

BEFORE THE SENATE COMMITTEE ON  
COMMERCE, SCIENCE, AND TRANSPORTATION  
TESTIMONY OF EARL W. COMSTOCK  
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Mr. Chairman and members of the Committee, my name is Earl Comstock. I am the President and CEO of COMPTTEL, the communications association of choice, which represents all types of competitive communications providers. COMPTTEL has more than 180 members and is celebrating its 25<sup>th</sup> year representing competitors in the communications marketplace.

The topic of today's hearing is competition and convergence, and COMPTTEL members are on the cutting edge of providing converged communications services to both business and residential users. Our members brought local Internet access numbers, Digital Subscriber Line (DSL) and Voice over Internet Protocol (VoIP) services to small businesses and residential users long before the incumbent carriers would offer them, just as COMPTTEL members brought competitive long distance offerings to businesses and consumers years before AT&T ever did. Likewise, COMPTTEL members are at the forefront of offering competitive cable services through overbuilding and through use of Internet Protocol Television (IPTV). It is thanks to the innovation of competitors, and not incumbents, that consumers enjoy new, lower priced, and ever expanding service offerings.

When Congress enacted the Telecommunications Act of 1996 ten years ago, one of the primary goals of that Act was to bring about convergence – namely the offering of voice, video, and data services over a common transmission platform. While it has taken longer to reach that goal than many might have expected when the 1996 Act was adopted, this hearing today can attest to the fact that convergence has finally arrived. The members of this Committee who helped craft the 1996 Act should be proud of this result, and should take credit where credit is due.

Notwithstanding the many myths that the Bell company and cable lobbyists spread daily – for example that Congress was not aware of the Internet when the 1996 Act was adopted – the Act has worked as many of those who drafted it intended. For example, the cable industry has successfully used the cost based interconnection rules established in sections 251 and 252 to interconnect their cable networks with the telephone networks of the incumbent telephone companies to provide broadband Internet access and, more recently, local voice services using VoIP. Interestingly, the cable industry's ability to provide broadband Internet access and local voice service was made possible by upgrades the cable industry undertook starting in the early 1990's in order to meet the threat of competition that Congress helped create in 1992 through the enactment of program access rules that are still in effect today. Those rules allowed Direct Broadcast Satellite (DBS) operators to successfully offer a competitive alternative to cable, and Congress included specific provisions in the 1996 Act to further spur cable network upgrades by allowing the Bell companies into cable and by including interconnection requirements that cable needed to enable them to provide Internet access and voice services.

It was in response to FCC actions, court decisions, and rules adopted by Congress that made competition likely, rather than in response to regulatory relief, that cable made its investment. The threat of competition, and not regulatory relief, is what led cable to upgrade their networks so that roughly 90 percent of the homes in this country are passed by cable networks capable of providing cable modem service – a broadband service that is several times faster than the DSL service offered by the Bell companies today. Taking into consideration cable modem service availability, America ranks near the top globally in broadband *deployment*. Congress should carefully consider this successful prior precedent as it evaluates the present requests by the Bell companies for regulatory relief as a means of spurring further broadband deployment.

Where America lags behind many other countries is in broadband *penetration*, i.e., in the number of homes that subscribe to broadband service. Broadband *penetration* is largely a function of price. America today pays more per megabyte of transmission speed than most of our European or Asian trading partners. This high price will only be reduced by competition or government price regulation. COMPTTEL believes that competition, rather than price regulation, is the preferable approach to reducing the price Americans pay for broadband services.

Unfortunately, the proposals before Congress today are not designed to spur competition. Instead, each of the proposals introduced so far in this Committee – S. 1504 and S. 2231 – are roadmaps to disaster. They each would take huge strides toward reinstating the old Bell monopoly based on the mistaken assumption that facilities based competition is well established and growing. While it is true that cable facilities pass roughly 95 percent of American *homes*, those facilities reach less than 1 percent of

businesses in the United States. Likewise, while many COMPTEL members have some of their own facilities to businesses and a few residential customers, COMPTEL members rely extensively on access to incumbent telephone company networks to reach most business and almost all residential customers. The same is true for wireless companies, some of whom are also COMPTEL members. Wireless companies link their cell towers to their mobile switching centers using wireline facilities – in most cases lines leased from the incumbent telephone companies under special access tariffs.

