Testimony of

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on behalf of

Free Press
Consumers Union
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before the

United States Senate
Committee on Commerce, Science and Transportation

Regarding

S. 2686, Communications, Consumers' Choice, and Broadband Deployment Act of 2006

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Summary

Free Press[1], Consumers Union[2], and Consumer Federation of America[3] appreciate this opportunity to testify on the revised draft of the Communications, Consumer's Choice, and Broadband Deployment Act of 2006 (S. 2686). We strongly support the goal of this legislation: to expand consumer choice and access to competitive video and broadband services. American consumers currently face high prices and very little competition in both the video and broadband Internet markets. Monopoly and duopoly provision of these essential communications services limits innovation, widens the digital divide, and permits rates to rise beyond the reach of many households. As the United States falls further behind in the global race to lead the world in broadband, action must be taken to remedy the failures of the 1996 Telecommunications Act and bring vigorous competition to video and broadband that will enhance the diversity of media choices for consumers. This is a window of opportunity to make broadband and video services available and affordable with robust content choices for all Americans.

However, our haste to bring competition must not result in a blind giveaway to one industry or another. Such action would simply yield anti-competitive activity in another direction and leave our problems unresolved. S. 2686 takes many positive steps but leaves much undone. Without substantial changes to the bill, the benefits of video and broadband competition will not reach many American households — particularly in the low-income and rural areas which need those benefits the most. The bill opens the door to competition, but doesn't ensure that new networks will be built universally. Key public interest protections and services have been abandoned, the most important of which is Network Neutrality — the foundation of the free and open Internet.

Any franchising framework without reasonable build-out requirements cements the digital divide into statute. On the one hand, it allows telephone companies to cherry-pick the most profitable franchise areas in the country and ignore all the others. On the other, it gives the incumbent cable operators an incentive to lower prices in competitive areas and raise them in non-competitive ones. Without regard to conditions of effective competition, the bill would eliminate prohibitions against discriminatory cable pricing. The end result will be that the most lucrative markets in the country will have video competition, new technologies and lower prices. But less prosperous and rural areas will be left out of the new networks and may well experience higher prices for the monopoly service still available. The unintended consequence will be systematic redlining on a national scale -- leaving millions of consumers with empty promises.

On the question of Network Neutrality, this bill applies the most important principle in communications law — nondiscrimination — indiscriminately, leaving out its most important application. The firewall of Network Neutrality, which protects competition, maximizes consumer choice, and guarantees fair market practices, has been abandoned on the Internet space -- endangering the most important engine for economic growth and democratic communication in modern society. Nondiscrimination made possible the grand successes of the Internet. Its removal can take them away. This will not happen immediately, of course. But once the practice of network discrimination begins, it will be virtually impossible to reverse. The loss of Network Neutrality will be a perpetual regret to all consumers and producers of Internet content and services, as well as to this Congress. Yet S. 2686 merely instructs the FCC to study the process that will destroy the Internet as we know it.

Notably, nondiscrimination is applied throughout this bill as a critical protection against abuses in the marketplace and a promoter of competition. The bill has it right in each case, but fails to bring the same logic to the Internet. For example, local franchising authorities must treat competitive video providers in a nondiscriminatory manner in the use of the public rights-of-way. Local governments that propose to build broadband networks must not use local ordinances to discriminate. Under the program access rules in S. 2686, cable operators may not use their market power to make exclusive or discriminatory deals with programmers that are denied other operators. Telecommunications providers must treat facilities-based VOIP providers in a nondiscriminatory manner. USF support must be distributed according to principles of competitive neutrality. The only sector that does not enjoy this

protection against discrimination is Internet content, applications and service providers — the most dynamic marketplace in our economy.

We should apply the principles of nondiscrimination everywhere in an even-handed fashion. We must protect Internet freedom by preventing the telephone companies and cable operators from putting toll booths on the information superhighway. It is both just and reasonable to apply nondiscrimination protections across the communications sector. Everyone loves nondiscrimination until it is applied to their own properties. The same telephone and cable companies that demand nondiscrimination in program access and interconnection hypocritically deny its importance in the broadband market. This duplicity must not be codified into law. The move toward discrimination and exclusivity for Internet content spells disaster for consumers — meaning higher prices, fewer choices, and a gatekeeper standing astride what was heretofore been a truly free market.

