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National Cable & Telecommunications Association

TESTIMONY OF KYLE McSLARROW
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on

THE COMMUNICATIONS, CHOICE, AND BROADBAND DEPLOYMENT ACT OF 2006

before the

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
WASHINGTON, D.C.

MAY 18, 2006

Chairman Stevens, Co-Chairman Inouye and members of the Committee, my name is Kyle McSlarrow and I serve as President and CEO of the National Cable & Telecommunications Association (NCTA), which is the principal trade association representing the cable industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is the nation's largest broadband provider of high speed Internet access after investing $100 billion over ten years to build out a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

Thank you for inviting me to comment on legislation pending before the Committee. I would like to commend Chairman Stevens and Co-Chairman Inouye for holding extensive informational hearings and for the thoughtful manner in which this legislation was crafted. We appreciate your giving the cable industry the opportunity to share its views on a wide variety of issues and your willingness to incorporate some of our industry's key priorities. In particular, we thank the Chairman and Committee staff for taking a close look at Title VI and for limiting and in some cases eliminating a number of economic regulations first imposed in the 1980s such as rate regulation and leased access that are no longer necessary in today's competitive video marketplace. We appreciate that the legislation before us moves in a direction of enabling all providers to compete on a level playing field in both video, and just as importantly, voice services. And while we have concerns with some provisions of this bill that address the universal service fund, the cable industry supports the *Broadband for Unserved Areas Account*. In addition, we strongly support the very thoughtful approaches to difficult issues like net neutrality and the digital transition.

Cable Embraces Competition and Less Regulation

Mr. Chairman, the cable industry fully embraces, and thrives today in, a robust, competitive marketplace. Our consistent policy over several decades has been to minimize regulation on us and our competitors. The cable industry has never asked Congress for a handout and we don't seek to obtain regulatory advantages over our competitors. Nor have we opposed efforts designed to lighten regulatory burdens on our competitors in order to foster fair competition on a level playing field.

For example, in 1999 the cable industry supported the Satellite Home Viewer Improvement Act (SHVIA), which authorized direct broadcast satellite (DBS) providers to offer local broadcast signals. DBS providers were given "local-into-local" authority but were required to follow the same rules as cable and other MVPDs when they offered local signals. SHVIA established a fair and level playing field for multichannel video competition. And as a result, growth in DBS subscribership exploded and competition in the multichannel video marketplace is thriving. Today, two national DBS providers have captured nearly 30 percent of the MVPD marketplace.

The cable industry did not oppose a key provision of the 1996 Telecom Act that eliminated rules prohibiting telephone companies from offering video service. Rather, we supported that legislation because it offered all competitors the ability to enter new markets on fair, market-based terms and established a stable deregulatory environment.

And, more recently, the cable industry supported the efforts of the telephone companies to deregulate their high-speed Internet access service so that they could compete with all broadband providers on a level playing field.

Franchise Reform Legislation Should Streamline the Process and Establish a Level Playing Field

The legislation pending before this Committee would amend a number of existing telecommunications laws, many of which directly affect the cable industry, including Title III of S. 2686 which seeks to streamline the franchising process for video service providers. As we have made clear at prior hearings on this topic, our primary interest in franchise reform is to ensure that all competitors in the video marketplace compete under the same set of rules, rules that can undoubtedly be streamlined in a dynamically competitive marketplace.

To the extent Congress believes that the franchise process needs to be modernized, the cable industry has clearly stated its preferred path to reform. We have expressed support for franchise reform that embodies the following principles:

- First, in order to expedite entry to market for new competitors, we believe that Congress should streamline the process by limiting the time that local franchising authorities have to consider an application to provide video service.
- Second, it is critical for all providers of video services to be treated on a level playing field. An incumbent should have the right to opt into any new franchise agreement that has better terms and conditions. The government should not pick

winners and losers in the broadband industry by establishing a different set of rules that favor one provider over another.

- Third, local governments should maintain oversight with respect to rights-of-way management, meeting community needs and interests (including the equitable sharing of any PEG and institutional network responsibilities), and enforcement of non-discrimination requirements.

While the legislation under consideration today includes provisions that are designed to promote a level playing field, we have some concerns regarding how those provisions would be implemented, and we believe that changes are necessary in order to ensure that all video providers have the opportunity to compete under a streamlined franchise process. The bill's anti-discrimination provisions also appear somewhat illusory under the current definitions of franchise areas. We would like to continue working with the Committee to ensure that all neighborhoods benefit from competition.

