent those that are in development organizations trying to attract economic commerce to regions of our country that have been sometimes left behind, that have not been part of the growth and expansion in the American economy and history.

Those people, as they see how the Internet is developing, becoming a critical factor in all of their walks of life, are anxious about the capacity of this network of networks that we are building and whether in the future it is really going to be able to provide the kind of fast, efficient connections to this tool that they all will need.

Now, I am not a veteran of the telecommunications fights of the 20th century, as are many here. I watched kind of on the sidelines and also from the White House as many of the debates, often very bitter, took place here. And some of the discussion has been about whether or not we want to go back and revisit the 1996 act.

You can argue a lot about what the applications of various sections of that bill are to the situation we are in now, but I think one thing is indisputable: no one at the time of the 1996 act predicted the transforming effect that these technologies would have on the American people as they thought about the situation we would be in now here in the 21st century. To try to adapt the regulatory structure that affects telephony to make it work for this brand new field that we are in seems to me a pretty daunting challenge for all of you.

This really is a new field and, in addition to the transforming effects I have discussed, it is going to affect us all in all areas. It is going to affect the ability to communicate with your constituents, to bring information to them, to convey to them the choices that have to be made in public policy. The very active citizenship in this democracy will depend on a rich, robust network that can carry lots of traffic, video, audio, etc., into the American home, into the business place.

Now, given that reality, let us look at what is happening.

Chairman Kennard said Internet traffic is doubling every 100 days. That may be. At the very least it is going to be doubling every year, or maybe even less than every year, and that is going to stretch the capacity of the network that we have today.

So few people have connections in the home to what we call the "broadband Internet" that we can't even foresee the things that might happen as we start to see congestion build on the Internet.

When the Department of Justice looked at a recent merger and looked at the quality of this current network, they were convinced that we are already seeing the telltale signs of an incapacity of this network to deliver traffic to the places it needs to go, and they were rightly concerned about the concentrations that exist in that market.

My point to you, in conclusion, is this: We are at the beginning of something brand new and we have the ability to get it right. If we try to transpose the telephony regulations of the 20th century and create that as the paradigm that governs the regulation of the Internet going forward in the future—which we are, in effect, doing by leaving the current restrictions that exist on the Bell companies in place, then I think we are going to get it wrong, and several years from now we are going to look back at this period of time as a lost opportunity.

iAdvance and the coalition of people it represents commend Congressman Boucher and Congressman Goodlatte for this legislation, which we strongly support.

[The prepared statement of Mr. McCurry follows:]

PREPARED STATEMENT OF MIKE MCCURRY, CO-CHAIR, iADVANCE, WASHINGTON, DC

Thank you, Mr. Chairman. On behalf of my co-Chair, Susan Molinari, and the members of iAdvance, I appreciate the opportunity to testify before the Judiciary Committee today.

Mr. Chairman, a copy of my testimony and other background materials has been submitted to the Committee and I ask that that material be included in the hearing record.

Mr. Chairman, our economy is in the midst of the greatest economic expansion in history. This boom has already created more than 1 million jobs and over \$300 billion in estimated Internet revenue. The impact of information technology has been so dramatic that many economists now believe that the US economy can sus-

tain this growth for years to come, *if the Internet is allowed to grow*. But this growth is in jeopardy because of bandwidth constraints and a lack of access to high-speed Internet backbone hubs.

iAdvance believes that the challenge of universal, high-speed access can be answered, in part, by the lifting outdated regulatory restrictions that prohibit local telephone companies from investing in broadband technologies. As we reported in our first study, "Breaking the Backbone,"¹ restrictions, which were never designed to apply to the Internet, have slowed the growth and diffusion of high-speed Internet backbone across the country.

At stake are not only economic prosperity, but also new forms of empowerment and engagement. From the elderly woman who can be examined by a distant specialist in the comfort of her home, to the farmer who takes distance learning classes from the university that is hundreds of miles away, to the grassroots voices that can come together from all points of the country to be heard by Congress, the Internet is creating a digital revolution.

Just as it essential to ensure that every American has access to a high-speed connection to the Internet, it is also vital to ensure consumer access to the robust content that can be carried by this medium. Technology and business models that discriminate against content and content providers are less likely to empower individuals and communities.

iAdvance is a coalition of computer companies, public interest groups, high-tech organizations, Internet companies, telecommunications companies and other groups at the forefront of the new economy. We are a diverse group, but we have a common vision. Our members believe that investment, innovation, choice and competition in the high-tech marketplace will keep our country and our communities connected and competitive in the rapidly expanding global economy.

iAdvance supports H.R. 1686 and H.R. 1685 and we applaud Representatives Bob Goodlatte and Rick Boucher for their leadership and their vision. The National Journal recently dubbed them "the country boys of high tech." We think the country they were referring to extends well beyond the Shenandoah Valley and New River Valley that cut through their Virginia districts.

Although it has been only four years since Congress passed the 1996 Telecommunications Act, the world has changed in ways that we could not have envisioned. Technological convergence has blurred the distinction between local and long distance telephone service. And wireless services are, for many, a realistic alternative for residential phone service; so much so that AT&T proclaims in its advertising that your wireless telephone is the only one you need.

Of the top 50 global technology and telecom companies today, four are wireless companies and eight are traditional local or long distance companies. The four wireless companies have a market capitalization of one trillion dollars while the other companies are only worth a combined \$670 billion.

The dramatic growth of the wireless industry is a result, in part, of the soft touch of government regulation. The FCC manages the spectrum, and sets broad requirements for technical standards and interconnection. But it does not micromanage how industry achieves these goals. The results, measured by falling prices and new technologies, have been astounding.

This stands in marked contrast to the high-speed Internet market. Here we strictly regulate everything from which companies can invest in Internet backbone to the prices charged for interconnection and wholesale services. It is micro management at its worst.

As a consequence, although the data carrying business has grown dramatically, it is still dominated by three major Tier 1 providers—WorldCom, Sprint, and Cable and Wireless. AT&T is a close fourth. Although they control the market, or, perhaps, because they control the market, these companies are not deploying Internet backbone to meet growing demand, nor are they investing in Internet backbone facilities in rural America. And they are discriminating in the provision of top tier backbone services. The best service, the quickest connections, and the most attractive pricing are reserved for the largest corporate customers.

A recent article in Forbes magazine titled "Backbone Bullies" (see attached) describes the real, day-to-day realities of life on the Internet. It discusses how a few major providers of Internet backbone services have transformed the Internet into a hierarchical network of networks where the fastest, most reliable service is only available to the largest and most profitable customers.

The Internet is a complex web of big and small fiber-optic networks, private interconnection and carriage agreements, and public "peering" or traffic exchange points

¹ "Breaking the Backbone" and "A 21st Century Internet for All Americans" are available on the iAdvance web site, www.iAdvance.org

where all bits and bytes are not equal. ISPs, small businesses, schools, small and rural communities, and consumers that have to rely on overcrowded public connections to the Internet surf at horse and buggy speeds.

According to the article:

"The big carriers serve who and where they want and require everyone who deals with them to keep the terms secret. Nor do they fear competition from their most formidable natural rivals, the regional Bell companies, because the Bells are barred from carrying traffic long distance."(emphasis added)

Isn't it time to put a little fear in their hearts the good, old-fashioned American way—competition?

While fiber optic cable is being rolled out at a record pace it is barely keeping up with overall bandwidth demand. "In the next five years we don't see any ability of service providers in the US to keep up with the demand," according to Mouli Ramani, director of strategic marketing for the optical Internet at Nortel Networks.

To quote a preliminary report by AT&T researchers released last week, "We do not think the carrying capacity of the network, at least the long haul national backbone network(s), can or will grow to accommodate arbitrary traffic growth rates. In fact we believe that if traffic grows by factors of more than two or three a year for any sustained period, the transport backbones are likely to become a very serious bottleneck."²

These researchers speculate that Internet traffic is likely to settle at a doubling every year. At the same time, however, they also acknowledge that what they call "disruptive innovations," including bandwidth-intensive applications, may generate huge amounts of traffic and have serious impact on major networks. What AT&T calls "disruptive innovations" are just the kind of new applications and content that we want to see on the Internet.

Given the uncertainty of what is to come, we must ensure that telemedicine, distance learning, streaming media and the many other applications of the Internet that we can not even imagine today are universally available.

There is evidence those who are developing high bandwidth applications are holding back due to the delays in broadband deployment. As yet, no broadband online entertainment companies have gone public and many, such as Digital Entertainment Network, have shed staff and re-focused their business models away from creating original broadband content. Yahoo and Lycos have scaled back content and service plans for broadband users, citing the basic fact that for every broadband user there are 50 with basic access. At a time when the Internet is just beginning to realize its great potential as an economic and social tool, its growth is being stifled.

The shortage of Internet backbone and high-speed local facilities persists, in part, because government restrictions impede investment in new backbone facilities. Local telephone companies are prohibited from carrying the high-speed data traffic beyond the communities they serve. The result is an Internet backbone that is too skeletal and backbone networks that are controlled by too few companies. It is these same companies that, not surprisingly, are the most vocal opponents of what we at iAdvance are trying to achieve.

Backbone access problems are particularly acute for rural America. A recent report issued by the Departments of Commerce and Agriculture concludes that rural areas are currently lagging far behind urban areas in broadband availability. An urban Internet Service Providers providing broadband services to its customers will typically spend between \$3,000 and \$5,000 a month on local loop circuits to connect to an Internet hub. A rural ISP which desires to supply the same level of broadband cannot buy the same connections, but those who can are typically forced to cross a LATA boundary, which forces rural ISPs to spend between \$41,000 and \$45,000 a month.

Numerous studies from the Department of Commerce, Milken Institute, and the Progressive Policy Institute, and iAdvance have concluded the same thing: some areas of the country and certain segments of the population are ill-positioned to take advantage and succeed in the Internet economy. These problems of a lack of broadband access and transport facilities are well documented. According to the Competitive Broadband Coalition, more than 53 million Americans in urban areas will have access to broadband technologies compared to less than 1 million in rural America. This means that urban Americans are 18 times more likely to be offered broadband services than rural Americans.

² *Internet growth: Is there a "Moore's Law" for data traffic?*, K. G. Coffman and A. M. Odlyzko. <http://www.research.att.com/amo/doc/networks.html>.

A recent posting on a news group that hosts a running discussion on access to broadband services highlights this problem. Let me quote:

Broadband is a myth. I live in an area where my normal connection rate is 26 kilobytes per second using the best 56k X2 V.90 modem available. There are no plans for the local cable company to bring in cable modem access nor does the phone company even consider offering ISP services. [Do] I live in an isolated rural community ? Wrong...I live in the 4th largest city in New Mexico. Broadband will bypass us and content heavy Web sites will continue to be too slow to even consider visiting. Any web developers who buy into the broadband myth will find themselves excluding a large part of the webizens and the market that could most use contact with the outside world.

That is from someone who lives in the 4th largest city in New Mexico. The problem is even more acute in rural communities which are touched by less than 10 percent of high-speed, redundant connections.

The major barrier to investment in new technology for rural areas are regulations that prohibit the regional Bell companies—companies that serve two-thirds of rural America—from owning Internet backbone facilities. Without interLATA data restrictions many more rural communities would be served. Moreover, the provision of local access is also heavily regulated. Regulated pricing, corporate structure and forced resale at regulated rates skew investment decisions. Without such restrictions, the regional Bell companies would have a greater incentive to invest in rural and local communities, their existing client-base.

Lifting the interLATA data restriction and other regulations is an important component of a strategy to bring affordable high-speed access to all of Americas small cities and towns, farms and mountain hollows. But it is not the only component. Wireless, satellite and microwave technologies will also be important part of the strategy. We will also rely upon those tools that were used to bring 20th Century technologies—basic telephone service, electricity, and other infrastructure—to rural communities. These include tools such as cooperative arrangements and publicly supported investments.

But Congress can start to address this widening gap today by allowing the regional Bell companies to build and operate 21st Century Internet facilities without regard to lines drawn on a map in the 20th Century.

The divide is not only between rural and urban areas. High-speed service providers are increasingly choosing private high-capacity networks to deliver their services to subscriber-based audiences because of Internet limitations. This growing number of closed networks is a disturbing trend and threatens the democratic nature of the Internet. Some may get to participate and reap the benefits from the next generation Internet, others may not.

Similarly, if those who control the conduit choose only to allow access to some content, the democratic ideal is lost. Technological advances now allow for discriminatory routing and caching of information. Some information may not be as easily accessible as other information. Other information may not be accessible at all. In short, consumers may only see what an Internet provider wants them to see.

As the New York Times stated in an editorial following a dispute in May involving Time Warner and ABC:

Democracy requires an open communication environment. Monopoly control over cable access threatens the flow of ideas and opinion that feeds the democratic process, not to mention the emerging electronic economy. For now, perhaps only the principle of non-discrimination can be declared, with the rule book to be written as conditions require.³

The Internet knows no borders or boundaries. The members of iAdvance believe that we should be doing everything we can to encourage, not discourage, investment in Internet backbone. We believe, with NIT's Nicholas Negroponete that, "the absence of bandwidth will be more isolating than the densest forest or largest desert."

The promise of a bandwidth rich society, one in which every home, every school, and every small business has a high speed, high bandwidth connection to the Internet is almost beyond our ability to imagine. The toys and tools we use on the Internet today will seem archaic when the Internet backbone is ubiquitous. With non-discriminatory access not only to the technology, but also to the information it can provide, the Internet will empower and enrich our lives in ways that we can only guess at today. Not only will commerce be redefined, but so will learning, health

³"Time Warner's Power Play," The New York Times, May 5, 2000, p. A25.

care, entertainment, and how we interact on a daily basis with our friends, our family members and our community.

Now is the time to begin to work towards this vision of the future. By removing outdated regulations that stifle investment and innovation in the Internet backbone and by ensuring access to the information that traverses its pipes, we can help overcome digital divides, empower consumers and strengthen democracy.

Thank you.

Beneath the Internet's happy communal culture, a cadre of giant carriers is mercilessly squeezing every last dime it can out of smaller players. Users are picking up the tab.

Backbone Bullies

By Neil Weinberg

Forbes Magazine, June 12, 2000

JOHN M. BROWN RUNS IHIGHWAY, an Internet access firm in Albuquerque, N.M. He'd like to give his clients the fastest possible link to the rest of the Web world—but he can't.

That is because Uunet and the few other giant data haulers that dominate Internet traffic don't have the fat, 45-megabit lines Brown would like in Albuquerque. And Brown can't afford \$120,000 a year to lease a pipe running 330 miles to the Uunet hub in Phoenix.

Without Uunet, a Net service can slow to a crawl. An e-mail from one of Brown's clients must pass through a poky, clogged—but mostly free—"public" access point in California, rather than zip along the snazzy but expensive Uunet hub. Messages back up. Web pages wither. Forget streaming video.

"It frustrates the hell out of me," Brown says. "When I ask big providers for local service, they're blasé."

But in Internet traffic, the big guys—WorldCom's Uunet, Sprint Corp., Cable & Wireless, AT&T and GTE unit Genuity—are the only game in town. They control 80% of long-haul traffic. Uunet alone zaps perhaps half of the world's Net bits, and 30% of all Web sites transmit their pages on Uunet's 300,000 miles of fiber.

This concentration could get even worse, for WorldCom is trying to acquire Sprint and its 30,000-mile fiber network. Here's the rub: These few behemoths have a cozy arrangement for swapping traffic free-of-charge among themselves—but they charge stiff fees for the very same service when dealing with smaller players.

The practice is a stark departure from how the Internet worked its first three decades, when networks handled one another's data for free under a communal love-in known as "peering." It threatens to balkanize the Net into haves and have-nots.

A balkanized Net is just what the government hoped to avoid when it privatized it in 1994 and bestowed special rights upon the cadre of Net titans. Their brazen ways risk riling antitrust regulators, still giddy from smacking around that rapacious monopolist, Microsoft.

"The only way to get access to their part of the Net is to pay them a tithe, and to that extent it's a classic monopoly," says Paul Vixie, head of Internet services for Metromedia Fiber Network, which is building its own network. "The playing field isn't level. The people who got in first got all the best land and now dictate peering terms to everyone else."

Forget the hype about the Internet as an egalitarian cyberparadise. Behind the warm and fuzzy facade is a merciless commercial hierarchy ruled by an oligopoly of carriers as indispensable as the local electric company--but with the clout to act like a bunch of bullies.

The big carriers serve whom and where they want and require everyone who deals with them to keep the terms secret. Nor do they have to fear competition from their most formidable natural rivals, the regional Bell companies, because the Bells are barred from carrying traffic long distance.

The biggest firms spend billions on their massive fiber infrastructures, and it is simply good business to pass along costs and earn a respectable return. The question is whether, given their dominance of what is arguably a vital public network, they could end up being seen as exploiting their position with impunity and draw government scrutiny.

"It's about someone giving as much traffic as they're getting," says Kathleen Earley, president of AT&T's Internet group. "No business with shareholders can have asymmetric peering relationships. There would be no way to earn a return and upgrade your backbone."

As it stands, puny ISPs pay for services without a clue about how the terms compare. There aren't any publicly disclosed rules for who rides free and who must pay, or for what are reasonable rates; a data "packet" can travel over several networks, and some peer while others pay.

"The last thing the big guys want is to rationalize the system and commoditize themselves out of business," says Paul McBride, chief financial officer of InterNap, a builder of systems that bypass peering points. "The problem is the Internet won't scale this way forever."

Bad as the system is, regulators have shied away from this arcana. But they could yet feel compelled to act. When MCI merged with WorldCom two years ago, the European Commission forced the pair to spin off MCI's Internet backbone. Cable & Wireless paid \$1.75 billion for it--then later sued MCI WorldCom for trying to hamstring the business by withholding contracts, blocking database access and failing to transfer key people. WorldCom recently agreed to fork over \$200 million to settle out of court.

Two years later WorldCom is seeking to buy close rival Sprint. Sprint vociferously opposed the merger of WorldCom and MCI on antitrust grounds; now, of course, it sees no threat in merging into them. If the FCC and Department of Justice allow the deal to go through at all, they will likely demand a spinoff of part of the trio's Internet backbone. But WorldCom Chief Executive Bernard Ebbers has said he will scuttle the entire Sprint purchase before he will spin off Uunet.

One look at WorldCom's pricing power shows why. The \$875 per megabit that Uunet gets is double what smaller backbones fetch, says a local ISP. If a small ISP refuses to pay up, its users may suffer a World Wide Wait.

The Internet got here via a peculiar history. Founded to keep military communications flowing after a nuclear attack, it was later turned over to the National Science Foundation. Amazingly, it

began accepting commercial traffic only in the early 1990s. Early commercial users had to honor the peering protocol, swapping data free of charge. That way, all data could travel on all wires for free; any message could go to any recipient anywhere, whether the hauler was a multibillion-dollar powerhouse or a punky startup.

Looking to get out of the way but prevent the fledgling Internet from fragmenting, the National Science Foundation paid four private enterprises in 1994 to build public Internet access points. The one in Washington, D.C. is now run by WorldCom; the site in San Francisco is Pacific Bell; Sprint has the hub in Pennsauken, N.J., and Ameritech the one in Chicago.

They effectively became the Net's on-ramps in 1995 when the feds closed their own backbone. As traffic grew, these four public access points (and a fifth added in Palo Alto, Calif.) clogged up. The biggest and richest players responded by setting up hundreds of faster, private peering points.

Then in 1997 Uunet said it would stop peering with small carriers; they would have to pay. Sprint and AT&T followed suit within months. The modern Net began to emerge. Titans swap traffic free and charge others; those who can't pay take the back roads of unreliable public exchanges. These days Cable & Wireless, for one, peers with just 52 carriers; the other 10,000 or so ISPs must pay the freight.

In a sense, the NSF's nightmare has come to pass: The Net is balkanized.

Yet the big guys can't tread too heavily. Given the Net's collectivist past and regulators' unease with concentration, they haven't abandoned peering altogether. But in reality, the large backbone carriers have the clout and the incentive to make "public" interchanges as onerous as they can.

In the past two months WorldCom has slapped smaller carriers with monthly fees that have run to tens of thousands of dollars, merely for locating their gear inside the public-access facilities that WorldCom manages.

The difference between public and private access is jolting. Sprint runs much of its backbone at a blinding 2.5 billion bits per second—but at the public access point it oversees, it offers just 45 million bits. It is like giving drivers on a six-lane highway access via a dirt road.

"The public peering points are by design bottlenecks," says Scott Hiles, Sprint's network operations manager. "We've moved to private peering."

That's great for other networkers—unless, of course, they are too small or too far away to be admitted to the club.

Mr. HYDE. Mr. Lowe?

STATEMENT OF RANDY LOWE, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, PRISM COMMUNICATIONS SERVICES, INC., WASHINGTON, DC

Mr. LOWE. Mr. Chairman, Mr. Conyers, members of this committee, I appreciate being here this afternoon. Indeed, I am both flattered and honored by my presence here today, honored because of the esteemed history of this committee, but flattered because I do believe that it is a recognition of the time spent by my company, Prism Communications Services, to do what we were allowed to do by the 1996 Telecommunications Act.

Prism Communications Services is a subsidiary of ComDisco out in Rosemont, Illinois, and as such is a member of the Competitive

Telecommunications Association, CompTel, as well as the Association for Local Communications Services, otherwise known as ALCS.

We, however, unlike the DLECs, which you have heard about here this morning, are a true CLEC, a competitive local exchange carrier, as we believe was envisioned by the act. By that I mean we not only provide data services, but we provide, on an integrated basis, both voice and data services in 33 cities, 27 States, including the District of Columbia, in 900-plus locations serving 57 million telephone lines. We are in the process of rolling that out, because over the last year-and-a-half we have spent \$400 million and will continue to spend at that rate money to build out our network in order to do what, again, we believe the Telecommunications Act of 1996 has allowed us to do.

Up to about a year ago, I was nicely ensconced here in town in private practice and was brought out for a reason, and the reason was that my experience in the long-distance business, dating back some 20 to 25 years, is identical to what we perceive to be the experience in this market, and that is the difficulty of getting access to the various elements of the local network that we need in order to compete and as we believe the 1996 act has required the Bell operating companies to provide to companies such as ourselves.

The act was a perfect balance, as Chairman Kennard said, we believe, between opening up the local marketplace and providing us the tools by which we need to get into that marketplace, and at the same time providing the incentive to the Bell operating companies to give us those tools by allowing us to get into long-distance, both data and voice.

The Telecommunications Act of 1996, back when it was passed then and I believe firmly now, is a watershed in the history of this country. In particular, it determined that communications is communications, data and voice. It doesn't matter. It goes over the same lines to the same places reaching the same people, albeit it for different purposes going in and different purposes going out, but it is communications.

Within that construct, this Congress declared that, in fact, we should be allowed to have access to a network which is built on the backs of the American ratepayer over the last 100 years—that is, the local telecommunications networks of the Bell operating companies, and it is that interconnection and the unbundling associated with that interconnection that we must, as an industry, have in order to survive, in order to provide the type of competitive services that Congress decided we should provide to the American people back in 1996.

But because it is a watershed, 4 years is not enough to build a network and provide those types of services to the American ratepayer. Four years in the scheme of things—and, again, considering that the network that we are presently faced with was built over the course of 100 years—is a small amount of time in order to accomplish that goal, but that goal, indeed, we are accomplishing.

As Chairman Kennard said, the act is working. The act is a masterful piece of legislation turned into law that is, indeed, working.

Unfortunately, the proposals before this committee—in particular, the H.R. 1686 and H.R. 1685 initiative—will not accomplish that goal but, in fact, will upset substantially that balance. It will

take away the unbundling aspects of the act. It will also disallow us from resale, which is a traditional way by which to enter into a particular market. But, most importantly, again, as Chairman Kennard said, it will take away the most fundamental portion of the 1996 act, and that was the incentive created by section 271.

I firmly believe that if, in fact, we allow the Bell operating companies to cross LATA boundaries—which are not anachronisms, by the way, but were designed specifically for purposes of determining what is local and what is long distance, not telephony versus data—then we will, in fact, take away completely the incentive that they have now to give us what we need in order to compete and in order to provide services to the American public.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Lowe.

[The prepared statement of Mr. Lowe follows:]

PREPARED STATEMENT OF RANDY LOWE, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, PRISM COMMUNICATIONS SERVICES, INC., WASHINGTON, DC

Good Morning, Mr. Chairman, members of the Committee. Thank you for the opportunity to appear before your Committee as it examines the "Internet Freedom Act" and the "Internet Growth and Development Act of 1999." My name is Randall B. Lowe. I am the Executive Vice President and Chief Legal Officer of Prism Communication Services, Inc. I also serve as a Board Member for CompTel, the Competitive Telecommunications Association, of which Prism is a member. Prism is also an active member of ALTS, the Association for Local Telecommunications Services.

Prism is a facilities-based competitive local exchange carrier and Internet service provider offering innovative broadband data and voice solutions to customers nationwide. Founded in 1997 in direct response to the passage of the Telecommunications Act of 1996 (the "96 Act"), Prism is precisely the kind of entrepreneurial, integrated communications carrier that Congress sought to nurture by adoption of the '96 Act. Prism is fulfilling the Act's vision by building a national communications network to meet the exploding demand for broadband services, integrated with traditional voice offerings.

Mr. Chairman, you have asked me to testify today concerning the deployment of broadband services as addressed by two specific pieces of legislation, the "Internet Freedom Act" and the "Internet Growth and Development Act of 1999." However, before doing so, I want to first summarize Prism's principal message.

In my experience as a veteran involved with the opening of the marketplace for long distance services, competition is the key to lower prices and innovative services for the consumer. Prism's experience with the opening of the marketplace for broadband services is no exception. Competition is the force that is driving broadband deployment today in the local telecommunications market. It is clear, therefore, that *the best means of accomplishing rapid deployment of broadband services is to stay the course set forth in the '96 Act—that is, open up monopoly local networks to competition.* Stated differently, stricter enforcement of the pro-competitive provisions of the '96 Act, not deregulating monopolies, is critical to the rapid deployment of broadband services to all Americans—just as Congress intended. Indeed, it would be tragically ironic if the very monopolists who have been slowing the deployment of broadband services by constantly litigating the interpretation and application of the '96 Act, are granted the relief provided by HR 1686 and HR 1685.

In my testimony today, I will first review the significant impact competition has made on the deployment of broadband services. I will also discuss the significant, inevitable harm to both consumers and competition in the broadband services marketplace should HR 1686 and HR 1685 pass.

I. COMPETITIVE CARRIERS ARE DRIVING RAPID, UBIQUITOUS BROADBAND DEPLOYMENT, NOT MONOPOLIES.

In the four years since the passage of the '96 Act, it has been competitive carriers like Prism that have invested in, built and deployed broadband networks nationwide to deliver innovative consumer broadband offerings.

Competitors have invested over \$30 billion in new networks and are now investing more than \$1 billion every month. (Source: *PaineWebber, New Paradigm Resources Group*). As a result, even the most rural states, including Alaska, Montana

and West Virginia, have at least one competitive carrier and the 'average' state currently has 20 to 30 competitive carriers. (Source: *The Association for Local Telecommunications Services*).

Prism alone has spent over \$400 million in the past one and one half years on the build-out of its facilities-based high-speed communications network. In doing so, Prism has taken no shortcuts. Instead, the company has built an advanced digital ATM network to support simultaneous voice, data and Internet access and to guarantee its customers speed, simplicity and a choice of services.

Prism launched its services in January 1999 and as shown by the attached map, the company's national footprint at the completion of its expansion will include 33 markets and 27 states and the District of Columbia. Prism's network is comprised of switches and proprietary advanced digital technology that will ultimately reach over 57 million phone lines.

Prism's state-of-the-art network is also particularly well suited to bringing the rapid deployment of broadband services to urban areas and inner cities because it uses a technology that is cheaper and more efficient than the technology used by the incumbents. As a result, Prism can more quickly and easily reach those communities where affordable high-speed access was previously out of reach. These include areas such as Washington, DC, Chicago, San Francisco, Philadelphia, Dallas, Miami, Los Angeles, San Francisco, Newark and New York—markets where Prism is already or will soon be providing its services.

In short, and as pointed out in the 1999 Economic Report of the President, the Council of Economic Advisers, it is the broadband service carriers like Prism, and not the monopolies, which bring about dynamic technological innovation and widespread deployment.

"The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from cable television networks delivering similar high-speed services, and the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities."

What all this tells us is that competition is the fastest and most effective way for consumers to get broadband services, and is precisely the type of movement—competition driving innovation and rapid deployment—that Congress intended. Considering that the economic strength of this country is founded on this principle, it comes as no surprise.

II. BROADBAND BILLS THAT DEREGULATE MONOPOLIES REVERSE THE PRESENT COMPETITIVE MOVEMENT AND HARM CONSUMERS.

The companion monopoly deregulation bills, HR 1686 and HR 1685, though well-intended by its sponsors, effectively reverse the dynamic course I discussed earlier—the movement towards innovation and widespread broadband deployment that competitors have put into place. Both bills would no less than repeal the core pro-competitive provisions of the '96 Act that drive deployment of broadband services today and that ensure viable, open telecommunications markets.

The bills would allow incumbents to immediately send data across LATA boundaries by exempting data from the definition of interLATA services, and thus from the long distance checklist requirements of Section 271 of the '96 Act. Section 271, however, is critical to competitive carriers since it requires incumbents to interconnect with other broadband carriers before competing in the long distance market. Without the leverage of Section 271 as expertly understood and crafted by Congress, the monopoly has no incentive to interconnect with competitive carriers. Because competitive carriers must interconnect with the incumbents' network in order to connect with their customers, eliminating these requirements seriously jeopardizes broadband competition and the benefits it brings to the consumer. Moreover, since voice traffic can readily be "packetized" or converted to data traffic, an exemption for data is an exemption for voice.

The proposed legislation would also prevent connection to the consumer by competitive broadband carriers by repealing the monopolies' unbundling and resale obligations under the '96 Act for facilities and services used for broadband offerings. Competitive broadband carriers like Prism are dependent upon these obligations because they allow access to the incumbent monopoly's local network and services. Without access to these key bottlenecks, a carrier such as Prism would not be able to access its customers or provide any of its services. There are no alternatives. The suggestion that competitors might build out their own duplicative local network is not an option—even assuming it is not cost prohibitive, it is extremely difficult for

most carriers to justify the expense duplicating a telecommunications network built on the backs of American ratepayers.

Ironically, while Congress considers scrapping the '96 Act's key unbundling protections which have so aptly brought about competition, the European Commission (EC), in an attempt to catch up to the United States in e-commerce, has made local loop unbundling a centerpiece of its telecommunications policy. Not surprisingly, the EC's formal proposal includes the requirement that incumbents provide operators with "full and shared unbundled access to their local copper loops on fair, reasonable and nondiscriminatory terms," as well as "cost-oriented" access.¹

The bills would also allow the monopolists to avoid state and federal rate regulation by simply submitting a plan to provide broadband services only when they are "economically reasonable and technically feasible." Thus, charges for the critical facilities used by carriers such as Prism to interconnect to the incumbents' network and to deploy broadband services will no longer be cost-based.

In addition, the bills do nothing to address the deployment of broadband services to rural areas and inner cities. Instead, the bills actually permit the monopolists to avoid providing broadband services to any rural area or inner city by claiming that serving any such area is not "economically reasonable and technically feasible."

Of equal importance, a monopolist is freed entirely from any deployment obligations if just one competitor offers service in a telephone exchange, or if the monopolist offers DSL over 70% of the phone lines in an exchange area. Consumers would inevitably see higher prices, reduced service offerings, lower quality of service, and slower deployment of broadband services.

The current Internet marketplace is highly competitive, with users enjoying a choice of many providers. The proposed legislation will only serve to deter broadband deployment and harm consumers. Not only will competitive broadband providers be unable to adequately serve their customers, but a change by Congress in the rules mid-stream will create great uncertainty in financial markets and jeopardize the ability of new and existing competitors to raise the capital needed to build and sustain their networks.

CONCLUSION

Prism urges the Committee to stay the course set forth in the '96 Act as the best means of accomplishing rapid deployment of broadband services. The choice at hand is whether you trust a monopoly provider over a robust, open, competitive marketplace to offer services. Ultimately, what is best for the consumer? It is the consumer, not the monopoly, that deserves "freedom"—freedom to choose a provider and freedom from local monopoly control. Let's allow competition to pick the winners and the losers in the race to provide broadband deployment.

Thank you.

SUMMARY

Mr. Chairman, members of the Committee. Thank you for the opportunity to appear before your Committee as it examines the "Internet Freedom Act," HR 1686, and the "Internet Growth and Development Act of 1999," HR 1685. I am Randy Lowe, Executive Vice President and Chief Legal Officer of Prism Communication Services, Inc. Prism is a facilities-based competitive local exchange carrier and Internet service provider offering innovative data and voice solutions. Founded in 1997, Prism is precisely the kind of entrepreneurial, integrated communications provider that Congress sought to nurture by adoption of the Telecommunications Act of 1996 (the "'96 Act"). Prism is fulfilling the '96 Act's vision by building a national communications network to meet the exploding demand for bandwidth, integrated with traditional voice service offerings.

In my experience as a veteran involved with the opening of the marketplace for long distance services, competition is the key to lower prices and innovative services for the consumer. Prism's experience with the opening of the marketplace for broadband services is no exception. Competition is the force that is driving broadband deployment today in the local telecommunications market. In the four years since the passage of the '96 Act, it has been competitive carriers like Prism that have invested in, built and deployed high speed Internet access services nationwide to deliver innovative consumer broadband offerings. Competitors have invested over \$30 billion in new networks and are now investing more than \$1 billion every month. Prism alone has spent over 400 million dollars over the past one and one half years on the build-out of its facilities-based high-speed communications network

¹ Keith Nuthall, "EC piles pressure on Europe's telcos," Total Telecom (July 12, 2000). <http://www.totaltele.com/view.asp?ArticleID=28936&pub=tt&categoryid=0>.

into 33 markets and 28 states. This fury of investment and deployment by competitive carriers has spurred incumbent local exchange companies ("ILECs") to upgrade their own systems in response to competitive pressure. What all this tells us is that local competition is the fastest and most effective way for consumers to get broadband services.

The companion bills HR 1686 and 1685, though well-intended, effectively reverse this dynamic course by repealing the core pro-competitive provisions of the '96 Act that drive deployment of broadband services today and that ensure viable, open telecommunications markets. By repealing market-opening requirements of the '96 Act, the bills restrict competitors from accessing key network bottlenecks and adequately serving their customers, and effectively remove any ILEC incentive to cooperate with competitors. They also create uncertainty in financial markets and jeopardize the ability of new and existing competitors to raise the capital needed to build and sustain networks.

Prism urges the Committee to stay the course set forth in the '96 Act as the best means of accomplishing rapid deployment of broadband services. The choice at hand is whether you trust a monopoly provider over a robust, open, competitive market to offer services. Ultimately, what is best for the consumer? It is the consumer, not the monopoly that deserves "freedom"—freedom to choose a provider and freedom from local monopoly control. Let's allow competition, rather than Congress, to pick the winners and the losers in the race to provide broadband deployment.



PRISM NETWORK ROLLOUT



Mr. HYDE. Chairman Ivey?

STATEMENT OF GLENN IVEY, CHAIRMAN, MARYLAND PUBLIC SERVICE COMMISSION, BALTIMORE, MD, ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Mr. IVEY. Thank you, Mr. Chairman, members of the committee. My name is Glenn Ivey. I am here to represent NARUC this morn-

ing in our strong opposition to H.R. 1686, and we oppose it for several reasons.

First of all, H.R. 1686 would allow the Bells to transport data cross LATA boundaries immediately. In essence what this would do is allow ILECs to become long-distance carriers of data, which they can't do under the act until they meet the section 271 requirements to open their local markets to competition.

If the Bells are allowed to transport long-distance traffic without first having to comply with the section 271 checklist, State commissions and the FCC would lose the primary tool for promoting local telephone competition.

Circumventing the incentives that Congress put in place would derail ongoing efforts to bring advanced services to local markets. States currently in the midst of arbitrating market entry disputes regarding advanced services could be required to revisit those previously-resolved issues and, in addition, the legislation would give the ILECs competitive advantage in broadband deployment without providing, in return, any demonstrable gains in local competition.

Secondly, data now accounts for at least 60 percent of the traffic on the public network and is projected to account for as much as 90 percent in 3 to 5 years. So, as Mr. Cannon pointed out, if we move forward with the legislation as drafted, data will overtake voice and essentially circumvent the balancing aspects of the Telecom Act.

In the interest of brevity, I will make one last point, and that goes to the issue of the Telecom Act being replaced by the Sherman Act in the bill. I am very troubled by that, because I think it means that the Sherman Act could be used certainly to prohibit anti-competitive activities by ILECs. At this point legislative changes to the current legal and regulatory structure would exacerbate an already litigious relationship between ILECs and their potential competitors.

Since litigation has been an essential factor in delaying full implementation of the Telecom Act, and because antitrust litigation is extremely expensive and protracted, it seems clear that shifting emphasis to the Sherman Act would delay rather than hasten broadband deployment.

I thank you for the chance to express our views to the committee, and I will submit the full statement for the record.

Mr. HYDE. Thank you, Chairman Ivey.

[The prepared statement of Mr. Ivey follows:]

PREPARED STATEMENT OF GLENN IVEY, CHAIRMAN, MARYLAND PUBLIC SERVICE COMMISSION, BALTIMORE, MD, ON BEHALF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Thank you for inviting me to testify before the Committee today. My name is Glenn Ivey. I am Chairman of the Maryland Public Service Commission and President of the Mid-Atlantic Conference of Regulatory Utility Commissioners. I offer my testimony this morning on behalf of the National Association of Regulatory Utility Commissioners ("NARUC"), which strongly opposes H.R. 1686 and H.R. 2420.

Congress crafted the Telecommunications Act of 1996 ("the Act") to promote competition, and thereby to secure lower prices and the ubiquitous deployment of advanced technologies. This was to be achieved by balancing the rights and responsibilities of ILECs and CLECs considering relative strengths, economic costs and proper incentives. Unfortunately, the pending legislation would undermine that balance and extend the ILEC's monopoly powers under the guise of accelerating broadband deployment. Passage of H.R. 1686 and H.R. 2420 would jeopardize the

ability of states to open local markets to competition and advance the goals of the Act.

H.R. 1686 and H.R. 2420 would allow ILECs to transport data across local access and transport areas, or LATA, boundaries immediately. In essence, ILECs would become long distance carriers of data, something they cannot currently do under the Act until they meet the Section 271 requirements to open their local markets to competition. If the Bell companies were allowed to transport long distance data traffic without first having to comply with the Section 271 checklist, state commissions and the FCC would lose the primary tool for promoting local telephone competition.

Circumventing the incentives that Congress put in place would derail ongoing efforts to bring advanced services to local markets. States currently in the midst of arbitrating market entry disputes regarding advanced services could be required to revisit previously resolved issues. This legislation would give the ILECs a competitive advantage in broadband deployment without providing in return any demonstrable gains in local competition. Furthermore, history has shown that major shifts in telecommunications policy lead to contentious, multi-forum litigation in the courts, before the state commissions and before the FCC.

Data now accounts for more than 80% of the traffic on the public network and is projected to account for as much as 90% in three to five years. H.R. 1686 and H.R. 2420 would prohibit both the FCC and the states from promoting the deployment of high-speed data services. Until a recent FCC order became effective, competitors were unable to utilize line-sharing, and therefore had to use a separate line to provide DSL services. This hindered access to broadband services by artificially raising the prices for these services.

Although the rationale for the legislation may have been to extend broadband services to underserved areas, this legislation could actually undermine that goal. The primary factor stimulating deployment of broadband infrastructure is competition. In those areas where competition exists, the Bell companies have provided more broadband services at lower prices than where there is little or no competition. For example, SBC reduced its DSL price by more than 40%, including Internet access service, in response to competitive pressures. Similarly, Bell Atlantic reduced the price of its Infospeed service by approximately 20% in response to increased competition from cable companies and competitive carriers.

In addition, there are increasing numbers of companies who are willing and able to provide data services. These companies have already begun to establish the facilities to provide these services. For example, in Maryland, like most states, broadband services are proliferating. To date, we have authorized over 100 competitive carriers, half of which are facility-based and many of which provide broadband services. Nationally, we have experienced a 50% increase in DSL lines in the first three months of this year alone. So clearly we are moving in the right direction. Yet residential markets are not experiencing robust local competition. Competition is still too nascent to abandon the pro-competitive elements of the Act.