The truth is that there is only one entity in this country that has facilities reaching 100 percent of businesses and residences in any given area, and that entity is the incumbent local exchange carrier (ILEC).

In many areas of the country the ILEC is also a Regional Bell Operating Company that was formerly part of the Bell System monopoly. Particularly now, in light of the recent mergers, and the further proposed merger, involving former Bell entities, as well as the FCC Chairman's unilateral action last week to further deregulate Verizon, it is essential that the common carrier rules Congress reaffirmed and strengthened in the 1996 Act be put back in place. It is those rules, and not unregulated market forces, that have produced the competition that the Bells and their supporters point to as a justification for eliminating those very regulations. Without the rules, the competition that America sees today – competition that is not yet robust enough to drive down residential broadband prices to levels that will allow America to enjoy the same broadband penetration rates that consumers in other developed nations enjoy – will dry up and disappear, placing Americans at a serious competitive disadvantage in the global information economy.

The 1996 Act was forward-looking and competitively neutral. Unfortunately the FCC was not up to the task of following the roadmap that Congress provided it. Entrenched in its own precedent and captive to the industries it was supposed to regulate, the FCC has step by step demolished the pro-competitive, technology neutral framework that Congress constructed in 1996. Starting with Chairman Hundt's decision in 1996 not to tackle access charge reform so that the FCC could continue its policy of favoring Internet data services over voice services, followed by Chairman Kennard's decision to exempt the telecommunications component of Internet access services (and other information services) from contributing to universal service and Chairman Powell's decision not to treat the transmission component of cable modem service in the same common carrier fashion that the FCC had previously treated the transmission component of DSL based Internet access services, until finally Chairman Martin decided to reverse 25 years of prior precedent and treat common carrier transmission services bundled with an information service as entirely an unregulated service (as opposed to a regulated transmission service and an unregulated information service). With these actions the FCC has unraveled the core premise of the 1996 Act – namely that transmission services provided to the public would remain subject to common carrier regulation, regardless of the facilities used.

Despite Congress' clear instruction in the 1996 Act to regulate based on what service was being provided rather than the technology used or the historic box in which a company started, the FCC to this day insists on classifying services based on technology and history. If left unchecked, this misguided policy will result in the re-monopolization

of business communications services in this country, and, at best, a duopoly in the provision of residential communications services.

In considering now how to approach communications law reform, it is imperative that the Congress act to undo the damage being done by the FCC's policies. Congress faces an historic choice as it moves forward with new legislation. Congress can choose to re-instate the historic legal framework that led to the incredible growth and success of the Internet – the choice most governments are following in the rest of the world – or it can chose to continue down the path the FCC has been following, a path that will lead to the creation of a cable duopoly or even a cable monopoly – depending on whether or not AT&T and Verizon are successful in eventually running the incumbent cable operators out of business.

The stakes couldn't be higher. Re-instating the rules that led to the success of the Internet will mean continued innovation, growth, and competition, which will keep America as a leader in the Information Age. Continuing down the path toward a cable duopoly will mean stagnation, higher prices, and the loss of our leadership position as innovators and entrepreneurs move overseas in search of countries that have rules that enable them to get their products and services on the Internet without having to go through the cable or telephone company gatekeepers.

The cable rules set forth in Title VI of the Communications Act are in fact the polar opposite of the Title II common carrier rules under which the Internet and competition evolved. The cable rules grant the operator of a cable network *exclusive* control over the content and services offered over that network, subject to only a few requirements to carry public, educational, and governmental channels and a limited

amount of unaffiliated programming. Using those rules, over the past *thirty years* no major cable operator has voluntarily allowed any other company to purchase capacity on its network to offer content or services, even content or services that the cable operator itself is not yet offering. The former AT&T bought two cable networks, and still it could not get agreement from its fellow cable operators to allow AT&T to offer phone services, even though the other cable operators were not then offering those services. Likewise, AOL bought a cable network, yet AOL was also unsuccessful in getting agreements with the other cable operators to allow AOL to offer competing cable modem service over their networks. Now Verizon and the new AT&T are both filing papers with the FCC suggesting that they intend to protect much the capacity of their broadband networks from competitors by claiming those networks are cable networks subject to the exclusive cable rules.