The Telephone Companies Have Had a Decade to Enter the Video Market

In 1996 when Congress lifted the ban on telephone entry into the video business, it was a significant change in federal telecommunications policy. For decades, Congress kept the telephone companies out of the video business for fear that their monopoly control over the local phone market would allow them to exert market power in a way that would harm video competition. This threat was based on the telephone companies' anticompetitive behavior regarding pole attachments and their incentive and ability to shift costs associated with video service into their regulated telephone rate base and thereby unfairly cross-subsidize their entry into the video business with revenues from their telephone monopoly.

However, Congress lifted the ban in 1996 largely because the ‘96 Telecommunications Act also established rules to promote competition in the local voice market. Congress hoped that such competition would inhibit the ability of the Bells to use their telephone monopoly to enter the video marketplace in an anticompetitive manner.

The ’96 Act gave the phone companies four options for entering the video business and expressly stated that if they chose to enter as a cable system, they would be subject to the same requirements of Title VI as any other cable operator. At that time, the telephone companies didn’t complain that the local franchising process was a barrier to entry and Congress chose not to eliminate for telephone companies that chose to enter the cable business, any of the traditional requirements that apply to cable operators, whether they were first to the market or last. To the contrary, recognizing that large incumbent telephone companies were fully capable of competing vigorously in the video marketplace, Congress stipulated that cable operators would be free from any remaining rate regulation whenever a telephone company entered an operator’s franchise area.

Now a decade later, having made little effort to enter the video business, the phone companies are back claiming that they need special rules that would allow them to enter the video marketplace in a manner that would give them a regulatory advantage over their competitors. It is remarkable that Congress would even entertain the Bells new pleas for special favors when the very rationale for allowing the Bell companies to enter the video business in the first place has yet to materialize—competition in the local voice market. Rather than spending the last ten years offering video competition, as they promised, they have invested their time and tremendous financial resources in the courts and at the FCC attempting to frustrate Congressional efforts to promote voice competition. They have successfully crushed most of their local voice competitors and swallowed their long distance competition. Ten years after the passage of the 1996 Telecom Act, the incumbent telephone companies still have a vice grip on 85% of the local telephone marketplace.

Meanwhile, during those same ten years, competition to cable operators has increased dramatically most notably through the presence of two large DBS operators. In stark contrast to the behavior of the Bell companies, the cable industry responded to the deregulation of the 1996 Telecom Act and vibrant competition by investing $100 billion in private risk capital to upgrade its facilities with state of the art fiber optic technology. The industry made this investment without government subsidies and with no guarantee of a return on its investment.

And just as it created a multichannel video service from scratch, cable pioneered the residential broadband marketplace, while the telephone companies kept DSL technology on the shelf in order to preserve their high-priced T1 business service. Cable's innovation and risk-taking made cable the nation's leading broadband provider of high-speed Internet access.

The cable industry has embraced convergence. We have created a broadband platform which delivers digital video, high definition television, digital telephone service, and an array of additional interactive services. As such, we commend the Committee for focusing on how best to promote and encourage broadband deployment and adoption and avoiding policies that could threaten investment in the upgrades necessary to offer the next generation of broadband services.

New Government Fees Should Not Be Imposed on Broadband Service

The cable industry strongly supports the goals and purposes of the universal service fund (USF). Thus, cable operators that offer VOIP services already pay millions of dollars into the current universal service fund and we support making that obligation clear in law. In addition, cable companies that offer traditional circuit switched service pay into the fund exactly the same as all other incumbent and competitive local exchange carriers that offer circuit switched service. It is further our view that universal service eligibility should be technology-neutral such that all facilities-based providers of voice services who are willing to meet universal service obligations should be eligible to *receive* universal service distributions.

We share the concerns of policymakers, industry stakeholders and the public that the universal service program, as it stands today, is not sustainable. The current USF contribution mechanism, which relies on the assessment of interstate telecommunications revenues only, virtually guarantees that the fund will continue to shrink. To address this problem, the cable industry has long advocated the adoption of a mechanism that collects universal service contributions based on assigned telephone numbers. This is a simple yet effective reform that will sustain the long-term health of this fund while still adapting to the evolving technology and economics of voice telephony. Under a telephone numbers-based system, all that matters is whether or not the service uses a phone number. Adoption of this approach would promote competitive neutrality among all voice telephone providers – those who offer their services as a replacement for plain old telephone service (POTS) – and would avoid assessments on services that only include a voice component but are not a substitute for POTS.