Finally, I am also troubled by the legislation's provisions that would replace the Telecom Act with the Sherman Act as the means for prohibiting anti-competitive activities by ILECs. At this point, legislative changes to the current legal and regulatory structure would exacerbate an already litigious relationship between ILECs and their potential competitors. Since litigation has been a central factor in delaying full implementation of the Telecom Act, and because antitrust litigation is extremely expensive and protracted, it seems clear that a shifting emphasis to the Sherman Act would delay rather than hasten broadband deployment.

I have attached to my testimony NARUC's resolution opposing legislation like H.R. 1686 and H.R. 2420. This resolution was passed unanimously by the NARUC Telecommunications Committee in March of this year. I have also attached a May 11, 2000 letter to Chairman Hyde sent by, among others, NARUC President Bob Rowe and Telecommunications Chair Joan Smith. This letter also explains our reasons for opposing H.R. 1686.

We share the Committee's desire to deploy broadband services to all areas. We simply ask that you address broadband deployment in a competitively and technologically neutral way—not by removing the Bell's incentives to open their local markets. This legislation is harmful to the development of local competition and could actually delay the deployment of broadband services. Therefore, we urge you to oppose the passage of H.R. 1686 or H.R. 2420.



N A R U C
National Association of Regulatory Utility Commissioners

May 11, 2000

The Honorable Henry J. Hyde
Chairman, House Judiciary Committee
2138 Rayburn H.O.B
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we respectfully urge you to oppose H.R. 1686, the Internet Freedom Act of 1999, sponsored by Reps. Goodlatte and Boucher. H.R. 1686 is unnecessary and would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act").

1) H.R. 1686 DAMAGES COMPETITION BY GUTTING KEY MARKET-OPENING PROVISIONS IN THE 1996 ACT.

H.R. 1686 would diminish the Bell companies' incentives under the Act to open their local markets to competition before they are allowed to carry data across boundaries. Data services already represent over 80% of the fastest growing telecommunications traffic in the United States.

Sections 271 and 251 of the Telecommunications Act are designed to open local markets. That work is well underway but is not finished. There are numerous examples of collaboration between companies and state commissions making the 271 process work. The New York State Public Service Commission convened an extensive group of parties to work successfully for Section 271 approval for Bell Atlantic in New York. The U S WEST states are now working on a region-wide basis with U S WEST and competitors to solve the technical requirements of interconnection. We look forward to the day when all Bell companies achieve 271 compliance so that everyone can enter everyone else's markets.

2) NOTHING IN CURRENT LAW PREVENTS BELL COMPANIES FROM PROVIDING ADVANCED SERVICES TO CONSUMERS TODAY.

The Act does not prevent Bell companies from providing broadband services to customers, if those broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed broadband facilities in their home markets and are actively marketing high speed Internet access in many areas.

Bell companies claim they need exemptions from the market-opening requirements in the Act to finance the roll out of advanced services in rural and urban communities. But the passage of H.R. 1686 does not guarantee the deployment of advanced services anywhere. Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way – not by removing the Bell's incentives to open their local markets.

For example, local telephone companies have possessed digital subscriber line (DSL) technology for several years. Only recently and especially in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest way for most consumers to obtain broadband services at competitive prices. H.R. 1686 would actually inhibit the deployment of advanced services because it reduces the incentives for RBOCs to open their local markets to competition.

3) MANY CARRIERS HAVE DEPLOYED ADVANCED SERVICES TO RURAL AND URBAN AREAS ALREADY. DESPITE THE RHETORIC, LEGISLATIVE EXEMPTIONS FROM THE 1996 ACT ARE HARMFUL TO THE GOAL OF COMPETITION.

Lots of competitive carriers are already providing broadband services under the framework of the Act. Where RBOCs lack authorization to provide broadband services across LATA boundaries, other companies (including rural carriers) are already doing so. For example, new entrants – not incumbent Bell companies – were the first to offer DSL services in California, New Hampshire and New Mexico. Allowing state commissions to fully implement the 1996 Act will help consumers benefit from the roll out of advanced services. H.R. 1686 would directly undermine this effort. RBOCs will be able to provide interLATA services as soon as they have passed muster under section 271. There is no urgent need to pass legislation that circumvents the process that Congress envisioned in 1996.

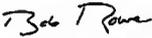
In addition, HR 1686 repeals from current law unbundling and resale requirements for facilities used for broadband services. These provisions would inhibit competitors from accessing key network bottlenecks and would prevent them from adequately serving customers. This bill also threatens the availability of line-sharing to competitors.

In conclusion, we urge you to oppose H.R. 1686 and support the continued growth and innovation stemming from the pro-competitive measures in the law that Congress worked so hard to pass in 1996. Competition will eventually eliminate the need for regulation of broadband services. Exempting these services from Section 271 requirements will delay the arrival of competition. Enactment of this bill would harm the emergence of broadband competition by destroying the Act's carefully crafted incentives for Bell companies to open their local markets to competition.

We are enclosing a copy of a resolution passed by the National Association of Regulatory Utility Commissioners (NARUC) in March opposing this legislation. This resolution articulates concerns state public service commissions have about H.R. 1686.

Thank you for your prompt attention to this matter. If you have any questions about the status of broadband deployment or the status of local competition in your district, please do not hesitate to contact any one of us or your state commission. You may call Jessica Zuflo at 202-898-2205 in the NARUC Washington office for further details about how to reach us or your state commission colleagues.

Sincerely,



Bob Rowe, Commissioner
Montana PUC
President, NARUC



John H. Smith, Commissioner
Oregon PUC
Chair, NARUC Telecommunications



Jim Burg, Chair
South Dakota PUC,
NARUC Board of Directors



Ruth K. Kretschmer, Commissioner
Illinois Commerce Commission
NARUC Board of Directors

Attachment: NARUC Resolution



N A R U C
National Association of Regulatory Utility Commissioners

R E S O L U T I O N

Resolution Regarding Broadband Legislation In The 106th Congress

WHEREAS, The stated goal of the Telecommunications Act of 1996 (1996 Act) is to provide for a pro-competitive, deregulatory framework "designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"; and

WHEREAS, Several bills being considered in Congress would amend the 1996 Act to allow the Bell Operating Companies (BOCs) to provide in-region, interLATA data services without first having to comply with the market-opening requirements of the 1996 Act, including the fourteen point "competitive checklist" requirements of Section 271; and

WHEREAS, Some of these bills also contain provisions that would limit State commissions from enforcing the market-opening requirements of Section 251 for data and advanced services, thereby denying States from fulfilling their obligations to regulate core telecommunications facilities used to provide both voice and data services, and to promote deployment of advanced telecommunications capabilities; and

WHEREAS, Soon the majority of traffic carried over the public switched network will be sent over packet-switched networks, and as such, technical distinctions between voice and data will become less relevant; and

WHEREAS, State commissions have been at the forefront of implementing and enforcing the market-opening requirements of the 1996 Act and in working with the BOCs and competitive local exchange carriers to advance BOC progress towards compliance with those requirements; and

WHEREAS, In approving Bell Atlantic's application to provide in-region, interLATA services in New York, the FCC made it clear that it will rely heavily on the factual record developed by State commissions and the States' rigorous analysis of the evidence in considering whether to grant future 271 applications; and

WHEREAS, The FCC also stated that it will work in concert with the States to monitor post-interLATA entry compliance by the BOCs; and

WHEREAS, Southwestern Bell recently filed its Section 271 application with the FCC, following an extensive review by the Texas Public Utility Commission, and several other States presently are reviewing BOC compliance with Section 271 requirements; and

WHEREAS, In addition to the coordinated effort on Section 271, the States and the FCC have established a joint conference to cooperatively address the numerous and complex issues associated with the development and deployment of advanced telecommunications capabilities to all Americans, consistent with the objectives outlined in Section 706 of the 1996 Act; and

WHEREAS, This unprecedented level of coordination and cooperation by State and Federal regulators to (1) implement the market-opening requirements of the Act, (2) promote and ensure BOC compliance with Section 271, and (3) foster the deployment of advanced telecommunications capabilities to all Americans, demonstrates that the 1996 Act is working as Congress intended; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its March 2000 Winter Meeting in Washington, D.C., reaffirms its support for the 1996 Act; *and be it further*

RESOLVED, That the NARUC opposes federal legislation that would permit the Bell Operating Companies to provide data services across LATA boundaries without first fully opening their local markets to competition as currently required under the 1996 Act; *and be it further*

RESOLVED, That the NARUC further opposes federal legislation that would limit the ability of State public utility commissions from exercising their authority and resources to fulfill their obligation to regulate core telecommunications facilities used to provide both voice and data services and to promote deployment of advanced telecommunications capabilities.

*Sponsored by the Committees on Telecommunications and Finance and Technology
Adopted by the NARUC Board of Directors March 8, 2000*

Mr. HYDE. Mr. Cleland?

STATEMENT OF SCOTT CLELAND, CEO, THE PRECURSOR GROUP, WASHINGTON, DC

Mr. CLELAND. Mr. Chairman and Mr. Conyers, thank you for the honor of testifying before your committee.

At The Precursor Group, we are structured to be independent so that we avoid the common financial conflicts of interest. We don't do any investment banking, any stock picking, any money management or proprietary trading, so in that context I offer kind of the following big picture insights.

I have one main message today, and that is that I think the lack of a balanced national Internet broadband policy actually devalues the Internet and it risks killing the goose that laid the golden egg.

Both H.R. 1685 and 1686 recognize that something is seriously wrong with the Internet. These bills also recognize that the current implementation of the Telecom Act is out of balance and it is not enhancing the value of the Internet.

Now, what has happened, I believe, is that industry lobbying has effectively undermined longstanding bipartisan public policy that has fostered growth, competition, consumer choice, and innovation on the Internet.

Now, specifically, if you look at the state of schizophrenic infrastructure regulation between telecom and cable, it is what is contributing to the breakdown of what makes the Internet valuable.

For the local telecos, the FCC has a hyper-regulatory policy. Essentially, it is micro-managing most prices and product terms to achieve desired market outcomes. Now, for the cable operators, es-

essentially the FCC effectively has what I call the “trust and don’t verify” policy, where even contemplating regulatory enforcement appears to be taboo.

Essentially, the FCC has picked cable as its winner. It has picked cable as the winning technology. I think that that has made the implementation of the Telecom Act and the process of the Internet be very out of balance.

So let us talk real briefly about what makes the Internet valuable. Why is this the goose that laid the proverbial golden egg?

What makes it valuable is, first of all, it is interconnected. It brings everybody together.

Second, it is interoperable. It integrates otherwise totally incompatible technologies and it allows a phenomenal increase in efficiency, in convenience, in productivity.

Third, what makes it valuable is it has few barriers; therefore, it allows easy competitive entry for new businesses. Essentially, it is supposed to be open, competitive, and a high-growth marketplace.

Fourth, the Internet is an engine of economic growth and innovation. It enables new businesses and new ways of doing business because it decentralizes control and gives it to the end user.

Finally, why the Internet is valuable is because it increases consumer choice and it decreases supplier control. It is these extraordinary synergies and network effects and efficiencies that make the Internet overall worth a whole lot more than the sum of its parts.

So what is the problem? Well, I believe that public policy neglect is actually devaluing the Internet. The FCC shift to a hands-off policy after 30 years of a bipartisan hands-on policy that led to the Internet is essentially they are allowing an erosion of what I call the “public value” of the Internet, and they are encouraging a corporate tug of war to fight over the Internet.

Like the goose that laid the golden egg, when you pull apart the pieces of the goose, the goose either is crippled or it is going to die. Nobody appears to be defending the goose that laid the golden eggs.

So what do I mean? There are three main big problems that are going on in this debate.

Number one, the Government is allowing fragmentation of the Internet. The Internet grows in value by being interconnected, by being interoperable. That is essentially section 251A of the Telecom Act and section 256, which is inter-connectivity. But the neglectful hands-off policy devalues the Internet.

Now, the Government is allowing cable, the leading broadband facility going forward, to disconnect competitors from the underlying Internet infrastructure.

Problem two is cartelization. Rather than ensuring that the Internet remains open and competitive, the FCC has acquiesced to cable market power, it has permitted cable to erect all sorts of competitive barriers to entry, and it has tacitly promoted a first mover advantage by cable, and that is a problem because there is virtually no after-market competition in the broadband market.

Finally, problem three is politicization. After three decades of bipartisanship promoting competition and innovation through open networks, industry has successfully driven a partisan wedge on

Internet policy by making the Government out to be this Internet boogie man. It is a ridiculous charge. The Government developed, subsidized, and then commercialized the Internet, and it suckled its growth through massive subsidies and very minimal regulation.

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

Mr. HYDE. Thank you, Mr. Cleland.

[The prepared statement of Mr. Cleland follows:]

PREPARED STATEMENT OF SCOTT CLELAND, CEO, THE PRECURSOR GROUP,
WASHINGTON, DC

Mr. Chairman, thank you for the honor of testifying before your Committee on HR 1685 and HR 1686. I am Scott Cleland, CEO of The Precursor Group". 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, The Precursor Group® is an independent, employee-owned and -controlled research company structured to avoid the common financial-conflicts-of-interest rife in Wall Street research. The Precursor Group® does no investment banking, money management, proprietary trading or stock picking. We help institutional investors anticipate change in regulation, technology, competition and globalization so that they can invest more proactively than reactively. In that context, I offer the following insights and observations in hopes that they will be useful to the subcommittee.

I. LACK OF A BALANCED NATIONAL INTERNET/BROADBAND POLICY DEVALUES THE
INTERNET

Both HR 1685 and HR 1686 implicitly recognize that all is not well in the development of the Internet.

- These bills also recognize that current implementation of the Telecom Act is out of balance and not enhancing the value of the Internet.

I caution those who believe the government's "hands off the Internet" policy actually promotes its growth. That's overly simplistic. I believe *the lack of a vigilant national Internet/broadband policy is actually threatening to devalue the Internet and risks "killing the goose that laid the golden egg."* Industry lobbying has effectively undermined long-standing bipartisan public policy that has fostered growth, competition, consumer choice and innovation of the Internet.

Specifically, the current state of schizophrenic infrastructure regulation (telecom vs cable) is leading to a breakdown of what makes the Internet valuable.

- For local telcos, the FCC has a hyper-regulatory policy, micromanaging most prices and product terms to achieve predetermined market outcomes.
- For cable operators, the FCC effectively has a "trust and don't verify" policy where even contemplating regulatory enforcement is taboo.

Essentially, the FCC tacitly has picked cable technology as its broadband winner. However, exclusively encouraging cable deployment neglects the big picture: development of a BALANCED national broadband policy to ENHANCE THE VALUE of the Internet OVERALL.

II. WHAT'S THE ORIGIN OF THE INTERNET'S VALUE?

The Internet has been a public commons that *no one owns*, but everyone can use freely. The Internet is *not the physical infrastructure*, but the *virtual world of communications and e-commerce* that rides on top of the various technologies. It's a collection of universal communications protocols, open network rules, and cooperative agreements. While largely unregulated and free of government micro-management, the Internet is not a law enforcement-free zone as many imply.

The Internet is a fragile network and market dependent on government stewardship to protect the "public" attributes that make it so valuable. AOL, Yahoo, E-Bay, Amazon, ISPs and dot.coms simply would not exist in their current form, if not for the government's long-standing, bipartisan, national policy. That policy promoted growth, competition, consumer choice, and innovation by ensuring: (a) non-discriminatory access to the network; (b) open network architecture; (c) cheap online usage; (d) commercial development; and (e) minimal regulation.

III. WHAT MAKES THE INTERNET VALUABLE?

Why is the Internet the proverbial "goose that laid the golden egg?"

- (1) The Internet is *interconnected*—it brings everyone together. Metcalfe's Law says the value of a network increases exponentially with the number of users connected to it.
- (2) The Internet is *interoperable*; it integrates otherwise incompatible technologies fueling phenomenal increases in productivity, convenience, and efficiency.
- (3) With few barriers to entry, the Internet *allows easy competitive entry* for new businesses; it's an open, competitive, high-growth marketplace.
- (4) The Internet is an *engine of growth and innovation*. It enables new business models and ways of doing business by decentralizing control of the network and empowering end users.
- (5) The Internet *increases consumer choice* and decreases suppliers' control over markets.

In sum, these extraordinary Internet synergies, efficiencies, and network effects make *the Internet overall worth more than the breakup sum of its parts*.

IV. THE DEVALUING OF THE INTERNET:

The FCC's shift towards a "hands off" policy has eroded the "public" value of the Internet, and incited a corporate tug-of-war over the "goose that laid the golden egg." The risk is that this tug-of-war for corporate control of the Internet's public attributes could cripple or kill the proverbial "goose" so it cannot lay any more "golden eggs."

- (1) *Fragmentation*: Rather than ensuring the Internet grows in value by fostering interconnection and interoperability (sections 251a and 256 of the 1996 Telecom Act), a neglectful "hands off" government policy devalues the Internet. The government is allowing cable, the leading residential broadband facility going forward, to disconnect competitors from their underlying Internet infrastructure and to maintain proprietary "telecom" standards when every other telecom carrier must be interoperable by law. By not even bothering to ask whether cable broadband is a "telecom" common carrier service as the Ninth Circuit recently ruled, the FCC thus far has unwittingly added to the investment uncertainty.
- (2) *Cartelization*: Rather than ensuring the Internet remains open and competitive, the FCC has acquiesced to cable's market power, permitted cable to erect multiple barriers to competitive entry, and tacitly promoted cable's first-mover advantage in a market where there is virtually no after-market customer switching. And four years after passage of the Telecom Act, which required "competitive availability of navigation devices" and telecom "interconnectivity," those procompetitive interoperability mandates have been unenforced by the FCC.
- (3) *Politicization*: After decades of bipartisanship promotion of competition and innovation through open networks, industry has successfully driven a partisan wedge in Internet policy by making the government out to be the Internet "boogieman." That is a ridiculous charge given that the government developed, subsidized and commercialized the Internet and has a long sucked its growth through subsidies and minimal regulation.

Mr. Chairman, thank you again; it is an honor to testify before your committee.

Mr. HYDE. Mr. Padden?

**STATEMENT OF PRESTON PADDEN, EXECUTIVE VICE
PRESIDENT, THE WALT DISNEY COMPANY, WASHINGTON, DC**

Mr. PADDEN. Thank you, Mr. Chairman. With your consent, I would ask that my written testimony and the three letters attached be entered in the record.

Mr. HYDE. Without objection, all your statements in full will be made a part of the record and any attachments thereto.

Mr. PADDEN. Thank you, Mr. Chairman.

The Walt Disney Company is honored to be here today to support H.R. 1685 and H.R. 1686 and, in particular, we want to commend Congressmen Goodlatte and Boucher for their focus on consumer choice.

I want to begin by explaining why the Walt Disney Company is here, because we don't own any of the facilities that have been discussed all day today. We don't own any telephone wires, we don't own any cable wires, so we don't stand to be regulated or deregulated by any of this. Our sole interest is that we produce television programming and Internet content and what we are looking for is a world where the customer has the right to choose or to not choose our content based solely on how good a job we do of creating that content and promoting it, and to not have that choice limited or skewed by the conflicted business interest of the company that owns the pipeline to their home, that last mile you have heard about today.

In particular, as we go forward with this legislative process, we would ask you to focus on consumer choice in the context of what is the emerging part of this marketplace, and that is interactive television. Interactive television represents the convergence of traditional one-way cable television, which is regulated under title VI of the Communications Act, converging with two-way Internet content regulated under title II of the Communications Act.

And let me give you just a couple of examples. We are going to be doing a demonstration for your staffs next Monday over in the Capitol. We have sent an invitation around to them so they can see examples of interactive television. But the consumer will be able to call up the television they want by genre. There will be an icon on the screen that says "news," and the consumer will be able to click on that icon and something will happen. What happens is going to depend, in part, on what you do with this legislation. Either the consumer will get the choice of a lot of competing news services, or they might get the choice of the news service owned by the company that owns the pipe to their home.

The consumer will also be able to view both traditional television content and Internet content on the same screen at the same time. They will be able to drill down in a newscast and say, "This is a subject about which I would like to know more" and get transported right from the newscast to a broadband Website rich with detail about that news story. They will be able to interact with ads. If they see a car they really like being advertised, they will be able to click to indicate they would like to test drive. And they will even be able to do their e-mail and chat right over top of the television screen at the same time.

Now, the pending merger of AOL, Time Warner, and EMI, in fact, embodies this coming together of interactive television. This one company, if the merger is consummated, will own monopoly cable pipelines to about 20 million homes. They will own half of the narrow band Internet marketplace. They will own a vast collection of content—motion pictures, cable networks, television programs. They will own the set top box hardware that the customer uses to access all of this. They will own the operating system that runs that set top box. They will own a monopoly in instant messaging, sticky applications like e-mail and chat that tend to bind the cus-

tomers forever to their first choice, and they will own the largest collection of music publishing rights in the world.

Now, as you can imagine, as an unaffiliated content owner interested, remember, just in the customer having the opportunity to choose our content, we look at all of this with some trepidation, so we sent some letters to our friends at Time Warner, and they are attached to my testimony, and we said, "Gee, could you assure us that consumers will have the same level of opportunity to interact with our content that they have to interact with your content."

We are pretty sure if the customer wants to drill down on that news story in CNN that the system that Time Warner and AOL will be deploying will work for them. Our question is if the customer wants to drill down on more detail on an ABC news story will it work. We are pretty sure that interactive ad for a Jeep or a Chevrolet, the interactive functions will work when that ad runs on a channel that Time Warner owns like TNT or TBS, but we asked, "Assure us that same interactivity will occur if the ad is running on ABC or ESPN." Unfortunately, we didn't get any satisfactory response to our request. You will see in the letters what we got was, "Trust us. We will be good guys and take care of things."

That response stood in stark contrast to AOL's testimony on this same legislation just 1 year ago before this same committee where they said, "Strong, unequivocal Congressional action is required." And we would associate ourselves with AOL's view a year ago as opposed to their view today.

We are also influenced in believing that there is a role for the Government here by the history of anti-competitive practices of both of these companies, and I won't go into that a whole lot.

I will wind up just by saying there has been a lot of talk here about DSL today. We love DSL. We want to see the telephone companies encouraged. But we hope the committee will focus on the fact that today DSL is not a substitute to give consumers an alternative path to interactive television. Just to quote from one report, "Today's DSL deployments in technology are largely incapable of providing video," so when we think about this marketplace, please don't make the mistake of thinking that DSL, while it is a great substitute for higher-speed Internet access, it is not a good substitute for interactive television.

Thank you very much.

Mr. HYDE. Thank you, Mr. Padden.

[The prepared statement of Mr. Padden follows:]

PREPARED STATEMENT OF PRESTON PADDEN, EXECUTIVE VICE PRESIDENT, THE WALT DISNEY COMPANY, WASHINGTON, DC

Thank you Mr. Chairman. My name is Preston Padden. I am Executive Vice President, Government Relations, The Walt Disney Company. Disney strongly supports H.R. 1685 and H.R. 1686 and we commend Congressman Goodlatte and Congressman Boucher for their visionary leadership to preserve *consumer choice* in the emerging Internet marketplace.

At the outset, I would like to clearly define the interest of The Walt Disney Company regarding this legislation. Disney is a provider of creative content and services for Internet and television distribution. We are investing millions to develop compelling Internet content and services and to apply new technology to traditional television content to significantly enhance consumers' experience. But, we do not own any cable, telco or satellite pipelines to consumers' homes. Our sole interest in this legislation is to help foster a marketplace where consumers have the unfettered opportunity to choose—or to not choose—our creative content and our services based

solely on how good a job we do in creating and promoting our content and services. For us, and for consumers, the enemy is a marketplace where *consumer choice* is artificially limited or skewed by the conflicted business interests of companies that own both content and services of their own and a bottleneck pipeline to the consumers' home.

As this legislation moves forward, we urge the Congress to stay focused on enhancing *consumer choice*. After all, *consumer choice* is the touchstone of our national anti-trust and competition public policy. Specifically, we urge the Congress to focus on *consumer choice* in the context of the emerging Interactive Television marketplace. Interactive Television defines the content and services created by the convergence of traditional television and 2-way Internet service. Interactive Television will:

- empower consumers to select television and Internet content by genre (example: "click here for news");
- empower consumers to view simultaneously on a single screen both a television program and Internet content related to that television program (examples: "click here for real time statistics on this football game" or "click here to play along with *Who Wants To Be A Millionaire*");
- empower consumers to interact with e-mail, instant messaging or chat rooms while watching television on the same screen (example: "click here to participate in a chat room or live poll regarding this political debate");
- empower consumers to drill down to obtain more detail about a particular news story (example: "click here to get more detailed information about this Presidential nominating convention");
- empower consumers to interact with advertising messages (example: "click here to register to test drive this new Jeep"); and
- empower consumers to purchase goods and services featured in a television program (example: "click here to buy Regis Philbin's shirt").

As I hope you can see from these examples, assuring unlimited and unfettered *consumer choice* in Interactive Television content and services is critical to preserving fundamental American anti-trust, competition and First Amendment values. Because the narrowband Internet rides on open telephone facilities, consumers have enjoyed access to content and services from an unlimited array of diverse sources. As we move into broadband and into Interactive Television, we must assure that *consumer choice* is preserved. We look forward to working with the Committee, and with the sponsors of H.R. 1685 and H.R. 1686, to make sure that the legislative language is sufficient to safeguard *consumer choice* in the emerging market for Interactive Television.

The emergence of this new market is virtually defined by the proposed merger of AOL, Time Warner and EMI. The media colossus created by this proposed merger would represent an unprecedented concentration of content, bottleneck pipelines, "sticky applications" and operating systems. AOL/Time Warner/EMI would control:

- monopoly hybrid fiber-coax distribution pipelines reaching more than 20 million U.S. households;
- more than 50% of the U.S. residential dial-up Internet subscribers;
- one of the world's largest libraries of motion pictures and television programs and more than a dozen of the top cable channels including HBO, CNN, TNT, Cinemax, TBS and the Cartoon Network;
- set-top box hardware and software;
- the *overwhelmingly* dominant provider of Instant Messaging with more than 155 million users translating into 90% of the market;
- "sticky" applications such as chat rooms, buddy lists and e-mail; and
- 80% of the most popular music licensed by film and television producers

Preserving *consumer choice* within the AOL/Time Warner/EMI Interactive Television service is critical because millions of consumers will have little or no opportunity to obtain Interactive Television services from a different pipeline provider. AOL/Time Warner/EMI's two-way broadband, hybrid fiber-coax networks will enjoy inherent technical advantages in the provision of Interactive Television services. At least for the foreseeable future, telco twisted copper, even with DSL electronics, will not provide consumers with an alternative source of Interactive Television service. Even satellite will not be a good substitute. Satellite service is simply not available to millions of Americans who live in multi-family buildings or who lack a Southwest exposure. In addition, satellite is currently limited to a narrowband, twisted copper

return path and future advances promising two-way broadband satellite service, if they develop, are not likely to be cost competitive with the AOL/Time Warner/EMI hybrid, fiber-coax offering.

Because consumers will not enjoy good alternative sources of Interactive Television service, H.R. 1685 and H.R. 1686 should be crafted to assure open and unfettered *consumer choice* within the AOL/Time Warner/EMI service. It would be hard for me to express the public policy imperative any more eloquently than did AOL's George Vradenburg in a hearing on this same legislation just one year ago. Before striking a deal to buy Time Warner's bottleneck cable pipelines, Mr. Vradenburg stated:

"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 to telecommunications services at all levels is not thwarted."

Unfortunately, AOL's planned merger with Time Warner and EMI has produced a dramatic turn around in AOL's call for government action to protect consumer choice. Instead of "immediate and unequivocal Congressional action," AOL now favors forbearance in deference to the promise of voluntary openness—a "Trust Us" appeal. Unfortunately, consumers cannot rely on "Trust Us" because both AOL and Time Warner have demonstrated their propensity to restrict rather than enhance *consumer choice*. For example, AOL:

- refuses to allow interoperability with its Instant Messaging service;
- requires content partners in its "walled garden" to limit or eliminate links to sites outside the walled garden, thereby trapping consumers inside that restricted area for as much as 85% of their time online (by AOL's own admission); and
- designs client software that automatically disables the client software of competing ISPs.

And Time Warner:

- unilaterally shut off access to ABC Network programs and ABC local news to 8 million viewers;
- refused to carry state and regional cable news channels in Texas, Florida, Ohio, New England and the Northwest in order to prevent competition to its own existing and planned news channels;
- granted favorable channel positions to its own networks in New York;
- refused to carry Disney Channel on the basic tier (in order to favor its own Cartoon Network) on most of its cable systems; and
- blocks consumer access to electronic program guides (such as Gemstar) that compete with Time Warner's own program guides.

Both Time Warner and AOL have taken steps to moderate their anti-competitive behavior while their merger is being reviewed by government authorities. However, the history outlined above shows that "Trust us" is not enough. Disney tried to negotiate meaningful and specific commitments that AOL/Time Warner/EMI would provide consumers with access to our content and services no less favorable than they provide to their own content and services. As evident from the attached correspondence, those efforts failed. Absent the passage of strong legislation such as H.R. 1685 and H.R. 1686, AOL/Time Warner/EMI will abuse their ownership of both bottleneck conduit and content to limit and to skew *consumer choice* by:

- excluding competing content and services (e.g., dropping ABC);
- force-feeding AOL/Time Warner/EMI content (e.g., sending the customer to CNN when he or she clicks on a "news" icon, instead of offering a selection of competitive news choices);
- transmitting its own content "downstream" to consumers at preferential (i.e., faster) data rates;

- blocking critical, interactive "return path" communications between customers and competing content providers and services;
- limiting customers' ability to access locally "cached" data to their own content;
- favoring its own content in navigation systems and links; and
- favoring its own content with more simple and convenient consumer interfaces.

With the ever present touchstone of preserving *consumer choice*, Disney looks forward to working with this Committee and with the sponsors of H.R. 1685 and H.R. 1686 to make sure that our fundamental public policy values of anti-trust, competition and free expression are preserved in the emerging Interactive Television marketplace.



Anne M. Browary
President

February 18, 2000

Mr. Joseph Collins
Chairman & CEO
Time Warner Cable
290 Harbor Drive
Stamford, CT 06702

Dear Joe:

I must say that following our conversation of yesterday, I am even less optimistic that we will be able to bridge the material differences between us. This is particularly true with regard to our desire to bring Time Warner in line with the majority of the cable industry in offering The Disney Channel to consumers as part of a basic service (rather than an expensive premium service). Nonetheless, as I committed to do, I will consult with my colleagues and get back in touch.

In the meantime, I would like to highlight the importance of certain basic non-discrimination assurances that we believe should be a part of our agreement irrespective of where we end up on the business points. Specifically, such assurances should cover non-discrimination against Disney/ABC owned content, as compared to Time Warner (or, after your merger, AOL) owned content, with respect to:

- 1) channel position;
- 2) page placement;
- 3) navigation;
- 4) menu placement;
- 5) return path functionality;
- 6) customer interface;
- 7) caching; and
- 8) overall consumer availability and prominence.



Mr. Joseph Collins
February 18, 2000
Page 2

As you know, both Congress and antitrust regulators have grown increasingly concerned about "screen bias" as a means of steering consumers to affiliated service and content providers and away from unaffiliated providers. Indeed Congress included provisions in both the 1996 Telecommunications Act and the Satellite Home Viewer Improvement Act which, while not specifically applicable to cable, prohibited discrimination in presentation of content to consumers. Time Warner's own 1997 consent order with the FTC in connection with the Turner merger manifests similar concerns on the part of the regulators. The importance of this anti-discrimination issue increases exponentially as cable converts to digital and the Internet continues to expand as a distribution medium. Accordingly, we are looking to secure such non-discrimination assurances with respect to all of your non-broadcast distribution platforms including, without limitation, narrowband internet, broadband internet and cable.

The issue of assuring consumer access to our content on a non-discriminatory basis has always been a priority for us. Even more so in our dealings with Time Warner given our difficult negotiating history (particularly as compared with other cable companies) and Time Warner's enhanced market power to engage in discriminatory conduct should its planned merger with AOL be approved. In this regard, our point of view has been informed by AOL's strong advocacy of open access and the need to assure that ownership of distribution platforms is not permitted to skew competition in content.

In addition we will be seeking your assurance that in retransmitting our digital broadcast signals you will not block consumer access to any "bits" that a consumer could receive for free over the air.

I would be very grateful if you would provide me by early next week with definitive proposed language to provide these non-discrimination and non-blocking assurances.

Best regards,



The Walt Disney Company

Robert A. Iger
President and Chief Executive Officer

Dear Dick,

As discussed, below is a list of the various "access/non-discrimination" categories we would like to address with you.

As we discovered during our negotiation, our interests converge on many of these issues, as we seek to distribute our respective content over myriad platforms. We believe we will mutually benefit from a rigorous level of "content protection," and copyright enforcement, as new technologies prey upon our content without regard to value or ownership.

Although our two companies have been at odds on numerous issues, I believe it is also time for us to consider opportunities to work together, particularly in the area of interactive television. The access you provide will create a fertile ground for us both to develop a rich array of enhanced and interactive television features, which will ultimately offer your cable business countless new marketing opportunities.

In essence, we have 7 core concerns, and are primarily seeking a level of distribution comparable to what your company will afford its own program services and content. Many of these issues were raised during our negotiation, as well as during our meeting with Michael and Jerry.

I realize these are broad categories, and therefore believe we should discuss these in person as soon as possible:

Downstream program and data pass through:

AOL/TW channels and content will not receive preferential bandwidth or data rate treatment, and TW cable systems will not block consumer reception of services and features we provide, that are also passed through on a comparable basis in AOL/Time Warner program services.

Return Path Functionality:

AOL/TW will provide Disney/ABC with the same access to return path functionality as it provides its own program services, (or to third parties) for the purposes of interacting with our consumers.

Menus, Guides, Navigation and Channel Placement:

AOL/TW Channels and content (and third party content) will not be featured more prominently than Disney/ABC channels and content. This would include channel positioning, featured placement on electronic program guides, and home page or front screen positioning.



R. Parsons
Pg. 2

Caching:

AOL/TW will cache, or provide Disney/ABC the opportunity to cache content equal to the level and manner of caching provided to AOL/TW owned content, resulting in a comparable consumer experience.

Enhanced/Interactive television:

Disney/ABC services will be provided comparable "point and click" functionality to AOL/TW program services, for the purposes of providing its customers with enhanced television services, or interactive television.

Video Image Size and Quality

Without Disney/ABC's permission, AOL/TW will not reduce the image size from full-screen or the quality of the audio and video signal as originated by the Disney/ABC services.

License Agreement:

AOL/Time Warner acknowledges and agrees that it must negotiate licenses with Disney/ABC for interacting with our content, or for authorizing and or enabling such interactivity by others.

I look forward to discussing these issues, and any ideas you have about ways that they might be meaningfully addressed in the context of an ongoing negotiation.

Sincerely,

5/31/00

Mr. Richard Parsons
President
Time Warner Inc.
75 Rockefeller Plaza
29th Floor
New York, New York 10019

cc. Michael D. Eisner

TIME WARNER

Richard D. Parsons
President

June 15, 2000

Mr. Robert Iger
President & Chief Operating Officer
The Walt Disney Company
500 South Buena Vista Street
Burbank, CA 91521

Dear Bob:

Thanks for your letter of May 31st. Like you, I believe that despite our healthy rivalry as competitors—and any occasional flare-ups that may result—we're on the same wavelength when it comes to some fundamental issues of public policy. In fact, if there's a silver lining to our recent contretemps, I'm hopeful it's in our shared willingness to engage in a wide-ranging discussion of the digital transformation that is redefining the competitive environment for all of us.

Obviously the questions involved are complex and reaching commercial arrangements in the broad categories you set out won't happen overnight. This is further complicated by the regulatory review we are presently undergoing with regard to our pending merger with America Online. Yet, while it would be unwise to prejudice our position by seeking a private agreement with a single competitor, I believe that a more workable alternative is available to us.

As I see it, we have the opportunity to make clear that, along with our long-term desire to resolve specific business differences, we are in agreement on matters of basic importance to the consumers we serve and the talent we employ. If we do it right, a public statement on the principles we hold in common could go a long way toward focusing attention on concerns vital to the future of our companies as well as the entire industry.

Such a statement should address the two issues you raise—i.e., "a rigorous level of 'content protection' and copyright enforcement," and a commitment to providing consumers with the broadest possible selection of content. (I know that Michael has been active on these issues, and so has Jerry. The common ground they share is real, not contrived.) Without implying any definitive language, I think a joint statement might read something like this:

The digital future has arrived. The explosive proliferation of the Internet and the convergence of media into an instantly available, universally accessible interactive framework are already transforming our society and our economy. The long-term implications for expanding individual freedom, enhancing community empowerment and strengthening human solidarity are profound.

In order for these immensely exciting opportunities to be fully

realized, the creative and economic momentum driving the digital revolution must be sustained. Governments must refrain from imposing artificial constraints that impede private-sector investment and raise barriers to innovation. The private sector must actively promote the powerfully democratic nature of the digital marketplace, while at the same time insisting on copyright protection, which is the lifeblood of intellectual and creative labor.

For our part, we enthusiastically embrace the competitive challenge of the Internet.

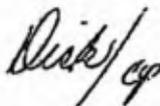
We pledge ourselves to helping ensure that consumers have a broad range of choices from as diverse an ensemble of content providers as technology makes possible. The criteria we use for offering these choices—and the only ones that consumers will settle for—must always be quality and originality, not corporate ownership.

Integral to the creation of content is copyright protection. Without this basic legal protection, artists and intellectuals can be denied the rewards of their work, and deprived of the means and motive to continue. Today the threats to copyright protection are greater than ever before. Unless adequate safeguards are instituted and enforced, the creative community will be stripped of any incentive to invest its time, talent and genius in producing material that is routinely subject to infringement and outright theft.

We believe the Internet is the greatest tool in human history for enhancing creativity and advancing artistic diversity. We pledge ourselves to seeking the necessary levels of copyright protection for all those whose work is the soul and inspiration of this new medium.

I hope you'll agree that a statement like this could help put forward priorities that are vital to each of us. We'd work closely, of course, in shaping language to which Michael and Jerry can be equally comfortable attaching their names.

Sincerely,



cc: G.M. Levin

Mr. HYDE. Mr. Baker?

STATEMENT OF DAVE BAKER, VICE PRESIDENT FOR LAW AND PUBLIC POLICY, EARTHLINK, INC., ATLANTA, GA, ON BEHALF OF THE OPENNET COALITION

Mr. BAKER. Chairman Hyde, Ranking Member Conyers, and members of the committee, I am Dave Baker, vice president for law and policy for EarthLink, headquartered in Atlanta. EarthLink is now the Nation's second-largest Internet service provider, serving approximately 3.5 million customers throughout the country.

I am pleased to appear today on behalf of the OpenNET Coalition, of which EarthLink is a charter member. OpenNET is a na-

tional coalition of more than 980 local, regional, and national ISPs and communications providers that have joined together to promote the rights of all consumers to obtain affordable, high-speed access to the Internet from the ISP of their choice.

Founded in 1999, OpenNET has quickly grown to become the largest organization of ISPs in the country. Thank you for the opportunity to share with you today OpenNET's views regarding the open access provisions of H.R. 1686 and H.R. 1685.

OpenNET commends Congressmen Goodlatte and Boucher for their early understanding of the open access debate, its implications for consumers, ISP competition, and the future architecture of the Internet. In their legislation, they have shown great foresight in authoring provisions which would quickly establish an enforceable national open access policy for the broadband environment in a direct, non-regulatory way. These provisions would ensure that consumers of broadband Internet services have multiple competitive ISP choices, regardless of the platform they use.

Such legislation is needed because incumbent cable companies that offer broadband services do not provide open access to their systems. If a consumer today wants high-speed Internet access through a cable modem, he or she has no choice but to buy and use the bundled offering of their cable company's own affiliated ISP. Cable companies are tying their transmission and ISP offerings together in making their affiliated ISP exclusive. They have implemented this structure notwithstanding their dominance over central transmission facilities and their 90 percent market share in the broadband market.

There has been some progress in recent months toward open access, but there is still a long way to go. Within the past year, the cable industry's opposing arguments that open access was technically infeasible or would chill investment or would slow deployment or is bad for business, these arguments have eroded. An increasing number of large cable companies have begun to at least promise eventual open access; however, we remain concerned that the cable industry still seeks to delay open access for as long as possible. This would allow them to gain a first mover advantage, and, by their own admission, rope off from competition as many customers of their bundled high-speed broadband services as possible.