This legislation also takes some positive and welcome steps. First, we applaud S. 2686 for opening up more unlicensed spectrum for innovative wireless broadband applications. The empty broadcast channels represent a massive public asset for next-generation communications that is ready for immediate use. This type of spectrum reform contained in this bill is much needed and overdue.

Second, we also strongly support the protections against pre-emption given to municipalities that would offer broadband to their constituents, either via public networks or the public-private partnerships already enjoying success in hundreds of communities. It is critical to remove all barriers to the development of broadband services.

Third, we believe that the reforms of the Universal Service Fund proposed in this bill are steps in the right direction. The expansion of the base of contributions and insertion of stringent accountability and audit measures will help stabilize a critical public-service program. We also support the application of USF funds to broadband in underserved areas. However, we are disappointed to note that the requirement for USF-supported networks to become broadband compatible has been removed from the bill. The USF programs must evolve to bring the dominant communications technology to all American households.

Fourth, we support the establishment of mandatory channel allocations and funding for public, educational, and government access television. This bill will bring online thousands of new channels that will provide an important public service and dedicate funding to support them. We must ensure that our most successful access channels — those currently operating at budgets above the 1 percent franchise fee allocation — are not harmed by this bill.

Finally, we support a rigorous application of non-exclusivity and nondiscrimination requirements to MVPD programming. Consumers have long been denied choices in video programming because of the anti-competitive activities of the system operators. This bill recognizes that the program access rules must be strictly applied and expanded to prevent MVPDs from using market power to execute anti-competitive practices. The terrestrial loophole certainly should be eliminated, but Congress should also move toward expanding diversity of programming through an a la carte pricing system and reform of the retransmission consent rules.

The Communications, Consumers' Choice, and Broadband Deployment Act of 2006 presents Congress with a great opportunity to make broadband and video services competitive, affordable, and open to all content, applications and services that flow over the networks to consumers. In many ways, this bill is a step in the right direction. However, the lack of build-out requirements and the failure to protect Network Neutrality are severe flaws. If left unaddressed, they will undermine the positive outcomes of this bill and leave consumers worse off than they were before. No reform of communications law that solidifies a duopoly of wireline triple-play providers can be pro-consumer without Network Neutrality and system-wide build-out requirements.

Assessment

USF programs must be stabilized, held accountable, and applied to broadband.
Title II – Universal Service Reform; Interconnection

The key requirements for reforming USF for the 21st century are a stable base of contributions, rigorous standards of accountability, and the modernization that extends the programs to broadband. To that end, we applaud the provisions in S.2686 that expand contributions into the Universal Service Fund to all providers of communications services. We will monitor the Federal Communications Commission's choice concerning which methodology of collection to use, and we support the adjustments to protect low-volume customers from disproportionate fees. Expanding the base of contributions will improve equity on a technology-neutral basis and address the economic inefficiencies that exist in the current contributions system. Most importantly, it will rectify shortfalls in the revenue needed to adequately execute USF programs. We support the injection of accountability standards, performance measures and audits into the system. We hope that the FCC will work to resolve the problems of parity surrounding the compensation of CETCs and rate-of-return carriers that has stressed the financial viability of the Fund. This will ensure that the fees that consumers pay into USF are commensurate with the benefits of an expanded network available to every household.

We support the creation of the account for funding broadband in unserved areas, but we do not believe that alone will be sufficient to solve our rural broadband problem. For example, if the per-line cost of deployment is $1,000, approximately 500,000 lines could be added per year — about a 1 percent increase in broadband penetration. We regret to note the removal of the provisions in the prior draft of S. 2686 that would have required providers receiving USF contributions to provide broadband service within five years of passage. To achieve the goals of universal broadband, it will be critical that carrier eligibility for USF be contingent on making broadband available to all of its customers.