The cable industry is pleased that the legislation introduced by Chairman Stevens would give the FCC the option of establishing a numbers-based assessment scheme. We would like to work with the Committee on language that would give priority to the numbers-based option and ensure that future assessments are limited to the kind of voice services I described and not extended to broadband and Internet services. The imposition of new fees on broadband service at the same time policymakers seek to encourage more widespread deployment and service penetration would be counter-productive and would raise the price of high-speed Internet services for current and potential broadband customers. We believe that an appropriately crafted numbers-based assessment plan that avoids assessing broadband service will raise the revenue necessary to put the universal service fund on solid and stable ground.

Broadband Subsidies Should be Focused Solely on Unserved Areas

Mr. Chairman, the cable industry shares your desire to ensure that all Americans, including those who live in rural communities, have access to broadband service. The good news is that broadband deployment is accelerating rapidly all across the country. High speed Internet access is available in 103 million homes passed by cable, representing 93% of U.S. households.

The cable industry alone has spent billions to upgrade its facilities and deploy broadband services in rural communities. We did this without a government mandate and without a government subsidy because we wanted to make certain that our customers have the same access to advanced digital technology as all Americans. We took the risk and invested private capital in order to provide broadband services in the communities we serve.

The cable industry's view is that the government should not use universal service funds to subsidize broadband in communities where companies are already offering consumers broadband service. It is profoundly unfair for the government to subsidize a broadband competitor to cable operators, many of which are small rural broadband providers that have stepped up to the plate and answered the call to help close the digital divide. Furthermore, providing broadband service in high cost rural areas is often economically risky. Faced with a competitor subsidized by the government could make that risk unsustainable. A better use of scarce resources would be to target areas where a market-based solution has not developed.

The *Broadband for Unserved Areas Account* included in your bill is an appropriate approach to promoting broadband deployment in areas where it is otherwise uneconomic to do so because it caps the level of government funding for facilities-based providers to deploy broadband, so as not to drain the universal service fund's limited resources, and it specifically targets funds to areas without broadband service. However, we urge you to keep in mind that programs designed to subsidize private entities to deploy broadband service have the potential for abuse and should receive stringent government oversight to ensure that government funds are clearly targeted only to areas where no one is offering broadband service.

An example of a well intentioned program that has not lived up to its stated purpose of providing funds for broadband deployment in unserved areas of the country is the current Rural Utilities Service (RUS) broadband loan program. Loan money from this program is being used to subsidize cable, phone and other competitors in markets where there are already two or more broadband providers. As noted above, this type of subsidized competition penalizes private entities serving those markets and discourages private investment in rural America. In its September 30, 2005 report, the Office of the Inspector General of the U.S. Department of Agriculture found that the RUS had failed to maintain its intended focus on rural communities without preexisting broadband service, questioned whether the Government should be providing loans to competing rural providers when many small communities might be hard pressed to support even a single company, and observed that the RUS, by granting such loans, may be "creating an uneven playing field for preexisting providers operating without Government subsidies."

Rights and Obligations of VoIP Providers

We are pleased that your bill includes language that extends to VOIP providers the same interconnection rights Congress established in 1996 to traditional competitive local exchange carriers (CLECs) to promote voice competition. The 1996 Telecom Act gave CLECs interconnection rights to competitive local exchange carriers so they could exchange traffic with the Bells on an economic basis, without glitches or delays, in order to promote local voice competition. Limiting interconnection and related rights to providers of voice services that use traditional circuit-switched technology would ensure the Bells retain their market dominance by hampering the introduction of cable's digital voice services – the best hope for widespread competition in the residential voice market. The bill correctly recognizes that any legislative effort to promote competition in communications would be incomplete unless it also addressed barriers to voice competition, especially where the Bell companies still control 85% of the market. And while this bill provides a solid foundation, we recommend changes be made in a few areas including, for instance, limiting these rights, duties, and obligations to facilities-based VOIP providers, who have made a commitment to deploying their own networks and infrastructure, and also urge that rural telephone carriers be required to exchange VOIP traffic with telecommunications carriers with whom they have existing interconnection agreements.

The Bill Rightly Avoids Regulating Broadband Internet Services in the Name of "Network Neutrality"

Cable supports Congress's longstanding policy of leaving the Internet unregulated and recognizes that such an approach has been a success and has encouraged tens of billions of dollars in investment. The cable industry believes that those who call for regulation in the name of "network neutrality" are offering a solution in search of a problem. However, we strongly support this bill's approach which requires the FCC to report annually to Congress on what is actually taking place in an extremely dynamic and evolving marketplace. We believe that FCC oversight of the Internet access marketplace will confirm that there is no evidence of harm or market failure to justify what amounts to imposing common carrier regulation on broadband service.