Given the continued resistance of the cable industry toward open access, a catalyst is needed if there will be any meaningful, widespread open access any time soon. The open access provisions of H.R. 1686 and H.R. 1685 provide this catalyst.

Among the positive developments we mentioned, these seek to emphasize rather than diminish the importance of this legislation. In December 1999, when my company was still known as Mindspring, I negotiated a statement of principles with AT&T which we submitted to the FCC. I noted at that time AT&T's commitment toward eventual open access was a step in the right direction but were, nonetheless, too limited and indefinite to stand in lieu of a comprehensive national policy.

In February of this year, AOL and Time Warner issued their memorandum of understanding which set forth more-detailed open access principles.

And in a landmark decision just last month in the *AT&T v. City of Portland* case, the U.S. court of appeals for the ninth circuit ruled that cable broadband service is a telecommunications service. As such, it is subject to Federal law requiring nondiscriminatory access and interconnection.

In light of this decision, the FCC announced on June 30th that it would finally initiate a long-requested proceeding to address cable Internet access; however, as the FCC, itself, has indicated many times in the past, such a proceeding will take time, and then we will still have to face litigation following that.

Consumers of emerging high-speed broadband services should not have to wait years for cable companies with market power to unilaterally decide whether or when they might offer access to unaffiliated ISPs so that consumers can have choice.

Mr. Chairman, open access has a proven track record of promoting consumer choice, competition, and innovation. Because of open access policies and narrow band, 97 percent of Internet users throughout the country can choose from among several, even hundreds of ISPs. Compare this to cable, where 97 percent of customers have no choice in who their cable company is or in the content they provide.

As we begin to offer high-speed Internet access over cable, we are at a crossroads. Will we follow the open, pro-consumer choice model of the Internet or the closed, no-choice model of cable?

At every turn, policy-makers have sought to give consumers greater choice in their communications services. This committee has played a leading role in crafting many of the laws that foster competition. Broadband Internet access over cable should be no exception.

Thank you again for inviting me to share OpenNET's views, and I look forward to your questions.

Mr. HYDE. Thank you, Mr. Baker.

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF DAVE BAKER, VICE PRESIDENT FOR LAW AND PUBLIC POLICY, EARTHLINK, INC., ATLANTA, GA, ON BEHALF OF THE OPENNET COALITION

SUMMARY

Chairman Hyde, Ranking Member Conyers, and Members of the Committee on the Judiciary, thank you for the opportunity to testify before you today regarding the open access provisions of 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.

I am Dave Baker, Vice President for Law and Public Policy with EarthLink, Inc., the nation's second largest Internet Service Provider (ISP) serving approximately 3.5 million customers throughout the country. I am pleased to appear today on behalf of the openNET Coalition, a national organization of more than 980 local, regional and national ISPs that have joined together to promote the rights of all consumers to obtain affordable, high speed access to the Internet from the ISP of their choice.

Incumbent cable companies currently offering broadband cable services do not provide open access to their systems by unaffiliated ISPs. A consumer of cable broadband transmission service must buy the ISP service bundled into the offering by the cable company (generally the ISP owned by or affiliated with the cable company). If a cable broadband consumer wants to use the services of any other ISP, he or she does not currently have the option of buying only the broadband transmission service from the cable company. In effect, such consumers have to pay for two ISPs to get the one they want.

The openNET coalition believes that a national open access policy is required to ensure that consumers have multiple ISP choices in the new broadband environment. OpenNET endorses the open access provisions in H.R. 1686 and H.R. 1685 because they would firmly establish an *enforceable* national nondiscriminatory policy applicable to cable broadband providers. Significantly, this approach would not negate the ability of parties to negotiate specific terms and conditions for open access in the marketplace. Enactment of these open access provisions would quickly end the cable companies' classic anticompetitive practice of tying their cable broadband transport services to "exclusive" ISP services provided by their affiliated ISP.

The openNET coalition maintains support for a federal legislative approach to open access notwithstanding several positive events that have recently occurred in the marketplace which have significantly advanced the progress of openNET's cause, including the acceptance of open access "in concept" by a number of the nation's largest cable operators. OpenNET also believes that the Ninth Circuit's recent ruling that cable broadband service is a "telecommunications service" fully confirms the need for a national open access policy which Congress is well-suited to establish.

OpenNET is encouraged by these recent developments, but none of them substitutes for the near-term establishment of a national open access policy which can be effectively enforced nationwide. OpenNET believes that this national open access policy should be established *as soon as possible*. Given the resistance of the cable industry to move quickly to implement open access, openNET submits that a catalyst is required to make the cable industry's implementation of open access a near-term reality. Enactment of federal open access legislation—such as the direct, non-regulatory antitrust provisions of H.R. 1686 and H.R. 1685—would provide that catalyst. These provisions would accelerate the national implementation of open access by cable providers; support marketplace negotiations while affording ISPs with an effective means of enforcement; sustain the open nature of the Internet's architecture and provide incentives for new innovation; and, most importantly, ensure that cable broadband consumers gain the benefits of competition, choice and innovation which are hallmarks of our Nation's telecommunications policy.

STATEMENT

Chairman Hyde, Ranking Member Conyers, and Members of the Committee on the Judiciary, thank you for the opportunity to testify before you today regarding the open access provisions of 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.

I am Dave Baker, Vice President for Law and Public Policy with EarthLink, Inc. Headquartered in Atlanta, EarthLink is now the nation's second largest Internet Service Provider (ISP) serving approximately 3.5 million customers throughout the country.

I am pleased to appear today on behalf of the OpenNet Coalition, of which EarthLink is a charter member. OpenNet is a national organization of more than 980 local, regional and national ISPs and communications providers that have joined together to promote the rights of all consumers to obtain affordable, high speed access to the Internet from the ISP of their choice. Founded in early 1999, OpenNet has grown to become the largest ISP organization in the country. OpenNet supports "open access"—the ability of consumers to use their ISP of choice over a broadband cable line the same way that they have always been able to do using a telephone line. OpenNet firmly believes that "open access" policies applied to the emerging broadband environment are critical for sustaining the Internet's open, end-to-end architecture. This open design has been the source of the Internet's explosive expansion, the catalyst for sustained information technology innovation, and the driver of extraordinary economic growth and efficiency.

When consumers today get Internet access over telephone company networks, either through narrowband dial-up access or through broadband digital subscriber lines (DSL), they already enjoy the benefits of an open access framework. Put simply, consumers are not forced to use or pay for their local phone company's affiliated ISP. Almost all consumers throughout the country can choose from among several Internet Service Providers; those in large cities can choose from among hundreds serving their area.

There are over 6,000 ISPs nationwide. Most are local "Mom and Pop" small businesses. Without the open access policies which apply to the phone companies' provision of Internet transmission services, the vast majority of these ISPs would not exist. Open access policy provided the foundation for the investment, innovation,

services and competition which these 6,000+ ISPs have brought to consumers over the past several years.

By contrast, incumbent cable companies providing broadband services do not provide open access to their systems. If a consumer today wants high speed Internet access through a cable modem, he or she has no choice but to buy and use the bundled offering of their cable company's own affiliated ISP. From the start, cable companies are establishing their broadband offerings in a classically anticompetitive way by tying their transmission and ISP offerings together and making their affiliated ISP exclusive. They have implemented this structure notwithstanding their dominance over essential transmission facilities in the broadband market.

Since its inception, OpenNet has led the national fight for open access and against closed cable monopolies. We are glad to report that some progress has been made, but there is still a long way to go. Within the past year, the cable industry's opposing arguments—that open access is impossible, or is “technically infeasible,” or would chill investment, or would slow deployment, or is “bad for business”—have eroded. An increasing number of large cable operators have begun to at least pay lip service to open access.

OpenNet remains concerned, however, that the cable industry still seeks to delay open access for as long as possible. This would allow them to gain a “first mover” advantage and “rope off” from competition as many customers of their bundled high speed cable broadband services as possible. Given the continued resistance of the cable industry towards open access, a catalyst is required if there will be any meaningful widespread open access any time soon. In other words, a coherent national policy supporting open access is more important than ever.

The open access provisions of H.R. 1686 and H.R. 1685 provide this catalyst. They would ensure that consumers throughout the country could enjoy the benefits of open access, without having to wait on the artificial timeframes that cable companies have established before they will even begin to open their systems. The open access provisions of H.R. 1686 and H.R. 1685 would firmly establish an *enforceable* national framework for nondiscriminatory access to cable broadband facilities without restricting the ability of parties to negotiate specific terms and conditions for open access in the marketplace. Enactment of these open access provisions would quickly end the cable companies' ongoing, classic anticompetitive practice of tying their cable broadband transport services to exclusive ISP services provided by their affiliated ISP. H.R. 1686 and H.R. 1685 would require broadband transport service providers, both cable companies and telephone companies alike, to abide by open access requirements so that consumers have a free and fair choice to select from a range of competitive ISPs regardless of the broadband platform they use for transport.

There have been some positive developments both in the marketplace and in the courts with regard to open access in recent months. However, they serve to emphasize, rather than diminish, the importance of the open access provisions of H.R. 1686 and H.R. 1685.

In December, 1999, AT&T, now the nation's largest cable operator, signed a statement of principles with MindSpring Enterprises, as my company was then known, which we submitted to the FCC. I noted at that time that AT&T's commitments toward eventual open access were a step in the right direction, but were nonetheless too limited and indefinite to stand in lieu of a comprehensive national policy for open access.

More recently, AT&T announced that it would conduct future open access trials in Massachusetts and Boulder, Colorado. My company, EarthLink, and several other OpenNet members hope to be able to participate in these trials.

In February, 2000, AOL and Time Warner signed their Memorandum of Understanding (MOU) which set forth more detailed open access principles which could serve as the foundation for a national open access standard implemented by the entire cable broadband industry.

And, in a landmark decision issued on June 22, 2000, in *AT&T v. City of Portland*, the U.S. Court of Appeals for the Ninth Circuit ruled that local governments could not require open access as a condition of transferring a local cable franchise because cable broadband service is a “telecommunications service.” As such, it is subject to federal law requiring nondiscriminatory access and establishing interconnection rights for other telecommunications carriers.

While OpenNet is encouraged by these recent developments, none of them substitutes for a comprehensive, enforceable national open access policy. To date, none of the various voluntary open access commitments by some large cable companies is close to meaningful implementation and the enforcement of these commitments remains unclear at best. In most cases, they raise more questions than they answer. When will implementation happen specifically? Will these voluntary commitments

support robust competition or only favor a few "preferred" ISPs? How will cable operators ensure that they do not discriminate against unaffiliated ISPs? How will ISPs enforce these commitments?

In light of the recent Ninth Circuit decision, the FCC announced on June 30 that it would finally initiate a long-requested proceeding to address cable Internet access. However, as the FCC itself has indicated many times in the past, such a proceeding could take years to complete. And any eventual FCC rule establishing open access would undoubtedly be challenged in court creating further delay, litigation expenses and business uncertainty.

Consumers of emerging high-speed broadband services should not have to wait for cable companies with market power to unilaterally decide whether or when they might offer access to unaffiliated ISPs so that their broadband customers have a choice of multiple ISPs. Similarly, consumers should not have to wait the years it would require for the FCC to complete an open access proceeding, already compounded by the lack of any FCC action to date. And while the Ninth Circuit decision has established clarity in the law in at least one portion of the country, the process by which that decision could be given national applicability would again take several years and would require the commitment of substantial litigation resources.

To retain the ability to reach their customers as the market continues its transition to high speed, broadband technologies, the 6,000+ ISPs operating today need a near-term opportunity for open access to broadband infrastructures. They require a certain and decisive way to enforce on a national basis the policy of open access which has now won at least grudging support from its critics in the cable industry.

The Goodlatte and Boucher open access provisions before the Committee provide ISPs and consumers with the immediate *national* enforcement capability needed to make a *national* open access policy effective. H.R. 1686 and H.R. 1685 set forth an efficient, nonregulatory approach to open access by establishing a presumption of an antitrust violation if a broadband transport provider with market power, such as an incumbent cable company, does not provide open, nondiscriminatory access to unaffiliated ISPs. For aggrieved ISPs denied access to a cable broadband system or discriminated against in the type of access provided to them by the cable provider, these measures provide an efficient, case-by-case enforcement tool. As the marketplace moves in the direction of high speed broadband technologies, this nonregulatory, direct antitrust approach to open access would ensure that cable broadband providers do not lock out unaffiliated ISPs from their broadband networks and would deter cable companies from discriminating against them when they provide access.

Enactment of the Goodlatte and Boucher open access approach would avoid the need for protracted regulatory analyses and proceedings by the FCC which, at this point, could serve to delay the establishment of an enforceable national open access policy in the broadband Internet environment. Had the FCC expeditiously exercised jurisdiction and initiated a rulemaking shortly after the national open access debate fully ignited in late 1998, it is conceivable that a national open access policy could have been established by the FCC by now. Given the FCC's past decision not to act, the rapid pace at which support for open access as a national policy has grown in less than two years, and the well-reasoned decision of the Ninth Circuit that cable broadband transport is a "telecommunications service," OpenNet believes that a federal legislative approach—such as the open access provisions of H.R. 1685 and H.R. 1686—is a direct and timely way to resolve the open access debate in favor of consumers, competition and innovation.

OpenNet believes that in order to be effective, negotiated open access arrangements must include the following seven minimum standards:

- Consumers of broadband cable services should have a choice among multiple ISPs, without being forced to pay for or go through their cable company's affiliated ISP.
- Cable broadband providers must negotiate at arms-length nondiscriminatory commercial arrangements with both affiliated ISPs and non-affiliated ISPs (including "first screen" placement).
- ISPs should have the choice of operating on a national, regional, or local basis.
- Cable operators must provide nondiscriminatory network management of their systems.
- ISPs should be allowed to purchase broadband backbone transport services of their choice.
- Both the ISP and the cable operator should have the opportunity for a direct relationship with the customer.

- ISPs should be allowed to provide video streaming and there should be no discriminatory restrictions on provision of content.

These elements should be used by policymakers as a minimum standard by which to measure whether private negotiations are working to implement open access and should inform the process by which open access obligations are enforced. To date, the AOL and Time Warner MOU comes closest to fulfilling these requirements and could form the basis for an effective national open access policy for cable broadband providers. AOL and Time Warner have committed to running an open system, but questions regarding the MOU's implementation timing and enforcement remain to be resolved. Enactment of federal legislation, such as the Goodlatte and Boucher open access provisions, would accelerate the rollout of these and other open access commitments, apply the obligation uniformly to broadband providers, and provide a means of effective enforcement.

Mr. Chairman, in closing, let me underscore that the proper resolution of the open access debate is critically important to the future of the Internet. Open access has a proven track record of producing consumer choice, competition and innovation. Because of open access policies applied to the narrowband marketplace, over 97% of Internet users throughout the country, even in the smallest towns, can choose from among several Internet Service Providers. Compare this to cable, where over 97% of customers throughout the country have NO choice in the selection of their cable company.

It has been consistent policy in this country for over 30 years to give consumers greater choice in their telecommunications services. The federal court decision that broke up AT&T in 1984 and created competition in long distance helped create a competitive market in which rates today are 2/3 lower than they were then. In the Telecommunications Act of 1996, Congress established the framework to bring these same benefits of competition to local phone service and to wireless. Recent legislation such as the Satellite Home Viewer Act seeks to end cable's longstanding monopoly over multi-channel video programming. And consumers have always had competitive choice in ISPs in large part because FCC decisions over the past thirty years allowed such information services to travel unfettered over phone lines.

At every turn, policymakers have sought to give consumers greater choice in their communications services. Mr. Chairman, this Committee has played a leading role in crafting many of the laws that have fostered that competition. Broadband Internet access over cable should be no exception.

The OpenNet coalition urges you and the Committee to ensure that open access is the law of the land as the Internet makes a transition to high speed, broadband applications. We commend Committee Members Congressman Goodlatte and Congressman Boucher for their early understanding of this critical policy debate and for demonstrating the leadership to author a nonregulatory, legislative approach that would quickly establish a national open access policy.

Thank you again for inviting me to share OpenNet's views. I would be pleased to answer any questions you may have.

Mr. HYDE. Mr. Cali?

STATEMENT OF LEONARD J. CALI, VICE PRESIDENT, FEDERAL GOVERNMENT AFFAIRS, AT&T, WASHINGTON, DC

Mr. CALI. Chairman Hyde, Ranking Member Conyers, and members of the committee, it is a pleasure to be here with you today.

My message is this: The marketplace is effectively addressing the primary issues of concern in H.R. 1685 and H.R. 1686, and this has been confirmed since this committee last held hearings on these bills.

There is no public interest reason to change these rules. To the contrary, the proposals would destroy the incentive-based framework of the 1996 act, create new marketplace uncertainty, introduce renewed opportunities for litigation, and otherwise impose unnecessary costs on competitive carriers.

First, the marketplace is working. Today more than three million subscribers to DSL and cable modem services enjoy high-speed Internet access. Analysts tell us by the end of this year high-speed

technology will be available to 54 percent or more of American homes, and that will rise to 80 percent by the year 2002.

When considering my written submission, I would ask the members of the committee, in particular, to consider two attachments to the back of the testimony. Those are two maps. The first map depicts more than 1,000 high-speed Internet points of access that have been deployed in the last 4 years by the competitive industry. As a result of that deployment, more than 94 percent—94.7 percent of Americans live within 50 miles of one of these high-speed POPs.

The second map depicts by State the percent of Americans in each State living within 50 miles of one of these high-speed Internet POPs.

This is the result of more than 40 Internet backbone providers competing, and six new major networks coming online, and we need to step back and consider what achieved this outcome. It is competition. We have some staggering numbers. In the last 4 years, the cable industry has spent \$36 billion to upgrade its networks and convert them to an advanced infrastructure. In addition, the CLECs have deployed 1,400 data switches and deployed 162,000 fiber route miles.

As a result, the Bell companies have begun to announce major deployments in the last year. SBC has announced that it will invest \$6 billion to reach 80 percent of its households in its territory. Bell Atlantic will invest \$1 billion a year until 2005 to upgrade its network. And U.S. West has recently announced that it will extend DSL deployments to 30 cities.

Meanwhile, competition is driving down prices. Just last week Verizon announced that it was reducing DSL rates from \$49.95 to \$39.95. In my testimony, I have also identified that other Bells have done the same. In fact, in one instance one Bell company has reduced DSL monthly charges from \$89 in 1998 to \$39 today.

Meanwhile, the residential local exchange market remains dominated by the Bell companies. And what we are hearing today about rural DSL deployment or broadband deployment by the Bell companies is very familiar. It is what we have heard before as to broadband deployment, generally. But what we now know is that the Bell companies can, and, in fact, have deployed broadband.

Just this May, Bell South announced that it will deploy a high-speed infrastructure in every LATA in Georgia, including rural LATAs.

But in all events, since last year we now know that the 1996 act requirements for entry into the LD market are attainable. They were attained in New York and they were attained in Texas. And other companies can attain entry into the interLATA market if they just open their local exchange market.

This is a crucial point. That remains a market dominated by the local exchange carriers. So when we look at the promising growth of competition in broadband deployment, we look at the local exchange market, particularly for residential customers, and we realize that it is dominated by the local exchange carriers. Granting the relief proposed here will only solidify that position.

In addition, you should also consider this: Passage of this legislation would hurt consumers in the 47 jurisdictions where the Bell companies do not today have relief, and that is because if this leg-

isolation were enacted, for all the reasons you have heard this morning, the Bells would have no incentive to open markets in those States. As a result, the competitive investment dollars that have been flowing since the 1996 act was passed will flow to New York and Texas but away from those States where less competitive opportunities exist.

In addition, I would like to mention that the marketplace is also working in a second important respect. Cable companies will offer choice of ISPs to their consumers. Last June, AT&T told this committee that it would provide consumers access to content of their choice. In a December letter to Chairman Kennard, AT&T confirmed that it would, upon expiration of its exclusive contract with Excite@Home, provide consumers with a choice of ISPs. And earlier this summer AT&T announced that it will conduct two trials to work out the technical issues involved in offering choice.

This is a result of our own self interest. The more that we meet our customers' needs, the more customers we will have, the more traffic we will carry, and the more likely we will be able to sell other cable and telephony offers.

Now we hear that other cable providers are also indicating that they will provide customers with choice. These steps confirm that the marketplace is addressing these concerns. There is no need for legislative action that would create uncertainty, give rise to litigation, and slow deployment of competitive offerings.

Mr. Chairman and members of the committee, we respectfully urge the committee to promote continued deployment of broadband in a swift, widespread, and commercially reasonable manner by maintaining the act's competitive incentives.

Thank you.

Mr. HYDE. Thank you, Mr. Cali.

[The prepared statement of Mr. Cali follows:]

PREPARED STATEMENT OF LEONARD J. CALI, VICE PRESIDENT, FEDERAL GOVERNMENT AFFAIRS, AT&T, WASHINGTON, DC

Chairman Hyde, Ranking Member Conyers, and members of the Committee, it is a pleasure to be with you today, and to discuss the many developments that have taken place in the telecommunications marketplace since the Committee's last hearing on these issues on June 30, 1999. AT&T and hundreds of competitive providers are working harder than ever to provide consumers with advanced technologies and services at affordable prices. The rapid development and deployment of these new services is a direct result of the opportunities created by the Telecommunications Act of 1996. Congress and this Committee should take great pride in this landmark legislation. It is transforming the way we communicate and increasing competition in the telecommunications marketplace.

My message to you today is this: the marketplace is effectively addressing the primary issues of concern in H.R. 1685, the "Internet Growth and Development Act," and H.R. 1686, the "Internet Freedom Act." It is generating unprecedented investment in new infrastructure and services, and giving millions of consumers new choices, quality services, and lower prices for broadband services. Congress should not jeopardize this remarkable success by gutting the 1996 Act, creating new marketplace uncertainty, and undoing the reforms that made this progress possible.

Last year, AT&T testified before this Committee that the provisions of H.R. 1685 and H.R. 1686 that would amend our antitrust laws and modify the long distance restrictions of the 1996 Act were both unwarranted and unwise. The bills address problems that do not exist in the marketplace, and do so in ways that would distort antitrust jurisprudence, retard competitive investments, lead to regulation of the Internet, and subvert the incentive-based framework of the 1996 Act. Rather than restate these arguments, I have attached to this statement a copy of AT&T's written testimony from last year. In addition, I request that the July 29, 1999 letter from

Judge Robert H. Bork to you, Mr. Chairman, along with his statement analyzing the legal and policy implications of these two bills, be made a part of today's record. With this introduction, I would like to focus my testimony on developments in the marketplace over the last year that underscore the case against re-opening the Act.

The Broadband Marketplace Is Working, With Rapidly Expanding Availability Of Broadband Offerings And Sharply Declining Prices

Taking advantage of the new opportunities created by the 1996 Act, and with increasing certainty about what the Act provides, industry participants have devoted tremendous resources and staggering investments to the development and deployment of advanced technologies and services. These participants include cable companies, competitive local exchange carriers, satellite providers, wireless providers, and the incumbent local phone companies. There is, in fact, a broadband race underway that is perhaps the most significant development resulting from the 1996 Act, and one that is having a very real impact on consumers. Prior to enactment of the 1996 Act, there were only a handful of potential local exchange competitors, and consumers were only able to access the Internet via dial-up access or an expensive T-1 line. Today, there are 300-plus competitive local exchange carriers ("CLECs"),¹ and many consumers can choose to access the Internet using competing and high-speed technologies, such as those offered by DSL, cable modems, satellite, and fixed wireless offerings. In addition, notwithstanding contrary claims based on outdated or incomplete data, dozens of competitive providers have, in the last four years, blanketed the Nation with over 1,000 high-speed Internet points of presence ("POPs"). As a result, today 95% of all Americans live within 50 miles of one of these competitively provided POPs (as depicted in the attached maps of the United States). And even this understates the level of access to the Internet backbone because local ISPs aggregate onto high-speed private lines the demand of local communities for transport to the Internet backbone, regardless of the distance to the Internet POP.

As a result of the growth of investment and competitive activity during the last 4 years, increasing numbers of American businesses and residential consumers in all regions of the country are able to choose from a greater number of technologies and broadband offerings at lower costs for their communications needs. For instance, today more than 3 million American subscribe to high-speed data services using either cable modem or DSL technology, and that number is rapidly increasing. Moreover, analysts estimate that cable modems will be available to 54 percent of U.S. households by the end of this year, and more than 80 percent by 2002.² In addition, the analysts tell us that DSL service should be available to over 36 percent of U.S. homes by year-end, and 65% in 2002.³ All of this is the result of the broadband competition that the 1996 Act made possible. This competition means more choices and lower prices—clear evidence that the marketplace is meeting the very needs that these two bills would address.

The cable industry has taken a leading role in bringing broadband offerings to residential consumers. Cable modems provide Internet access at speeds up to 100 times faster than dial-up telephone modems. Since 1996, the cable industry has invested more than \$31 billion—and the number is growing everyday—to enable this technology by rebuilding cable plant and making cable facilities two-way interactive systems through the use of hybrid fiber coax networks.⁴ As of May 2000, there were over 2 million cable modem subscribers in the United States, and cable modem service was available to more than 48 million homes in the U.S and Canada, or 44 percent of the homes in the cable service area. Analysts project that 7,500 high-speed cable modem service subscriptions are being added every day in North America, with an overwhelming majority of those in the United States.⁵

The cable industry has not been alone among the competitors. Fixed wireless providers, including companies such as AT&T, Winstar, Nextlink, and Teligent are investing significant resources to develop fixed wireless technologies that will use radio frequency to transmit large amounts of data and permit American businesses and consumers to obtain high speed Internet access. In addition, competitive local exchange carriers that have come to be known as "data LECs" or "DLECs" are rapidly deploying DSL technology for high-speed Internet access. (See attached chart of annual investment in infrastructure.) As of June, 2000, more than one million Americans subscribe to DSL services provided by competitive and incumbent local

¹ C.E. Unterberg, Towbin, *Broadband Communications Providers*, June 14, 2000, p. 5.

² Morgan Stanley Dean Witter, *The Broadband Report*, May 1 2000, p. 8.

³ Morgan Stanley Dean Witter, *The Broadband Report*, May 1 2000, p. 8.

⁴ Remarks of James Ewalt, Vice President of Public Affairs, National Cable Television Association, to the Economic Development Forum, Economic Development Administration and the U.S. Conference of Mayors, Albuquerque, New Mexico, June 1, 2000.

⁵ C.E. Unterberg, Towbin, *Broadband Communications Providers*, June 14, 2000, p. 8.

exchange carriers, and analysts project that number will exceed 2.1 million subscribers by year's end.⁶ As of the end of the first quarter of this year, three of the top eight DSL service providers are competitive carriers, representing 22 percent of DSL subscribers. Some of these companies, like Covad Communications, did not even exist prior to enactment of the 1996 Act.

DSL technology has existed for more than 10 years, but until recently the incumbent monopoly providers have had no incentive to deploy it. In recent months, however, spurred by this growing broadband competition, the incumbent carriers have responded with their own burgeoning DSL deployment. For example, SBC announced in October that it will devote \$6 billion to provide 80 percent of its customers with DSL service by 2002. Bell Atlantic has also announced that it will invest \$1 billion per year until 2005 to further develop its fiber network. And just last month, US West announced that it was expanding its DSL service to 30 new cities.⁷

Developing competition is not only driving the incumbent carriers to deploy DSL, but where competition exists, it is also forcing the incumbent carriers to reduce their DSL charges to consumers. Bell Atlantic, for instance, just announced that it is lowering its DSL rates from \$49.95 to \$39.95 per month. Other Bell companies have similarly slashed their charges, with one Bell company having been forced to reduce its monthly charge from \$89 in 1998 to \$49 in 1999 and again to \$39 in 2000. (See attached chart of RBOCs DSL pricing changes.) While these companies might be commended for these efforts, it is only the developing competition—and the prospect of greater competition—that is driving these aggressive roll out strategies and price reductions.

In short, during the past 12 months, market participants in all regions of the country have greatly increased their deployment of various broadband technologies. At the same time, prices for these services have fallen dramatically. The deployment to date has required vast sums of capital that the companies have been able to raise in the marketplace because of the growing regulatory certainty and framework provided by the 1996 Act. Congress should not jeopardize the further deployment of these technologies nor the competition that exists today by passing legislation that would re-open the 1996 Act and create new and uncertain obligations.

The Bell Companies Have Demonstrated The Ability And Incentive To Deploy Broadband Services Without Obtaining Further Long Distance Relief, And Such Relief Is, In All Events, Within Their Reach

This discussion also confirms that, notwithstanding their claims to the contrary, the Bell companies do not need long distance "relief" to deploy broadband services. They are amply able to do so, and have done so under the spur of developing broadband competition.

Since the Committee's last hearing on these bills, moreover, it has been confirmed that the Bell companies themselves hold the key to obtaining the authority to provide long distance services, and that they will make efforts to open their local markets in order to do so. For example, in December, the FCC granted Bell Atlantic permission under Section 271 of the Act to provide interLATA service in New York. Little more than two weeks ago, the FCC also granted SBC approval to provide interLATA service in Texas. Although AT&T believes that each of these Bell company applications fell short of what the Act requires in particular respects, it is clear that the requirements of Section 271 of the Act are attainable and can be met, if a Bell Company takes steps to open its local markets to competition.

This is a particularly significant point. As AT&T testified before this Committee last year, in order to foster local competition, the 1996 Act permits in-region interLATA authority only after a Bell company has opened its market to competition. This incentive-based approach takes full advantage of the long distance restriction to provide the Bell companies reason to open their local markets for the benefit of all consumers. Too much remains to be done for Congress now to remove or lessen this incentive. If one thing has not changed since this Committee's last hearing on this bill, it is the continuing dominance of the local exchange market by the Bell companies and other incumbent local carriers. CLECs account for only about 6 to 8 percent of the total local telecommunications market,⁸ and far less of residential local telephone service. As a result, and notwithstanding the growth of broadband competition, the Bell companies continue to dominate local exchange telephone serv-

⁶ Telechoice, *One Millionth DSL Customer!!!*, June 6, 2000; see also C.E. Unterberg, Towbin, *Broadband Communications Providers*, June 14, 2000, p. 7 (DSL Line Chart).

⁷ US West Newsrelease, *US West Jumps Out of the Blocks in the Race to Speed Super-Fast Internet to Mass Market-30 New Cities, Hot Multi-Media Portal & World's Fastest Man*, June 19, 2000

⁸ C.E. Unterberg, Towbin, *Broadband Communications Providers*, June 14, 2000, p. 5.

ices, particularly for residential consumers. By permitting Bell companies to enter the interLATA market without first opening their local markets, H.R. 1685 and H.R. 1686, as well as H.R. 2420 sponsored by Representative Tauzin, would substantially reduce the prospects that this dominance will end. As such we strongly encourage you to oppose these measures.

Passage of this legislation would also hurt consumers in another way, in the 47 jurisdictions where the Bell companies have not yet sufficiently opened their local markets to obtain interLATA authority. Recent press reports indicate that other Section 271 applications may soon be filed.⁹ But if this legislation were enacted, the Bell companies in those states and others would have no incentive to take any steps to open their local markets to competition. That means that CLECs and other competitive providers would have substantially fewer opportunities to compete in those states than would otherwise exist, and less than exist in New York and Texas today. As a result, investment dollars would be directed toward the latter two states, and away from the remaining states in the Nation.

Cable Companies Will Offer Their Consumers A Choice Of ISPs Over Their Broadband Cable Facilities

Last June, AT&T told this Committee that, free from government mandate and regulation, AT&T would ensure that consumers are able to access the content of their choice over its cable facilities. Over the last year we have worked diligently toward fulfilling this vision. On December 6, 1999, AT&T publicly confirmed, in a letter to FCC Chairman William E. Kennard, that it would, upon expiration in 2002 of its exclusive contract with Excite@Home, provide consumers with a choice of ISPs and that it would enter into commercial negotiations with unaffiliated ISPs that wish to offer high speed Internet access over AT&T's broadband cable facilities. Earlier this summer, AT&T also announced that it will conduct two trials to work out the technical issues involved in offering customers a choice of ISPs on its cable system. These trials will take place in Boulder, Colorado this Fall and in Massachusetts next Fall. ISPs representing a broad cross-section of popular national and local providers have indicated an interest in participating in these trials.

These actions further confirm AT&T's commitment to provide its customers with a choice of ISPs over its broadband systems. We were the first company in our industry to commit to choice, we were first to agree to a set of principles with an unaffiliated ISP to provide connectivity, and now we're first to commit to meaningful technical trials.

These efforts are hardly surprising, however. AT&T has invested billions of dollars in its cable facilities, and its own self-interest is driving it to provide consumers the choices and access they desire over those facilities. This is because the more that AT&T satisfies its customers, the more customers it will have, the more traffic it will carry, and the more likely it will be to sell to customers its other cable, broadband, and telephony offerings. And now three of the other largest cable providers—Time Warner, Comcast, and Cox Communications—have also indicated that they would offer their customers a choice of ISPs. These steps confirm that the marketplace is addressing the concerns reflected in H.R. 1685 and H.R. 1686. There is no need for legislative action that would create marketplace uncertainty, give rise to litigation, and slow deployment of competitive offerings.

This explains also why, in the face of these facts, some of the most vocal proponents of forced access to cable facilities are the incumbent local exchange carriers. They stand to benefit the most if unnecessary legal and regulatory requirements impose greater cost, uncertainty, and delay on the conversion of cable facilities to an advanced infrastructure that is capable of providing competitive broadband and residential local telephone services. There is no public interest benefit in such an outcome.

Conclusion

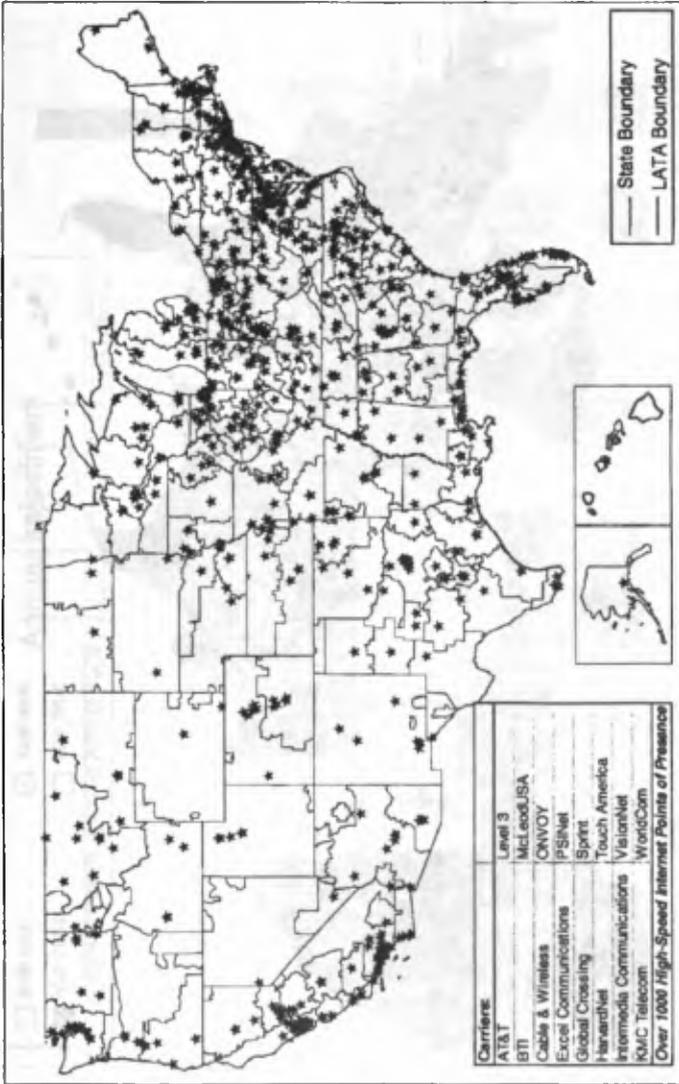
Mr. Chairman and members of the Committee, the marketplace for broadband offerings is working. Notwithstanding the costs, technical hurdles, and, at times, hostility and resistance of the incumbent local carriers, broadband services are being rapidly deployed in a competitive framework. As a result, American consumers are enjoying new technologies and services at lower prices. Analysts predict that by 2005, 38 million U.S. households will access the Internet via broadband services.¹⁰ In addition, the major cable companies have indicated that they will offer their consumers a choice of ISPs over their broadband cable facilities, and AT&T is taking

⁹ Communications Daily, *Bell Companies Predict Increase in Sec. 271 Applications*, July 10, 2000.

¹⁰ Merrill Lynch, *Internet / e-commerce*, June 15, 2000, p.7.

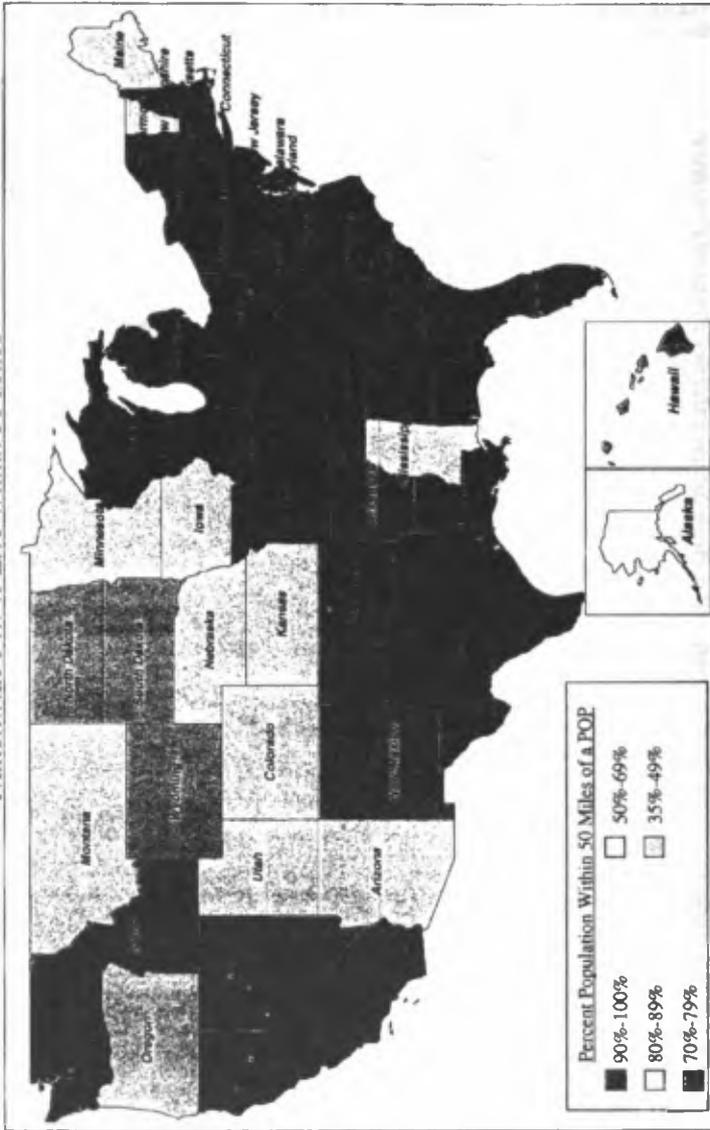
the necessary steps in preparation for doing so. We respectfully urge the Committee to promote continued deployment of broadband in a quick, widespread, and commercially reasonable manner by maintaining the competitive incentives provided under the 1996 Act.