We also suggest the following additional provisions: First, we recommend that municipal broadband systems be made explicitly eligible for funding from the Broadband for Unserved Areas Account, enabling communities to finance the construction of broadband networks where private players refuse to invest. Second, we recommend that Congress instruct the FCC to explore expanding the Lifeline and Link-up programs to broadband. A major factor curtailing broadband penetration in the United States is the price of connectivity. Removing this barrier could greatly expand the reach of the technology and the opportunities it brings. The fund for unserved areas will not likely bring universally affordable broadband. A complementary program will be necessary to address the rich-poor digital divide in addition to the rural-urban digital divide. For similar reasons, we recommend thirdly that a requirement for USF eligible networks to become broadband compatible within 60 months be reinstated in the bill. Finally, we recommend that all network operators that receive public subsidies through USF programs be subject to nondiscrimination rules with regard to the content, applications and services that they transmit.

New franchising practices must include build-out requirements.
Title III – Streamlining Franchising Process

We strongly support policies that will bring video competition to all consumer households as rapidly as possible. However, we must take great care not to abandon our commitment to public service requirements and to expanding competition as broadly as possible. A duopoly is better than a monopoly in wireline video services, but it is not a competitive marketplace. By creating new franchising processes to ease new market entry, we run the risk of creating a lowest common denominator of public service policies that do a disservice to localities while failing to maximize competition.

In principle, we support the policy of keeping the franchising authority at the local level. Localities know best how to manage their own rights-of-way, administer fees, protect local consumers, and offer public services like PEG channels. However, the federal framework that now guides these local franchising agreements must provide for adequate safeguards and consumer protections to maximize availability and quality of service. As we have testified before on this issue,[4] the franchising section of S. 2686 contains many liabilities in this regard.

The legislation removes too many public service protections upon the entrance of a second wireline competitor into a market. It immediately allows incumbent cable providers to jettison their existing franchise obligations without any demonstration of effective competition. The standardized franchise agreement would then apply to both the cable incumbent and the newcomer, requiring neither to hold to build-out, upgrade, or basic tier regulations. Allowing incumbent providers to backslide on their existing franchise obligations would have devastating impacts in any community where the new video entrant is not providing service throughout the community. If a telephone company offers its video service in only an affluent part of a franchise area, as allowed under the legislation, an incumbent cable provider will have both the ability and the financial incentive to offer service upgrades only to competitive areas, while denying them to customers in neighborhoods not served by the new entrant. While the National Cable and Telecommunications Association has pointed out the importance of providing network upgrades in an equitable and non-discriminatory manner,[5] it has refused to pledge that cable providers will not deny service upgrades or withdraw service to currently served areas if a national system of franchising is adopted.[6]

S. 2686 appropriately prohibits redlining based on income, race and religion. However, it opens up substantial loopholes that will render these protections all but meaningless. The limitations in Section 642, under which discriminatory service provision will be permitted, are broad and indeterminate. Service may be denied because of “technical feasibility,” “commercial feasibility” and “operational limitations.” It is hard to imagine how an operator could fail to construe its decision to redline under one of these vague categories. This puts the burden of proof squarely on the victims of discrimination and gives them little hope of redress. Further, even in a best-case scenario, anti-redlining protections will only ensure that service is provided throughout the franchise areas selected by the telephone companies. We will very likely see a patchwork quilt of affluent LFAs with service agreements, while neighboring towns and counties (particularly those in rural areas) will languish without competition.

Skepticism that telephone companies will offer their video services to just the wealthiest counties is particularly warranted given statements by SBC (now AT&T) last year that it would roll out Project Lightspeed, the company’s IPTV video offering, to 90 percent of its “high-value” customers (those willing to spend up to $200 on communications services per month). These high-value customers make up just 25 percent of its subscriber base. SBC also contended it would provide the video service to just 5 percent of “low-value” customers who constitute 35 percent of its customer base.[7] Assurances that low-value customers would still be able to receive satellite video through SBC’s affiliation with Dish Network ring hollow, given the failure of satellite to provide meaningful price discipline. Instead, SBC’s statements suggest it will offer services only in mostly affluent areas, disregarding communities made up predominantly of rural or lower-income residents.