With bandwidth usage growing at a rapid pace, continued investment will be needed to keep broadband services robust. If broadband providers are to continue to make these investments, and if consumers are going to be given the levels of services and innovative new products and features they desire, all at prices they can afford, broadband providers need to have continuing flexibility to develop new business models and pricing plans. Network neutrality rules will stifle that flexibility and discourage capital investment.

The broadband marketplace is booming and hotly competitive. No real-world problems needing a regulatory solution have been identified. The pace of technological development is breathtaking. There can be no better circumstances than these to let the marketplace work, let companies invest, and let competitors compete.

Program Access

Existing program access rules should not be expanded to include terrestrially-delivered services or other programming services not owned by a multichannel video program distributor. However, to the extent Congress believes that cable-owned programming should be covered by the existing program access rules, such rules should apply to programming owned by any multichannel video programming distributor.

In 1992, when cable's share of the multichannel video market was 95 percent, Congress enacted comprehensive program access requirements to stimulate competition in the multichannel video marketplace by ensuring that cable's competitors had access to programming they viewed as critical for their success. The enactment of these rules was a significant departure from the generally recognized competition principle that exclusivity serves as a pro-competitive tool that benefits consumers and provides incentives to cable operators and their competitors to invest in the development of unique video services such as local and regional programming.

In enacting these program access rules, Congress consciously and correctly exempted terrestrially-delivered cable program networks. Congress struck a deliberate balance between ensuring that cable's then-fledgling competitors could not be denied sufficient access to popular satellite-delivered programming in which cable companies had an ownership interest while preserving the pro-competitive benefits of exclusivity in order to foster new program networks. Program networks, especially local and regional services, are high-risk ventures – some of which have failed in recent years. Offering distributors the opportunity to be the exclusive source of such programming can be essential to attracting investment, promotion, and carriage.

Today, it is clear that Congress's decision to exempt terrestrially-delivered networks has not impeded competition, and indeed competition in the multichannel video marketplace is thriving. Over the past decade, cable's share of multichannel video customers has dropped from 95 percent to 68 percent, and almost 30 million subscribers (about 1 in 3) receive their multichannel video programming from non-cable providers. Each of the cable industry's two largest competitors – DIRECTV and EchoStar – are larger than all but one cable company, and the nation's largest telephone companies are now deploying video services. Finally, in the past decade, the percentage of program services in which cable companies have a financial interest has declined sharply, from 53 percent to 23 percent.

There is no evidence of any problems with the current program access rules or with the multichannel video marketplace. The goal that Congress envisioned in 1992, a highly competitive multichannel video marketplace, has been reached. In addition, the FCC has found no evidence of any abuses of the existing program access rules in general and with respect to terrestrial services in particular.

Specific Issues Raised by the Draft Bill

While there is much to commend in S. 2686 -- in particular the elimination of unnecessary economic regulation of cable services and the absence of a "net neutrality" mandate -- as with any bill of this size and scope there are areas of ambiguity and room for some improvements. In this spirit we have identified a variety of specific issues raised by the bill. On the franchising side, these issues include the creation of two different regulatory schemes -- "old" and "new" Title VI -- for functionally equivalent services and an opt-in scheme that ties the regulation of existing cable operators to the business decisions of cable's competitors. With respect to universal service, the bill appears to require contributions from cable modem services in all cases, seemingly deprives VOIP providers of eligibility to receive funds, lacks provisions to encourage efficiency in the disbursement of money from the rural and high-cost funds, and limits auditing safeguards to the e-rate program. We discuss these issues and others below. We look forward to working cooperatively with Chairman Stevens, Co-Chairman Inouye and all members of the Committee to address these matters.

Video Franchising

Role of Local Governments; Prohibition on Discrimination. We have consistently said that because each community is unique in demography, economics, and geography, local governments are uniquely positioned to ensure that video providers meet each community's needs and interests in a fair and equitable manner. The Federal government has neither the resources nor the expertise to address these issues. While S. 2686 prohibits a video service provider from denying service to potential subscribers on the basis of race or religion, in addition to income, it would deprive franchising authorities of the authority to enforce this prohibition, leaving enforcement to the FCC and reducing local governments to the status of a complainant. We continue to believe that local governments are much better equipped than the FCC to investigate and determine instances of discriminatory conduct. We also note that franchise revocation is available as a remedy only for making false statements to the FCC related to the provision of service in a franchise. We would suggest also making false statements to the franchise authority grounds for revocation.