High Speed On-Ramps to the Internet
94.7% of Americans live within 50 miles of a High-Speed Internet Point of Presence



Prepared by the "Competitive Broadband Coalition"
 June 15, 2000

% of Population Within 50 Miles of a High-Speed Internet Point of Presence
Nationwide 94.7% Live Within 50 Miles



Prepared by the "Competitive Broadband Coalition"

June 15, 2000

Annual Investment

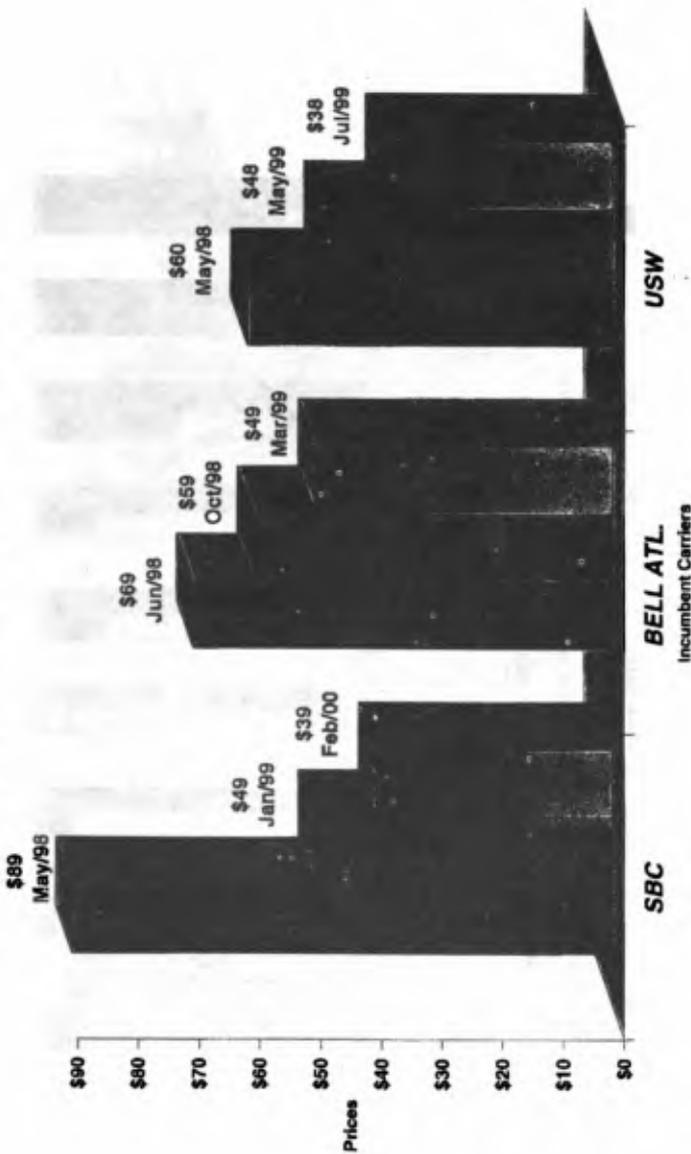


The 1996 Telecom Act

SOURCES: ALTS, CTIA, MultiMedia Telecommunications Market Review, FC

*ILEC figure is projected

Competition Delivers Residential DSL Price Breaks*
RBOCs Drop Prices to Compete with Excite @ Home (\$39.95 - \$44.95)



*Source: Company Reports, includes internet Service

PREPARED STATEMENT OF MARK C. 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 deny 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.¹ Moreover, courts have uniformly recognized that the Sherman Act is a law of general application and is for the "protection of competition, not competitors."² 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

¹"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).

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

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 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."³ Wall Street analysts have likewise observed that competition from cable and CLECs is the primary force spurring incumbent LECs to increase their investment.⁴ 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.⁵

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

³ 706 NOI Report ¶ 42 & n.84.

⁴ 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 . . ."

⁵ 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>>.

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.

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.⁶ Another estimate has data "outgrowing voice 15:1," noting that "90% of data is long-haul rather than local."⁷

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."⁸ 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."⁹ 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."¹⁰ 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.

⁶ Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

⁷ Jack Grubman, "Review of Our Position on RBOCs: SBC & BEL will create most value," Salomon Smith Barney, March 9, 1999.

⁸ Andrew Brooks, "SBC Accelerates Plans for High-Speed Net Lines," *The Dallas Morning News*, June 16, 1999, at 4D.

⁹ Kenneth Kelly, "The Shift to Data by Two Major U.S. Suppliers," Dataquest, Sept. 14, 1998.

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

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. Wolzien?

**STATEMENT OF TOM WOLZIEN, SENIOR MEDIA ANALYST,
SANFORD C. BERNSTEIN & CO., NEW YORK, NY**

Mr. WOLZIEN. Thank you, Mr. Chairman, members of the committee. As senior media analyst for Sanford C. Bernstein, a Wall Street research and investment firm providing research on publicly-traded entertainment and cable companies to the large institutional investors, the managers of pension and mutual funds, I cover Disney, AOL, Time Warner, Viacom, Comcast, Cox Communications, and Liberty Media, putting me on at least two sides, if not more, of these broadband discussions.

Since Bernstein is not involved in investment banking, none of these companies is a client.

Today, at the invitation of the committee, I will make four points dealing with investor concerns over mandated access, potential cable reactions, the legitimate concerns of content providers that don't own cable systems, and to note the unique opportunity companies have now to cooperate to use this new technology to assist efforts in the public interest.

Point one, what investors expect. The traditional cable business of offering video channels is a mature business. It is the new digital businesses that provide investors with the potential returns that provide the rationale to invest in cable today. If the rationale goes away, so may some of the investments.

Cable companies are past the mid-point of investing more than \$20 billion to provide upgraded plants that can handle traditional analog video signals and the two-way transmission of data bits to open up new applications in the online, pay-per-view, television-based commerce and digital telephone areas.

The improved economic returns justifying the expenditure are not based simply on common carriage of data bits at some bulk price; rather, they are based on the much higher returns that are anticipated for those new bit-using applications, for the applications, not the transport.

Here is an example of what cable investors fear. An ISP taking advantage of mandated access, for example, might transmit streaming movies on demand, in direct competition with the same movies provided by the cable company elsewhere on that same cable, but the ISP might pay the cable company only a flat rate for the number of bits transmitted, keeping the up side for entertainment value carried in those bits for the ISP, itself.

Conversely, in a negotiated business deal, the ISP might still be providing those streaming pay-per-view movies to the detriment of the cable company, but the cable operator might have negotiated to share in the pay-per-view up side and would see his returns made whole because the ISP might deliver millions more new subscribers to the cable company's digital services.

Such a negotiation, of course, presupposes that the ISP brings something of value to the table.

Point two, mandated access could damage implementation of the second wired infrastructure. If mandated access threatens cable's expected returns, a cable company can either quit building out its plant at halfway or 60 percent of where we are today, leaving the country stuck with about half the plant upgraded, or it might avoid offering a retail data service and shift emphasis, instead, to other services that might not fall in the common carrier arena. For example, it could focus its two-way plant on digital pay-per-view or television-based commerce but forego the data-related businesses that might put that portion of its business under regulation.

Without an aggressive roll-out of cable data services, I think it is reasonable to ask if the RBOCs would continue to be as motivated to expend the capital necessary to build out their own broadband infrastructure.

Point three, there is risk to content companies. Worries that a cable company could provide preferential technical treatment to services it owns I think are legitimate. Think of the customer reaction to a slow response of a music video service not owned by a cable company versus one playing the music instantly because the cable company owns it and technically assures a faster response.

This is a risk, I believe, and I think it must be watched closely, but the lack of protective legislation is not damaging entertainment company investors today, and in the 1992 act, of course, there is precedent for dealing with cable companies that abused their positions as content owner and distributor.

Point four, a unique opportunity. No investor I have ever spoken with has complained about companies doing good works. And now is the time for content and distribution companies, alike, to begin defining programs of interactive public service announcements in the public interest. For example, an AIDS announcement runs on TV, click to get additional info. An Army ad runs, and click and a recruiter is at the door before the end of the show. An anti-alcoholism or drug abuse spot runs and click and there is information there for the closest AA meeting, and so on.

Finally, a pragmatic public policy question: The digital plant is being built, competition is beginning, and the dynamic marketplace is seeming to start to respond. Why change the rules now and regulate this area before the construction of the digital plant is completed and risk slowing or stopping the roll-out of digital services?

Politically-astute cable companies know they must find a way to open up access. They know legislation is likely if they use technology to discriminate against content providers. And if legislation comes, those same cable companies know they will be severely punished by investors, just as they were in the mid-1990's after re-regulation was necessary then to correct abuses.

Thank you very much.

Mr. HYDE. Thank you, sir.

[The prepared statement of Mr. Wolzien follows:]

PREPARED STATEMENT OF TOM WOLZIEN, SENIOR MEDIA ANALYST, SANFORD C. BERNSTEIN & Co., NEW YORK, NY

Good Morning. I am Tom Wolzien, the Senior Media Analyst for Sanford C. Bernstein & Co, a Wall Street Research and investment management firm. I provide research on publicly traded entertainment and cable companies to large institutional investors, the managers of pension and mutual funds. I cover Disney, AOL and Time

Warner, Viacom, Comcast, Cox Communications, and Liberty Media . . . putting me on at least two sides of these Broadband discussions. Since Bernstein is not involved in investment banking, none of these companies is a client.

I have been at Bernstein for nearly nine years, after a 25 year career in broadcast news and cable programming, working for NBC, CBS, Pulitzer, Time-Life, McGraw Hill, and the US Army as officer in charge of a combat photography unit in Vietnam. In the interests of full disclosure, I have some personal involvement in interactivity, having been awarded a patent for a process to connect television and radio programming with the Internet.¹

Today at the invitation of the committee, I will make four points dealing with investor concerns over mandated access, potential cable reactions, the legitimate concerns of content providers that don't own cable systems, and to note the unique opportunity companies have to cooperate to use this new technology to assist efforts in the public interest.

Point One—What Investors Expect: The traditional cable business of offering video channels is mature, and it is new digital businesses that provide investors with the potential returns that provide the rationale to invest in cable. If the rationale goes away, so will the investments. Cable companies are past the midpoint in investing \$20 billion or more to provide upgraded plant that can handle traditional analog video signals and the two way transmission of data bits to open up new applications in the online, pay per view, television based commerce, and digital telephone areas. The improved economic returns justifying the expenditure *are not* based simply on the common carriage of data bits at some bulk price. Rather they are based on the much higher returns that are anticipated for those new bit-using applications.

Here's an example of what cable investors fear: An ISP taking advantage of mandated access might transmit streaming movies on demand, in direct competition with the same movies provide by the cable company elsewhere on the same cable, but the ISP would pay the cable company only a flat rate for the number of bits transmitted, keeping the upside for the entertainment value carried in those bits for the ISP itself. Conversely, in a negotiated business deal, the ISP might still provide streaming pay per view movies to the detriment of the cable company, but the cable operator might negotiate to share in the pay per view upside, and would see his returns made whole because the ISP would deliver millions more new subscribers to the cable company's digital service. Such a negotiation, of course, presupposes that the ISP brings something of value to the table.

Point Two—Mandated Access Could Damage Implementation of the Second Wired Infrastructure. If mandated access threatens cable's expected returns, a cable company could either quit building out its plant—leaving the country stuck with about half the plant upgraded—or it might avoid offering a retail data service and shift emphasis to other services that wouldn't fall in the common carrier arena. For example, it could focus its two way plant on digital pay per view and television based commerce, but forego the data-related businesses that would put it under regulation. And without an aggressive rollout of cable data services, it is reasonable to ask if the RBOCs would be as motivated to expand the capital necessary to build out their own broadband infrastructure.

Point Three—There Is Risk to Content Companies: Worries that a cable company could provide preferential technical treatment to services it owns are legitimate. Think of the consumer reaction to the slow response of a music video service not owned by a cable company versus one playing the music instantly because the cable company owns it and technically assures a faster response. This is a risk and it must be watched closely, but the lack of protective legislation is not damaging entertainment company investors today. And, in the '92 Act, there is precedent for dealing with cable companies that abuse their positions as content owner and distributor.

Point Four—A Unique Opportunity: No investor I've ever spoken with has complained about companies doing good works. Now is the time for both content and distribution companies to begin defining programs of interactive public service announcements. For example, an Aids announcement runs on TV—click to get additional info. Army ad runs and click, a recruiter is at the door before the show's over. Anti alcoholism or drug abuse spot runs, click for the closest AA meeting and so on.

Finally, a pragmatic public policy question. The digital plant is being built, competition is beginning, and the dynamic marketplace is responding. Why change the

¹Tom Wolzien, Bernstein's Senior Media Analyst, holds an interest in a public company, ACTV, Inc., and is a director of subsidiary to exploit his patent linking mass media with on-line services.

rules now and regulate this area before the construction of the digital plant is completed...and risk of slowing or stopping the rollout of digital services? Politically astute cable companies know they must find a way to open up access. They know legislation is likely if they use technology to discriminate against content providers. And if legislation comes, those same cable companies know that they will be severely punished by investors just as they were in the mid '90s after reregulation was necessary to correct abuses.

Thank you.

Mr. HYDE. Mr. Sachs?

STATEMENT OF ROBERT SACHS, PRESIDENT AND CEO, NATIONAL CABLE TELEVISION ASSOCIATION, WASHINGTON, DC

Mr. SACHS. Mr. Chairman, Congressman Conyers, and members of the Judiciary Committee, my name is Robert Sachs and I am president and CEO of the National Cable Television Association. Thank you very much for the opportunity to express the cable industry's views on H.R. 1685 and H.R. 1686.

NCTA strongly believes that this legislation is unnecessary and unwarranted in light of developments in the broadband market where multiple providers, including cable, telephone, satellite, and wireless companies are vigorously competing to offer high-speed data services. Already the Nation's largest cable operators, including AT&T, Time Warner, Comcast, and Cox Communications, have committed to providing their Comcast customers with a choice of Internet service providers, and even today cable modem subscribers can access any content they choose on the Internet.

While cable modem service is still very new, accounting for only about 5 percent of Internet access in the U.S., and cable companies are still upgrading their networks, the trend is clear. Cable operators are developing business models and seeking technical solutions to give consumers a choice of Internet service providers.

For instance, AT&T will soon begin technical trials to test how multiple Internet service providers can utilize its broadband network.

These developments, all of which have occurred since these bills were first introduced, should eliminate any argument for government intervention. The goals of the bills are being realized through marketplace solutions. For their spirited encouragement of competitive access, Congressmen Goodlatte and Boucher rightfully deserve credit.

Deployment of broadband technology has been explosive. Since passage of the 1996 Telecommunications Act, the cable industry, alone, has invested \$36 billion to upgrade facilities and provide broadband services. Cable's efforts have spurred a competitive response from the telephone industry, which is investing heavily in digital subscriber line, DSL, technology.

The regional Bells and GTE ended 1999 with 36.5 million DSL-ready lines, and last year experienced a ten-fold increase in DSL subscribers.

Fixed wireless, and satellite providers have also made great strides in delivering high-speed data services. Sprint has begun to roll out its broadband wireless service, and DirecTV and EchoStar will introduce two-way high-speed satellite Internet service later this year.

Dramatic reductions in price for broadband services provide further evidence that the competitive marketplace is working. As mentioned, Verizon slashed its DSL price 20 percent recently, from \$49.95 a month to \$39.95 a month to meet cable modem competition.

In this dynamic environment, Government intervention is neither necessary nor warranted, and existing antitrust laws already protect against genuinely anti-competitive practices.

Congress' policy of allowing marketplace forces to foster the development of the Internet has succeeded beyond anyone's expectations. Reversing course by imposing burdensome regulation on new entrants will only slow delivery of high-speed Internet and competitive local phone service to consumers.

Finally, even without mandated access provisions, H.R. 1685 and H.R. 1686 would reopen the 1996 Telecommunications Act. We think this is a bad idea. This landmark telecommunications legislation is working. The pro-competitive policies Congress adopted in 1996 have provided a foundation for unprecedented growth and innovation in communications markets. So, rather than create regulatory uncertainty and discourage investment in new technology and services by reopening the 1996 act, we would strongly urge you to allow the act to continue to work for the benefit of American consumers.

Thank you very much.

Mr. HYDE. Thank you, Mr. Sachs.

[The prepared statement of Mr. Sachs follows:]

PREPARED STATEMENT OF ROBERT SACHS, PRESIDENT AND CEO, NATIONAL CABLE TELEVISION ASSOCIATION, WASHINGTON, DC

Mr. Chairman, Congressman Conyers, and members of the Judiciary Committee, my name is Robert Sachs and I am President and CEO of the National Cable Television Association. NCTA represents cable companies serving more than 90 percent of the nation's 68 million cable customers and more than 200 cable program networks. Thank you for providing me with this opportunity to express the cable industry's views on H.R. 1685, the "Internet Growth and Development Act," and H.R. 1686, the "Internet Freedom Act" introduced by two distinguished members of this committee, Congressmen Boucher and Goodlatte.

OVERVIEW

NCTA strongly believes that H.R. 1685 and H.R. 1686 are unnecessary and unwarranted in light of developments in the broadband market, where multiple providers are competing to provide a variety of high-speed data services to our nation's consumers. In this robust marketplace, the largest cable operators—including AT&T, Time Warner, Comcast, and Cox Communications—have already committed to providing their customers with a choice of Internet Service Providers (ISPs). While these two bills purport to encourage the growth of the Internet, they would in fact impede its development by: (1) imposing undefined—and inevitably complex and burdensome—access obligations on new entrants; and (2) hindering investments in high-speed cable services. H.R. 1685 and H.R. 1686 also undermine the policies contained in the Telecommunications Act of 1996—landmark legislation that successfully promoted competition over regulation and took the administration of telecommunications policy (especially the fate of the RBOCs) out of the hands of anti-trust courts.

THE BROADBAND MARKET IS BOOMING: THERE IS NO BOTTLENECK

Recent deployment of broadband technology has been explosive, as the attached study from Kagan Media Appraisals demonstrates.¹ Cable operators have led the way in deploying the broadband facilities necessary to provide high-speed Internet and data services, but they have been joined by virtually all segments of the communications industry. ILECs, CLECs, satellite operators, wireless service providers, public utilities, broadcasters, and overbuilders like RCN are investing tens of billions of dollars to accelerate their own deployment of high-speed facilities and services in order to respond to competitive market pressures. The number of customers for all broadband services (cable, DSL, satellite, and wireless) grew 210 percent from 1998 to 1999, with a 238 percent increase expected in 2000 (from 1.8 million to 6.1 million customers). In major markets, consumers can choose from among at least 10 different service providers.²

Since passage of the Telecommunications Act of 1996, the cable industry has invested approximately \$36 billion to upgrade its facilities, offer digital services, and provide high-speed access to the Internet. The industry currently serves about 2.5 million cable modem customers³ and expects to add another 1.1 million during the second half of this year, for a total of 3.6 million by year's end.⁴ And cable modem customers are just one click away from any site on the web.

Despite our growth, cable companies are new entrants in the Internet business. Cable modem service today accounts for approximately five percent of all Internet access in the U.S. Cable modem penetration also averages about five percent in households where cable Internet service is available.

Although cable was an early leader in the broadband sector, we are not alone. In particular, cable's efforts have spurred a competitive response from the telephone industry, which is investing heavily in the deployment of Digital Subscriber Lines (DSL). The DSL services offered by Local Exchange Companies and CLECs attracted 390,940 new high-speed data customers in 1999—more than a ten-fold increase over 1998—for a year-end total of 420,940 customers.⁵ Combined, the Regional Bells ended 1999 with 36.5 million DSL-ready lines, which represents nearly a quarter of the 171 million phone lines in the United States. Some analysts predict that demand for DSL will overtake deployment of cable modems by 2002.⁶ Examples of specific DSL offerings include:

US West

- As of January 1, 2000, US West had more than 100,000 users in the 14 states where it provides service. US West has 5 competitors in Utah, where it began service in 1998: Covad, Jato Communications.net, Rhythms, RMI.net and Northpoint (Vince Horiuchi, "Companies Lining Up to Provide High-Speed Internet Access." *The Salt Lake Tribune*, Saturday, January 1, 2000, p. D1).
- US West offers residential service for as little as \$37/month (Vince Horiuchi, "Companies Lining Up to Provide High-Speed Internet Access." *The Salt Lake Tribune*, Saturday, January 1, 2000, p. D1).
- US West is deploying DSL service in 30 cities in Arizona, Idaho, New Mexico, Nebraska, Oregon, South Dakota, Utah, Washington, and Wyoming (TR Insight, *Advanced Services*, June 19, 2000).

SBC Communications

- SBC has made DSL service available to 14 million homes in its service area and had 201,000 DSLs in operation at the end of March 2000. SBC hopes to offer its high-speed service to more than 18 million homes and businesses by the end of 2000 (Patricia Fusco, "SBC Offers DSL Installation Kits." *InternetNews—ISP News*, July 5, 2000).
- SBC plans to spend more than \$6 billion on "Project Pronto" to extend DSL service to 80 percent of its customer base in a 13-state region by the end of 2002. SBC hopes to have more than 1 million DSL subscribers by year's end (Ted Sickinger, "Southwestern Bell to Build DSL Gateways." *The Kansas City Star*, Friday, June 30, 2000, p. C1).

¹ Kagan Media Appraisals, "The State of Broadband Competition: An Analysis of Cable, Telco DSL, Fixed Wireless and Satellite Competition for High-Speed Data Services, 1999-2000," March 2000.

² *Id.*, p. 25.

³ Paul Kagan Associates, Inc., *Broadband Technology*. April 30, 2000, No. 273, p. 1.

⁴ *Op. Cit.*, p. 6.

⁵ *Id.*, p. 8.

⁶ Kelsey, Dick, "Report—DSL Will Overtake Cable"; *Newsbytes*, July 5, 2000. Grice, Corey, "DSL Could Pull Ahead in High-Speed Race"; CNET News.com, March 1, 2000.

- In another move to unleash Project Pronto, SBC began offering self-installation kits on Monday, July 3, 2000, to make high-speed Internet access simple. The kit will also be made available to partners who are reselling SBC's service (Patricia Fusco, "SBC Offers DSL Installation Kits." *InternetNews—ISP News*, July 5, 2000).
- SBC cut monthly DSL residential charges by \$10 to \$39.95 and eliminated installation fees to keep customers and to lure more subscribers (Peronet Despeignes, "Phone Companies Launch Super-Speed Internet in Mich." *The Detroit News*, Thursday, February 24, 2000, p. 2B).

Fixed wireless and satellite providers have also made great strides in delivering broadband services during the past year. Sprint has begun to roll out its broadband fixed wireless service and expects to deploy its Sprint Broadband Direct service in ten to fifteen cities by the end of the year.⁷ Sprint projects that it will be able to reach 30 percent of all households in the United States.⁸ FCC Chairman Kennard has pointed out that fixed wireless brings more competition to the phone business and can hasten the deployment of high-speed Internet access in rural areas.⁹

Broadband satellite services are also becoming more accessible. For example, by next year, there will be several competing interactive broadband satellite services available. Gilat-To-Home, in partnership with EchoStar, will begin offering two-way service this year as will DirecPC (DirecTV's high-speed Internet service),¹⁰ while iSky will offer interactive service by the end of 2001. These national broadband services will offer even the most rural areas high-speed access to the Internet. And we are also seeing efforts by consortia like Geocast to use the broadcasters' digital television spectrum to offer new competition to broadband providers.

Just as consumers can choose among autos, trains, buses, and planes to get to their geographic destination, they can choose among cable, DSL, fixed wireless, and satellite to connect to the Internet.

Prices for Broadband Services Are Falling

Dramatic reductions in price for broadband services and innovative service offerings are further evidence that the market is working. For example, Verizon Communications, formed by the merger of Bell Atlantic and GTE, recently announced that it has cut prices for its high-speed DSL service by 20 percent in certain regions.¹¹ Similarly, SBC has announced that customers who sign two-year contracts for its DSL services will receive free Compaq personal computers.¹² These price reductions and marketing campaigns are a direct response to cable's broadband efforts and the perception, which I believe to be correct, that the market is going to become even more competitive in the future.

REGULATION IS UNNECESSARY AND COUNTERPRODUCTIVE

In this dynamic environment, access regulation is neither necessary nor warranted. It is in a cable operator's business interest to provide consumers a choice of ISPs. Providing such choice will give cable modem customers additional e-mail services, customer service support, and web page tools. (As I mentioned earlier, cable modem customers today can access any Internet content they wish. Some on-line service providers charge extra for their content; most provide it for free. That is a decision made by the content provider, not the cable operator.)

On the other hand, government-mandated access would be counterproductive. Imposing burdensome regulatory requirements on new entrants would result in increased costs and market uncertainty, which would in turn make it difficult for companies to attract the capital they need to fund the construction of broadband facilities. Cable companies in particular are raising substantial funds necessary to upgrade their facilities in the private capital market. The \$36 billion our industry has spent since 1996 to rebuild our networks is just the beginning. Upgrading one-way cable networks to two-way hybrid fiber coaxial (HFC) networks to carry digital video, voice, and data is a massive construction undertaking. These investments are

⁷ Patricia Fusco, "Sprint Wireless Leaps Past Last-Mile Broadband Limits," *InternetNews.com* (May 8, 2000) <www.internetnews.com>.

⁸ Id.

⁹ "We've Come Unplugged: Speedy Wireless Access to Net Connects with Firms, Customers," *USA Today*, Wednesday, February 23, 2000, p. 1B.

¹⁰ Jim Hu, "AOL Speeds Towards Satellite Service," *CNETNews.com* (May 31, 2000) <<http://news.cnet.com>>.

¹¹ Corey Grice, "Verizon Communications Cuts DSL Prices," *CNETNews.com* (July 6, 2000) <<http://news.cnet.com>>.

¹² Deborah Solomon and Scott Thurm, "SBC to Give PCs to Internet Customers," *Wall Street Journal*; July 10, 2000; p. B8

risky and lack a guaranteed return. Cable's ability and incentive to continue the rollout of broadband facilities and services is closely linked to a stable regulatory environment that promotes investment and rewards risk-taking.

Government-mandated access requirements would also weaken the forces driving investment by others in new facilities. Cable's investment in broadband has served as a powerful competitive spur to the incumbent telephone companies and other facilities-based providers, multiplying the benefits of this investment across various platforms and driving down prices. For example, digital subscriber line (DSL) technology has been around for years. However, until three years ago—when cable operators began to offer high-speed data services—GTE and the Bell companies were reluctant to roll out a technology that would cut into the lucrative sales of T-1 lines (which cost customers thousands of dollars a month) and ISDN circuits. The ILECs were also happy to sell consumers second phone lines for dial-up Internet access, rather than enhancing existing lines with DSL.

Cable broadband—and the Bell companies' subsequent efforts to respond by accelerating DSL deployment—have now substantially reduced data transmission costs and eliminated the need for second phone lines—all to the benefit of consumers. By slowing cable's investments in broadband facilities and services, government-mandated access would deprive consumers of this valuable competitive spur.¹³

Cable is Offering Access to its Networks on its Own

Government-mandated access is particularly unnecessary in light of the commitments by AT&T, AOL/Time Warner and other cable operators to provide their customers with a choice of Internet service providers. While cable modem service is still very new, and cable companies are still in the process of rebuilding their networks to offer broadband services, the trend is clear: cable operators are developing various business models to provide consumers with a choice of Internet access. Not every cable operator is at the same stage in terms of system upgrades or broadband deployment, and cable operators are still figuring out technically how best to accommodate multiple ISPs. Significantly, however, the two largest cable operators, AT&T and AOL/Time Warner (who together account for nearly half the cable subscribers in the U.S.), have already detailed in writing their commitment to consumer choice. AT&T will soon begin technical trials in Colorado to test how multiple Internet service providers can offer high-speed, always-on cable Internet service over a hybrid fiber-coaxial network. These developments—driven by market forces and spirited encouragement from several members of this committee—remove any argument for forced access legislation.

CRITIQUE OF H.R. 1685 AND H.R. 1686

H.R. 1685 and H.R. 1686 would amend the antitrust laws to create new grounds for civil action in federal court. They would establish a presumption that the antitrust laws are violated when a "broadband access transport provider" (such as a cable operator, satellite system, telephone company or a broadcaster using digital spectrum for data transmission) offers a service provider access to its high-speed plant on terms or conditions that are less favorable than those it offers to any other ISP. The bills also make unlawful any unfair methods of competition or unfair or deceptive acts or practices which would discriminate in favor of an ISP that is affiliated with a "broadband access transport provider" or which "restrains unreasonably" an unaffiliated ISP from competing with the transport provider or its affiliate.

In addition, these bills would remove the "interLATA restriction" (line of business restriction) which limits the RBOCs' provision of advanced services and voice services across LATA boundaries. The bills would remove the restrictions for advanced (data) services but not for voice services and would otherwise deregulate advanced services provided by the RBOCs.

Problems with H.R. 1685 and H.R. 1686 include the following:

- *These bills would slow cable's deployment of broadband facilities.*

The "forced access" provisions of these bills would impose undefined and burdensome regulations on new providers of Internet access and lead to expensive and lengthy litigation while courts try to define what the terms in the legislation mean. They would also encourage ISPs to bypass marketplace

¹³This is true whether that regulation takes the form of federal, state, or local forced access requirements or revisions to the antitrust laws to prohibit vaguely defined "anticompetitive behavior" by broadband providers. An amendment to the antitrust laws expanding the definition of "anticompetitive behavior," for instance, would lead to extensive litigation in which the courts would have to define which business practices were "unfair" or "deceptive." The resulting uncertainty would stifle the deployment of broadband facilities and services.

negotiations in favor of using the courts to force their way onto cable and other broadband platforms. The resulting costs, delays and uncertainty will make it difficult for companies to attract the capital needed to upgrade their facilities.

- *Forced access requirements would defeat two of the main goals of the 1996 Telecommunications Act.*
 - *The 1996 Act sought to promote competition and the delivery of new advanced services through deregulation.* H.R. 1685 and H.R. 1686 would impose burdensome regulatory and pricing requirements on broadband providers, hinder competition, and slow the delivery of high-speed Internet access to consumers.
 - *The 1996 Act sought to take the administration of telecommunications policy and the fate of communications companies out of the hands of the antitrust courts.* H.R. 1685 and H.R. 1686 create a new and unnecessary cause of action under the Sherman Antitrust Act which encourages civil suits and would throw the cable industry into the hands of antitrust courts for many years of protracted litigation.
- *Even without forced access provisions, these bills would re-open the 1996 Telecommunications Act, which is a bad idea.*
 - *Reopening the Act is not needed to—and will not—speed deployment of broadband.* The 1996 Act is working as intended—widespread broadband deployment by cable, telephone companies, and others is underway. CLECs and the RBOCs have responded to cable by accelerating their own deployment. Moreover, the line of business restrictions has not impeded RBOC deployment of high-speed data services.
 - *Reopening the Act will create regulatory uncertainty and slow deployment of broadband services.* Changing investor expectations mid-stream will increase the cost of capital and reduce the willingness of investors to risk money on the deployment of new services and technology.
 - *Reopening the Act is unnecessary to deregulate the RBOCs.* The 1996 Act already lays out a path to for the deregulation of the RBOCs: if they meet the terms of the interconnection checklist (Section 271)—terms which the RBOCs endorsed—the line of business restrictions will be lifted. Bell Atlantic has entered the long distance business in New York, as has SBC in Texas.
 - *Reopening the Act could lead to unintended results.* Drafting and passing the Telecommunications Act of 1996 took three years and two Congresses to accomplish, and resulted in three years of litigation. Now that the lawsuits surrounding Title II have finally been settled, it would be wise to allow the Act to work—as the current economic expansion in the United States proves it is doing.

As Professor Einer Elhauge of the Harvard Law School commented in his *Analysis of the Proposed Internet Freedom Act* (released October 12, 1999):

The avowed purposes of the Internet Freedom Act are to increase competition, consumer choice, and freedom from regulation. [H]owever well-intentioned, this Act can be expected to have the opposite effect: reducing competition in broadband services, harming consumers, and requiring a massive increase in government regulation. These counter-productive effects seem particularly unnecessary because antitrust law already stands ready to police any genuinely anti-competitive practices. The proposed Act, in contrast, would sweep well beyond existing antitrust law, and in the name of protecting competition would perversely hinder it.¹⁴

Professor Elhauge's white paper, which NCTA supplied to members of this committee last October, supports the Federal Communications Commission's findings to date that government regulation of cable's broadband Internet services is unnecessary, would slow deployment, and would be harmful to consumers. The white paper concludes:

Requiring the cable companies to share any broadband capacity they create with other firms at regulated prices will discourage investment in creating broadband capacity at all. In short, although the Proposed Act has the aspiration of getting the "FCC out of the business of regulating the Internet," it does

¹⁴ Executive Summary, p. 1.

so by massively involving antitrust courts in price regulation, and state regulators in investment regulation. The Proposed Act is thus not truly de-regulatory, but rather creates a huge increase in regulation in a different form. This regulation would harm competition and consumers.¹⁵

SEVERAL STUDIES ON THE DEPLOYMENT OF BROADBAND ARE UNDERWAY

The deployment of broadband facilities and the development of commercial arrangements for ISP choice are proceeding under government's watchful eye, addressing any concern that these trends may not continue their present course. For instance, the General Accounting Office is currently studying how competition is developing in the market for Internet access services, including the development of consumer choice of Internet access. The GAO expects to release its report in October 2000. Furthermore, the Federal Communications Commission, pursuant to its statutory obligation under Section 706 of the Telecommunications Act of 1996, is about to complete its second annual inquiry into the deployment of advanced telecommunications capabilities. The Commission also recently implemented a data collection program to enable it to assess the state of local telecommunications competition and broadband deployment. The results of these studies and monitoring efforts will give the public and policymakers a detailed picture of broadband deployment and competition.

In addition, the FCC announced on June 30, 2000, its intention to undertake a proceeding to address some questions raised by the recent U.S. Court of Appeals decision in the Portland case.¹⁶ As you know, that decision held that local franchising authorities do not have jurisdiction to impose forced access conditions on cable franchisees. In so doing, the Court affirmed the cable industry's view that regulatory policies involving the Internet should be a matter of national telecommunications policy. Recognizing the FCC's jurisdiction and expertise in this area, the Court stated:

Thus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation. We note that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. See 47 U.S.C. S 160(a). Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters.¹⁷

To date, the Commission has set a national policy of regulatory restraint. We welcome the proceeding announced by Chairman Kennard and look forward to the Commission's clarification of questions raised by the Ninth Circuit decision.

WHY ARE THE RBOCS LEADING THE FORCED ACCESS CAMPAIGN?

Why have the Regional Bell companies and GTE been leading a campaign to force cumbersome government regulation on cable operators when the phone companies are building their own competing high-speed Internet access facilities that do not depend on cable?

We think that the answer is to derail cable as the only real facilities-based competitor for integrated voice, video, data and Internet services. Incumbents like SBC and GTE/Bell Atlantic still control 98 percent of all local residential telephone service and have fought endlessly to protect their dominant market share. Following passage of the Telecommunications Act of 1996, GTE filed suit against more than a dozen state public service commissions and the FCC in a bid to delay competition in their local markets for as long as possible. Cable companies are among the most vigorous competitors of the ILECs in the provision of local phone services. In places like Atlanta, Boston, Chicago, Long Island, Minneapolis-St. Paul, and San Diego, where cable operators are starting to provide local phone competition, cable charges significantly less than the incumbents.

To the extent that the ILECs compete with cable by speeding up DSL deployment and lowering prices, that is good for the public and a tribute to Congress's passage of the 1996 Telecommunications Act. But when the ILECs seek to maintain their towering market share—and use it to move into new businesses like Internet and

¹⁵ *Id.*, p. 4.

¹⁶ On June 22, 2000, the U.S. Court of Appeals for the Ninth Circuit held that local franchise authorities (LFAs) may not require cable operators to permit multiple ISPs to use their high-speed facilities. The decision reverses the federal district court decision in the *Portland* case which held that LFAs could impose such "forced access" conditions.

¹⁷ *AT&T v. City of Portland*, No. 99-35609 (9th Circuit, June 22, 2000).

video without fear of effective competition—by asking the government to saddle cable operators with requirements that would slow the deployment of competitive high-speed Internet service and telephony, that is bad for the public and contrary to the purposes of the 1996 Act.

CONCLUSION

The pro-competitive policies adopted by Congress in recent years have provided a foundation for growth and innovation in communications markets. Congress's policy of allowing marketplace forces to foster the development of the Internet has succeeded beyond anyone's expectations. Reversing course by imposing burdensome regulation on new entrants to these competitive markets, as H.R. 1685 and H.R. 1686 would do, will only impede broadband deployment and hinder the development of competitive Internet and telephone services.

[NOTE: Additional material submitted by Mr. Sachs—An Analysis of Cable, Telco DSL, Fixed Wireless and Satellite Competition for High-Speed Data Services, 1999–2000 entitled “The State of Broadband Competition,” compiled for the National Cable Television Association by Kagan Media Appraisals—is not reprinted here but is on file with the House Judiciary Committee.]

Mr. HYDE. I will recognize myself for 5 minutes.

I listened, Mr. Cali—I will direct my remarks to you—I listened to some testimony about how prices are being slashed, and that sounds utopian to me because in my district they are going up 10 percent. AT&T is buying every cable company they can find, and there is no competition and you have a monopoly situation. You have the inevitable Newton's law of motion that applies when you have a monopoly.

Now, I am very concerned about the cable rates because my people are very concerned. In trying to figure out what is going on, I got some correspondence directed to me talking about the local sports programming. In recent years, as the programming services have invested substantially more money in producing new programs and purchasing the rights to transmit other programs over the networks, I guess Jackie Gleason is going up in price. The rates they charge have risen dramatically. We, in turn, have had to recover these charges from subscribers. By far the most significant increases have been occasioned by the charges for sports programming.

Well, let us have the pro basketball games be on a pay-per-view thing then and feature high school basketball, feature high school football, feature high school baseball. These guys who are getting millions and millions for being a utility infielder, if the consumer has to pay that do we just let the agents and the athletes run the whole cable business and the entertainment business? Somewhere, somehow, someone has to draw the line.

I love to watch sports as well as anyone, but this reaches the law of increasing disutility.

A recent “Chicago Sun Times” story said AT&T is raising rates more in Chicago than in other places. Now, we have just gone through and are going through a struggle with gasoline prices which are higher in Chicago and Milwaukee than the rest of the country, and now AT&T joins the parade. I wonder if they all collectively decided that we are the ideal victims. I don't know.

But, Mr. Cali, I don't expect you to be able to answer this now. This isn't really the subject of this. It is just that you are here and I can get at you. [Laughter.]

But could you provide a breakdown for the communities in my district as to precisely what service has been upgraded, because that is the excuse that is used. "We are upgrading service." What service has been upgraded and what programming has been added, so I can share it with my constituents who daily want to know what I am doing about this.

Mr. CALI. Yes, Mr. Chairman, we will do that.

[The information referred to follows:]

AT&T,
FEDERAL GOVERNMENT AFFAIRS,
Washington, DC, November 21, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: When I appeared before the Judiciary Committee on July 18, 2000 concerning H.R. 1685 and 1686, you asked for an explanation of AT&T's cable rate increases in the 6th Congressional District in Illinois (the "6th District"). Since then, we have reviewed pricing, cost, and system upgrade information with your staff and the FCC. This letter summarizes that material, which we also will provide to the Committee.

During 2000, rates for analog cable services in the 6th District have increased by approximately 7.8 percent for those systems owned by AT&T or subsequently acquired by AT&T through its merger with MediaOne. This 7.8 percent increase raised the average price for the analog tiers of service from \$29.92 to \$32.26, a \$2.34 increase, for 61 analog channels. These increases occurred essentially in either January or July of this year. This new rate of \$32.26 for 61 channels equates to a \$0.58 per channel rate (including the typical equipment charges). The increase is less than the national average for AT&T, and less than the average rate per channel for all cable systems reported by the FCC for 1999 of \$0.62 to \$0.65 (for competitive and non-competitive systems respectively) in their 1999 Price Survey Report (FCC 92-266).

Two factors have significantly contributed to the need to increase cable rates: double-digit programming cost increases and significant increases in salary and wages.

Programming Cost Increases

For the 38 communities now served by AT&T in the 6th District, programming costs have increased, on average, \$1.83 per customer in 2000, which represents 78 percent of the overall average cable rate increase in the District. This is significantly larger than the average increase in cable rates related to programming that the Nation as a whole experienced in 2000. As reported in the 1999 FCC Price Survey (the latest official data available), the national average increase in cable rates related to programming for 1999 was 51 percent to 53 percent (for non-competitive and competitive systems respectively).

Overall, programming costs are a significant part of AT&T cable systems' annual expenses; programming costs currently account for 30 to 40 percent of our annual expenses associated with our analog cable service. As a result, the sharp increase in programming costs is of significant concern to us. AT&T has seen these costs nearly double since 1996 on a normalized basis. For AT&T, over the last year Sports programming has increased 31.5 percent, Children's programming has increased 29 percent, and News programming by 16.5 percent. On average, AT&T programming costs increased almost 18 percent over last year.

Sports programming accounted for the largest single element of the increase in AT&T's programming costs. For the 6th District, Sports programming accounted for 63% of the \$1.83 increase, or \$1.16 per customer per month. The most expensive Sports programming for the 6th District doubled in cost over the last year, which is approximately two times AT&T's national average for Sports programming cost increases. This substantial increase in Sports programming has caused the 6th District to experience almost double AT&T's national average for total programming costs.