Similarly, Verizon’s conduct to date strongly suggests it is seeking franchise agreements for its FiOS service in only the wealthiest counties. For example, Verizon has negotiated or signed franchise agreements with largely affluent local franchise areas—such as in Fairfax County, Va. (where it has four franchise agreements in place for Herndon, Fairfax County, Fairfax City and Falls Church); Howard County, Md.; Massapequa Park in Nassau County, N.Y.; Nyack and South Nyack, in Rockland County, N.Y.; and Woburn in Middlesex County, Mass. In terms of median family income, Fairfax County ranks No. 1 nationally; Howard ranks fourth; Nassau 10th; Rockland 12th and Middlesex 17th.[8]

Unfortunately, in the absence of meaningful and enforceable requirements to build out services throughout a franchise area, the porous anti-redlining provisions of S. 2686 will be not be sufficient to prevent redlining by video providers. Existing Title VI anti-redlining provisions have only been effective because they exist *in tandem* with the ability of local franchise authorities to require service throughout the franchise area over time. Without requirements for build-out, anti-redlining provisions provide inadequate incentives or enforcement tools to ensure that all American households receive the same benefits from service provision. Our policy goal must be to deliver competitive video services as widely as possible, not as widely as a duopoly market will accomplish of its own volition.

Incremental Build-out Across System-wide Franchises

We strongly recommend that the Committee amend S. 2686 to include a build-out requirement that addresses the *service territory* of the ILECs entering the video marketplace. The concept of the system-wide franchise is appealing for a variety of reasons. It is elegant in its simplicity — everywhere an ILEC has a telephone line, it must make available a video service over a reasonable period of time. Most importantly, it would provide for build-out across its existing service territory in a state, rather than just permitting build-out in a patchwork of counties and cities with the most desirable economics and demographics for a network operator. Variations of this model have been adopted by legislatures in Virginia and New Jersey.

A build-out requirement for a system-wide franchise cannot be executed all at once for obvious reasons of scale. There must be incremental steps to ensure that there is sufficient revenue to make the investment in the next round of expansion. The key is finding the right balance that will *both* permit the ILEC to expand its fiber infrastructure on a schedule that makes business sense *and* maintain a commitment to universal availability of the service, over time and across each state. Further, in the interest of the level playing field, the same kind of build-out requirement would need to apply to the cable incumbent, if and when it chooses to upgrade its lines to compete with the new fiber offerings from an ILEC.

The balance in each case could be found by applying an incremental build-out plan (based on market-share) on a state-by-state basis across the provider's service territory in that state. For the first few years of deployment, the ILEC would be permitted to establish its own service area. After a period of time, if 15 percent of the market was captured, that measure of effective competition would trigger a build-out requirement. This requirement would be to reach an additional 20 percent of the service territory in the state over several years. There would then be another check for market share capture, and the subsequent trigger for a further 20 percent build out would repeat every few years. If the ILEC failed to capture sufficient market share (and therefore did not have an established revenue stream), the build-out benchmark would not be triggered. Eventually, all lines in the state service territory would be reached with the new, upgraded system (subject to density-based limitations).

The overall rules for the franchise would be federal. The authority of oversight and enforcement of the build-out would be at the state and local level. This model also provides a legislative framework that would integrate with the USF reform plans that extend to broadband. The overall public policy goal would be to ensure that high-capacity networks carrying voice, video, and data reach all American households over time, making universal the benefits of video competition and high-speed broadband.

Consumer Protection and Public Services in the Franchise

Under current law, states and localities have authority to establish more stringent cable customer service standards than required by federal law. Localities are able to enforce those standards through the terms of their local franchising agreements. Many franchise authorities have staff and offices dedicated to resolution of cable complaints that provide for speedy resolution of customer billing concerns, service outages and more. Penalties in the form of liquidated damages or mandatory discounts for customers harmed by a provider's violation of customer-service standards are not uncommon.