Related to the goal of nondiscrimination is the determination of a video service provider's franchise area. Prohibitions on income-, race-, or even religion-based discrimination can be rendered meaningless if a provider can self-define its franchise area to be just the wealthiest communities or the wealthiest neighborhoods in a town. We urge the Committee to consider defining franchise area to be the area served by existing cable operator or entire geographic area of the franchising authority.

Treating Like Services Alike. While we strongly agree that the bill's franchising provisions should apply to all providers of video programming that make use of the public rights-of-way, regardless of the delivery technology they use, the blanket replacement of the core terms "cable service" and "cable operator" with "video service" and "video service provider" could have unintended consequences. Must-carry obligations, for instance, apply only to a "cable operator *of a cable system*." Since the bill refers to “video service systems,” it is unclear whether must-carry would even apply to a “video service provider.” While this is presumably not the bill’s intent, it does suggest the kinds of problems that this substitution-of-terms approach presents. We believe it is more prudent to retain the existing definitions of “cable service” and cable operator,” and amend them to make them explicitly technology-neutral. If the Committee decides to retain the new definition of “video service provider,” it should clarify that the exemption for wireless and satellite providers applies to those entities only to the extent they are using those technologies.

Treatment of Existing Cable Operators; Opt-In Provisions. While we believe that local governments should retain their current role in ensuring that all video service providers meet local needs and interests, we have also consistently said that economic regulation of the cable industry, devised when the video marketplace was far less competitive, warrants a *comprehensive* re-examination. We are therefore pleased that S. 2686 gives existing cable operators the benefits of a streamlined regulatory framework -- “new” Title VI -- in markets where new video service providers enter after the date of enactment.

We are concerned, however, that the bill’s opt-in opportunities for existing operators are too limited. While there is a “competition trigger,” for instance, it would not apply in markets where a wireline competitor already provides service, or where an existing operator faces effective competition from DBS. In these situations, the existing operator would remain subject to “old” Title VI. Existing providers should not be bound by the business decisions of other providers in this manner. Opt-in should be allowed for every existing cable providers beginning on the date of enactment. All providers should compete on a level playing field.

Clarifications to PEG/INET Support Fee. The bill rewards an applicant that is granted a default franchise with exemption from the 1% PEG/INET support fee. While this may provide an incentive for a local authority to act on an application, it could penalize competing providers by requiring them to offer service under a different fee structure. All holders of a streamlined franchise should be required to pay the PEG/INET support fee. With regard to that fee, the bill refers to an offset against the fee from “incremental” operating costs, but does not specify which such costs would be included. Any operating costs should be allowed as an offset against the fee. The bill also does not specifically permit a video service provider to itemize the new 1% PEG/INET support fee, as cable operators are permitted to do today with respect to franchisee fees. This issue should be addressed. Finally, the bill should expressly preempt any attempt from the franchising authority to require “voluntary” PEG and INET support above and beyond 1% fee.

Franchise Fees. With regard to the 5% franchise fee, we are pleased with the effort made by this bill to limit the definition of gross revenue on which franchise fees are based. For instance, unlike the House bill, S.2686 does not expressly include advertising revenue in the definition of gross revenue. Local ad revenue is projected to more than triple over the next ten years from $4.6 billion in 2005 to $13.3 billion in 2015. In our view, franchise fees should be closely linked with an operator’s use of public rights-of-way and management of those rights-of-way by a local franchise authority –and not include peripheral revenue streams that could result in a windfall for franchising authorities. The connection between cable's access to rights-of-way and the selling of advertising is attenuated at best, and therefore we support the Committee's efforts in limiting the definition of gross revenues. To remove any ambiguity on this point, gross revenues should be limited to revenues from subscribers.

Further clarification is also needed to ensure cable operators are not required to pay a separate franchise fee assessed on the money they collect from subscribers and remit to franchising authorities in payment of the franchise fee ("a fee on a fee"). Consistent with the goal of a level playing field, the bill should specify that competing video service providers in the same franchise area should pay the same franchise fee. Further, the bill should limit the information that a State commission can request in a franchise fee audit to only those items directly relating to the gross revenues definition, and should prohibit requests for corporate financial information not directly related to local system's gross revenues.

Preemption of Local Franchising Authority. Several courts have held that in the absence of express Congressional preemption, State and localities may have an independent State law basis for imposing franchise requirements. If the goal of S. 2686 is a uniform national policy, the bill should include express preemption language. Compliance with Title VI should be an explicit requirement -- but the only requirement -- for offering video programming service to subscribers.