Salary and Wage Increases

The other significant cost factor considered in these price adjustments is an increase in AT&T's salary and wage costs. From 1999 to 2000 these costs increased by 11 percent. Typically these cost elements comprise another 25 to 35 percent of our annual expenses.

AT&T is mindful of the concern caused by rate increases, and does not pass costs on to customers lightly. In the 6th District, for instance, AT&T incurred programming cost increases in October of 1999, but did not reflect those programming cost increases in cable rates until July of 2000. Nonetheless, these programming and wage costs are cable system input costs, and AT&T and other cable operators generally pass these costs on to consumers.

With all our offerings, we are striving to bring quality services and new choices at reasonable prices to all residential customers we serve. This is the reason that we acquired cable systems, including the TCI and MediaOne systems that had been operating in the Chicago area. In the 6th District, approximately 85% of AT&T's cable systems are upgraded to at least 550 MHz, which is higher than the national average, and we are working to upgrade our cable infrastructure throughout the Nation. Our goal is to use these upgraded facilities to provide the consumers of the 6th District and elsewhere in the Nation with new services, including competitive local telephone, high-speed Internet, and digital cable services. Indeed, today over its upgraded cable infrastructure, AT&T is delivering on the promise of the Telecommunications Act of 1996 and providing more than 400,000 customers with a facilities-based alternative for local telephone services and more than 1 million customers with high-speed access to the Internet.

I have submitted this response into the record of the hearing proceedings. Please let me know if you have any additional questions, or wish any further information.

Sincerely,

LEONARD CALI, *Vice President.*

Enclosure

Mr. CALI. And, if I may, may I make a couple of points?

Mr. HYDE. Please.

Mr. CALI. On the competition point, competition works. That is how come we have seen DSL prices being slashed. And there is a strong and good public policy in this Nation to create competition for both the local telephone monopolies as well as the cable companies. I dare say that that public policy is far closer to being achieved in the cable industry than on the telephone side.

Today, two out of three new MVPD subscribers opt for satellite, and the satellite industry has taken 15 to 20 percent of the marketplace.

As to the rising rates on cable, it really is a local issue and you have to look from local market to local market. I did look at the Wheaton, Illinois, market recently, and I know there was a 9.5 percent increase there, about a \$2.74 increase. About \$2.17 in that context was attributable to programming. Other costs accounted for about \$0.57. That is not true everywhere. In some areas—

Mr. HYDE. Excuse me, now. The programming ought to be pretty standard throughout the country. I mean, if you are going to show Desi and Lucy in Chicago, you are going to show it in Poughkeepsie.

Mr. CALI. Well, as I understand it, part of the issue in the market around Chicago is the sports programming, the local sports programming. In other areas you see significant increases as a result of upgrades to the cable system.

Mr. HYDE. May I suggest you go after the beer companies and not the subscribers?

Mr. CALI. Well, part of the issue with the programming, I think it is fair to say, and probably as a cable company there are others who could address it better, but this is programming that is in demand. It is in demand by our customers, and that is why we are providing it, and yes, there are charges associated.

Mr. HYDE. Sure it is in demand, but the price ought to go down if you have more people wanting it per capita. But I just think we

are victimized by a monopoly and we have got to look at that. There is not effective competition.

Mr. CLELAND. If I can answer your question, what you are concerned about is the vertical leverage and the lack of packaging competition. What open access would allow is, if somebody could get an ISP, most Americans only want seven channels. Well, they could get a lower price for those seven packages, and if you had other ISPs on there—somebody could be the high school basketball ISP, somebody else could be the Desi and Lucy ISP. What you are asking for is for your consumers to have competition in choice, and that is what open access would provide. People wouldn't have to support programming they didn't want and they could have a lower price.

Mr. HYDE. I thank you.

And now I indulge myself. Mr. Berman?

Mr. BERMAN. On the one hand from AT&T and the cable folks we hear about the marketplace working, the competition, DSL, what the phone companies have done given the competition with the pricing of DSL, satellite, and references to wireless, as well. On the other hand, Mr. Padden and others talk about these really not being replaceable kinds of modalities; that cable broadband can do certain things, I take it, that DSL can't in the area of interactivity video.

I would like whoever is interested to talk about this. We have passed legislation on satellites. We have allowed local channels to be broadcast. We hear about all kinds of new innovations in wireless. Why isn't cable broadband just one of a number of choices, and to the extent that Mr. Hyde's constituents and my constituents find that pricing unsatisfactory they can switch to satellite, they can go for DSL, they can take one of the options available, and they truly do have a choice, including a choice if the cable companies are not being open enough in terms of their access to Internet service providers that other people want.

Could a few of you address those kinds of issues?

Mr. PADDEN. Sure, I would be happy to jump in. We think DSL is a great service for getting higher-speed Internet access, but when it comes to interactive television the opportunity to get full motion, full-screen, live television coupled with interactivity, there are millions and millions of Americans for whom, over the next as far out as 5 years, they are going to have a choice of exactly one provider for that service and that is the cable company at their door because the DSL, if they are lucky enough to be in a neighborhood that is DSL capable, the DSL can't give them that full motion video that you can get from the higher-band-width cable.

Mr. BERMAN. And satellite?

Mr. PADDEN. And satellite is a great service for television. The return path on satellite is limited to the twisted copper, so you don't have two-way broadband. And it is just a reality that for many consumers they don't have the option of a satellite because their landlord won't let them nail a dish to the wall or they point the wrong compass direction.

Mr. BERMAN. But even cable broadband is not anywhere near universally deployed. The cable folks assert that if we get into legislating in this area right now we would, as Mr. Wolzien says, see

investments deferred or moved to other areas. Assuming you are correct on this, huge numbers of people won't even have access to that one alternative if we muck around too quickly.

So I guess I would like to hear the response from the cable folks to what you said and then somebody's response to this notion that Congress mucking around means delayed investment and delayed deployment, which means people kept from having access to high-speed, interactive video.

Mr. SACHS. If I can try to put the issue in context, we are talking about, in all cases, relatively recent developments. Today there are approximately 2.5 million cable modem subscribers. Our universe of basic cable subscribers is about 68 million, just to give you the relative ratio.

If we go back in time several years, there were many skeptics who doubted whether the cable plant was even going to be able to be used for data or for cable telephony. Our industry has taken that risk and, as you have heard today, we have invested some \$36 billion since the 1996 act.

DSL technology has been around for years, but when there was no alternative there was no reason for the Bell companies to be rolling out DSL, so T-1 lines, ISDN lines, and second phone lines for dial-up Internet access were the options that consumers had.

As our industry started to invest and upgrade the plant—and we are really talking about rebuilding cable networks across the country—a multi-year process that started in the last 3 and 4 years and really has another couple years to go to completion. As we started to do that, the phone companies have started rather aggressively to be deploying DSL.

Meanwhile, since the 1996 act, we have also seen a boom in DBS. It was mentioned that today nearly one out of five subscribers to a multi-channel video service is receiving that service from somebody other than their cable operator. In most cases that is the DBS provider that is DirecTV or EchoStar. In 32 States today, DBS has more than 15 percent penetration.

The satellite companies are now starting to offer high-speed data. Today it is to the home. DirecTV just announced recently that they had signed up their 100,000th high-speed data customer. In the fourth quarter of this year, they have announced plans to have a transmitter from the home so that the traffic can go back at higher speed.

EchoStar is working with Gilat, an Israeli company, and their plans are to launch their high-speed service later this year.

There is a lot happening in this space. I am from Boston. Next to the Big Dig Project, there is a sign which says, "If Rome were really built in a day, we'd have hired their contractor." Well, the Big Dig is going to take a lot longer than the cable industry's rebuild of its networks across the country, which is also happening without tax dollars.

But the reality here is that this all can't happen at once. It is a multi-year process.

Mr. HYDE. The gentleman's time has expired.

Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

I think Mr. Tauke wanted to respond to that same question and Mr. Cali.

Mr. TAUKE. We are, in this case, talking about the last mile, and in the deployment of technology in the last mile we are all relatively new at it. The cable company is redoing its network. We have to redo our network in order to provide broadband services to the last mile. But there are very different rules by which we operate. The telephone company has to make its lines available to anybody who wants to buy it at a rate set by the FCC. The cable company does not have to make its lines available.

Even if we provide services over the line, we have to have open access for our systems so that any content provider who wants to come has to be given access to the customer. The cable company does not have to give access to any content provider.

We have to have a separate affiliate that we establish to provide services, broadband services, through that entity, which is additional cost and so on imposed by the rules. The cable company does not have that.

Those are just three of the big things that are different in the way in which we approach the business.

Now, if the cable companies—if it is okay for them and they need the incentive to invest in that last mile with new technology and the incentive is that they should be able to limit the content providers and strike deals with content providers, then that should apply to the telephone companies, too, because we have the same incentive to make investments that they do.

Clearly, it is very tough to compete if we have to get all of the revenue out of the service itself, while somebody else can package the high-speed broadband service with content and sell that as a package and get both the content and the service revenue. And if we have to compete against that, we are in tough shape.

So this open access issue is a competition issue for the last mile. It is also an issue of whether consumers get access to all the content.

Mr. GOODLATTE. Let me interrupt because I wanted to ask a question of Mr. Sachs.

Has the National Cable Television Association adopted open access as a policy of the association now that so many of your members have avowed open access as their policy?

Mr. SACHS. You will find in my written comments today where I say we are not opposed to the concept of open access; that, in fact, it is in our companies' business interests to offer open access.

In this whole debate, though, "open access" as used by the OpenNET Coalition has become synonymous with mandated Government access. That is a different concept.

What we are in support of is having companies in the market negotiate business arrangements to accommodate multiple ISPs.

The other thing here is there is not a single business model or technical solution to accomplish this, so different companies in our industry are going about it in different ways, and all are not there in the same place on their own learning curve. But the largest companies in our industry, AT&T and Time Warner, are there and these two together constitute almost 50 percent of subscribers.

Mr. GOODLATTE. I take it your answer is your association has not adopted open access as a policy of the association.

Mr. SACHS. We have not adopted "open access."

Mr. GOODLATTE. Let me go down to Mr. Cali, since my time is short.

Mr. Cali, during a March 29th of this year press conference called to discuss the extension of AT&T, Comcast, and Cox Cable Company's distribution agreements with Excite@Home, George Bell, the president and CEO of Excite@Home stated, "We have all agreed that whatever number of customers exist on the Excite@Home portal and platform at the end of June 2002, you put a rope around those customers and our cable partners have agreed not to remarket other platform or portal opportunities to those customers through the term of those new agreements, so you have a protected set of customers that exists as of 2002."

I wonder if you would comment on Mr. Bell's rope-off strategy.

Mr. CALI. I am unfamiliar with the quote, but I would be glad to comment.

There is a lot of concern around the exclusivity provisions of AT&T's agreement, inherited from TCI, with Excite@Home. I think we need to recognize that Excite@Home was ahead of other companies investing private capital in an industry that no one was quite sure would develop, and it did so based on a market case that included these—

Mr. GOODLATTE. Are you going to honor their statement that you are going to rope off those customers and exclude others—if AOL suddenly has the opportunity to do business on AT&T's cable lines, which I hope they and many others have the opportunity to do. Are you going to rope off those customers and keep them from being marketed to by new ISPs so that we don't have competition for those customers?

Mr. CALI. No. Absolutely not. I do not believe, though I am not familiar with the quote, that that is what Mr. Bell said, from your reading of it. What he seemed to indicate was that the cable companies would not market. In fact, we have extended our agreement with Excite@Home to 2008, where they are a preferred supplier of ours.

What that really means is if a cable customer chooses AT&T for their broadband service, they would get Excite@Home during that period. A cable customer would remain free to choose any one of the other ISPs that would be available on the system to them, and those ISPs are, of course, free to market to anyone they want.

Mr. GOODLATTE. But you won't?

Mr. CALI. We will have a marketing arrangement with Excite@Home, I believe.

Mr. GOODLATTE. And nobody else?

Mr. CALI. But it is important to emphasize—but there is an important point here that we have indicated and we have repeated that we will not favor an ISP after this period of exclusivity based on its affiliation with AT&T. That means operational, technical systems will be the same for other similarly-situated ISPs.

It is a very complex industry. Interconnection arrangements will be complex. Marketing and billing arrangements will be complex.

That is why we have urged that it should be left to the commercial marketplace to negotiate.

But the critical point and the critical commitment is that our customers will have the choice of ISPs they would like.

Mr. GOODLATTE. Mr. Padden, I believe you wanted to respond to that, too?

Mr. PADDEN. Well, I think the language you quoted shows the difference between so-called "voluntary open access commitments" and meaningful Government intervention in this marketplace. Once again, we would associate ourselves with the testimony a year ago by AOL which said that Government needs to step in here. Their MOU is a good starting place, and I think maybe even codifying it would be a good start, but it doesn't require non-discriminatory terms among different ISPs.

And I would also have a question about its application to interactive television—consumers who are trying to interact with Internet material at the same time they are doing television, whether they will have the open ability to interact in that fashion.

Mr. HYDE. The gentleman's time has expired.

Mr. Boucher?

Mr. BOUCHER. Thank you, Mr. Chairman.

I want to commend all of the witnesses today for their very informed testimony. This is one of the better panels I think we have had before this committee in quite some time, and I think that each of you has enriched our discussion today, so my commendation.

Mr. Tauke, a number of misconceptions about the interLATA data provisions of our legislation have crept into the conversation today, and I would like to give you an opportunity to clarify precisely what the legislation does and also to address the requirements that would remain in the law and the incentives that would remain in the law for the opening of the local exchange. And specifically you might want to touch on the charge that our legislation would repeal the interconnection provisions that are a part of the 1996 act. They don't, but you might elaborate on that.

You might reference the fact that the long-distance voice market is still very robust. I understand it is about a \$90 billion market. That ought to offer plenty of incentive to take the steps necessary to participate in it.

You might mention the various provisions that will remain in the law that require interconnection, unbundling, and promote local exchange competition.

And I would hope that you could clarify that, in the event that voice migrates to the Internet protocol, which it certainly at one point will, that that fact, alone, does not defeat the requirement that would remain in our legislation that, before Bell companies could offer voice-based long distance, they would still have to get permission under section 271. It doesn't matter how you would offer the voice-based long distance, you would still have to get section 271 permission.

That is several points, and if you could touch on those I would appreciate it.

Mr. TAUKE. You have done a good job.

Let me just observe that when the Telecommunications Act passed, it applied to all 1,000 telephone companies in the country, not just the regional Bell operating companies. And many of those companies are very substantial local telephone companies that also have all the requirements to open their network under section 251 of the act that apply to the Bells.

The FCC is doing a great job of making sure that those companies comply with the interconnection provisions and all of the other market-opening provisions of the act. So first the FCC has its traditional enforcement authority and a direction to make sure the companies abide by those rules.

Secondly, for the regional Bell companies, there still are the 271 requirements, and, as you indicated, in order for us to offer voice long-distance services we would have to go through that 271 process.

I would observe that that is where, at the current time, the money is, and for the foreseeable future that is where the money is. The growth in data traffic is not a reflection of a change and a substantial change in the revenue base or the revenue generated in our industry. The revenue is still in the voice business.

But, more importantly, in order for us to be full players in the marketplace, we have to be able to offer a combination of voice and data services, particularly to major customers. So you go to a CitiBank or to a WalMart, and you are trying to provide services to them. They want an array of services. They don't want just the voice service or just the data service. They want the whole thing.

So for us to be players in the marketplace it is essential that we be able to offer the full package of services, and that is why section 271, even without the data provision, is a huge incentive for us to enter the market, in addition to the fact that we are required to open our markets.

Mr. BOUCHER. Thank you very much.

Mr. Baker, addressing the other portion of our legislation, the open access provisions, we have had a lot of discussion about the pros and cons that from various perspectives attend that proposal, but we have not had very much discussion about what open access really means.

Time Warner, in its memorandum of understanding, set forth a number of principles, including not limiting the number of ISPs that could serve their customers on the cable platform, providing for a direct customer relationship between the ISP that attaches and its customer, allowing attachment to be at the cable head end so as to promote competition and the transport of that information between the cable head end and the Internet backbone, and also providing nondiscriminatory terms among all of the various ISPs for attachment.

What is your view as to the adequacy of those standards as a formulation of a genuine and workable open access policy? And are there other elements that ought to be considered as a national open access policy is constructed?

Mr. BAKER. Congressman Boucher, the AOL-Time Warner memorandum of understanding to date is probably the most complete articulation of open access principles that has been put forth by any major cable company, and certainly we applaud their efforts in

doing that. Obviously, it sort of took the largest Internet service provider in the country to buy that cable company, essentially, before we got to that point, so obviously there has been some influence there, all for the good.

I am not saying that the MOU is the last word, but we do think that it is sufficiently complete, that it could essentially serve as a model of what open access needs to look like.

Again, in my testimony I have reiterated seven points that are necessary for open access, and I think just about all of them are contained in the MOU, things such as the consumer being able to choose their ISP, not having to go through and pay for the cable company's affiliated ISP, nondiscriminatory access, all things being equal, pricing terms and service, no restrictions on content, no favoring of affiliated content, etc., etc.

Mr. BOUCHER. Have the other cable companies that have announced their intention to implement open access policies indicated what they mean by open access? Do those statements contain these various commitments that Time Warner has made in its MOU?

Mr. BAKER. Well, the statement of principles which AT&T signed with us last December was not as specific as the AOL-Time Warner MOU which followed a couple months later. Again, compared to where we were just 6, 7, 8 months ago, with cable companies saying open access is impossible or technically infeasible or would destroy our investment or we won't deploy if we have to do this, to get AT&T, the largest cable company in the country, to the table to at least make the promises that they did, that was a step in the right direction.

But, again, it is not, in itself, sufficient to say that we don't need this, because even if they kept every promise that they have made, number one, it is a question of time. They are saying it is something that we are only going to begin to implement 2 years from now. Number two, there is no enforceability provisions.

We like to talk about how the Internet and Internet companies have grown, and we are still tiny compared to communications incumbents.

Mr. BOUCHER. And I think it is reasonable to say that the other cable companies have even been less specific than AT&T—

Mr. BAKER. Yes.

Mr. BOUCHER [continuing]. In terms of their statement of intention to implement open access.

Well, I think some attention is going to have to be paid to really what we mean by open access as we go forward, and I am glad this morning we had an opportunity to begin that conversation.

Thank you very much, Mr. Chairman.

Mr. CALI. Congressman, may I address this point?

Mr. BOUCHER. My time has expired. If the chairman permits the answer, that is fine.

Mr. GOODLATTE [assuming Chair]. Yes.

Mr. CALI. Just a brief answer. I think the discussion just goes to highlight the complexity of the issues we are discussing, and the fact that if we do move toward a Government mandate, whether it be legislative or regulatory, the type of detail and a regulatory analysis that is going to be required to enforce this type of forced access arrangement.

As to the AT&T statement, I think you could just look at it for one clear example of complexity. I look at the Time Warner proposal on billing, where it sort of sets up a marketing race. If Time Warner or the cable company wins the customer, then the cable company would bill for the entire piece, the cable piece as well as the ISP piece. And if the ISP won, the ISP would bill for the entire piece.

The AT&T statement of principles doesn't foreclose that arrangement, but it also makes clear that the ISP would have an independent right always to bill the customer for its portion of the services, and thereby retain the customer/ISP relationship.

That is a very positive thing. Again, it is a detail but it is a complexity that is important in the business market.

I just wanted to underscore that we have two avenues before us. One is an avenue that says the marketplace looks like it is working. It is a nascent marketplace. It looks like it is moving in the right direction, and proper incentives can drive us in the right direction through negotiation.

The other says it is time to step in and regulate, and we need to balance on the other side of that equation the risk to the certainty in the marketplace and the investment that is currently taking place.

Thank you.

Mr. GOODLATTE. Mr. Baker, I believe you said that the market was working but we still needed action. Would you care to elaborate on that?

Mr. BAKER. Yes, Congressman. To leave the future of broadband Internet to unilateral decisions of major cable companies when there is essentially no ability to negotiate on the other side, that is just not sufficient. We have already seen examples, first of all, starting with the status quo, where if you want broadband Internet access through cable you have no choice but to go through and pay for the cable company's affiliate ISP. Cable companies have unilaterally decided that situation isn't going to change, at least for another couple of years.

We have already seen examples where there has been discrimination as to the content that is provided over those.

The point is that, whether we have been talking narrow band access, DSL access, any other form of Internet access, the status quo is an open market with rules for nondiscriminatory access and interconnection in place. Those rules are lacking in the cable broadband market, so we are not talking about regulating, we are talking about bringing and ensuring the same open platforms that have allowed the Internet to grow in narrow band, that are allowing it to grow in DSL, and making sure that it can grow in cable, as well.

If I may, we had discussion before, essentially, "Well, why do we need to worry about open access in cable if DSL is available, if wireless and satellite and other things are available?" The point is that, for all the talk about DSL, fixed wireless, mobile wireless, satellite, cable and DSL are the only major broadband plays for years to come.

Furthermore, DSL is limited in its availability. For many consumers throughout the country, particularly in rural areas, and for

all the talk of digital divide and folks in rural areas being left out, cable will be their only broadband choice for years to come. That is why it is essential to ensure that, no matter what the platform, customers can choose their ISP over that platform.

Mr. GOODLATTE. I am going to cut you off because we have extended to have two opposing views the opportunity. I see Mr. Cali and Mr. Padden want to jump in, too, but I am going to recognize the gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, I have had conflicting meetings all day, and I apologize for my being in and out. Having said that, I have no questions right now.

Mr. GOODLATTE. We will then go to the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Ivey, have the costs actually gone down with competition for the dial tone service where there is, in fact, competition?

Mr. IVEY. Local telephone service?

Mr. SCOTT. Local telephone. I mean, this whole idea is to get competition in local service. Where there is the competition, have the costs gone down?

Mr. IVEY. I can tell you it has not in my State to any significant degree, and that is because we don't really have local telephone competition in Maryland. I think you have got some States like New York who has gone through the section 271 check list, but for the vast majority of the States there is a promise out there with respect to the Telecom Act that we are waiting to have fulfilled, and that is why we are so concerned about the impact of this legislation on section 271.

Mr. SCOTT. Well, where you have had the section 271 compliance, have the costs gone down?

Mr. IVEY. I believe so. I am not—

Mr. SCOTT. Not in your State.

Mr. IVEY. Not in my State, but I believe that is the case in New York. Yes, sir.

Mr. SCOTT. Well, how much control do the Bells have in actually attracting competition to themselves? If they have opened up and no one has come in to compete, can they comply with section 271 under those circumstances?

Mr. IVEY. Well, it depends on what you mean by "open up." And I will give you an example. And I think Chairman Kennard referred to this earlier, as well. Here is the example: the argument is that the CLECs could come in and compete for local service immediately. The problem would be—say, for example, AT&T or MCI ran an ad tomorrow on national television that said, "Sign up with us and we will give you better service than you are currently getting," and 300,000 people sign up. The question would be whether Bell Atlantic Maryland has the system in place in which they could transfer those customers to the new service in a timely way. The answer appears to be no.

That was one of the major problems in New York. It is called OSS. We need testing and the like to make sure that those systems are in place and that we have a smooth transfer of customers. Otherwise, you will alienate customers, and they will say, "Gee, I don't want to go to that company. I had better stay where I am."

Mr. SCOTT. And if you were to remove the incentive that they have now to open up that area so they can get into the data competition, what would happen to the ability of companies to get in to compete on the dial tone service?

Mr. IVEY. Well, if you remove the section 271 incentives, it seems to me you are not likely to get much movement in local competition. In States in which the Bells have had the strongest interest in moving forward, and section 271 activity is underway, you have had more competition come into the local market, as is the case in New York, and then the customers see the benefits from that competition.

Mr. SCOTT. On this next question—I think we have gotten into it a little bit—you have got cable, you have got the Bell Atlantic DSL, and you have got wireless. My question is whether or not, with the technology, they are sufficiently competing with each other, or whether you need competition within, say, cable or Bell?

And it seems to me that wireless is just inherently more promising long term because it is easier to set that up. All you have to do is set up a satellite dish rather than string some wires.

What does the future look like in terms of whether or not they will be able to effectively compete with each other? I think Mr. Wolzien had talked about that a little bit.

Mr. WOLZIEN. Work we have done indicates that cable has probably got a 2-year head start here, will be basically—perhaps 75 percent of the cable plants should be built out within the next 12 to 18 months. That doesn't mean the services will be offered, as customer service operations come up to speed and technicians, and so on, but basically for high-speed access it looks like the plant, itself, is within 2 years away of being done.

The DSL plant—and this is up to about 75 percent of households—the DSL plant, because of various technology issues, is perhaps 2 years behind that to reach the same level of penetration, and wireless starts to roll out some place in the middle, suggesting that wireless, particularly for—

Mr. SCOTT. As you enter this, can you say a word or two about technology whether one is better than the other and whether you are getting a better buy or essentially all the same?

Mr. WOLZIEN. Between cable and DSL they should be able to offer effectively the same thing to the PC. Mr. Padden's point is that the cable guys probably have more potential to provide the digital set top boxes and therefore have control of the television set. But, as far as pure data transmission, there are quirks one way or the other, but effectively they should be able to provide you with the same product.

Wireless is a little bit more difficult, and, while it is easy to reach a lot of people, it probably isn't quite as fast.

Mr. PADDEN. If I could just add, our concern about DSL, just to give you the example, when Time Warner dropped ABC off their cable system in New York, consumers did not have the option of sticking a phone wire in the back of the set and getting reconnected to Eyewitness News. However wonderful it is as a high-speed data service, DSL is not now and is not going to be for a long time a substitute for television and particularly interactive television service.

Mr. CLELAND. If I can add, one of the things that is most remarkable about this hearing is, in a hearing on antitrust legislation addressing this matter, nobody ever mentioned the AT&T Media One consent decree, and they have studied this and they have found that cable broadband has market power. The people that enforce this law have found that. They have a 10-year decree with AT&T and they essentially are worried about AT&T exploiting its gatekeeper front position.

So at least the Justice Department has already ruled "DSL still lags substantially behind cable modem service in market penetration and acceptance." Then they go on in their analysis to say that "fixed wireless and satellite are not likely to be major factors in the immediate future."

So the people that matter to you all as antitrust oversight, their judgment on this is there is market power that cable has, and they are not—they don't have the same optimism of the no-opoly stance that many have.

Mr. GOODLATTE. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Baker, I would like to ask you a question that, while it may appear on the surface to be unrelated to the discussion today, I think you can understand it really isn't because it goes to matters that are very, very important to users of ISPs—the consumers, that is—and their ability and their power to choose an ISP of their choice. And if privacy is important to them, then they can choose an ISP that provides a greater level of protection.

I have a concern over a recently-revealed Government program called "Carnivore." Who comes up with these things, I don't know, but they labeled it Carnivore. If they had labeled it something less benign it might not be so troubling, but they seem to go out of their way to highlight, draw attention to these things.

But Project Carnivore is a software program developed by the FBI in which they will go to an ISP and attach this software. The ISP has no control whatsoever over what the FBI is monitoring, and the FBI, while they ask us to trust them, that they are only going to be monitoring one individual that the court order provided them to be able to monitor surreptitiously, they have access to virtually all traffic over that ISP for tens of thousands, hundreds of thousands, millions of consumers—users of that ISP.

This is very troubling to us and we are going to have some hearings specifically focused on this, and I think Attorney General Reno is indicating she may be looking at it, as well.

Is this of concern to you?

Mr. BAKER. It is, Congressman Barr. The sort of silver lining to the cloud here is that I think we have got a good story to tell here, and that is we have two clearly-stated policies that affect all our members and all our users. We have several policies, but among them two that relate to this.

Number one, first and foremost, we protect our users' and members' privacy. Number two, we also have stated that we do cooperate with legitimate law enforcement requests that we might get from time to time. Most of the time these two policies are not in conflict. As in the case here, they may have rubbed up against one another.

Depending on the level of information that law enforcement requests from us, there are different procedures that obviously have to be gone through, and the good news is that most law enforcement, particularly at the Federal level, is well familiar with the provisions of the Electronics Communications Privacy Act and they know the hoops that they have to jump through and what information they can and can't request from us.

Carnivore is a system by which the FBI, in this case, could get at the most sensitive level of information, and that is the actual content of communications, and they did have the proper authorization with which to do that, but when they said, "We don't just want you to provide this information to us, but rather we want to install our own system in order to get it," we had two concerns.

Number one was, obviously, getting past the "trust us" concern, making sure that this program would do only what it purported to do, and that is, to draw an analogy, in trying to find content of e-mails going to and from one particular person, it would be the equivalent of only opening envelopes that had that person's name on it. But the problem is making sure that, number one, they don't open up anybody else's envelopes, and, number two, that they not gain information just from seeing what might be written on the outside of any other envelope.

The other concern was one of network compatibility, and that is, as an ISP your stock in trade, what you sell to your customers, is making sure that they have fast, reliable connections. And if someone were to come in from the outside, install equipment that bogs down your system, makes it hard for everybody else to get their e-mails, that is hurting us, as well.

Mr. BARR. And these aren't hypothetical. These are very real, actual problems.

Mr. BAKER. Right. Exactly.

So what happened in this case, the order to install Carnivore is for a finite period of time, but, nonetheless, we had to—we met with the FBI, we were sufficiently satisfied as to the privacy concerns, but we did run into some problems with how it made our network function, and so we actually went to a Federal magistrate to challenge the FBI's authority to put this on our system, not because we don't cooperate with law enforcement—we do—but we think there are less-intrusive ways to do this.

While the Federal magistrate granted or denied our request and allowed the FBI to install this equipment, at least for that period of time—it is no longer on our system today—we did have to deal with this for a period of time.

Again, having had this experience, we are now trying to work with law enforcement to come up with a way in the future so that we can still cooperate with legitimate requests for information but do it in such a way that it both protects all our other users' policy and doesn't compromise our network performance.

Mr. BARR. Thank you. This, as I said, will be the subject of some hearings coming up very shortly by one of the subcommittees of the Judiciary Committee, and some of you all may be interested in watching for that and perhaps participating.

Mr. BAKER. And, if I may, Congressman Barr, the importance and the relevance to this here today is that we think we handled

this pretty well, but if any of our customers, our members don't think so they are free to switch to another Internet service provider. They can do that in a heartbeat. With a broadband connection, number one, you don't have a choice in who is providing your Internet service. Number two, it is a lot harder to switch. There are all types of set top box and other things that configure you, give you a broadband Internet connection. It is not as simple as picking up the phone and calling someone else.

So the point is, you know, if there is any customer out there that thinks that we didn't protect their privacy enough, they have got other ISP choices out there—lots of them, hundreds of them, thousands of them. In the broadband world, particularly on cable, that is not the case, and that is why it is important to be able to choose your ISP regardless of what connection you use. This is but one example of that.

Mr. BARR. Thank you, Mr. Baker.

Thank you, Mr. Chairman.

Mr. GOODLATTE. Thank you.

The gentleman from North Carolina?

Mr. WATT. Mr. Chairman, unfortunately, I missed all the testimony because I had a conflicting engagement, so I think I will just read the testimony and pass.

Mr. GOODLATTE. I thank the gentleman.

The gentleman from Utah, Mr. Cannon?

Mr. CANNON. Thank you, Mr. Chairman. I sort of feel like Thor, the Norse god who drank from the cup connected to the ocean. I appreciate our panelists' vast store of an ocean of knowledge that they are sharing with us today.

Mr. Cali, may I ask just a couple of questions of you to clarify? In AT&T's relationship with Excite@Home, does Excite have any advantage other than the fact that it will be promoted through AT&T over other ISPs, other portals?

Mr. CALI. Today we have an exclusive arrangement with Excite@Home that is contractual and we intend to honor that arrangement.

After the exclusivity period expires in 2002, we have indicated that it will be a preferred ISP, and, as a result, customers who choose AT&T for broadband will receive its service, but we have also said we will not favor it based on affiliation in terms of operational issues.

I do want to clarify something I said earlier to be sure I am clear. The reality is we are urging that the commercial marketplace be allowed to work out these arrangements, and we may have a variety of arrangements with a variety of ISPs going forward. The key commitment here is that our customers will have a choice.

Mr. CANNON. Will that choice come at an additional cost? In other words, will Excite@Home be free or will it be a competitive cost based on what is provided by the ISP?

Mr. CALI. Let us be clear. Today, if you use Excite@Home, you can get to any content on the Internet, and some content providers charge for that, others do not. A lot of people have a concern that yes, but in order to get to that other content, you have to buy Excite@Home's enhanced offering, and so we are paying twice, in effect. At least that is the argument that is being made.

We have made clear that going forward you will not have to acquire Excite@Home's enhanced content to get to other providers on the Internet.

Now, will there be separate charges for the provisioning of the broadband access? Perhaps. And again I think we have to look at the arrangements we enter into.

As to the technical issues, that is why we are entering into trials. We are trying to determine how technically we can make it easy for customers to choose ISPs and move their choice if they need to.

On this point I would just like to emphasize that we really are in a nascent market, a world of convergence. I think you look at the AT&T Media One consent decree and you realize that the Department of Justice allowed this merger to go forward because they believe the consent decree addressed the issues of concern, and it really was more an issue of will DSL and will satellite and will fixed wireless and ultimately the utility companies be effective competitors in this marketplace. We think they will. The question is, it is a nascent market today, and is today the right time to enter into that market with regulation.

Mr. CANNON. Thank you.

Mr. Tauke, if I could refer to you, I couldn't help but think, when you talked about the first mile and the backbone and the middle area, that the RBOCs become sort of the lords of the middle kingdom here and clearly the area where we need a lot of work.

You said in your testimony that the dollars are in voice, but if the RBOCs get data capability will there not be an inexorable movement toward IP telephony or voice over data?

Mr. TAUKE. First of all, we are not asking and I don't believe this legislation grants relief, interLATA data relief for IP telephony. If we would offer a voice long-distance service, whether it would be an IP telephony service or a traditional long-distance service, and were charging for that service, presumably that would be in violation of the law under section 271 of the act.

Obviously, the FCC has the ability to know what we are charging our customers for what services we are offering in the marketplace.

Mr. CANNON. But if you are offering data and people have a computer that is connected with your network in getting data, you couldn't stop them from using—

Mr. TAUKE. That happens today. People can sign up on their computer now and we don't know and they can do voice over the Internet, but, of course, we receive no revenue from that and we lose out on the revenue so that the long-distance carriers—this is an issue that is interesting, but it is not something that is, in a sense, relevant to this discussion in the sense that there is no money being charged for that service.

Mr. CANNON. Thank you.

Mr. Cleland, you talked earlier about cable clearly leading in the broad bandwidth. Is it not true that DSL is also catching up with cable over time?

Mr. CLELAND. Well, cable had a very big head start. When we first looked at this about a year ago, cable was at 90 percent of the broadband market. Now, today they are probably in the mid to high 70's. And so DSL is catching up. But the question is, it is going to be a weak duopoly. There is not one clear winner. It is not

black and white. But there clearly is market power by the two duopoly players, and the market power on the teleco side is mitigated because there is open access on it.

Mr. CANNON. Thank you.

Thank you, Mr. Chairman.

Mr. GOODLATTE. Thank you.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the chairman very much. I started this morning with remarks to the chairman that my ultimate consideration is the increased opportunity for competition and the recognition that regulation by the Federal Government, and in particular the FCC and legislative initiatives is appropriate inasmuch as the Internet is somewhat a creation of this Government.

In the legislation, H.R. 1618, there is a definition of "broadband" that refers to transmission capacity in excess of 200 kilobits per second in at least one direction. Having visited a number of new broadband entities by diversified companies, meaning large institutions that are now seeing the light and the excitement of getting into broadband, it seems to me that this is a new popular kid on the block.

So I would like to ask—and if the question is too technical for those that I raise the question with, just pass it on to someone who is either for or against the bill.

Mike, let me ask you, that definition, do you agree with that? And how does it help increase? You support the bill, as I understand it, the legislation. How would that technical definition help in competition?

Mr. MCCURRY. You are asking the guy who never even signed on to the White House Website when I worked there, so probably not.

Ms. JACKSON LEE. I am not putting you on the hot seat. Welcome, by the way. Glad to see you.

Mr. MCCURRY. Let me comment, though, because I think it did come up a little bit indirectly in the discussion about the capability of DSL with respect to video streaming technology and what the different rates are for that.

I will defer to my colleagues on the panel, but I think that standard is the section 706 definition, is that right?

Mr. CLELAND. Actually, it is the FCC's definition. It is half of the FCC's definition. The FCC says 200 kilobits both ways, and it is an arbitrary kind of distinction to try and be faster than ISDN speed, which was baby DSL of the past.

Ms. JACKSON LEE. Thank you.

Mr. MCCURRY. But the larger point I would make is that the people who are interested in the capacity of what broadband will bring, particularly into the residences—we know what the applications are increasingly now with respect to the business place—but those who are interested in what this will mean in the home with respect to entertainment, with respect to the way in which you can interact with Government officials as a citizen, know that speed, irrespective of how you define it, depends on a backbone that is capable of carrying that traffic with the speed and the efficiency that we are going to need going forward.

We only can predict, you know, massive increases in the number of people, the number of entities, the kinds of organizations that

are going to want to use this technology, and if the Department of Justice's concern, as expressed in the WorldCom-Sprint filing, is correct, we can see the telltale signs of congestion beginning.

If that is true, why would we lock out of building those efficient networks some of the companies that have got the greatest capacity to do exactly that kind of investment.

Ms. JACKSON LEE. And you believe this legislative intervention is both appropriate and needed?

Mr. MCCURRY. I do. I think there is an irony here, which I would grant you. On the one hand, with respect to this issue of open access, nondiscriminatory access content that we have been talking, some on the panel seem to say no, you know, the markets will work, let us follow the Periclean model and time will work in advantage for us. But, ironically, when it comes to the infrastructure necessary to carry that content, they say, "No, the regulatory paradigm that exists because of telephony restrictions that are in section 271, they can be the good and the heavy hand of regulation that will create the incentive for companies to make the investments necessary."

Ms. JACKSON LEE. Thank you.

Let me, in light of the time, go to Commissioner Ivey, representing both public utility companies and, I guess, the State of Maryland. Why not intervene at this point? And how does that, in your leadership and wisdom, interfere with where we are trying to go with the Telecommunications Act of 1996?

Again, my focus is consumer viability and competition, and I would appreciate—I have a question for Mr. Sachs and I should say that on the record so the chairman will indulge me, but I appreciate very much your answer.

Mr. IVEY. We have a number of concerns. The first is with respect to the impact on section 271. This legislation would gut it unnecessarily. If the goal is to ensure there is a roll-out of these types of services to under-served areas, you don't have to gut section 271 to do that. That is point number one.

Point number two is, to the extent this legislation is aimed at giving the Bells a chance to build a network, I think, as Ms. Lofgren pointed out earlier, the Bells are already participating in serving a lot of these DSL lines already.

If the Bells want to go beyond the LATA boundaries that are there, they should get the section 271 checklist taken care of, comply with the Telecommunications Act, and then go forward with their DSL efforts across LATA boundaries.

Ms. JACKSON LEE. I have a question for Mr. Sachs. Mr. Chairman, I ask for an additional minute to finish my questioning.

Mr. GOODLATTE. Indulgence is our specialty this afternoon.

Ms. JACKSON LEE. You are gracious this afternoon, Mr. Chairman, as you have always been, and I appreciate it.

Let me just put on the record I am probably not going to get answers verbally from you gentlemen. We put issues on the record and then we have to be diligent, ourselves, to follow up with you for these answers in writing.

I am going to be concerned specifically about the physically challenged, minorities, small businesses, schools, libraries, and the elderly as to whether or not intervention at this time enhances their

access to Internet resources. And I will reach out to you to get those answers, but I do want to go to Mr. Sachs because someone cited New York, but Houston also was in the midst of the extinguishing of service through their cable service in a dispute between the cable service and Disney.

What arguments do you make in opposition to the present legislation that would, as I understand it—and I understand you to be opposed to it, but, in opposition to present legislation, that would give me comfort that, as we are proceeding now, we will have the competition as we move to the next level that does not have communities blocked out because of contractual disputes, as we just had in Houston where we could not see a particular airing because you all were in a contractual—when I say “you all,” cable network was in a contractual fight.

Why do you not want to intervene or have legislative intervention at this time?