The fundamental premise of the cable rules is that one person – the network operator – has the exclusive right to offer video programming to consumers over the cable network. The entire cable business model is predicated on rules that give network operators’ control so that consumers are only able to access whatever package of video programming the network operator offers. Yet this business model is diametrically opposed to the Internet business model, which is predicated on common carrier rules that limit network operators’ control so that consumers are able to access any content and services, including video content, which they choose. The two cannot co-exist, which is precisely why the cable companies, closely followed by the Bell companies, are working so hard at the FCC and in Congress to ensure that common carrier rules do not apply to their networks. In the aftermath of the FCC’s recent decision to reverse its prior

precedent and not apply common carrier rules to the transmission facilities underlying Internet access and other information services, Verizon and AT&T, like the cable operators before them, have both announced plans to limit the bandwidth available to consumers to speeds far less than what would be needed to access or provide independent packages of high quality video content.

The Bells are making their plea for video franchise relief based on the argument that consumers deserve greater competition in the video marketplace. They rightly point to the fact that cable rates have been going up roughly eight percent per year – several times the rate of inflation – ever since Congress enacted the 1996 Act. Yet the Bells do not propose getting rid of the cable rules that have led to these abuses. Instead, what the Bells have proposed is simply allowing them faster entry so that they can share in the profit taking at consumer expense. If Congress really wants to give consumers competition in the video marketplace, the far more effective remedy would be to apply basic common carrier rules to all network operators. That would provide consumers with the greatest level of choice, and the greatest level of price competition.

Eliminating the cable rules would also have other benefits. It would eliminate the messy debates that Congress, the FCC, and the courts all get dragged into over First Amendment rights, must-carry, and ala carte programming rules. While the only fair way to eliminate the cable rules is through a transition plan – after all, the cable industry legitimately relied on the existing rules – the time for such a plan is now. Particularly in light of the capacity that will eventually be freed up on cable networks with the analog to digital TV transition that Congress has slated for 2008, there is a short window of opportunity for Congress to enact a transition plan that could take advantage of that fact.

Establishing a transition plan to eliminate the cable rules and apply basic common carrier principles to all network operators is an ambitious undertaking, but it is what is needed for America to remain as a world leader in the Information Age. COMPTEL stands ready to work with this Committee to fashion such legislation. This legislation should adopt technology neutral requirements that apply to all companies that construct their networks over public rights of way, using public spectrum, or other public resources (for example numbering resources). These requirements should include the duty to provide non-discriminatory transmission service upon reasonable request, to interconnect their networks with other providers of transmission service on reasonable and non-discriminatory terms and conditions, and not to interfere with content and services transmitted over their networks. In addition, universal service obligations and benefits should apply to all such companies in a competitively neutral manner.

The legislation should also recognize the considerable barriers to entry faced by new network operators. New network operators must construct their networks in a competitive environment, without the benefit of an existing infrastructure and customer base. In addition, every customer the new network operator hopes to serve is already being served by at least one incumbent. As a result, the new network operator must win that customer from an established provider, a task far more difficult than signing up customers who have never been served.

In the alternative, if the Committee would prefer to leave in place the existing cable rules and build instead on the framework of the 1996 Act, COMPTEL urges the

Committee to: 1) apply the cost-based interconnection and unbundled network element requirements of sections 251, 252, and 271 of the Act to both copper and fiber facilities; 2) require incumbent LECs to provide cost-based special access services under sections 201 and 202 of the Act; 3) require all facility based providers of Internet access services (including cable operators) to offer the transmission component of such services to others on the same terms and conditions as it provides such transmission to itself; 4) treat cable operators as common carriers to the extent they provide transmission services; 5) strengthen the program access rules in Title VI of the Act by closing the terrestrial loophole and improving access to video programming by small providers 6) improve the language in section 224 regarding access to rights of way to ensure competitive neutrality and eliminate discriminatory practices by franchising authorities; 7) establish reciprocal compensation arrangements for the transport and termination of traffic between carriers; 8) modify universal service mechanisms so that all facilities based providers contribute in a competitively neutral manner and are eligible to receive universal service support in a competitively neutral fashion; and 9) prohibit cable operators and common carriers from interfering with or degrading content or services transmitted over their network, or from favoring their own content and services (other than video programming offered as a cable service) over other content and services.

Thank you for the opportunity to testify, and I would be happy to answer any questions.