Rights-of-Way Management. The bill eliminates the provision in current law granting cable operators access to easements dedicated to "comparable uses." This provision has been important in enabling cable operators to gain access to rights-of-way already being made available to gas, water, and electric companies, without having to renegotiate easements. This provision should be included in S. 2686, and consideration given to expanding what is meant by “dedicated” to include private agreements as well as public dedications. We also note that the bill’s cost-based limitation on local permitting fees does not clearly apply to other rights-of-way management fees. The cost-based standard should be extended to all rights-of-way-related fees, to ensure that the fees imposed by the bill are the exclusive “rent” paid for use of the rights-of-way.

Clarifications To Franchise Application Process. It appears that the applicant rather than the franchising authority specifies the length of the franchise term. This is clearly an area in which the local authority should have input. Further, the bill does not clearly address the consequences of an applicant’s refusal to accept the terms proposed by a franchising authority, and does not impose a deadline on a local franchise authority to address the reasons for such refusal. One approach for remedying this issue would be to specify that a refusal to accept terms is deemed a rejection of the application, subject to appeal by the applicant.

Integrated Set-Top Boxes. To the extent the Committee is going to revise Title VI generally, we urge you to repeal the FCC’s rule that bans integrated set-top boxes (the set-tops leased today with the security features embedded in the box) and requires operators to re-engineer their set-top boxes to include separate security technology in boxes leased beginning in July 2007. At a time when Congress has spoken clearly about the need to move to the digital transition for broadcasters, the success of that transition is dependent on consumers having access to the lowest cost digital converter boxes for both over-the-air broadcast and cable services. The set-top box ban is anti-consumer and will slow the digital transition.

Requiring that every operator's leased box have separate security will increase lease costs by roughly $2-3 per box per month. This additional cost to consumers is wholly unnecessary. The purpose of the rule was to ensure that cable operators would support retail devices that used separate security devices (called CableCARDs), the theory being that if operators had to make sure the cards worked with their own leased boxes, the cards would also be certain to work in retail CableCARD-enabled devices. With the FCC's adoption of rules implementing the landmark "Plug and Play" agreement, requiring cable operators to support CableCARD-enabled retail devices, the rationale for the integration ban ceased to exist.

Separate security is used in "cable ready" devices sold in retail outlets, so that those devices can be made available anywhere in the country and used on any operator's system. If a consumer moves, he or she simply needs to obtain a CableCARD from his or her new cable operator to be used in the device. By contrast, consumers who lease their boxes from a cable operator today do not need separate security because their leased set-top boxes are used only in their operator's system and are returned when the consumer moves. More significantly, with or without the integration ban, cable operators have strong marketplace incentives to make sure CableCARD-enabled retail devices work and receive cable's services in order to compete with DBS, which has enjoyed a retail presence for a decade. Congress should repeal the ban to ensure that consumers can choose whether to lease a set-top box without paying an unnecessary financial penalty for their choice.

Satellite Services of a Video Service Provider. The bill exempts "satellite carriers" from the definition of video service provider, and therefore from the obligation to pay franchise fees. That exemption should not apply to a video service provider who uses satellite to avoid its obligation to provide comparable services to all neighborhoods in a community. AT&T, for example, has announced its intention to use satellite to extend its service offerings to portions of its service areas, rather than using its own network. As an extension of its wireline service, AT&T's satellite offering should be subject to franchise fees to ensure a level playing field with existing cable operators in those markets.

Miscellaneous Issues. Finally, a number of other provisions in Title III of the bill raise concerns:

- ***Expansion of FCC Authority Over Equipment.*** The bill proposes to delete references to "cassette" and to replace "tape" with "copy" in existing Section 624A of the Cable Act. This would broaden existing law by giving the FCC the authority to compel cable operators to accommodate digital DVR functionality and copy capabilities. We urge the Committee to reconsider this unwarranted expansion of the Commission's powers.

- ***Shared Headends.*** S. 2686 prohibits vertically-integrated "video service programming vendors" from denying access to a video service provider solely because that provider uses a shared headend. This provision would effectively deprive programmers of control over their intellectual property because programming is delivered on an "all or nothing" basis to all systems sharing a headend. We urge the Committee to remove this provision of the bill.

- ***Offset for Telecommunications Service Sales Tax.*** New Section 622(d)(3) appears to require States to offset the franchise fee against any telecommunications sales tax. Particularly if this is intended as a dollar-for-dollar offset, rather than a percentage-based offset, it could give an unfair advantage to the incumbent telephone companies.