Mr. SACHS. First, let me say, with respect to the Disney/Time Warner dispute that it unfortunately caught several million consumers between two companies—

Ms. JACKSON LEE. And, as I mentioned, I am concerned about consumers in competition.

Mr. SACHS. Yes. And I should say that while Disney and Time Warner are both members of the cable industry, our trade association doesn't get involved in their private contractual negotiations.

Ms. JACKSON LEE. But you are on the hot seat now, to a certain extent.

Mr. SACHS. And I am going to speak to it. I think the lesson from that dispute is that these companies need to do a much better job of resolving contractual negotiations in the board room or the conference room and not let them boil over so that they impact consumers. In fact, there are some 1,500 television stations and 11,000 cable systems in the U.S. We have had re-transmission consent since 1992, and you really can count on one hand the number of instances where there has been this kind of interruption. This was, obviously, the most visible case.

But I think the lesson that the companies have taken from it is that it behooves them not to have this happen again.

As to the relationship between that and the forced access issue, there are differences—Mr. Padden referred to the fact that in New York City, other than off the air with a broadcast antenna, there is not another alternative in that instance for people to—

Ms. JACKSON LEE. I would rather you just answer the question of why not this legislation and why your approach.

Mr. SACHS. Why not this legislation? Because this is a new business that we are entering into. It is not even available yet in many places across the country because we are just in the process of rebuilding our networks.

At the same time, there are a number of other providers of broadband high-speed services who are emerging. We have talked about DSL. We have talked about satellite. We have talked about wireless. In fact, even the broadcast industry is now pooling some of the digital spectrum that Congress gave it in 1996—ostensibly to do high-definition television—for datacasting.

So consumers are going to have numerous alternatives here. It is not all going to happen overnight.

Ms. JACKSON LEE. Thank you.

Mr. Chairman, I thank you very much.

Mr. Cali, I will both read your testimony in depth and would like to pursue some discussions with you. I think the chairman has indulged me, and I will yield at this time. Thank you very much.

Mr. GOODLATTE. I thank the gentlewoman.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you.

Mr. Cali, you say in your statement that consumers ought to have choice and that is why you are here today. AT&T testified over a year ago before this committee and said that you will ensure that consumers are able to access the content of their choice over our cable systems. In other words, you want to ensure that consumers get the content of their choice over your systems. That hasn't been done, has it?

Mr. CALI. Congressman, yes, it has been done and it is being done in two respects.

Mr. BACHUS. Do any of your customers have access to the content of their choice?

Mr. CALI. Yes, they do, in fact, through Excite@Home, and then the concern has been that they have to go through Excite@Home.

Mr. BACHUS. Actually, that is not a choice of content. A choice of content is when you have more than one content provider. Now, you and I both know that; is that right?

Mr. CALI. No, that is not correct. I think what I am explaining is—

Mr. BACHUS. Well, what you also said is that you are opening your cable lines to other content providers to assure that customers have content choice.

Mr. CALI. Right.

Mr. BACHUS. So you are opening the cable systems to other content providers to ensure that your customers have—

Mr. CALI. Our customers will have their choice of content. They can go anywhere on the Internet today. They do so through—

Mr. BACHUS. But they can't choose their content providers, can they?

Mr. CALI. No. They can go anywhere. They have access to—

Mr. BACHUS. Answer my question.

Mr. CALI. I am trying to do so. With all due respect—

Mr. BACHUS. Answer my question.

Mr. CALI. I am answering that question.

Mr. BACHUS. Do they—can they choose their content provider?

Mr. CALI. And we are engaged—we have announced we will begin technical trials this fall to work out the remaining technical issues to permit them to chose—

Mr. BACHUS. But they can't now.

Mr. CALI [continuing]. Their ISP of choice.

Mr. BACHUS. They can't now.

Mr. CALI. We have taken firm steps. We did testify last year.

Mr. BACHUS. Okay. You have taken firm steps. You want to ensure all this. But as of today they don't have choice of content providers. Yes or no?

Mr. CALI. As of today customers—our cable customers do not have a choice of multiple ISPs.

Mr. BACHUS. So, in other words, the answer is no, they don't have a choice.

Mr. CALI. No, that was not the answer. The answer was they do not have a choice of multiple ISPs, sir.

Mr. BACHUS. Okay. They don't have a choice. Well, what you said is that you are opening the cable lines to other content providers. You said that last year. You haven't done that, have you?

Mr. CALI. No. What we said last year was we would ensure that our customers had access to the content of their choice. They have access—I am making two points. They have access—

Mr. BACHUS. Let me ask you this—

Mr. CALI [continuing]. Through Excite@Home.

Mr. BACHUS. Let me ask you this. You have an exclusive agreement with Excite@Home for them to provide all content over your cable lines; is that correct?

Mr. CALI. We have an exclusive agreement with Excite@Home as the ISP of choice until 2002.

Mr. BACHUS. Well, ISP of choice is them.

Mr. CALI. That is correct.

Mr. BACHUS. That is not a choice, is it? How can that be a choice if it has to be them?

I think this is a pretty good illustration of a straight answer or not a straight answer.

Mr. CALI. No. I think we have a definitional issue here, with all due respect.

Mr. BACHUS. I think we do have a disagreement about that. But there is only one content provider, and that is Excite@Home if you link up with TCI or Media One.

Mr. CALI. There is one ISP available on the old TCI systems. That is Excite@Home. Roadrunner is available on the Media One systems.

Mr. BACHUS. Mr. Sachs, a cable company that blocks consumer access to electronic program guides, a cable company that refuses to carry channels that compete with its own existing and planned new channels, a cable company that blocks critical interactive communication between customers and competing content providers, a cable company that makes its own content more accessible by simplifying its own interfaces but making complex interfaces with other providers, or that designs client software that automatically disables the client software of competing ISPs, would you consider that they are committed to consumer choice?

Or maybe we just say it unplugs eight million ABC customers. Is that committed to consumer choice?

Mr. SACHS. These sound like the concerns that Disney has raised with both the Federal Trade Commission and the Federal Communications Commission.

Mr. BACHUS. And I think—

Mr. SACHS. Would you like me to speak to your question?

Mr. BACHUS. Well, those are exactly—what we are talking about is AOL/Time Warner.

Mr. SACHS. Those are allegations and concerns that one company which is involved in business negotiations with another company has raised before regulators—

Mr. BACHUS. But not all of those—

Mr. SACHS [continuing]. Reviewing a merger.

Mr. BACHUS. But what I mean, they have, in fact, done all those things, have they not?

Mr. SACHS. No.

Mr. BACHUS. They haven't?

Mr. SACHS. No, they have not.

Mr. BACHUS. Have they done any of those things?

Mr. SACHS. I wouldn't agree with your characterization of the ABC/Disney dispute. Again, that was a retransmission dispute which I don't believe, personally—

Mr. BACHUS. But did they—

Mr. SACHS [continuing]. Had anything to do with the carriage of the ABC Network or Time Warner's choice of carrying the ABC Network. I think that dispute has—

Mr. BACHUS. Well, they admitted that they had walled off on it on cases over 85 percent of the content.

Mr. SACHS. Excuse me?

Mr. BACHUS. They have admitted that they walled off as much as 85 percent of the—

Mr. SACHS. I am not at all familiar with what you are referring to.

Mr. BACHUS. All right.

Let me ask you this. Do you think AOL/Time Warner—where are they on the learning curve compared to other cable companies?

Mr. SACHS. I think that they are probably farther along in terms of providing choice to other ISPs, and I think that they have articulated this in their memorandum of understanding perhaps more comprehensively than other companies.

Mr. BACHUS. So some of the other cable companies are less committed—

Mr. SACHS. It is not a question of commitment. It is a question of developing the business model and figuring out how technically to accommodate multiple ISPs.

Mr. BACHUS. All right.

Let me close with this. I think one obstacle to the Internet is consumer privacy. Polls say that consumers aren't confident that their information will be protected when they get on the Internet, and I think trust is very important, and privacy.

Mr. Padden, Toys Mark—it recently came to my attention that they had made a pledge. In fact, I think you have probably seen that, where they actually say, "Our promise is that personal information voluntarily submitted by visitors to our site is never shared with a third party," then they go over and say, "Your information is safe with us," actually in bold term.

Disney owns a majority of that company. I have filed legislation which would prevent a company from promising or pledging that it would not release private information and then attempt to do so. It would make that an unfair business practice.

Do you agree?

Mr. PADDEN. We would support that legislation. We would be happy to work with you. We were as alarmed as anybody when this issue arose in the bankruptcy proceeding. We were surrounded by bankruptcy lawyers that initially told us we couldn't even publicly express our desire that this commitment be honored and preserved because we would put ourselves in jeopardy vis-a-vis the creditors in the bankruptcy proceeding.

As I think you are aware, we, nonetheless, did put out a strong statement that we strongly support honoring this pledge and, in fact, have indicated a willingness to step up and bid in the bankruptcy court for this data so that we can bury it somewhere in the back yard and nobody will ever have to worry about the pledge being violated.

Mr. BACHUS. Thank you.

Mr. PADDEN. We agree with the thrust of your bill completely.

Mr. BACHUS. Thank you. In fact, I think you all actually said that you might buy back the list if that is what it took.

Mr. PADDEN. That is right.

Mr. BACHUS. So I commend you for that. I really do commend Disney.

I have no further questions.

Mr. GOODLATTE. I thank the gentleman.

Does anybody else—I have a few more questions. Does the gentleman from Virginia have any more questions? The gentleman from North Carolina? The gentlewoman from Texas? Why don't you go ahead, and then I will finish up with a couple.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I want to clarify and make sure that my inquiry on the Time Warner/Walt Disney issue was not so much personal contractual transgressions as much as it was to highlight the responsibility of this committee, which is competition and the opposition to monopolistic impact, and so my inquiry was to suggest that that dispute single-handedly barred a number of my constituents—in fact, the whole city of Houston, at least those who were tied to cable—from having access to a product that they wanted.

In my interpretation, both for the layman who may be listening, that is anti-competitive. I know there were some contractual issues, so I raised the question on that basis.

Let me follow up and allow Mr. Cali to give me a precise answer on content question, which is his projection for when he feels comfortable that there will be competition or when, at least within his portfolio, consumers will have choice.

You were trying to get the answer out. Why don't you give me that answer please so I can understand it and then pursue it from there.

Mr. CALI. Thank you. And I apologize if I was unclear. I am trying to draw a distinction between ISPs and content. Today, through Excite@Home—but it is through Excite@Home over the old TCI systems and Roadrunner on some of the Media One systems—you can access any content on the Internet. We understand that many parties have raised concerns with that and a number of ISPs said, "I just don't want to be able to be accessed through Excite@Home, but I would like to be able to have customers choose me as the ISP," and we have committed to do so.

The exclusivity agreement with Excite@Home runs until June of 2002. We intend to honor that agreement. There are also technical issues that need to be resolved, and we are beginning trials this fall in Boulder, Colorado, and again next fall in Massachusetts to work out those technical issues, and then we intend to be ready on the cable systems to offer customers choice of ISPs upon expiration of the Excite@Home exclusivity period.

Ms. JACKSON LEE. So 2002. Let me ask you what would be your response to those who would say you are not moving fast enough, that is why we are here today?

Mr. CALL. I completely understand the concern of many, and what I would ask the members of the committee to consider is this—again, we weren't even in the business at the time when Excite@Home first started taking risks with capital, first started investing on the hope that this marketplace would work. And at that time they entered into exclusivity arrangements with the cable companies.

You can't walk away from that type of a contract lightly. It is an independent company. AT&T has a significant interest in it, but it is publicly traded. There are other shareholders.

We share the concern of some that we are not moving fast enough, but we know where we are going and we are committed to get there.

I would also point out, if there is some question about AT&T's commitment, AT&T is also working mightily to roll out a fixed wireless offering. That offering will deliver both telephone service, competitive telephone service, as our cable services will, and it will deliver broadband access. And we have said from the beginning we will give customers on that service their choice of ISPs, and we are currently negotiating with some ISPs in order to give our fixed wireless customers a choice of ISPs.

Ms. JACKSON LEE. I am interested in pursuing that. Mr. Scott made a very important point about the ease of wireless, and why not just go there now.

I am going to seek to engage you in a meeting in my office, and I will pursue that with some additional inquiries I would like to put on the record.

But I notice Mr. Wolzien wanted to comment on that question, and I would appreciate your response.

Mr. WOLZIEN. Thank you, Congresswoman.

Ms. JACKSON LEE. Or at least wanted to comment.

Mr. WOLZIEN. Thank you, Congresswoman.

I think it is important to somebody who covers both cable and also covers AOL to point out that we are really talking about, with Excite@Home, a bundled content and ISP, that you have to buy the ISP and the content together, whereas you can go and buy AOL with access to AOL's content to \$9.95 with no connectivity whatsoever.

So the issue is that you are buying two things with Excite@Home. You are buying the connectivity and the content, and you have to buy through that content to buy somebody else's content.

While, in fact, there may be an exclusive arrangement with AT&T, the reality is that AT&T is fundamentally today in control

of Excite@Home, and over time there would seem to be the potential to try to sort these things out.

Ms. JACKSON LEE. Mr. Sachs or Mr. Tauke, let me just ask a simple question. Do you think we are moving fast enough? Do you think we need to hold our horses on present legislative initiatives and do you feel comfortable that we will get where we want to get on the Telecommunications Act of 1996?

Mr. SACHS. Yes.

Ms. JACKSON LEE. You are representative of a certain body. Yes, and I will give you about five more words, but yes under the intent or under the auspices of how? How do you believe we are moving fast enough?

Mr. SACHS. I think the evidence is in the amount of investment that has been made by our industry over the last several years and the fact that we are rolling out cable modem service as quickly as we can obtain the modems. At the same time our companies are learning. For instance, in today's "Communications Daily" there are two stories. One is that Comcast just signed a 3-year agreement with Cisco for broadband routers. The article goes on to explain how broadband routers enable Comcast to accommodate multiple ISPs.

A second article reports that a company called I-Sky, a satellite provider, just completed a second round of equity financing. They have raised \$750 million. They are going to be offering broadband to the home via satellite next year.

This is a dynamic marketplace. A lot is happening.

Ms. JACKSON LEE. So you see no dilatory tactics at this time?

Mr. SACHS. Not on the part of our industry. No.

Ms. JACKSON LEE. Thank you.

Mr. Tauke, let me read into the record the entities that I mentioned, and also cite for you that right now, as we speak—and I am going to be heading over there—the National Telecommunications Information Administration Agency is holding a session at the Department of Commerce on how to improve access to minorities and small businesses.

Let me read this group into the record again: the physically challenged, minorities, small businesses, schools, libraries, and the elderly.

There is a two-pronged question. One on small businesses would mean access of cooperation to secure pieces of the industry. With the others, and minorities and women, as well, let me read minorities and women into the record. But with the others—the physically challenged, schools, and libraries—it is a question of access and competition.

How does the intervention of these legislative initiatives improve any of that?

Mr. TAUKE. I think, first, that the technology that is being developed has great promise for the physically challenged community. We have been working very closely with them during the past several years to improve the quality of life for them. As this technology is made available to them, broadband services are rolled out to them, they have many opportunities that they do not have today.

And so anything that we can do to encourage the deployment of broadband services and make those services more available, wheth-

er it be to the physically challenged community, the schools and libraries, others that you mentioned, this is going to improve the ability of these individuals to receive health care services, education services, and so on. As well as have the economic benefits of shopping over the Internet or small businesses relating to their manufacturers and being more efficient.

Ms. JACKSON LEE. Do you have any specific parts of your business that deal with those issues specifically?

Mr. TAUKE. Yes.

Ms. JACKSON LEE. Do you have any segmented out parts of your business that say, "I am trying to reach those populations?"

Mr. TAUKE. Yes, we have segments of the business that are focused on almost all of those populations, which I would be happy to discuss with you at any time.

Ms. JACKSON LEE. I would be gratified, as well as participation with minorities, women, and small businesses having access to it.

Mr. Chairman, I will conclude, because you have been indulgent, but I do see the hand of Mr. Cleland. I appreciate his being able to answer the question. Thank you, Mr. Cleland.

Mr. CLELAND. One point on your physically challenged issue is under section 255, if a service is a telecom service, by law the physically challenged get special access. Cable broadband, if it is not a telecom service, the physically challenged don't have that same legal right to access that technology.

Ms. JACKSON LEE. Thank you, Mr. Chairman. And thank you, Mr. Cleland.

I would appreciate more definitive answers on those particular groups that I offered, and I would appreciate it if the witnesses would provide me, both from their perspective of being for or against this legislation, how their position enables these populations to have more access to the resources that I believe belong to all of the people of this country.

I yield back. Thank you.

Mr. GOODLATTE. The gentleman from Alabama.

Mr. BACHUS. Someone mentioned that broadband cable is not a telecom service. Did the ninth circuit rule that it was? And what implications is that going to have?

Mr. CLELAND. Yes, the ninth circuit did rule that cable broadband was a common carrier telecom service.

Mr. BACHUS. Okay. What significance is that?

Mr. BAKER. The implications are that, as a telecommunications service, they have to provide both nondiscriminatory access to entities such as Internet service providers and interconnection to other telecommunications carriers, which as a further definition under the Telecommunications Act.

Mr. BACHUS. Mr. Sachs I think said that—you know, I mentioned the practice of disconnecting competitors over their system. I think you basically denied that that had happened; Is that right?

Mr. SACHS. As a physical proposition, clearly that could happen, but I—if we are talking about going back to Time Warner and Disney, that signal was taken off the air. The Time Warner position was that they didn't have the retransmission right to continue to carry it. The FCC found against them.

Mr. BACHUS. Yes. Other than the ABC example, there have been numerous cases where a cable company was owned by a broadcast company that had another sports program, and they came in when they bought it, they took that sports program off or that regional program and they put their own service on.

Mr. SACHS. The Congress in 1992 put in effect some program access rules. In the 6 years since that time, there may have been half a dozen complaints presented to the FCC which were adjudicated. So do cable companies change programming from time to time? Yes. There is consumer demand for other programming, and in an age of limited capacity—there are some 200-odd networks—all couldn't be accommodated. Companies do need to be sensitive to their customers' interests however.

Mr. BACHUS. Would you say the cable companies have erected barriers to competition which discriminate against companies which they don't own or favor companies which they do?

Mr. SACHS. No. And I don't believe there is evidence of that, either.

Mr. BACHUS. All right. Does anyone else on the panel disagree?

Mr. CLELAND. I think there is ample evidence. I will let Preston tackle that one.

Mr. PADDEN. There is plenty of evidence. And, if I could interrupt Congresswoman Jackson Lee, as well, with this example, just to give you an example, in Houston—well, we own a children's channel called "Disney Channel." It is carried on the basic tier in over 60 million homes by many fine cable companies that don't have any conflicted interest.

Time Warner owns their own children's channel called "Cartoon Network," which they would rather that your kids watch, so they declined to carry Disney Channel on basic tier.

In Houston, where the city was half TCI and half Time Warner, TCI was carrying Disney Channel on the basic tier. The two companies swapped systems so that Time Warner ended up owning all of the cable in Houston. Time Warner went into the former TCI systems, ripped out the Disney Channel, made it only available as a premium offering, and raised basic fees at the same time. And the only reason we can think why they would do that is because of their conflicted interest owning Cartoon Network.

Mr. BACHUS. There is another gentleman on the panel next to you, Mr. Padden. Mr. Cleland?

Mr. CLELAND. Yes, sir. I think, you know, if the question cuts to is there past instances where cable has possibly abused its market power or tried to prevent choice, and there are four places in law where Congress determined that the cable industry was anti-competitively leveraging their power—program access, allowing access—as a time of open access for programming; they mandated the broadcasters under must-carry and retransmission consent, should get access; they required leased access for commercial competitors; and they required competitive availability for navigation devices. So there were four different instances on four different marketplace leverage points that the Congress, in its wisdom, decided to try and mitigate the leveraging of that market power.

Mr. BACHUS. Has the FTC been aggressive in enforcing those provisions?

Mr. CLELAND. Certainly on the competitive navigation devices they have not. On leased access they have not. There is very little leased access competition. Program access has been a huge success. There are over 10 million Americans who use DBS. That is largely to the success there. They must carry a retransmission consent except for a few isolated instances. It has been very successful.

Mr. GOODLATTE. If I might interject, that is due to congressional legislation.

Mr. CLELAND. Correct.

Mr. GOODLATTE. The gentleman from Massachusetts.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. Tauke, when Bell Atlantic and GTW decided to merge to form Verizon, the FCC had said that GTE Internet backbone provider formerly called BBN had to be spun off. It is my understanding that the section 271 test is the reason BBN, now known as Genuity, had to be spun off.

What is your perspective on any benefits or costs to consumers stemming from the spin off of Genuity?

Mr. TAUKE. First, you are correct that, as a result of the restrictions on our ability to be affiliated with a company that provides any form of interLATA services, Genuity was spun off as part of that transaction.

In terms of the benefits or the detriments to consumers, at this juncture it probably is too early to tell.

Since Genuity was a tier one backbone, the concern that was expressed by both the Department of Justice and the FCC was that if Genuity were not preserved as a tier one backbone that there would be a diminishment in the competition in the tier one backbone market, which the Department of Justice has concluded is very concentrated in the hands of a few players.

The concern that the Justice Department, I think, had expressed related to this kind of spin-off was that, instead of Genuity being linked with a company that had a substantial customer base, it would be separated from that customer base, and there was concern about how it would thrive. When part of the MCI backbone was spun off as a result of the MCI/Worldcom merger, that piece of backbone went to Cable & Wireless. Cable and Wireless is a great solid company, but it doesn't have customers in the U.S., and that piece of the backbone withered, and there was concern that that might happen to Genuity.

We believe that, because of the structure that has been put in place by the FCC, that Genuity will be able to thrive during this period, and we hope that, with prompt movement through the 271 process, that we will have the ability at some point to pull it back.

Mr. MEEHAN. What is your response to the argument that the regional Bell operating companies won't even bother to comply with section 271 if these bills pass? And, in answering this question, can you give us a status update on the Verizon efforts to secure section 271 approval in Massachusetts?

Mr. TAUKE. First, we have no option. We must comply with the market-opening provisions of the act, even if we do not apply for long-distance relief. So this is not a choice, this is a requirement.

When we have sufficiently complied that we are able to file section 271 applications, there is a long and lengthy process that we

must go through. We are now at the stage in Massachusetts where we expect that the full report and record, if you will, will be before the Commission in a relatively short period of time. We expect that the Massachusetts Commission will be acting on that record in the foreseeable future and that we will be filing with the FCC at the end of the third quarter or the beginning of the fourth quarter of this year in Massachusetts.

Mr. MEEHAN. One last question. Actually, I have this question for Mr. Cali, as well. Obviously, there is some difference of opinion on when the Telecommunications Act, section 271 was intended to apply to long-distance data communications. Can you provide the committee with your respective opinions on that issue?

Mr. TAUKE. That is a question that I am glad we have an opportunity to address before this hearing ends. When the Telecommunications Act was put together in the early 1990's and into 1995 and 1996—and it was actually signed in 1996, put together in 1994 and 1995—there was a lot of discussion about the long-distance piece, and there were two areas where there was considered to be—where freedom was given for long-distance services. One was in the wireless area, and so the long-distance restrictions do not apply to wireless. The second was in the area of information services.

I think many former Members of Congress and current Members of Congress who were involved in that process have indicated that, at the time, when information services were set aside to be free from the interLATA or long-distance restriction, most Members thought of that as data and Internet content.

The way it has been interpreted by the Federal Communications Commission, it has been interpreted very narrowly and there has been no action taken under the section 706 provision of the act, and so therefore there has been no movement to permit data to be free of those long-distance restrictions.

So, obviously, people can differ as to what the intent was, but I think the intent was to treat wireless and information services or data different from voice services under the act.

Mr. MEEHAN. Mr. Cali?

Mr. CALI. Sure. Thank you. There is no doubt that data was included in the restriction. Let us remember where this restriction comes from. It arises out of a consent decree to settle an antitrust case. Under the MFJ, there was no distinction between voice and data services, and data is not a new thing. In effect, packet services have been around for years.

I think the evidence that Representative Eshoo read into the record indicates that this was under consideration during deliberations concerning the act, and, in fact, the existence of section 706, itself, is an acknowledgement that the Congress knew that we were moving into a new world of data.

That, coupled with the fact that, as we have said, the industry is moving to data, everything is going to data, as Chairman Kennard said, indicates that the very policy of section 271 also requires that we understand the act in terms of data being included in the restriction.

Mr. LOWE. If I may, Congressman, just to quickly add, I think it is quite clear that data was incorporated in the confines of the

act along with voice. Indeed, the definition of telecommunications just says the transmission of information.

But, more importantly, I think if you take the principles that are driving the 1996 act and apply them to voice, I think you will find that they apply equally as well to data, meaning that it is the Bell operating companies, particularly the incumbent local exchange carriers, that have control over the monopoly local plant, and it is that local plant that people need to get access to in order to terminate and originate traffic. Whether that traffic be voice or data, it doesn't matter. We all still need to get access to that plant.

And so the rules and the constructs set up by the act, in particular section 257 and section 271, apply equally as well whether it is voice or data, and that is how the FCC came to its conclusion.

Mr. TAUKE. Congressman, I think it is instructive to note that the administration at the time of the 1996 act, consideration of it, proposed a title seven to have a section devoted specifically to broadband. The Congress looked at that but never acted on the specific broadband example, but they did set up two what they called "incidental" interLATA exception—where interLATA relief was permitted. One was for wireless and the other was for information services.

I think that you would have to ask yourself if, by "information services" the Congress wasn't thinking about data and Internet and medicine over the Internet and that kind of thing. What is it that the you were thinking? You could go back and read the record yourself to reach a conclusion.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

Now that I have indulged everybody else, I am going to indulge myself for just a few more questions, if you will bear with me.

Mr. CALI, in the merger agreement between AT&T and TCI, Liberty Media was granted preferred provider status. What does that mean?

Mr. CALI. As I understand it and to my knowledge of it, that meant that we would give—for Liberty Media's new programming, we would make reasonable efforts to distribute that programming. We would do so pursuant to standard industry terms and conditions. It did not suggest a discrimination against other programming providers.

Mr. GOODLATTE. Does it get better channel placement?

Mr. CALI. I cannot provide you personally more info on that. That is what I know, but we would be happy to supplement the record with that information.

Mr. GOODLATTE. Could that be one of the things that it means?

Mr. CALI. I would not know, as I said. My understanding is that we would use reasonable efforts to provide distribution, so it would not suggest that.

Mr. GOODLATTE. What about a better price?

Mr. CALI. No. To my knowledge it would not, but, again, we can supplement the record if you would like.

Mr. GOODLATTE. If it got better channel placement, would you consider that to be discrimination?

Mr. CALI. I just will not comment on that until I get further information on it.

Mr. GOODLATTE. Would you submit that information to the committee?

Mr. CALI. Yes, we will.

Mr. GOODLATTE. If you would answer that question, we would appreciate it.

Mr. CALI. Sure.

Mr. GOODLATTE. Recently John Malone stated that AT&T would shift its focus to the content side. Is that getting into the problem area that Mr. Padden raised earlier?

Mr. CALI. Actually, I believe we were reading the same article, because the only information I have is the press report, as well, where Dr. Malone said AT&T should shift its focus into the content side, and then in that same "Wall Street Journal" article, as I recall, he said he was still trying to sell that idea.

We have consistently viewed ourselves largely as a pipe company. The reason we moved into cable was because of the desire to serve our telephone customers with residential local telephone service, something very few other companies in the country are expressing an interest in.

Mr. GOODLATTE. Have you entered into an MOU similar to the AOL/Time Warner MOU?

Mr. CALI. For the cable properties?

Mr. GOODLATTE. Yes.

Mr. CALI. We have not. We are currently speaking to a number of providers, both national and regional ISPs, for participation in the trial this fall in Boulder.

Mr. GOODLATTE. All right.

Mr. Tauke and Mr. McCurry, what do you foresee as the future of the Bell Company applications to enter long distance in the next year or so? I know the gentleman from Massachusetts asked about Massachusetts. Obviously, I am interested in Virginia, but I would like to have an overview. Are there going to be lots more applications now that the first two have been approved, or will it still be a long, slow process?

Mr. TAUKE. Mr. Chairman, I think you have had the opportunity to see how extensive these applications are and the amount of work, regulatory work, that State commissions and others have to put into it in order to get an application ready, so these are major undertakings.

As a result, I don't think that they are going to come flowing rapidly, but I think the pace is certainly going to pick up.

I anticipate that our company will have four or five applications to the FCC in the next year. I believe that the other Bell companies will also have single digit numbers to the FCC so that the FCC, over the course of the next year, may receive 10 applications.

Mr. GOODLATTE. And they all encompass an entire State?

Mr. TAUKE. Each application encompasses an entire State.

Mr. GOODLATTE. And the Virginia application?

Mr. TAUKE. We are getting into speculation here, but we anticipate that we will be engaged in operation support system testing with KPMG, this third-party testing of systems, some time before the end of the year. Depending on how quickly that goes, we would hope that we would be able to complete the process in Virginia during the course of the year 2002.

Mr. GOODLATTE. And what does that mean for the roll out of DSL service in—just pick Roanoke, Virginia, as a random location. [Laughter.]

Mr. TAUKE. I should have studied Roanoke before I came. There is a relationship between the roll out of DSL services and this legislation, but I might just observe—and section 271 applications, but it is not—it is a somewhat incidental relationship. So the roll out of DSL services has to do with our ability to make investment and the determination of where that investment is going to be made, the capability of the plant in the area, and a variety of other issues, so I would be happy to talk with you offline about timing in Roanoke, to what level we could penetrate the market in Roanoke with DSL services. As you know, we aren't able to deliver them to every customer. I would be happy to do that offline.

Mr. GOODLATTE. All right. That sounds like a great place to stop.

I want to thank all of you. This has been a very, very helpful panel and a very good discussion and debate about two critically important issues for the future of the Internet, and I appreciate all of your participation.

The hearing stands adjourned.

[Whereupon, at 2:53 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, August 24, 2000.

Mr. LEN CALI,
Vice President for Federal Government Affairs,
AT&T, Washington, DC.

DEAR MR. CALI: 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": Part 2 on July 18, 2000.

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. CALI FROM MR. CONYERS

1. Please explain the extent to which the Telecommunications Act of 1996 considers and applies to data services. If the Telecommunications Act of 1996 covers data services, can H.R. 1686 and H.R. 1685 accurately be considered a "mere" clarification of the Act?
2. Congressman Tauzin testified that LATA lines are an anachronism that were devised, under the Modified Final Judgment in the AT&T antitrust case, for voice telephony, not data, and that this has caused stranded regional Points of Presence (POPs) in many states, including Louisiana and Illinois. Is this actually the case, and, in your opinion, do H.R. 1686 and 1685 address this issue?
3. For the past several years, the RBOCs and their allies have claimed that there is a "backbone shortage" in this country. In his testimony, Mr. Tauke conceded that there is no such shortage, but put forth a new argument. He asserted instead that there is a "regional network" shortage of broadband capacity between the central office and the network access point of the backbone provider. Is this true, and if so, would H.R. 1686 and 1685 change this?
4. Congressman Boucher and FCC Chairman Kennard disagreed about the ability to distinguish between long distance voice and data communications. Based upon your experience in the telecommunications industry, could you explain how exempting high-speed data services from Section 271 would affect the BOCs' ability to provide long distance voice communications?
5. There is considerable concern that broadband deployment is less likely to reach minorities, the elderly, small businesses, the physically challenged, schools and libraries, and rural communities, as it is to reach others in this country. Are competitive carriers already deploying service to these individuals and entities? Would H.R. 1686 and H.R. 1685 accelerate service to them?

AT&T,
FEDERAL GOVERNMENT AFFAIRS,
Washington, DC, December 4, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: On August 24, 2000, as a follow-up to the House Committee on the Judiciary's July 18 legislative hearing on H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999," you sent me additional written questions from Congressman Conyers that you asked me to answer for the record. AT&T respectfully submits answers to those questions in the attached document.

Please let me know if you have any additional questions, or wish further information.

Sincerely,

LEONARD J. CALI, *Vice President.*

cc: The Honorable John Conyers, Jr.

Enclosure

RESPONSE TO QUESTIONS FOR MR. CALI FROM MR. CONYERS

Question 1. Please explain the extent to which the Telecommunications Act of 1996 considers and applies to data services. If the Telecommunications Act of 1996 covers data services, can H.R. 1686 and H.R. 1685 accurately be considered a "mere" clarification of the Act?

Answer: As explained below, the Telecommunications Act of 1996 clearly considers and applies to both voice and data services. As a result, the proposed changes would constitute far more than a mere clarification of the Act.

Preliminarily, the Telecommunications Act of 1996 (the 1996 Act) defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(48). On its face, this definition clearly includes all types of information, whether it is voice or data.

The term "information" clearly includes data. Webster's Ninth New Collegiate Dictionary (1986) defines "data" as "factual information." The same dictionary defines "information" as "the communication or reception of knowledge or intelligence . . . a signal or character (as in a communication system or computer) representing data. . ." Newton's Telecommunications Dictionary (8th Ed., 1994) defines "data" according to the AT&T Bell Labs' definition as the "representation of facts, concepts, or instructions in a formalized manner, suitable for communication, interpretation or processing." Newton's definition goes on to add that "data" means "[t]ypically anything other than voice."

That the plain meaning is the meaning intended by Congress is evidenced by the legislative history. The definition of "telecommunications" in the House bill (H.R. 1555), of which Congressman Tauzin and Congressman Boucher both were original cosponsors, used a definition almost identical to the final text enacted into law. The House definition was taken directly from the Modification of Final Judgment, which defined "information" to mean "knowledge or intelligence represented in any form of writing, signs, signals, pictures, sounds, or other symbols." House Report 104-204, Part I, at 125. The Senate definition was nearly identical to the House definition and thus the final enacted text, and explicitly stated that it included the transmission of "voice, data, image, graphics, and video." Senate Report 104-23 at 17-18. The conferees adopted the Senate definition with an amendment that deleted the extraneous text in both the House and Senate definitions, keeping the text that was essentially identical in both versions. Nothing in the amended definition or the Statement of Managers indicates any intent to remove "data" (or anything else) from the plain meaning of the term "information" used in both the House and Senate bills and in the final enacted text. House Report 104-458 at 114-116.

There is also other evidence that the House and Senate bills that became the Telecommunications Act of 1996 included data within the commonly understood meaning of the term "telecommunications." Congressman Tauzin, speaking on the floor of the House of Representatives upon passage of the 1996 Act, stated:

. . . Today, in a bipartisan way, we unleash the spirit of competition in all forms of telecommunications services, from telephones to computers, to services dealing with video programming and data services to interexchange services that are going to link us as Americans together as one like never before and give us access to the world and the world access to us as never before.

Congressional Record (Feb. 1, 1996) at H1151.

In addition, Congressman Boucher championed the entry into telecommunications by electric companies subject to the Public Utilities Holding Company Act (PUHCA). Under H.R. 912, a bill Congressman Gillmor and Congressman Boucher (along with Congressman Tauzin) sponsored, the substance of which was ultimately incorporated into section 103 of the 1996 Act, the PUHCA companies are allowed to provide "telecommunications services, information services, or other services or products subject to the jurisdiction of the Federal Communications Commission . . ." H.R. 912, § 1(a)(1); accord § 34(a)(1) of PUHCA as added by § 103 of the 1996 Act. Mr. Thomas Shockley III of the Central and South West Corporation, a PUHCA company, presented extensive testimony to Congressman Boucher and other members of the House Committee on Commerce on May 10, 1995, regarding the need to include H.R. 912 in what became the 1996 Act. Not once in his testimony or in the exchanges Mr. Shockley had with various members did he ever mention the provision of a voice service. Instead, Mr. Shockley focused on how PUHCA companies could use their broadband fiber optic capacity to help build the "information super-highway" and provide services to consumers like "real time electricity pricing"—a service that is clearly not a voice service. In the only exchange between Congressman Boucher and Mr. Shockley they discussed the adequacy of safeguards against cross subsidy, an exchange which Congressman Boucher concluded by saying "[s]o there are adequate safeguards against the potential for cross subsidy as you enter the business of offering commercial communications services." Hearings on Communications Law Reform, Serial 104-34, House Committee on Commerce, at 121.

H.R. 1685 and H.R. 1686 each contain an identical section that would amend the definition of "interLATA service" as added to the Communications Act by the 1996 Act. See H.R. 1685, § 401(a) and H.R. 1686, § 202(a). The 1996 Act defined "interLATA service" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. 153(21). As discussed above, the term "telecommunications" clearly includes both voice and data communications. The amendment proposed in both H.R. 1685 and H.R. 1686 would amend the definition of "interLATA service" to exclude "the transmission of any data or information" transmitted by means of a packet-switched network, the Internet, or any network employing Internet protocol based transmission. A separate freestanding provision of law is included in the amendment which purports to prohibit "two-way, voice-only interLATA telecommunications services originating" in a state in which the RBOC was the incumbent local exchange carrier on the date of enactment of the 1996 Act. See H.R. 1685, § 401(b) and H.R. 1686, § 202(b).

These are not "mere" clarifications. They represent a substantial change that in effect completely eviscerates the present meaning of "interLATA service" at 47 U.S.C. § 153(21). The proposed amended definition would exclude any packet-switched or Internet protocol (IP) based transmission technology from the definition of any "services that consist or include the transmission of any data or information, including writing, signs, signals, pictures, or sounds related to such transmission . . ." Yet, the majority of traffic currently traveling over long haul networks is data traffic, not voice, and analysts predict that data traffic will make up 90 percent of all traffic within four years. Moreover, this exemption would include voice communications sent over a packet-switched or IP based network, a direction in which the industry appears to be rapidly moving.

The free-standing provision of law prohibiting the origination of "two-way voice only" services does little to constrain the interLATA provision of IP or other packet-based (such as ATM or even frame relay) voice services, since the restriction can be avoided by offering the consumer a bundled package of voice and data services, which would thus not be "voice only" services. As a result, if the proposed amendment in either H.R. 1685 or H.R. 1686 were adopted, the Regional Bell Companies would be immediately freed from having to comply with the competitive checklist in section 271 of the Communications Act (47 U.S.C. 271) before being able to offer interLATA services for rapidly growing data services and bundled packages of voice and data services (e.g., high-speed Internet access and voice service using DSL technology for residential consumers, and a full service package of voice and data services for business customers).

Question 2. Congressman Tauzin testified that LATA lines are an anachronism that were devised, under the Modification of Final Judgment in the AT&T antitrust case, for voice telephony, not data, and that this has caused stranded regional Points of Presence (POPs) in many states, including Louisiana and Illinois. Is this actually the case, and, in your opinion, do H.R. 1686 and H.R. 1685 address this issue?

Answer: As part of the 1996 Act Congress eliminated the prospective effect of the Modification of Final Judgment (MFJ, or more precisely, the AT&T Consent Decree as defined in section 601(e) of the 1996 Act) and replaced the conditions and restrictions imposed by the MFJ with the requirements imposed by the Communications Act as amended by the 1996 Act. House Report 104-458 at 197-201. In making this legal change, Congress carefully considered which conditions and restrictions imposed by the MFJ to keep or eliminate. Among the restrictions Congress explicitly decided to keep was the prohibition on in-region "interexchange" or "interLATA" telecommunications imposed by section IID of the MFJ on the Regional Bell Operating Companies. 552 F. Supp. 131 at 227-228. This restriction was incorporated in section 271 which the 1996 Act added to the Communications Act. 47 U.S.C. 271. As in the MFJ, the restriction can be lifted when certain conditions are met.

In light of the considered decision to keep the "interLATA" restriction, Congress specifically incorporated the definitions of "interLATA service" and "local access and transport area" into section 3 of the Communications Act, as amended by the 1996 Act. 47 U.S.C. 153(21) and 47 U.S.C. 153(43). As a result, any characterization of the definition as an "anachronism" does not square with the fact of Congress' deliberate decision to add the term as a new definition to the Communications Act.

Further, as discussed extensively in the answer to Question 1 above, both the MFJ term "interexchange telecommunications" and the Congressionally defined term "interLATA service" include the transmission of any information of the user's choosing, including voice and data, between a point within a local access and transport area and a point outside such area. See 552 F. Supp. 131 at 229 (definition of "interexchange telecommunications") and 47 U.S.C. 153(21) (definition of "interLATA service"). Thus, any characterization that the MFJ definition was, or that the Congressional definition is, limited to "voice telephony" is simply incorrect.

The concern about stranded regional Points of Presence (POPs) is also misplaced. As a threshold matter, there are over 1,000 high-speed Internet points of presence ("POPs") in the Nation, and about 95 percent of all Americans live within 50 miles of one of these POPs. Each represents a DS-3 POP capable of providing customers with speeds of 45 Mbps or more. And while some interexchange carriers and Internet backbone providers may have only a single "Point of Presence"—or connection to their interstate long haul network—in a particular state, these are not stranded POPs. Each of those POPs can be reached by all consumers in that state using the facilities of one or more intrastate providers. At most, the POPs are only stranded from the point of view of the Regional Bell Operating Company (RBOC) in that state, which might not itself be able to carry the calls of all of its customers to a particular POP due to the interLATA restriction of section 271.

Question 3. For the past several years, the RBOCs and their allies have claimed that there is a "backbone shortage" in this country. In his testimony, Mr. Tauke conceded that there is no such shortage, but put forth a new argument. He asserted instead that there is a "regional network" shortage of broadband capacity between the central office and the network access point of the backbone provider. Is this true, and if so, would H.R. 1686 and 1685 change this?

Answer: The argument that there is a "regional network" shortage is as misplaced as the RBOCs' earlier claim that there was a "backbone shortage," but for different reasons. To the extent that there is a shortage of capacity between a particular central office and the network access point for a particular backbone, the RBOC certainly has it within its power to correct that. The RBOCs presently control the greatest amount of regional network capacity, which they make available to ISPs and businesses under their special access tariffs. But these special access rates are set far above cost. As a result, if there is a "regional network" shortage in a given area served by the RBOC, it is because the RBOC has chosen not to build additional facilities or the RBOC price is so far above cost that the market cannot afford to buy more capacity, or both. And while this situation normally would attract competitors if the construction of alternative facilities is economic, the RBOC's ability sharply to reduce their inflated special access charges in any area where a facilities based competitor might enter makes building additional regional capacity an extremely risky proposition for competitors, at least until RBOC rates are set closer to cost.

Nothing in H.R. 1685 or H.R. 1686 does anything to address these problems. In fact, passage of either bill would make the problem worse, because once the RBOC has the ability to provide interLATA data services it has even less incentive to comply with the unbundling and other requirements of section 251 that make local competition possible.

Finally, if there is any network constraint resulting from the interLATA restriction, it can be addressed far more narrowly than by legislation that rejects the in-

centive-based framework of the 1996 Act. The FCC has itself established an expedited process under which it will approve targeted LATA boundary modifications if a Bell company can demonstrate that such a modification is necessary for the deployment of advanced services. It is notable that the FCC has not received any requests for LATA modifications under this process.

Question 4. Congressman Boucher and FCC Chairman Kennard disagreed about the ability to distinguish between long distance voice and data communications. Based upon your experience in the telecommunications industry, could you explain how exempting high-speed data services from Section 271 would affect the BOC's ability to provide long distance voice communications?

Answer: As described in more detail in the answer to Question 1, H.R. 1685 and H.R. 1686 effectively exempt *all* data and information, including voice services, sent over a packet-switched or IP based network from the interLATA restriction in section 271. This is because, with the growth of services like IP telephony, the functional distinctions between "voice" and "data" services will start to break down. Moreover, the provision in both bills that purports to bar the provision of voice services using a packet-switched or IP based network until the section 271 requirements are satisfied is so limited that it is largely meaningless. The prohibition applies to the provision of "two-way, voice only" communications—a prohibition that can be easily avoided by simply offering business and residential consumers a bundled package of services—for example high-speed Internet access and voice service using DSL technology for residential consumers, and a full service package of voice and data services for business customers.

Question 5. There is considerable concern that broadband deployment is less likely to reach minorities, the elderly, small business, the physically challenged, schools and libraries, and rural communities, as it is to reach others in this country. Are competitive carriers already deploying services to these individuals and entities? Would H.R. 1686 and H.R. 1685 accelerate service to them?

Answer: Competitive carriers are deploying broadband services as fast as they can build facilities and get cost-based access to the ILEC's ubiquitous network. The RBOCs and other ILECs have generally used every tactic at their disposal to slow access to their networks, and, as a result, much of the competition has come through the deployment of alternative facilities. As one would expect, facilities competition has generally been focused first on the highest volume, most densely populated areas. However, as cable facilities are upgraded and new technologies like satellite are deployed to provide an alternative means of access to homes, competition and access is expanding.

Evidence of this includes the rollout of new services to low income areas within AT&T's service areas such as Los Angeles. The systems AT&T owns in Los Angeles serve ethnically diverse and lower income areas. AT&T has nearly finished the upgrades of these systems and is offering consumers in its service area a choice of local phone service and high-speed cable modem services. Indeed, even when subscribers choose not to, or cannot afford to, subscribe to cable and cable modem services, a significant number are choosing to subscribe to AT&T's local phone service at rates substantially lower than those offered by the incumbent local exchange company. AT&T also provides free cable modems and high-speed Internet access services to schools and libraries wherever it has upgraded cable facilities. Another example of the availability of high-speed Internet access includes the satellite industry's efforts to offer high-speed Internet access services to consumers in all areas of the Nation. In fact, just days after the Committee's hearings, one provider, Pegasus Communications Corp., announced that, in conjunction with DirecPC, it would this year begin "to offer high-speed Internet access by satellite . . . to rural and underserved households", that the service will have "full two-way satellite Internet access" beginning in 2001, and that the service "will enable PC users to obtain high-speed Internet connections virtually anywhere in the Continental United States, no matter how remote".¹

H.R. 1685 and H.R. 1686 would do nothing to speed broadband deployment. In fact, they would do the opposite. By removing packet-switched and IP based services from the interLATA restriction the bills would reduce the incentive for the RBOCs to meet the competitive checklist and open their markets to competition.

¹Pegasus Communications And Hughes Network Systems Form High-Speed Internet Access Relationship, "Pegasus Broadband Powered by DirecPC" Will Enable Delivery of Broadband Internet Access to Rural America by Pegasus and over 2,500 Independent Retailers in the Pegasus Retail Network" (7/19/00), <http://www.pgtv.com/index2.asp?mainframe=news/structure/newrelfr.asp>.

Yet, competition from cable services and competitive DSL providers is what is driving the roll-out of ILEC DSL services. DSL technology existed for more than 10 years, but the incumbent monopoly telephone companies only began to deploy it in the face of this competition. Nothing is stopping them from serving any underserved communities now. However, just as the RBOCs did not feel compelled to upgrade service in many areas prior to the imposition of competition through the 1996 Act, they will feel no compulsion to do so now unless they face the threat of competition. Passage of either H.R. 1685 or H.R. 1686 would reduce the threat of competition, which would delay instead of accelerate the roll out of broadband services to all areas.

AT&T,
FEDERAL GOVERNMENT AFFAIRS,
Washington, DC, October 3, 2000.

Hon. ROBERT W. GOODLATTE,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CONGRESSMAN GOODLATTE: When I appeared before the Judiciary Committee on July 18, 2000 concerning H.R. 1685, the "Internet Growth and Development Act," and H.R. 1686, the "Internet Freedom Act," you asked for an explanation of the "preferred vendor status" granted to Liberty Media Corporation ("Liberty") by AT&T. AT&T respectfully submits that explanation below.

As part of its merger with Tele-Communications, Inc. ("TCI"), AT&T granted Liberty "preferred vendor status" with respect to access, timing, and placement of new programming services. This means that AT&T will use "reasonable efforts" to provide digital distribution of new services created by Liberty and its affiliates on a mutual most-favored nation basis that is otherwise consistent with industry practices. Any programming provided by Liberty must meet standards that are consistent with the type, quality and character of AT&T's cable services, and AT&T will use reasonable efforts to provide any access, timing and placement of new Liberty services on AT&T would be on terms no less favorable than those provided by AT&T to other programmers. In response to your specific questions at the hearing, AT&T's "preferred vendor" arrangement with Liberty does not afford Liberty channel placement or pricing that is unavailable on similar terms and conditions to the programming of other providers.

AT&T publicly disclosed Liberty's "preferred vendor status" in its filings with the Securities and Exchange Commission. In addition, and the Federal Communications Commission specifically considered the matter in its review of the AT&T/TCI merger and . At paragraph 36 of the order approving the merger, the FCC explicitly declined to prohibit the preferred vendor status. I have enclosed the relevant excerpts from the FCC's merger order and from AT&T's S-4 filing with the SEC, which describes the preferred vendor status.

I have submitted this response into the record of the hearing proceedings, and hope this addresses your questions. Please let me know if you have there is any additional questions, or wish further information that I can provide to you.

Sincerely,

LEONARD J. CALI, *Vice President.*

Enc.

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

In the Matter of)	
)	
Applications for Consent to the)	
Transfer of Control of Licenses and)	
Section 214 Authorizations from)	
)	
Tele-Communications, Inc.,)	CS Docket No. 98-178
Transferor)	
)	
To)	
)	
AT&T Corp..)	
Transferee.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1999

Released: February 18, 1999

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement; Commissioner
Tristan approving in part, dissenting in part, and issuing a statement.

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attachments are just and reasonable.⁵⁶ To the extent Ameritech seeks imposition of section 224 obligations on AT&T-TCI in areas where the company only provides cable service, we decline to impose section 224 obligations because we conclude the company is not acting as a "utility" within the meaning of section 224 when it provides only cable service. The Commission has never regulated cable companies that provide solely cable services as "utilities" under section 224 and sees no reason to do so in the context of this merger.

2. Program access

31. Various commenters urge the Commission to rule that AT&T-TCI will be subject to the Commission's program access rules with respect to TCI's provision of cable service and Liberty Media's investments in cable-affiliated programming vendors.⁵⁷ The program access rules apply to programming vendors that are affiliated with cable operators, such as through common ownership, and to sales of cable programming that is delivered via satellite from a programming vendor to a cable operator.⁵⁸ The Commission adopted its rules pursuant to section 628 of the Communications Act,⁵⁹ through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.⁶⁰ Among other restrictions, the rules prohibit any cable operator that has an attributable interest⁶¹ in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.⁶² The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.⁶³ In addition, cable operators generally are prohibited from entering

⁵⁶See 47 U.S.C. § 224(b)(1).

⁵⁷See Ameritech Comments at 27; DIRECTV Comments at 2; EchoStar Comments at 8; U S WEST Petition at 42; WCA/ICTA Comments at 3,10; BellSouth Reply at 15; CoreComm Reply at 5. A partial list of the video programmers in which Liberty Media Group owns interests includes: Discovery Communications, Inc.; USA Networks; BET Holdings, Inc.; Fox/Liberty Networks, LLC; QVC Inc.; MacNeil/Lehrer Productions, and Encore Media Group. Application at 7-8.

⁵⁸47 C.F.R. §§ 76.1000-76.1004.

⁵⁹47 U.S.C. § 548.

⁶⁰Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460-1, § 2(a)(5) (1992).

⁶¹The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. 47 C.F.R. §§ 76.501 now, 76.1000(b). Under those provisions, AT&T's 100% ownership interest in TCI will be attributable to AT&T.

⁶²47 C.F.R. § 76.1002(a).

⁶³47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

into exclusive distribution arrangements with affiliated programming vendors.³⁴⁴ Those provisions of the program access rules that apply to "cable operators" apply equally to any common carrier or its affiliate that provides video programming directly to subscribers.³⁴⁵

32. TCI and Liberty Media are subject to the Commission's program access rules because they are vertically integrated. Some commenters are concerned that AT&T-TCI might argue in the future that the program access rules should not apply to the merged company because of the post-merger operational separation between Liberty Media, which will continue to own interests in programming vendors, and AT&T Consumer Services, which will provide cable service.³⁴⁶ Ameritech is concerned not only about the proposed corporate structure but also about any future restructuring that might affect the merged company's ownership of Liberty Media. Ameritech recommends that the Commission reserve the right to review and approve any such restructuring.³⁴⁷

33. To the extent that our program access rules apply only to programming delivered by satellite, some commenters ask the Commission to condition its approval of the merger by applying the current program access rules (or equivalent restrictions) to any programming that may be delivered terrestrially from Liberty Media programmers to AT&T-TCI cable systems.³⁴⁸ These commenters believe terrestrial delivery might be feasible once AT&T's existing facilities are combined with TCI's facilities. Certain commenters also argue that the Commission should require the merged entity to waive TCI's existing exclusivity agreements with programmers.³⁴⁹ Ameritech adds that AT&T-TCI should be required to forego any new exclusivity agreements for at least five years, regardless of whether the Commission's

³⁴⁴47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

³⁴⁵47 C.F.R. § 76.1004.

³⁴⁶See, e.g., Ameritech Comments at 33-34; DIRECTV Comments at 3-4; EchoStar Comments at 9; Consumers Union Petition at 3-4; U S WEST Petition at 45; WCA/ICTA Comments at 2, 9; CoreComm Reply at 11.

³⁴⁷Ameritech Comments at 28.

³⁴⁸See, e.g., Ameritech Comments at 32-33; U S WEST Petition at 42, 47; WCA/ICTA Comments at 3-4, 9; BellSouth Reply at 15; CoreComm Reply at 12.

³⁴⁹Ameritech Comments at 28; Seren Comments at 8. In essence, Ameritech and Seren Innovations, Inc. ("Seren") ask the Commission to declare unlawful any grandfathered exclusivity agreements between TCI and Liberty and any exclusivity agreements between TCI and unaffiliated programmers. Seren, a start-up cable overbuilder, states that its ability to compete with TCI in St. Cloud, Minnesota, will be hampered by TCI's existing exclusive distribution agreement with Midwest Sports Channel, a regional programmer that is not affiliated with TCI. Seren Petition at 6-7. A similarly situated commenter, Hiawatha Broadband Communications, Inc. ("Hiawatha"), raises the same argument. Hiawatha Petition at 2, 9-11. Hiawatha filed its petition to deny on December 30, 1998, well after the close of the pleading cycle. Thus, we do not accept the pleading as late-filed. Instead, we will treat the pleading as a written *ex parte* communication pursuant to the Commission's *ex parte* rules. See 47 C.F.R. § 1.1206.

rules otherwise would permit such agreements.¹⁰⁸ Consumers Union, Consumer Federation of America, and the Office of Communications, Inc., of the United Church of Christ ("Consumers Union") state that the Commission should require Liberty Media to charge market prices for its programming, regardless of whether it is engaging in unlawful price discrimination.¹⁰⁹ Consumers Union claims that offering programming only at above-market prices would constitute an unfair method of competition, which is prohibited by the program access rules.¹¹⁰ CoreComm Limited ("CoreComm") asks the Commission to investigate the reported "preferred vendor" arrangements between Liberty Media and AT&T-TCI.¹¹¹

34. In response, AT&T-TCI state that nothing in the merger transaction would shield the merged company from the program access rules.¹¹² They conclude that a condition therefore is unnecessary. AT&T-TCI object to any proposed conditions that would go beyond the Commission's current program access rules, arguing that there is nothing about the merger that would justify imposing a unique restriction on AT&T-TCI's entering into exclusive arrangements with programming vendors that are not vertically integrated and not covered by the rules.¹¹³

35. *Discussion.* We affirm that the merger, as proposed, will not shield AT&T-TCI from the program access rules. Liberty Media will be a wholly owned subsidiary of AT&T,¹¹⁴ and transactions between the merged company and Liberty Media programmers therefore will fall within the scope of the Commission's program access rules.¹¹⁵

36. We decline to prohibit, as a condition on this merger, Liberty Media's reported post-merger "preferred vendor" status with AT&T-TCI, as AT&T-TCI have explained such status. AT&T-TCI state that the arrangement will ensure that the terms and conditions offered by AT&T-TCI

¹⁰⁸Ameritech Comments at 28.

¹⁰⁹Consumers Union Petition at 6 n.7. Consumers Union does not explain how "market prices" would be defined, but states that for Liberty Media to not charge "market prices" would constitute an "unfair act [] or practice" under 47 U.S.C. § 548(a).

¹¹⁰*Id.* (citing 47 U.S.C. § 548(a)).

¹¹¹CoreComm Reply at 6, 13 (citing TCI Communications, Inc. Form 10-Q for quarter ending June 30, 1998 at 10 (Aug. 14, 1998)).

¹¹²AT&T-TCI Reply at 59.

¹¹³*Id.* at 58-60; see Opposition to Motion To Accept Late-Filed Petition To Deny and Joint Response of Telecommunications, Inc. and AT&T Corp. (filed Jan. 11, 1999) at 4.

¹¹⁴Application at 10-13; AT&T-TCI Reply at 59.

¹¹⁵It is expected that, after the merger, Liberty Media will become one of two groups under AT&T Corp. Liberty Media is expected to merge with TCI Ventures (TCI's non-cable holdings) to form the New Liberty Media Group with its own tracking stock, while AT&T will also offer an AT&T Common Stock Group. Application at 10, Merger Proxy Statement at 6-7. Liberty Media will continue to hold, among other assets, its existing ownership interests in video programmers. *Id.* AT&T-TCI acknowledges that the merged firm will be subject to the Commission's program access rules. AT&T-TCI Reply at 59.

to Liberty Media for its programming are no less favorable than the terms offered by AT&T-TCI to other programming vendors.¹¹⁸ If an entity believes that this "preferred vendor" arrangement violates the program carriage or program access rules, or any other Commission rule, they are free to file a complaint detailing the alleged infraction.

37. The parties have not demonstrated that the merger provides a basis for imposing restrictions that are beyond the scope of the Commission's program access rules. We decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company, in conformance with our recent decision in the *Program Access Order*.¹¹⁹ We recognize, however, that the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. As we indicated in the *Program Access Order*, we remain aware of the potential for this type of migration and the possible need to address it in the future.¹²⁰ If it appears that the movement of programming from satellite to terrestrial delivery is frustrating the pro-competitive purposes of section 628, we will so notify Congress.

38. We further decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules. If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.¹²¹ Commenters have not alleged that existing exclusivity arrangements are unlawful, and we do not find that this merger provides a basis for the Commission to declare unlawful TCI's future exclusivity agreements to the extent they conform with current rules.

¹¹⁸Letter dated Jan. 8, 1999, from Mark D. Schneider, Counsel for AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission at 1 ("Jan. 8 Schneider Letter"). AT&T states that the preferred vendor provision in the Merger Agreement provides that "post-merger, AT&T will use 'reasonable efforts' to provide digital distribution for new services created by Liberty and its affiliates on a mutual most-favored nations basis that is otherwise 'consistent with industry practices,' an arrangement that merely ensures access and services on terms no less favorable than those provided to other programmers or services." *Id.* at 1. AT&T adds that "[t]he Merger Agreement also contains provisions related to the renewal of existing affiliation agreements of Liberty and its affiliates and arrangements for the distribution of interactive video services." *Id.* AT&T asserts that these provisions "are all common in the industry and in no way constitute the discrimination prohibited by the program access or program carriage rules." *Id.*

¹¹⁹*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Red 22840, 22861 ¶ 50 (1997) ("*Program Access Order*"). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by satellite is a significant competitive problem. However, we acknowledge that if, as a trend, vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules, we would "consider an appropriate response to ensure continued access to programming." *Id.*

¹²⁰*Program Access Order*, 12 FCC Red at 22861-62 ¶¶ 50-51.

¹²¹47 C.F.R. § 76.1003.

39. We reject Consumers Union's proposal that the Commission mandate the sale of programming at "market" prices. Neither the merger nor the Commission's rules provide any basis for the imposition of a mandate that Liberty Media price its programming at any particular level, provided the pricing is not unlawfully discriminatory.

40. Finally, we will not condition the merger on any restriction on the merged company's right to restructure the ownership of Liberty Media beyond the Commission's usual requirement that companies seeking to transfer Commission licenses first obtain the Commission's approval.¹²² Assuming all license transfer requests are approved, our rules do not explicitly prohibit vertically integrated companies from restructuring their corporate relationships. If parties believe any future corporate restructuring is motivated by an unlawful or otherwise improper purpose, they may pursue such claims in a complaint detailing the alleged improprieties.¹²³

3. Digital broadcast signal carriage

41. The National Association of Broadcasters ("NAB") and the Consumer Electronic Manufacturers Association ("CEMA") are concerned about the impact of the proposed merger on the future of advanced digital television technologies ("DTV").¹²⁴ Considering that over two-thirds of the American public receive broadcast signals via cable,¹²⁵ NAB and CEMA submit that the cable industry's commitment, in particular TCI's, to carry digital broadcast signals is essential to ensure the timely completion of digital broadcast deployment as mandated by both Congress and the Commission.¹²⁶ To this end, NAB asks the Commission to condition approval of the merger on the requirement that the merged entity carry all local digital television broadcast signals to consumers' television sets without

¹²²See, e.g., 47 C.F.R. § 78.35 (transfer of CARS microwave licenses).

¹²³See 47 C.F.R. § 76.1003.

¹²⁴NAB Comments at 4; CEMA Comments at 3-4. The Commission recently adopted rules establishing procedures for the conversion from analog television broadcasting to digital television broadcasting. 47 C.F.R. §§ 73.622-73.624. With respect to a broadcaster's analog transmissions, cable operators today are subject to "must carry" requirements for commercial and noncommercial television stations. 47 U.S.C. §§ 534, 535. During the transition period, however, broadcasters will transmit simultaneously their signals in both analog and digital form. One of the most difficult issues still left unresolved is whether and to what extent the Commission's "must carry" rules will apply to cable operators during and after this transitional period. This issue is the subject of a pending rulemaking proceeding, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Red 15092 (1998) ("*Digital Broadcast NPRM*").

¹²⁵CEMA Comments at 6. CEMA argues that because TCI is substantially larger than any other cable operator in the United States, its treatment of digital broadcast signals will be a bellwether for the cable industry as a whole and will directly affect the timing of the digital transition. CEMA Comments at 3-4 (citing *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, CS Docket No. 97-141, 13 FCC Red 1304 (1998) at Table E-3).

¹²⁶NAB Comments at 6; CEMA Comments at 6.

As filed with the Securities and Exchange Commission on January 8, 1999

Registration No. 333-

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

AT&T Corp.

(Exact name of Registrant as specified in its charter)

New York
(State or other jurisdiction of
incorporation or organization)

4811
(Primary Standard Industrial
Classification Code Number)

13-4934710
(R.R.S. Employer
Identification No.)

32 Avenue of the Americas, New York, New York, 10013-2412 (212) 387-5400
(Address, including zip code, and telephone number, including area code, of Registrant's principal executive office)

Marilyn J. Wauer, Esq.
Vice President—Law and Secretary
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-2000

(Name, address, including zip code, and telephone number, including area code, of agent for service)

Copies of all communications to:

Steven A. Rosenblum, Esq.
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Frederick H. McGrath, Esq.
Baker & Botts, L.L.P.
599 Lexington Avenue
New York, New York 10022
(212) 705-5000

Approximate date of commencement of proposed sale to public: As soon as practicable after the effective time of the Registration Statement and the effective time of the merger (the "Merger") of a subsidiary of AT&T Corp. with and into Tele-Communications, Inc., as described in the Agreement and Plan of Restructuring and Merger, dated as of June 23, 1998 (the "Merger Agreement"), attached as Appendix A to the Proxy Statement/Prospectus forming a part of this Registration Statement.

If the securities being registered on this Form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box.

CALCULATION OF REGISTRATION FEE

Title Of Each Class Of Securities To Be Registered	Amount To Be Registered	Proposed Maximum Offering Price Per Share	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee
Common Stock, par value \$1.00 per share	499,876,427 Shares(1)	(2)	\$34,720,676,225(3)	\$ 9,652,348(5)
Class A Liberty Media Group Common Stock, par value \$1.00 per share	604,502,284 Shares(4)	(2)	\$26,624,435,660(5)	\$ 7,401,594(5)
Class B Liberty Media Group Common Stock, par value \$1.00 per share	56,720,431 Shares(6)	(2)	\$ 2,588,611,076(7)	\$ 719,634(7)
Total			\$63,933,722,961	\$17,773,576(8)

- create any derivative instrument whose value is based on any direct or indirect equity interest of AT&T in Liberty Media Corporation or Liberty Media Group LLC;

provided, however, that the foregoing will not apply to:

- any of the foregoing approved by the Liberty Board prior to the occurrence of a Triggering Event or approved by Liberty Management LLC after the occurrence of a Triggering Event;
- AT&T's issuance or sale of its own securities, other than indebtedness secured by any direct or indirect equity interest of AT&T in the Liberty Media Corporation or Liberty Media Group LLC and other than any derivative instrument whose value is based on any direct or indirect equity interest of AT&T in Liberty Media Corporation or Liberty Media Group LLC; or
- AT&T's participation in any merger, consolidation, exchange of shares or other business combination transaction in which AT&T, or its successors, continues immediately following such transaction to hold the same interest in the business, assets and liabilities comprising the New Liberty Media Group that it held immediately prior to such transaction, other than as a result of any action by Liberty Media Corporation or any other person included in the New Liberty Media Group.

Liberty Intercompany Agreement

At the Effective Time, TCI, on behalf of the TCI Group, and the appropriate subsidiaries of TCI, on behalf of the New Liberty Media Group, will enter into one or more agreements (the "Intercompany Agreements"), the terms of which are attached as an exhibit to the Registration Statement and incorporated herein by reference. The following is a description of the essential terms of such Intercompany Agreements.

Preferred Vendor Status. Liberty Media Corporation will be granted preferred vendor status with respect to access, testing and placement of new programming services. This means that AT&T will use its reasonable efforts to provide digital basic distribution of new services created by Liberty Media Corporation and its affiliates, on standard "most favored nation" terms and conditions and otherwise consistent with industry practices, subject to the programming meeting standards that are consistent with the type, quality and character of AT&T's cable services as they may evolve over time.

Funding TCI Agreements. The TCI Group and the Liberty Media Group (including its programming affiliates) have agreed upon certain terms of funding agreements for the carriage of specified services for New Odyssey, the Telecommo Network, The Box service offered by TCI Music, Inc., Comics & Prevue Interactive Guide, Court TV and Fox Sports Chicago.

Liberty Media Corporation Affiliation Agreements. AT&T will agree to extend any existing affiliation agreements of Liberty Media Corporation and its affiliates that expires in the first five years following the Effective Time to a date of not less than 10 years following the Effective Time, provided that most favored nation terms are offered and the arrangements are consistent with industry practice.

Interactive Video Services. AT&T will enter into arrangements with Liberty Media Corporation for interactive video services under one of the two arrangements described below, at the election of AT&T:

- Pursuant to a five-year arrangement, renewable for an additional five-year period on then-current most favored nation terms, AT&T will make available to Liberty Media Corporation capacity equal to one 6 megahertz channel (in digital form and including interactive emblem, fast screen access and hot links to relevant Web sites—all to the extent implemented by AT&T cable systems) to be used for interactive, category-specific video channels that will provide entertainment, information and merchandising programming. Nothing set forth in the preceding sentence shall compel AT&T to disrupt other programming or other channel arrangements. The sale of services will be accessible through advanced set top devices or boxes deployed by AT&T, except that, unless specifically addressed in a mutually acceptable manner, AT&T will have no obligation to deploy set top devices or boxes of a

type, design or cost materially different from that it would otherwise have deployed. The content categories may include, among others, music, travel, health, sports, books, personal finance, automotive, home video sales and games.

- AT&T may enter into one or more mutually agreeable ventures with Liberty Media Corporation for the interactive video services described in the first sentence of the preceding paragraph. Such ventures will be structured as 50/50 ventures for a reasonable commercial term and provide that AT&T and Liberty Media Corporation will not provide interactive services in the category(s) of interactive video services provided through the ventures for the duration of such term other than the joint venture services in the applicable categories. When the distribution of such interactive video services occurs through a venture arrangement, AT&T will share in the revenue and expense of the provision of such interactive services *pro rata* to its ownership interest in lieu of the commercial arrangements described in the preceding paragraph. At the third anniversary of the formation of any such venture, AT&T may elect to purchase the ownership interest of Liberty Media Corporation in such venture at fair market value. The parties will endeavor to make such transaction, if any, tax efficient to Liberty Media Corporation.

DESCRIPTION OF AT&T CAPITAL STOCK

The following description of certain terms of the capital stock of AT&T does not purport to be complete and is qualified in its entirety by reference to the AT&T Charter and the AT&T Tracking Stock Amendment, a copy of which is attached as Appendix B to this Proxy Statement/Prospectus. For more information as to how you can obtain the AT&T Charter, see "Summary—Where You Can Find More Information."

General

The AT&T Charter currently provides that AT&T is authorized to issue 6.1 billion shares of capital stock, consisting of 6 billion shares of AT&T Common Stock and 100 million shares of AT&T Preferred Stock. As of January 1, 1999, 1,753,579,304 shares of AT&T Common Stock and no shares of AT&T Preferred Stock were issued and outstanding.

If the AT&T Merger Proposal is approved and the Merger is consummated, AT&T will increase the number of its authorized common shares. See "—AT&T Tracking Stock Amendment—General." The authorized number of shares of AT&T Preferred Stock will remain unchanged under the AT&T Tracking Stock Amendment.

AT&T Common Stock

The holders of AT&T Common Stock are entitled to one vote for each share on all matters voted on by shareholders, including elections of directors, and, except as otherwise required by law or provided in any resolution adopted by the AT&T Board with respect to any series of AT&T Preferred Stock, the holders of such shares possess all voting power. The AT&T Charter does not provide for cumulative voting in the election of directors. Subject to any preferential rights of any outstanding series of AT&T Preferred Stock created by the AT&T Board from time to time, the holders of AT&T Common Stock are entitled to such dividends as may be declared from time to time by the AT&T Board from funds available therefor, and, upon liquidation, will be entitled to receive *pro rata* all assets of AT&T available for distribution to such holders.

If the AT&T Merger Proposal is approved and the Merger is consummated, the AT&T Charter will be amended to create New Liberty Media Group Tracking Stock and to make other changes in the AT&T Charter relating to the creation of a separate class of AT&T common shares as described under "—AT&T Tracking Stock Amendment."

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

EXHIBITS
TO
Form S-4
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

AT&T Corp.
(Exact name of Registrant as specified in its charter)

Intercompany Agreement Principles

1. Preferred Vendor Status

Liberty Media Corporation ("LMC") will be granted preferred vendor status with respect to access, timing and placement of new programming services. This means that AT&T will use its reasonable efforts to provide digital basic distribution of new services created by LMC and its affiliates, on mutual MFN terms and conditions and otherwise consistent with industry practices, subject to the programming meeting standards which are consistent with the type, quality and character of AT&T's cable services as they may evolve over time.

2. Documentation Clean-Up

Prior to closing, the Company and LMC (including its programming affiliates) will document pending agreements for the following services: New Odyssey, Telemaniac, TCI Music, Spanish Plus, Proven Interactive Guide, Court TV, Sports.

3. Presumption of Renewal

AT&T will agree to extend any existing affiliation agreement of LMC and its affiliates that expires in the first five years following closing to a date of not less than 10 years following closing, provided that MFN terms are offered and the arrangements are consistent with industry practice.

4. Interactive Video Services

AT&T will enter into arrangements with LMC for Interactive Video Services under one of the two arrangements described below.

(a) Pursuant to a 5-year arrangement, renewable for an additional 4-year period on then-current MFN terms, AT&T will make available to LMC capacity equal to one 6 megahertz channel (in digital form and including interactive enablement, first screen access and hot links to relevant web sites*—all to the extent implemented by AT&T cable systems) to be used for interactive, category specific video channels that will provide entertainment, information and merchandising programming. Nothing herein shall compel AT&T to disrupt other programming or other channel arrangements. The suite of services will be accessible through advanced set-top boxes deployed by AT&T except that, unless specifically addressed in a mutually acceptable manner, AT&T shall have no obligation to deploy set-top boxes of a type, design or cost materially different from that it would otherwise have deployed. The content categories may include, among other, music, travel, health, sports, books, personal finance, automotive, home video sales and games.

(b) Alternatively, at AT&T's election, AT&T may enter into one or more mutually agreeable ventures with LMC for the interactive video services described in the first sentence of (a) above. Such ventures would be structured as 50/50 ventures for a reasonable commercial term and provide that AT&T and LMC will not provide interactive services in the category(s) of interactive video services provided through the ventures for the duration of such term other than the joint venture services in the applicable categories. When the distribution of such interactive video services occurs through a venture arrangement, AT&T will share in the revenues and expense of the provision of such interactive services pro rata to its ownership interest in line of the commercial arrangements described in paragraph (a) above. At the third anniversary of the formation of any such venture, AT&T may call the ownership interest of LMC in such venture at fair market value; the parties will endeavor to make such transaction, if any, tax efficient to LMC.

* Nothing herein shall compel AT&T to provide interactive applications or video services or access thereto, direct or indirect, to competitors of AT&T in its principal business.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, August 24, 2000.

Hon. TOM TAUKE, *Senior Vice President for
Public Policy and External Affairs,
Verizon Communications, Washington, DC.*

DEAR TOM: 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": Part 2 on July 18, 2000.

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. TAUKE FROM MR. GOODLATTE

1. At the hearing, Maryland PSC Chairman Ivey said "we don't really have local telephone competition in Maryland." Can either business or residential customers obtain phone service from competitors in Maryland?
2. If the answer to question 1 is yes, how many interconnection agreements has Verizon/ Bell Atlantic signed in Maryland?
3. At the hearing, you mentioned that Bell Atlantic had asked the FCC to allow it to provide interLATA Internet transport in West Virginia. Also at the hearing, FCC Chairman Kennard said that no one had filed such a waiver request. What happened?
4. Several witnesses claimed that, if the Bell Operating Companies (BOCs) are permitted to provide interLATA Internet services, there will be no incentive to comply with the market-opening provisions of Section 271. Is this true?
5. In your oral testimony, you said that the money is in voice long distance. How do you support this claim?
6. If the long distance Internet market is not so lucrative, why is Verizon pushing hard to get interLATA Internet relief?
7. Will allowing BOCs into interLATA Internet be a back door for providing interLATA voice services, as Chairman Kennard claimed? Even if the BOCs migrate voice services to the packet-switched network, can the BOCs offer voice telephone service under either bill?
8. You mentioned some ways in which DSL service is regulated and high-speed cable modem service is not. Can you please elaborate?
9. At the hearing, you mentioned that Section 271 contains two exceptions for interLATA communications—wireless and information services. You said that the information services exception should indicate that Congress never intended to include the Internet. Mr. Cali responded that the Section 271 restriction was drafted from the MFJ, which certainly included a long distance data restriction. How do you respond?
10. Chairman Kennard asserted that most rural areas are not served by BOCs. How many rural subscribers does Verizon serve? How many rural subscribers are served by non-BOC incumbent local exchange carriers (ILECs)?
11. How many DSL subscribers are there today? How many cable modem subscribers?
12. Mr. Cali claimed that 94% of the U.S. population lives within 50 miles of a high-speed Internet POP. Are these claims correct? Please explain why a POP with a T-1 connection to the Internet is not really adequate for a city the size of Fargo?
13. High-speed Internet access already is available to a significant percentage of U.S. homes and businesses, what good would interLATA relief for the BOCs do for urban areas?
14. Chairman Kennard claimed that BOCs will not invest in infrastructure if given interLATA relief. What is Verizon's experience?

15. Why would Verizon want to spend the money to bring high-speed, interLATA Internet service to rural areas with relatively few customers?
16. Representative Eshoo and Mr. Sachs both stated in the hearing that the BOCs had DSL technology available for a long time and did not start deploying it until cable started marketing high-speed modems. What were and what are the current hurdles to widespread DSL deployment?
17. Chairman Kennard stated that allowing Internet relief will take away his tools for opening the local markets (Section 271). Does the Commission lack the authority to ensure that the markets of Tampa, Las Vegas, Durham, Lincoln (NE) and Honolulu are fully opened to competitors—cities that are served by ILECs and not subject to Sec. 271 and are all offering long distance service today? Are any CLECs offering service in any of these cities today? If so, how many in each city? GTE, prior to merging with Bell Atlantic, was not subject to Section 271 restrictions. How many interconnection agreements did GTE negotiate prior to the merger?
18. Chairman Kennard several times stated that, if the BOCs were allowed to build POPs where they don't exist today, that it would somehow inhibit competition and they might be the only ones to serve these areas. Are these high-speed connections important for under-served communities?
19. Some have claimed that the smaller, independent incumbent local exchange carriers had done the most in connecting their customers with DSL, in rural areas. What's your reaction?

VERIZON COMMUNICATIONS,
PUBLIC POLICY & EXTERNAL AFFAIRS,
Washington, DC, August 24, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Thank you for your follow-up questions from my testimony before the House Judiciary Committee's hearing on H.R. 1686 and H.R. 1685. Attached are the answers to your questions.

Please contact me if you have further questions. Thank you for your leadership on this and many other issues important to the future of the telecommunications industry.

Sincerely,

TOM TAUKE, *Senior Vice President.*

Attachment

cc: Hon. John Conyers

RESPONSE TO QUESTIONS FOR MR. TAUKE FROM MR. GOODLATTE

Question 1. At the hearing, Maryland PSC Chairman Ivey said "we don't really have local telephone competition in Maryland." Can either business or residential customers obtain phone service from competitors in Maryland?

Answer: Both business and residence customers have competitive alternatives in Maryland. In fact, the Maryland Commission has adopted a number of market opening measures. As a result, as of June 30, 2000 there are over 100,000 resold business and residential lines, and Verizon provides over 23,000 unbundled loops (of which almost 15,000 are used for voice services). The competitive carriers have been assigned well over 9 million telephone numbers. Finally, there are 115 competitive carriers that have been authorized to do business in Maryland. All of these facts point the vigor of competition in the State of Maryland.

Question 2. If the answer to question 1 is yes, how many interconnection agreements has Verizon/Bell Atlantic signed in Maryland?

Answer: As of this writing, Verizon has signed 173 interconnection agreements, of which 105 have been approved by the Maryland Commission.

Question 3. At the hearing, you mentioned that Bell Atlantic had asked the FCC to allow it to provide interLATA Internet transport in West Virginia. Also at the hearing, FCC Chairman Kennard said that no one had filed such a waiver request. What happened?

Answer: On July 23, 1998, Bell Atlantic filed an emergency petition for permission to provide high speed interLATA connections to the Internet from Morgantown,

West Virginia, to Internet Access Points in neighboring states. This request was made to allow Bell Atlantic to provide this capability to the West Virginia Network for Educational Computing.

The petition was supported by affidavits from several West Virginia officials that showed the state had virtually no interLATA high-speed bandwidth available. The petition also demonstrated that Bell Atlantic had been working unsuccessfully with the State for more than six months to find long distance carriers to provide the high-speed links. However, no incumbent Internet backbone provider had agreed to provide even a single end-to-end link, and the only provider that offered to provide even part of one link has failed to meet several prior commitments.

The FCC dismissed this request in an order released on February 11, 2000, because it found that there was capacity available from one provider. The Commission did this in spite of the fact that it also found that this provider's service was not operating at the capacity specified by the State's RFP. Thus, the FCC left the State with only one choice of provider—one that admittedly had problems—and without any competition for its business.

Question 4. Several witnesses claimed that, if the Bell Operating Companies (BOCs) are permitted to provide interLATA Internet services, there will be no incentive to comply with the market-opening provisions of Section 271. Is this true?

Answer: No. The BOCs would still have a great incentive to open their local markets to competition.

In order to be competitive in the telecommunications market today, companies need to provide a package of services, including local voice, long distance voice and data.

Under the Telecommunications Act of 1996, a BOC must open its network to competition and gain approval from the Federal Communications Commission (FCC) before the company can provide voice long distance services. In addition, *Section 251 of the Communications Act*, not section 271, mandates resale, unbundling and interconnection—the necessary elements for local competition. *Even if a BOC has no intention of entering the long distance market, the BOC is still bound by the requirements of section 251.*

The long distance market is a \$105 billion market. BOCs will not ignore that market. Verizon's (formerly Bell Atlantic) experience and success in New York shows that the voice long distance business is very attractive. Verizon had a target of 1,000,000 New York long distance customers in the first year of the service, but had nearly half a million long distance customers *in the first three months!* It is clear that entry into the voice long distance market via Section 271 is necessary to compete in the future.

Question 5. In your oral testimony, you said that the money is in voice long distance. How do you support this claim?