- ***Local Review of Sales and Transfers.*** S. 2686 repeals the provision in existing law that limits local review of cable sales and transfers to 120 days, but it does not prohibit such review. Without language expressly prohibiting such review, the only effect of this language would be to remove the deadline in current law.

- ***Program Access Rights for Multicast Broadcasters.*** The bill removes a provision of existing law, added in 1996, clarifying that multicasters are not considered "multichannel video programming distributors" with rights to demand cable programming services under the program access law. Broadcasters have the resources to develop their own programming for their digital streams. There is no justification to expand the reach of the program access law for their benefit.

- ***Purposes of Title VI.*** The bill replaces the current purposes of Title VI, which include the encouragement of growth and development of cable, with single purpose of establishing a "comprehensive Federal legal framework" for franchising. We encourage the Committee to consider additional purposes, such as establishment and maintenance of level playing field and an appropriate role for local governments.

Universal Service

As I explained earlier, the cable industry supports the principles underlying the universal service regime, and we agree that universal service reform is needed. It is essential, however, that any reform address disbursements as well as contributions. The goals of reform should be to ensure that contributions are assessed fairly, eligibility and distributions are determined equitably, efficiently, and support is targeted to the appropriate services. On all three of these objectives, the bill represents an important and thoughtful starting point, but more work is needed. We stand ready to assist the Committee to make sure universal service is put on a fair and firm footing.

Contributions. Proposed new Section 254(d)(1) requires all communications service providers, which would include providers of broadband services (at least 200 kilobits per second in one direction), to pay into the universal service fund. This provision could be read as a mandate to assess contributions on broadband revenues even if the Commission otherwise concludes that a numbers-based contribution methodology would be sufficient. We strongly urge the Committee to eliminate any ambiguity on this point by barring the FCC from imposing a contribution requirement based on broadband revenues.

As noted earlier, the assessment of broadband service revenues would impose new fees on broadband service at the same time policymakers seek to encourage more widespread deployment and service penetration. These new fees would raise the price of broadband for current as well as potential broadband customers, and penalize those who have worked diligently to deploy broadband to nearly the entire nation. The assessment of broadband service is unnecessary to the goal of a stable, sufficient and predictable fund.

Eligibility to Receive Funds. The bill perpetuates several requirements that will impede the eligibility of new entrants to receive universal service funds, even if they are the most efficient provider of basic services. For instance, it retains the existing statutory requirement that a recipient must be an "eligible telecommunications *carrier*" (ETC), potentially excluding VOIP service providers if VOIP is classified as information service. The bill also codifies the FCC's existing restrictions on ETC eligibility, including the requirement to offer local usage plans comparable to those offered by incumbent local exchange carrier (ILEC) in the area and to provide equal access to long distance carriers if all other ETCs in area relinquish their designations.

Those ILEC-centric obligations and others, including a requirement that the ETC must provide 5-year plan of how support will be used in "every wire center" for which it seeks designation, skew against universal service eligibility for providers with innovative service offerings and those whose footprints do not match the service territory of the incumbent carriers (just as the Bells argue they should not have to provide video service beyond their telephone network footprint). Competitors should not have to mimic ILEC service offerings or network architecture or geographic coverage to qualify for universal service support. Cable telephony providers should be eligible if they offer supported services throughout their cable franchise areas, without regard to the historical ILEC study area or technology.

Promoting Efficiency. Any universal service reform effort must address the "demand" side -- distributions -- as well as the contribution "supply" side. In this regard, there must be an attempt to introduce more efficiency into the rural and high-cost support mechanisms. As competitive options become available to rural consumers, it may be possible to cap the existing funds or even reduce them. Congress should also consider the possibility of promoting more efficient use of universal service funds by establishing a cost benchmark for awarding support.

Finally, while we agree that it is critically important to ensure that providers of supported services to consumers in rural and high-cost areas have adequate funding, as universal service contributors we also believe that funding must be subject to reasonable and regular oversight. We note that S. 2686 requires the establishment of appropriate fiscal controls and accountability standards for the "E-rate" programs. These requirements should be applied to the rural and high-cost programs as well.

Targeting Support. The requirement that all universal service fund recipients deploy broadband appears to validate -- even if indirectly -- using funds for broadband deployment. Even without a direct broadband subsidy from the universal service fund, recipients will have additional revenue to spend on broadband because they no longer have to self-fund the deployment of their basic services. Cable companies are understandably very reluctant to contribute revenues from their own broadband services to subsidize their competitors, either directly or even by supplying them with fungible resources. The broadband prerequisite should be clarified to ensure that recipients do not directly use funds intended for basic voice service for broadband deployment instead.