Answer: As I have referenced earlier in Question #4, the domestic retail long distance market is now estimated to be more than \$100 billion a year in 2001. That's roughly the same size as the projections for the local telephone service market (\$104 billion). *Multimedia Telecommunications Market Review and Forecast—1998.*

A study by *Frost and Sullivan* estimate the worldwide market for IP telephony (Voice over the Internet) for this same period (2001) at only \$1.89 billion. That is less than 2% of the size of the traditional long distance market. *Multimedia Telecommunications Market Review and Forecast.*

While no company can afford to ignore the \$100 billion long distance market, the incentives to open local market are even greater when you understand the telecommunications market for business customers. Many businesses want and demand that their telecommunications provider offer the full array of services (local, long distance, wireless and data). Business consumers and convergence are blending these four market segments into a single \$1/4 trillion market. To compete in this environment you *must* be a full service provider. The incentive to pursue relief through Section 271 is powerful regardless of the outcome of any of the legislation before this Congress.

Question 6. If the long distance Internet market is not so lucrative, why is Verizon pushing hard to get interLATA Internet relief?

Answer: Verizon wants to provide high-speed, end-to-end broadband services to all its customers. Because of the InterLATA restriction, Verizon must rely on other providers to serve our customers. Even in the dial-up Internet world, Verizon must employ a global service provider (GSP) to provide the interLATA portions of our Internet service. This increases the cost to the consumer, and does not allow Verizon to serve the consumer in a reliable, end-to-end fashion.

The speed on the Internet depends on the speed throughout the system. It depends on three sets of connections: 1) from the home to the ISP's point of presence (POP); 2) from the ISP's POP to the national Internet backbone; and 3) from the national Internet backbone to the rest of the world. While we can get high-speed services deployed from the home to the ISP's POP, we cannot provide our customers with the regional high-speed links to ensure end-to-end high-speed data services.

Question 7. Will allowing BOCs into interLATA Internet be a back door for providing interLATA voice services, as Chairman Kennard claimed? Even if the BOCs migrate voice services to the packet-switched network, can the BOCs offer voice telephone service under either bill?

Answer: The provisions of the two bills, H.R. 1685 and H.R. 1686, specifically prohibit BOCs from providing two-way voice services over the Internet until the BOC gets Section 271 approval from the FCC. Providing such service will clearly be illegal if the bills pass, as it is today.

If a Verizon local exchange customer wants to make a call using the computer over the Internet, the customer can do that using any Internet service today, even using Verizon's own ISP. Verizon, however, is not providing the long distance service to the customer and is not get paid by the customer for that long distance call. If Verizon is selling the service and getting paid for it—the only logical reason to provide the service—Verizon would advertise the availability of the service. At that point it is easy to determine whether or not Verizon is providing long distance voice services over the Internet in violation of the law. Interestingly, it is not in Verizon's interest for the customer to make calls over the Internet using the computer because Verizon does not receive access charges or any other compensation for that call. There is no possible business reason for Verizon to promote such usage.

Question 8. You mentioned some ways in which DSL service is regulated and high-speed cable modem service is not. Can you please elaborate?

Answer: DSL is clearly a telecommunications service and is subject to the standard federal common carrier regulatory regime. Verizon must offer it under tariff, tariffs are subject to FCC review, etc. Until recently, cable modem service was not regulated at all, neither as a telecommunications service nor as a cable service. Now one court of appeals has ruled that it, too, is a telecommunications service.

Question 9. At the hearing, you mentioned that Section 271 contains two exceptions for interLATA communications—wireless and information services. You said that the information services exception should indicate that Congress never intended to include the Internet. Mr. Cali responded that the Section 271 restriction was drafted from the MFJ, which certainly included a long distance data restriction. How do you respond?

Answer: If Congress had wanted simply to codify the MFJ, it would have done so—nothing would have been easier. In other cases, the Act referred to provisions in the MFJ, but Congress did not do that here. Instead, it re-wrote the long distance restriction from top to bottom—it changed the statement of the prohibition and all the definitions on which it was based. It also wrote six exceptions into the statute, none of which were part of the decree. Clearly, then, Congress was not trying to continue the MFJ—it was trying to change it.

Question 10. Chairman Kennard asserted that most rural areas are not served by BOCs. How many rural subscribers does Verizon serve? How many rural subscribers are served by non-BOC incumbent local exchange carriers (ILECs)?

Answer: Based on year-end 1998 figures filed with the FCC, there were 166,748,760 access lines in the U.S. Of this number, Bell Operating Companies and GTE served over 157,000,000 access lines (94%). Verizon today estimates its rural subscribers number in excess of 7 million. Among the nearly 10 million subscribers served in 1998 by companies other than the Bells and GTE, not all of them could be considered rural. Certainly Cincinnati—served by non-BOC ILEC Cincinnati Bell—would not be considered rural using any measurement.

Question 11. How many DSL subscribers are there today? How many cable modem subscribers?

Answer: At the end of the first quarter, 2000, there were 550,000 DSL subscribers and 2.2 million cable modem subscribers according to TheStandard.com (5/18/00). The means that there are four times as many high-speed data customers using cable modems than using DSL! Results suggesting higher levels for individual companies have been reported more recently, but no new aggregate estimate was released. For example, Verizon claims 221,000 DSL subscribers as of the end of June (July 21, 2000 briefing for analysts). That is 50% higher than the 147,000 subscribers re-

ported by TheStandard for Bell Atlantic and GTE at the end of the first quarter. Roadrunner reported more than 900,000 subscribers at the end of June 2000, compared with 730,000 subscribers TheStandard reported for the first quarter.

Question 12. Mr. Cali claimed that 94% of the U.S. population lives within 50 miles of a high-speed Internet POP. Are these claims correct? Please explain why a POP with a T-1 connection to the Internet is not really adequate for a city the size of Fargo?

Answer: I am not aware of the source of Mr. Cali's data so it is difficult to respond to these numbers. Boardwatch Magazine, the most respected authority on Internet backbone networks, shows the network maps of 43 backbones. The maps of all but one consider a major backbone hub to have a connectivity of DS-3 (45 Megabits) or greater. Only one of the 43 companies, PSI Net, considers DS-1 (1.5 Megabits) to be a backbone hub on its map. Boardwatch agrees with Mr. Cali in that there are more than 1,000 major hubs, but many of them are in the same city. To illustrate this point, Massachusetts has 29 of these major hubs but they are all located in the Boston metropolitan area. Of the more than 1,000 cities that Mr. Cali claims to have major hubs, Boardwatch Magazine lists less than 130 cities. Reducing the number of cities served by major hubs by 87% would certainly make me question his statement that 94% of the population lives within 50 miles of a high speed Internet POP.

A DS-1 connection to the Internet backbone is not adequate for a city the size of Fargo. The slowest speed DSL service Verizon offers in the DC metropolitan area 640 Kilobits. That is nearly half the capacity of a DS-1 (1.5 Megabits) circuit. While a single customer isn't constantly using that bandwidth, it doesn't take too many broadband users downloading at the same time to exceed the capacity of this DS-1 connection. When this happens, all users experience a slowdown and are unable fully utilize the service they are paying for. It is not the fault of the DSL service, but rather the weak link in the chain that today connects Fargo to the backbone. Anything less than DS-3 connecting communities to the Internet backbone is like pumping gallons of water through a drinking straw.

Question 13. High-speed Internet access already is available to a significant percentage of U.S. homes and businesses, what good would interLATA relief for the BOCs do for urban areas?

Answer: Such relief would give businesses and individuals a greater choice of providers and services, especially because companies like Verizon have the financial resources to develop and install innovative, high-speed services. Open markets—such as long distance telephone and wireless services—have attracted multiple, competing providers, and ever lower prices, and spawned innovative new services.

Question 14. Chairman Kennard claimed that BOCs will not invest in infrastructure if given interLATA relief. What is Verizon's experience?

Answer: In New York, the only state where the FCC has certified that Verizon may offer long distance under Section 217, Verizon has made significant investments in Class 4 switches (also known as long distance tandem switches), in ATM equipment and transport. We are investing at levels consistent with the volume of long distance traffic our new customers generate and consistent with the prohibitions on using our existing network to carry that traffic. As we obtain relief to operate in adjacent states the level of investment will accelerate.

Question 15. Why would Verizon want to spend the money to bring high-speed, interLATA Internet service to rural areas with relatively few customers?

Answer: The infrastructure cost is not prohibitive. Verizon already has local offices in these areas, with installation equipment and Verizon employees who know the communities and their fellow residents. It easier and more economical for us to handle both the local and interLATA portions of the transmission ourselves, so we can pass on those savings to customers, while providing a high quality, dependable service.

Providing such service is also a good investment for Verizon and the rural communities. Rural areas can best attract new businesses and residents by offering them the same high-speed data advances that are available in urban areas—including distance learning and health services. Businesses especially need such high-speed data connections to their suppliers and customers. As new businesses and employees & families arrive, the communities prosper and Verizon gains new customers.

Question 16. Representative Eshoo and Mr. Sachs both stated in the hearing that the BOCs had DSL technology available for a long time and did not start deploying

it until cable started marketing high-speed modems. What were and what are the current hurdles to widespread DSL deployment?

Answer: We've heard this revisionist history before. What really happened was this . . .

Bell Atlantic was the leader in developing ADSL technology in the late 1980s, but for video dialtone, not today's broadband Internet access. We had to invest in the technology, take risks to make it work and, most importantly, try to find the market where its advantages could be put to good use.

In 1992-3 our ADSL carried compressed digital video at rates of 1.5 megabits over 5,000 feet of copper in consumer trials. Video dialtone was technically feasible, but it became a victim of FCC regulations that required cost allocations so high that video on demand was pushed beyond the customer's reach. That left ADSL a technical success but a casualty of regulation. In 1993 there was no meaningful Internet for ordinary consumers. ADSL languished until another set of market conditions developed that offered affordable costs and most important, content that needed high speed.

The Internet was in its infancy during the period that led up to the Act. The commercial Internet was slow, rickety file-exchange medium when the Act was passed in 1996 and the Act referenced Internet in just two minor contexts. In 1995-6, most modems carried data at speeds of 9.6 to 19.2 kilobits; the few Internet Service Providers in existence generally charged by the minute for Internet access; software needed to manipulate Internet content was arcane (i.e. UNIX); and PCs were slow (33 megaHertz). Only the skilled and truly dedicated were willing to brave the early commercial Internet.

By 1997-8, software had improved thanks to Netscape and Microsoft's Internet Explorer. The http (hypertext transfer protocol), was a major advance over the laborious ftp (file transfer) protocol. Browsers such as Netscape and Internet Explorer demystified the browsing the Internet. Http allowed web sites to easily carry more graphics, better color selections, and more attractive presentations of content. The skill level for both using and creating web sites decreased. At the same time PC speeds began to approach the 100 megaHertz level (Pentium).

Question 17. Chairman Kennard stated that allowing Internet Relief will take away his tools for opening the local markets (Section 271). Does the Commission lack the authority to ensure that the markets of Tampa, Las Vegas, Durham, Lincoln (NE) and Honolulu are fully opened to competitors—cities that are served by ILECs not subject to Sec. 271 and are all offering long distance service today? Are any CLECs offering service in any of these cities today? If so, how many in each city? GTE, prior to merging with Bell Atlantic, was not subject to Section 271 restrictions. How many interconnection agreements did GTE negotiate prior to the merger?

Answer: Under Section 251(c) of the Act, all ILECs have a requirement to open their markets to competitors. Unlike Section 271, Section 251 is not optional. One only has to look in the telephone book in cities like Tampa and Honolulu to see that robust competition exists in markets served by GTE prior to the merger. GTE alone has negotiated more than 1,400 interconnection agreements since the passage of the Act. Today more than 1 million access lines are served by CLECs in Verizon service territory formerly served by GTE. The requirements of 251(c) are working to open markets and Internet backbone competition by the BOCs in no way changes those requirements.

Question 18. Chairman Kennard several times stated that, if the BOCs were allowed to build POPs where they don't exist today, that it would somehow inhibit competition and they might be the only ones to serve these areas. Are these high-speed connections important for under-served communities?

Answer: It is difficult to understand how a community without a high-speed connection to the Internet is better served by keeping out one potential provider until a second one appears. Many under-served areas may wait for years for a service they could have today using the fiber optic facilities already in the ground. This position does nothing to close the digital divide and in fact exacerbates it by delaying any opportunity to close it. If you ask economic development professionals in these under-served areas they overwhelmingly see high-speed access to the Internet as crucial to their communities.

Question 19. Some have claimed that the smaller, independent incumbent local exchange carriers had done the most in connecting their customers with DSL, in rural areas. What's your reaction?

Answer. Both small and large telephone companies are doing what they can to provide broadband Internet connections. Of more than incumbent 1,000 local exchange carriers, there are undoubtedly some success stories, and we count Verizon among them. Small rural telephone companies face some of the same economic challenges that Verizon faces in serving its rural customers.

The technologies small companies have access to are the same as those Verizon uses. Some have opted to offer DSL speeds that match Verizon's and some have opted for much lower speeds—thus extending the length of copper that can be tolerated in offering DSL. Some have even gone to IDSL—a DSL variant at about the same speed as ISDN, but which can be run over 25,000 feet or more of copper. The downside to that strategy is that when it's in use, you cannot simultaneously use the line for voice service. And since Verizon already offers ISDN just about everywhere, there would be no significant addition to the customer's choices of Internet access speed.

While small telephone companies have access to the same technology tools, they work under materially different regulatory burdens and economics. Many of the small providers receive significant levels of universal service subsidies; many are under rate-base regulation, allowing them to spread the cost of network enhancements across all subscribers, not just those taking DSL; almost all are free to run their DSL service offering from their core business, instead of a more expensive separate subsidiary; none is required to sell loops to competitors—especially at rates below actual costs; and all are free to make rational arrangements to connect their communities to the Internet backbone since they face no LATA boundaries. Differences such as those can make a massive difference in the prudence of deploying broadband services, even in a rural area.

ILLINOIS COMMERCE COMMISSION,
Springfield, IL, July 14, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1686, the Internet Freedom Act of 1999, sponsored by Representatives Goodlatte and Boucher, scheduled for markup by the House Judiciary Committee on July 18. The passage of H.R. 1686 will seriously undermine the key market-opening requirements contained in the Telecommunications Act of 1996 ("the Act").

If enacted, H.R. 1686 would:

- Drastically reduce the economic incentive for Bell companies to meet their obligations under the Act to open their local markets. Data communications service is one of the fastest growing and most profitable segments of the telecommunications market. H.R. 1686 would allow Bells to enter this attractive market segment with little restriction, thereby reducing the existing incentives to comply with the market-opening provisions of the Act.
- Repeal from current law the unbundling and resale requirements for facilities used for broadband services. These provisions would inhibit competitors from accessing key network facilities as provided for in the Act.
- Limit State public utility commissions' ability to enforce the market-opening provisions of Section 251 of the Act for data and advanced services.
- Threaten the implementation of the recent FCC requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid development of competitive broadband services to consumers.

H.R. 1686 is also unnecessary because current telecommunications law does not prevent Bell companies from providing broadband services to customers if such broadband services do not extend beyond the company's local service territory. In fact, Bell companies have already deployed this very same broadband technology in their home markets and are actively marketing high speed internet access in many areas.

The passage of H.R.1686 does *not* guarantee the deployment of advanced services anywhere. *Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way—not by removing the Bell's incentives to open their local markets.*

Local competition is the fastest way for most consumers to obtain broadband services at competitive prices. Page of H.R. 1686 will inhibit the deployment of advanced

services because it reduces the incentives for Bell companies to open their local markets to competition.

In conclusion, *we urge you to oppose H.R. 1686 and support the continued growth and innovation stemming from the pro-competitive measures in the law that Congress worked so hard to pass in 1996.* Enactment of this bill would harm the emergence of broadband competition by destroying the 1996 Act's carefully crafted incentives for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter

Sincerely,

RICHARD L. MATHIAS, *Chairman.*
RUTH K. KRETSCHMER, *Commissioner.*
TERRY S. HAVILL, *Commissioner.*
MAY FRANCES SQUIRES, *Commissioner.*
EDWARD C. HURLEY, *Commissioner.*

ADVANCE,
Washington, DC, July 17, 2000.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE: Tomorrow the Judiciary Committee will hold a hearing on H.R. 1686, the Internet Freedom Act, and H.R. 1685, the Internet Growth and Development Act of 1999. Both bills encourage investment in new Internet backbone facilities.

The Department of Justice is not on the Committee's witness list. But the department's recent decision to challenge the proposed WorldCom Sprint merger provides ample evidence that the interLATA data provisions of H.R. 1686 and H.R. 1685 are needed now.

The DoJ findings in its court challenge to the WorldCom Sprint merger indicate that the Internet backbone is an oligopoly dominated by a few big players. DoJ notes that:

- "UUNET [World Com's backbone company] is by far the largest Tier 1 IBP [Internet Backbone Provided] by any relevant measure and is already approaching a dominant position in the Internet backbone market."
- "The explosive growth of the Internet overwhelmed these NAPs and MAEs [public interconnection points to the backbone] and despite the addition of new public access points to accommodate this growth, the public interconnection facilities remain chronically congested."
- "Today, large IBPs exchange most of their traffic with other IBPs at private interconnection sites at various points throughout their networks [peering]. Many smaller networks, however, still rely solely or substantially upon public access points. These networks have been unable to provide high-quality Internet access to their customers."
- "Generally network operators seek the most direct routing for their Internet communications—i.e., over routes with the fewest possible number of cross-network connections or 'hops'—because of the greater risk that data will be lost or its transmission delayed as the number of interconnection points increases. Lower tier IBPs that must rely on transit typically reach other networks indirectly through their transit provider's network, adding 'hops.'"

A complete copy of the DoJ filing is available at www.usdoj.gov/atr/cases/f5000/5051.htm.

DoJ filed suit to stop the WorldCom Sprint merger because we need more, not less, investment in Internet backbone. We need more, not fewer, companies deploying regional and national backbone networks. And we need to reduce, not increase, the number of "hops" that a typical Internet user must navigate before reaching Tier 1 backbone.

Thank you for scheduling tomorrow's hearing on H.R. 1686 and H.R. 1685. These bills, introduced by Reps. Bob Goodlatte and Rick Boucher, will help us reach these goals and make Internet access faster, affordable and available to more Americans.

Sincerely,

SUSAN MOLINARI.
MIKE MCCURRY.

cc: Members, House Judiciary Committee

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, August 24, 2000.

Mr. RANDY LOWE, *Executive Vice President
and Chief Legal Officer,
Prism Communications Services, Inc.,
Washington, DC.*

DEAR MR. LOWE: 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": Part 2 on July 18, 2000.

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. LOWE FROM MR. CONYERS

1. Please explain the extent to which the Telecommunications Act of 1996 considers and applies to data services. If the Telecommunications Act of 1996 covers data services, can H.R. 1686 and H.R. 1685 accurately be considered a "mere" clarification of the Act?
2. Congressman Tauzin testified that LATA lines are an anachronism that were devised, under the Modified Final Judgment in the AT&T antitrust case, for voice telephony, not data, and that this has caused stranded regional Points of Presence (POPs) in many states, including Louisiana and Illinois. Is this actually the case, and, in your opinion, do H.R. 1686 and 1685 address this issue?
3. For the past several years, the RBOCs and their allies have claimed that there is a "backbone shortage" in this country. In his testimony, Mr. Tauke conceded that there is no such shortage, but put forth a new argument. He asserted instead that there is a "regional network" shortage of broadband capacity between the central office and the network access point of the backbone provider. Is this true, and if so, would H.R. 1686 and 1685 change this?
4. Congressman Roucher and FCC Chairman Kennard disagreed about the ability to distinguish between long distance voice and data communications. Based upon your experience in the telecommunications industry, could you explain how exempting high-speed data services from Section 277 would affect the BOCs' ability to provide long distance voice communications?
5. There is considerable concern that broadband deployment is less likely to reach minorities, the elderly, small businesses, the physically challenged, schools and libraries, and rural communities, as it is in reach others in this country. Are competitive carriers already deploying service to these individuals and entities? Would H.R. 1686 and H.R. 1685 accelerate service to them?

PRISM COMMUNICATIONS SERVICES, INC.,
LAW DEPARTMENT,
Washington, DC, October 27, 2000.

Hon. HENRY J. HYDE, *Chairman,
Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: I would like to sincerely thank you for allowing me to appear 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".

To clarify some outstanding issues, Congressman John Conyers requested that I respond to a few questions in writing. I have included my responses and respectfully request that they be included in the hearing record.

Should you have any questions, please have your staff contact me. Thank you again for allowing me to participate in this important debate.

Sincerely,

RANDALL B. LOWE, *Executive Vice President
and Chief Legal Office.*

Enclosure

RESPONSE TO QUESTIONS FOR MR. LOWE FROM MR. CONYERS

Question 1. Please explain the extent to which the Telecommunications Act of 1996 considers and applies to data services. If the Telecommunications Act of 1996 covers data services, can H.R. 1686 and H.R. 1685 accurately be considered a "mere" clarification of the Act?

Answer. Congress enacted the Telecommunications Act of 1996 (1996 Act) having fully considered data services as a substantial and rapidly growing portion of all telecommunications traffic. Therefore, H.R. 1686 and H.R. 1685 cannot be considered "merely" clarifications but a significant alteration of the terms and spirit of the 1996 Act. In other words, the 1996 Act clearly includes data services such that any exclusion of data as proposed by H.R. 1686 and H.R. 1685 completely alters the structure of the 1996 Act.

The 1996 Act defines telecommunications as "the transmission . . . of information of the user's choosing. . . ." The broad term "information" in no way distinguishes between voice and data. More striking is the affirmative change Congress made to the definition of "telephone exchange service" when it enacted the 1996 Act. Senators Stevens and Burns explained the importance of this change by stating:

[The 1996 Amendment] would not have been necessary had Congress intended to limit telephone exchange service to traditional voice telephony. The new definition was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition of telephone exchange service, was not made useless by the replacement of circuit-switched technology with other means—for example, packet switches or computer intranets—of communicating information within a local area.

Senators Steven and Burns further explained that by amending the statute "Congress added new definitions to the Communications Act to respond to the convergence of communications and computer technology and to provide the framework for the new competitive local communications world." It is clear that Congress was certainly aware of the importance of data communications and advanced services at the time it passed the 1996 Act.

Simply put, and to reiterate, H.R. 1686 and H.R. 1685 significantly alter the terms of the 1996 Act. For instance, the 1996 Act allows the Regional Bell Operating Companies (RBOCs) to cross inter LATA boundaries once they can show that they have given full access to local facilities by means of meeting a 14 point checklist which is so carefully laid out in section 271. Without such access, it will be impossible to compete with the RBOCs. Thus, it can be said that meeting the 14 point checklist is at the heart of the 1996 Act. However, these bills hope to circumvent this process by making an exception for data. Moreover, since the transport of voice and data are becoming indistinguishable, an exception for data will also be an exception for voice. In short, removing the data restriction through this legislation is a change to the 1996 Act and not a "mere" clarification.

Question 2. Congressman Tauzin testified that LATA lines are an anachronism that were devised, under the Modified Final Judgement in the AT&T antitrust case, for voice telephony, not data, and that this has caused stranded regional Points of Presence (POPs) in many states, including Louisiana and Illinois. Is this actually the case, and in your opinion, do H.R. 1686 and 1685 address this issue?

Answer. LATA lines are not anachronisms devised only for voice telephony that force stranded Internet points of presence (POPs). LATA lines were never based on service type, but, rather, on the geographical separation of monopoly and competitive markets. Specifically, they were devised to separate local services from long distance services so that the Regional Bell Operating Companies (RBOCs) would not be able to discriminate against long distance competitors or to cross-subsidize competitive long distance services with their monopoly local services to the detriment of local ratepayers and long distance competitors. This prohibition is equally valid today as it was when it was first created. Unless the RBOCs are able to show that the local markets are open to competition—that is, that they are no longer the local monopolist—before being able to offer interLATA long distance service, the RBOCs will be able to engage in discrimination and cross-subsidization. This is equally true

for data, as well as voice, services. LATA boundaries, particularly as they relate to Section 271 of the 1996 Act, are therefore not only appropriate but essential to guarding against this.

Furthermore, POPs are not being stranded and left unused. In fact, Louisiana is an example of a 1996 Act success story. Although Congressman Tauzin testified that Louisiana only has two high-speed Internet POPs, the reality is that Louisiana has 25 high capacity, 45 megabits per second or higher, Internet POPs, and almost 90% of the households in Louisiana are within 50 miles of a high speed Internet POP. New companies, such as KMC Telecom and McCleodUSA, as well as more established companies such as AT&T, Sprint, and WorldCom, have diligently worked to build these POPs. This success story continues around the nation where 94% of all Americans live within 50 miles of a high-speed Internet POP. Furthermore, these POPs can be used for intra LATA communications regardless of whether the communications originates and terminates within the POP's LATA or a different LATA.

In sum, stranded regional POPs are not an issue that must be addressed. Instead, it is a red herring raised for the purpose of scaring people into believing that without the RBOC relief proposed by H.R. 1686 and 1685, Americans will somehow have paid for something they cannot use and, in the process, be denied access to advanced telecommunications services. Both could not be further from the truth.

Question 3. For the past several years, the RBOCs and their allies have claimed that there is a "backbone shortage" in this country. In his testimony, Mr. Tauke conceded that there is no such shortage, but put forth a new argument. He asserted instead that there is a "regional network" shortage of broadband capacity between the central office and the network access point of the backbone provider. Is this true, and if so, would H.R. 1686 and 1685 change this?

Answer. There is no shortage of "regional networks." As with the Internet backbone, competitive local exchange carriers (CLECs), as well as the RBOCs, are quickly meeting the needs of their customers. For instance, in his written testimony, Mr. Tauke cites Shreveport, LA as an example of a city that is lacking a solid regional network claiming Shreveport "must buy high-capacity circuits to carry its traffic to the nearest Internet hub." However, Shreveport is home to five high-speed, 45 megabits per second hubs. Thus, the homes and businesses in Shreveport are not being denied advanced services due to a shortage of a regional network.

Moreover, merely because the RBOCs would be allowed to provide in region, inter LATA data services does not mean that they will build regional networks or that their existing POPs serve any particular need. Instead, this argument is nothing more than a ruse thought of only when the RBOCs could not prove that there is a national backbone shortage.

Question 4. Congressman Boucher and FCC Chairman Kennard disagreed about the ability to distinguish between long distance voice and data communications. Based upon your experience in the telecommunications industry, could you explain how exempting high-speed data services from Section 271 would affect the BOCs' ability to provide long distance voice communications?

Answer. FCC Chairman Kennard correctly stated that it is impossible to distinguish between long distance voice and data communications because both communications can utilize the same technology. Like data communications, long distance voice communications may utilize Internet Protocol-based technology or any other packet-based technology. The true identity of the communication is masked by the utilization of the same technology because the signal that transmits voice and data communications is the same. Hence, the word "convergence" is often used when referring to the fact that voice and data are becoming indistinguishable. A vivid example of this convergence is the use of the Internet for long distance services. (Internet sites such as Computer Telephony Depot (www.ctdepot.com) contain easy to follow tutorials on how to place free or nearly free calls over the Internet.) If H.R. 1686 and H.R. 1685 permit the RBOCs to cross inter LATA lines for data, users can employ this simple Internet technology, or for that matter, any other convergent technology, to transport voice and data communications across LATA boundaries. Thus, not only do H.R. 1686 and H.R. 1685 essentially award the RBOCs with the ability to provide both voice and data service but they essentially make criminals out of the consuming public by permitting them to knowingly or unknowingly transmit both services even though voice would be prohibited.

Question 5. There is considerable concern that broadband deployment is less likely to reach minorities, the elderly, small business, the physically challenged, schools and libraries, and rural communities, as it is to reach others in this country. Are competitive carriers already deploying service to these individuals and entities? Would H.R. 1986 and H.R. 1685 accelerate service to them?

Answer. The CLEC community is committed to ensuring that advanced services reach everyone. For instance, companies such as McCleodUSA Inc. and Covad are serving both rural and urban communities. Over the last year, Covad expanded its service in locations such as Green Valley, New Mexico and Akron, Ohio. Thus far, competitors have built over 1,000 high-speed Internet points-of-presence ("POPs") in all but two LATAs (local calling areas) in America. These POPs are not just in densely populated urban centers, but in areas such as Owatonna, MN, Ocala, FL and Joplin, MO. Efforts such as these will ensure ubiquitous deployment of advanced services.

H.R. 1686 and H.R. 1685 will not expedite or even guarantee advanced services deployment to these often marginalized communities. These bills merely allow the RBOCs to cross inter LATA boundaries for data communications. They provide, therefore, no additional incentive to deploy these services. Instead, it will be necessary to depend upon the goodwill and promises of the RBOCs to actually provide these services, which CLECs are already deploying. In fact, the recent actions of the incumbent local exchange carriers (ILECs) demonstrate that they are moving away from rural regions rather than entering them. Since 1992, U S West and GTE have sold about 868,000 phone lines in sparsely populated areas—more than half of those in New Mexico. In the last five years, U S West has sold nearly 600 rural systems that serve about 1 million consumers to small companies and local phone cooperatives.

If any legislation is necessary, it must specifically target the need to bridge the digital divide. As an example, Senator Moynihan's bill S. 2698 entitled Broadband Internet Access Act of 2000 provides tax incentives for deploying advanced services to underserved areas. Deployment of advanced services to underserved areas will not occur through well intentioned but misapplied legislation like H.R. 1686 and H.R. 1685.





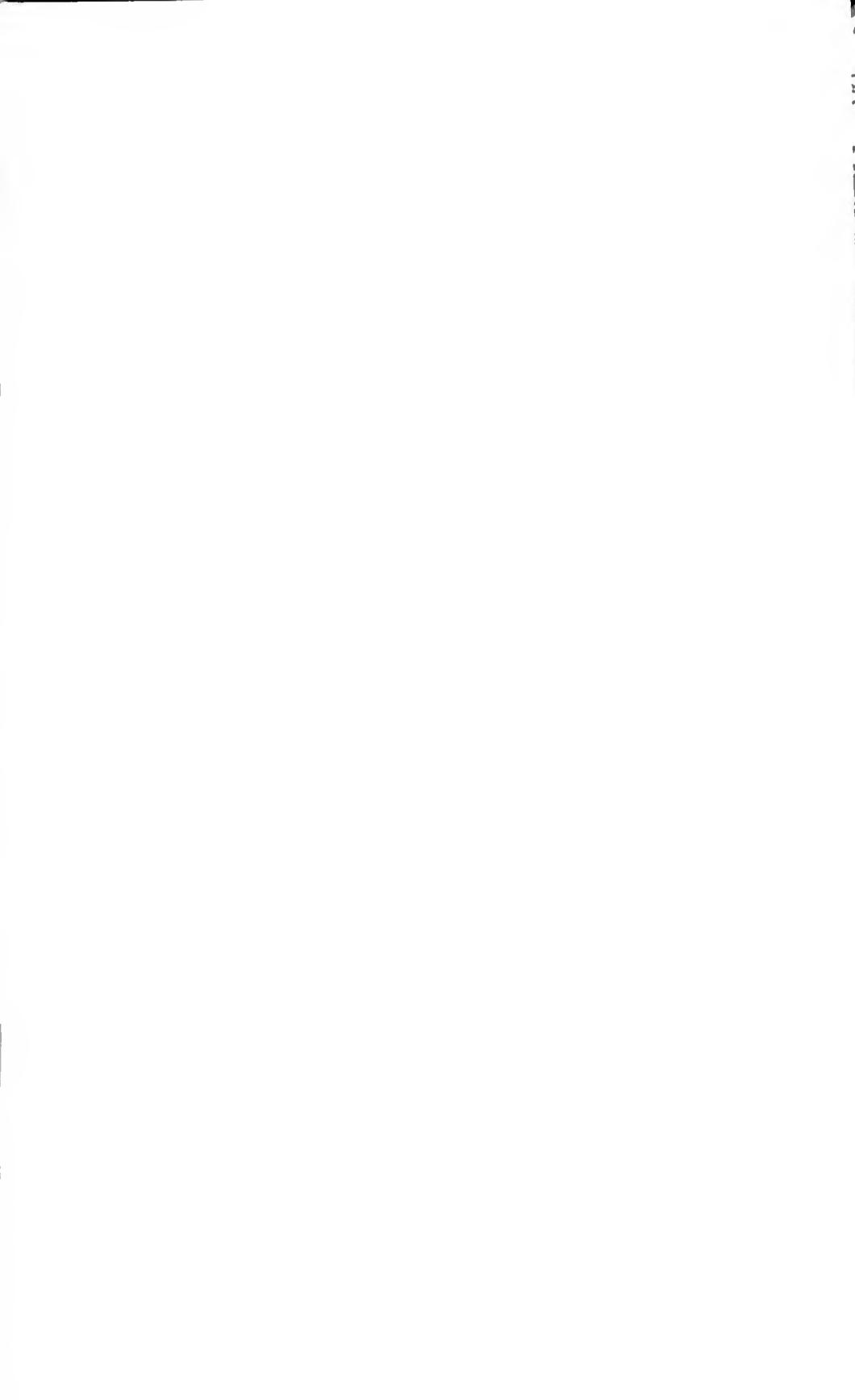


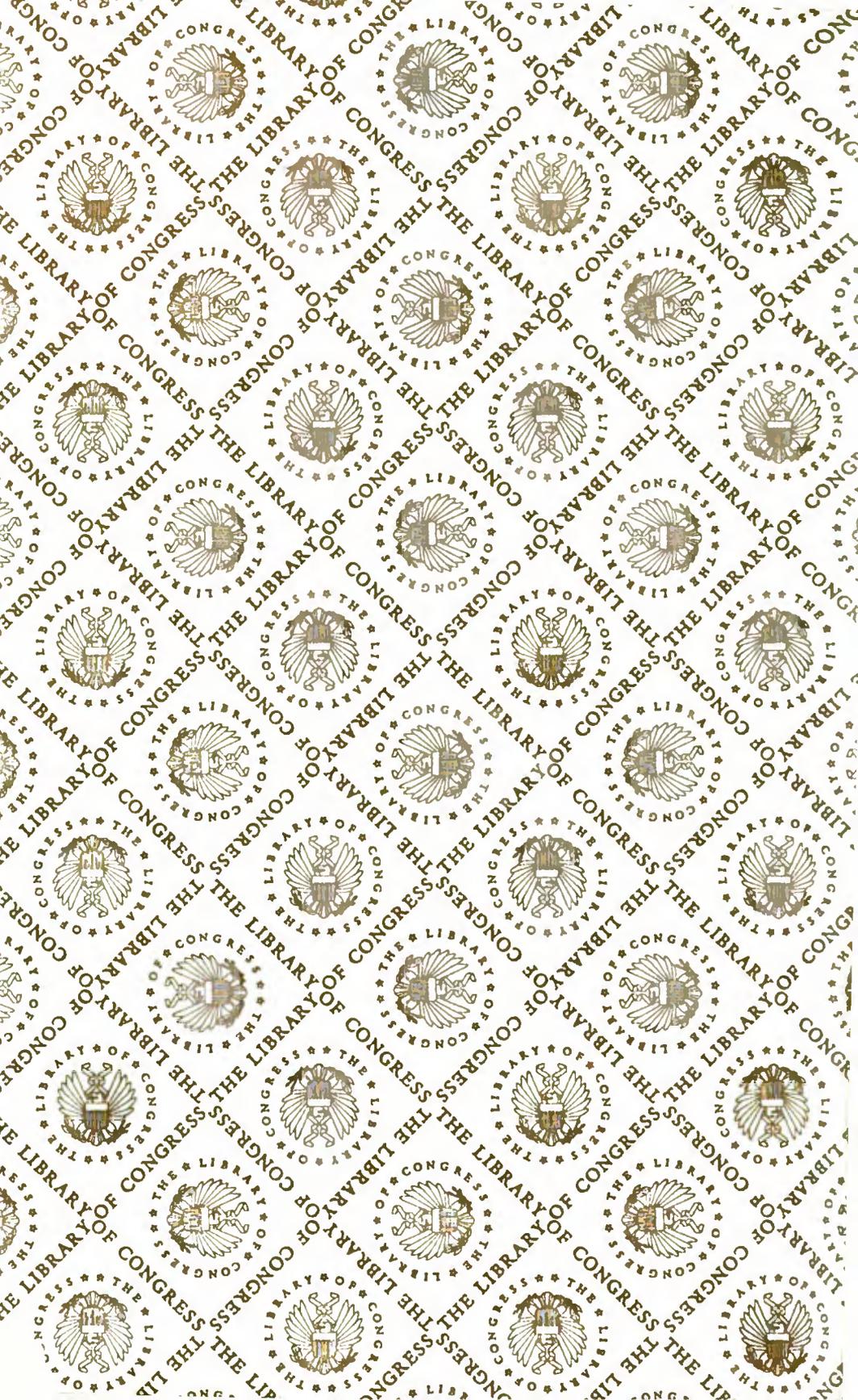


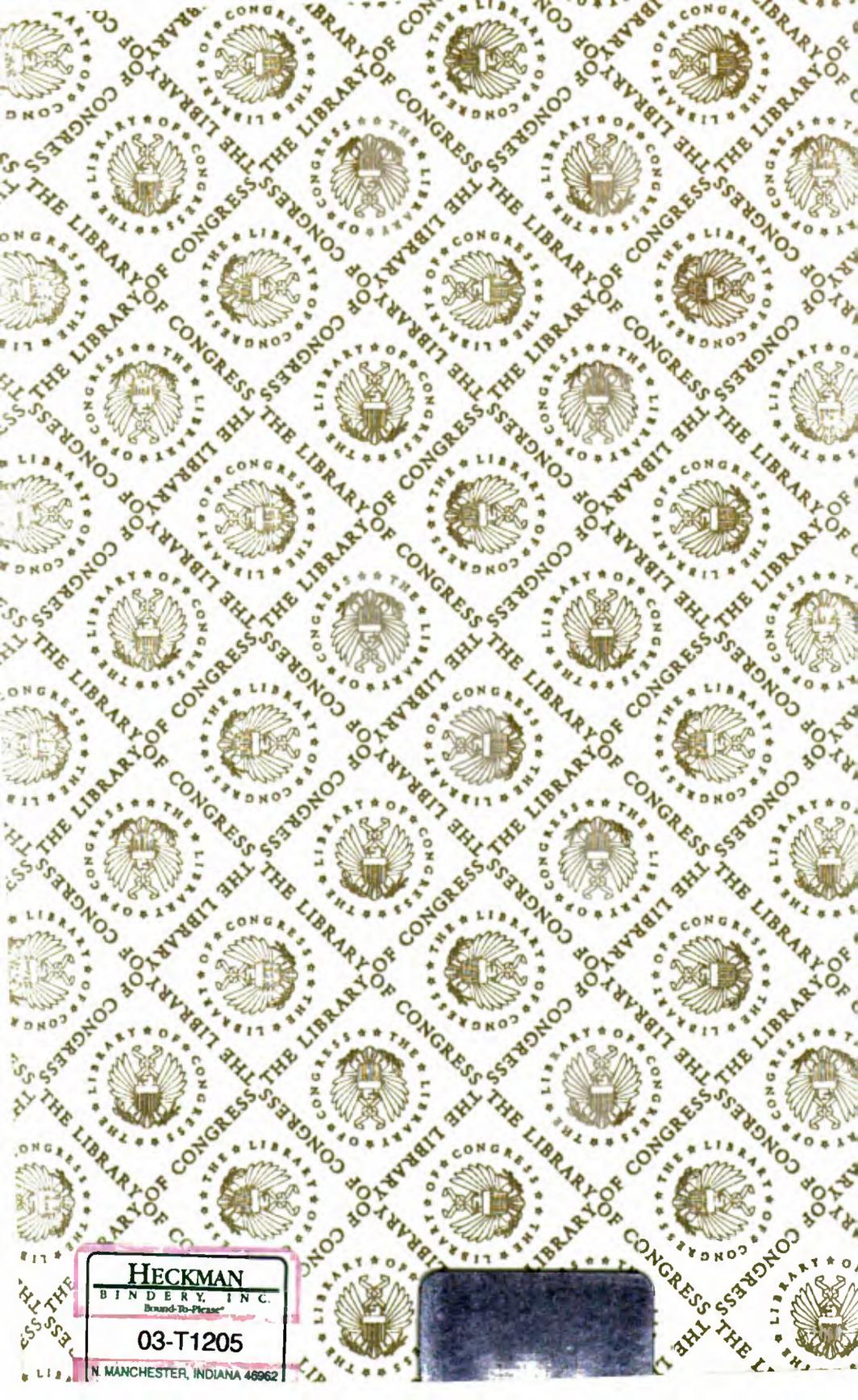
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