The proposed new broadband account, by contrast, is capped and available on a technology-neutral basis only in unserved areas. As noted earlier, we are pleased with the more targeted nature of this account. Nonetheless, we do not believe it is fair to allow one technology -- satellite -- to obtain subsidies for customer premises equipment. If the satellite providers has no other facilities in an unserved area, we believe it would make more sense to apply the subsidy to offset a subscriber's monthly bill for service than to fund his or her purchase of equipment.

Interconnection

We support the technology-neutral intent of the interconnection provisions of the bill, which extends the rights, duties, and obligations of carriers under sections 251 and 252 of the Communications Act to VOIP service providers. However, we would suggest limiting these rights, duties, and obligations to *facilities-based* VOIP providers, who have made a commitment to deploying their own networks and infrastructure. A non-facilities-based provider should not have the right to order facilities-based entities on whose networks it rides to interconnect at a particular place or manner.

There are several other interconnection-related issues that the Committee should consider addressing in order to ensure that facilities-based competitors can compete fairly with the entrenched Bell monopolists and other incumbent carriers. First, we strongly urge the Committee to address rural telephone carriers' recent refusals to exchange VOIP traffic with telecommunications carriers, even though they have existing interconnection agreements with those carriers. Rural carriers' resistance on this point is depriving rural consumers of competitive voice services.

The bill should also ensure that incumbent local exchange carriers have a continuing responsibility to interconnect with other voice providers, regardless of whether the ILECs are reclassified as information service providers. Finally, the bill needs to include effective measures to ensure cost-based pricing for special access and transit services. ILECs are often the only suppliers of these critical links.

Video and Audio Flag

While NCTA has been neutral on whether to codify the FCC's broadcast flag rules, if Congress is going to do so we would urge you to consider granting the FCC express authorization for the Commission to make several modifications to those rules, particularly the ability to exempt home networking solutions under control of a multichannel video programming distributor from the FCC's certification process for output protection technologies. Whatever the merits of requiring certification of home networking devices made available at retail, there is no need to impose this requirement on equipment under the control of a cable operator or other MVPD. In this regard, we note that the bill would already permit the transmission of digital broadcast signals over a home network. Separately, rather than specify only that approved flag technologies be offered on a reasonable and nondiscriminatory basis, we would also propose that the bill alternatively permit licensing on "terms of reciprocal non-assertion."

White Spaces

We do not oppose the provisions in S. 2686 imposing a deadline on the FCC's "white space" proceeding. However, we would urge the Committee to include language that expressly protects cable equipment and systems, and not just broadcasters, from interference by unlicensed devices.

Digital Television

Mandatory Carriage of All Digital Streams on the Basic Tier. The bill requires a cable operator to put *all* digital signals of a broadcaster, not just the primary signal, on the broadcast basic tier. Such a requirement would have the perverse effect of *discouraging* voluntary agreements with cable operators to carry additional digital programming streams. It is a requirement, moreover, that would appear to apply only to existing cable operators, since video service providers would not be required to offer a broadcast basic tier. This provision should be removed.

Energy Efficiency Requirement for "Converter Boxes." The bill would require the Commission to set energy standards for converter boxes. The standards would apply until May 17, 2009. To the extent this provision is aimed at all set-top boxes and not just the basic converters eligible for the subsidy established by the Deficit Reduction Act of 2005, we are concerned that it could hamstring technological advances and slow the digital transition. Set-top boxes have evolved from simple tuners and descramblers to devices that may control multiple functions including digital television capability, a conduit to the Internet, program recording capability, storage of digital photos, and a platform for electronic games. Imposing energy efficiency standards now could limit the features and functionality that are built into a set-top device.

Focusing solely on the energy used by a set-top box also ignores the energy savings that these more sophisticated devices can produce. For instance, using broadband to telecommute would likely result in energy savings that vastly outweigh any additional energy usage by including broadband capability in an all-purpose device. Similarly, set-top boxes with video recording capability may produce a net energy savings as consumers abandon VCRs and other devices. The point is that it's too soon to tell where technology may lead us. Set-top box designers should have the maximum flexibility to envision the future.

Conclusion

As Congress drafts changes to the Telecommunications Act of 1996, we urge you to treat like services alike, preferably in a deregulatory environment. We will do the rest by raising private risk capital, investing in new technology, offering better customer service, creating innovative new programming, and competing with other multichannel video providers in order to provide consumers with the best voice, video, and data services possible.