Establishing baseline federal consumer-protection rules is not a bad thing, provided they are strong and permit local governments to add additional protections to meet local needs. However, S. 2686 strips states and localities of the authority to establish consumer protections that exceed federal minimum standards and eliminates the ability of localities to use the franchise agreement itself as an enforcement tool. The legislation provides no guarantee that federally established consumer protection standards would take into account unique local needs or be able to respond quickly to adapt regulations to novel anti-consumer behaviors.

Any national franchise legislation should retain some state and local authority to establish customer-service standards and consumer protections. When facing billing errors, failures to make service repairs, property damage by cable employees and other related hassles, consumers need a means for timely and local resolution of complaints against their service providers. Federalizing rules and appeals of local consumer protection decisions is not the most consumer-friendly solution. The FCC is ill-equipped to establish regulations in a timely manner to protect consumers, nor can it handle the thousands of potential cases brought on appeal.

We are pleased to see the recognition that public, educational, and governmental (PEG) video channels are an important local service and should be preserved and extended to all franchise holders. We strongly support minimum channel allocations, dedicated funding for PEG channels, and all of the technical requirements needed to bring this programming to local consumers. This bill will create thousands of new channels and public services where none existed before. We also believe that those access centers that current rely on funding in excess of the 1 percent franchise fee set-aside in the bill should not be harmed. There is no public benefit from punishing the most successful PEG producers and their audiences with a hefty budget cut.

Video programming should be available to all providers on a nondiscriminatory basis and to all consumers exclusive of bundles.

Title IV – Video Content

The 1992 Cable Consumer Protection Act banned cable companies from refusing to make their programming available, but the "terrestrial loophole" and lax enforcement have allowed cable operators to use control of programming to frustrate new competition. The situation has always been a fierce battle between cable incumbents and DBS -- and consumers often have been denied the programming they want. The entry of the ILECs into the video market should lead to reform.

We strongly support a rigorous application of non-exclusivity and nondiscrimination requirements to MVPD programming. This bill recognizes that the program access rules must be strictly applied to prevent MVPDs from using market power to promote anti-competitive practices. We are particularly pleased to see these nondiscrimination requirements apply to dominant MVPDs that have made exclusive arrangements with *unaffiliated* programming and unfairly denied access to other distributors. This is notable because it recognizes the ability of a monopoly or duopoly distributor to distort the free market of content even when that content is not affiliated with the distributor.[9]

The elimination of the terrestrial loophole is the first in a series of steps that Congress must take to maximize choice and diversity in the video content market. Congress also must take up a la carte programming and retransmission consent. In each case, as in non-exclusivity requirements, the policy goal is to maximize diversity, lower barriers to entry for independent content providers, and thwart the anti-competitive activities of vertically integrated network operators that use market power to distort the content choices available to consumers.

The content and distribution markets are both badly in need of new, pro-competitive policies. As the cable distribution market consolidated through mergers, concentration in video programming has increased dramatically. Broadcast giants and cable programmers have merged; broadcast and satellite distributors have merged; and cable distributors increasingly offer their own programming or have gained ownership stake in other video programmers.

The premise of video franchise reform policy is to bring ILECs into competition with cable incumbents to drive down prices. To realize this goal, we must also deal with problem of bundled programming, or offering programming in a package artificially inflates prices. Innovative programming deals that offer consumers smaller bundles or a la carte pricing would differentiate new entrants in the market. Surveys have shown that the majority of consumers want the option to buy video service channel-by-channel.[10] In countries where such choice exists, cable prices are significantly lower. For example, according to FCC's chief economist, Hong Kong consumers who select channels a la carte, pay 50 percent less than those who buy programming tiers.[11] However, program carriage contracts preclude cable competitors from offering consumers smaller bundles or individual channels. These bundling requirements have contributed to increased size and price of the expanded basic tier, which has increased in cost by two and a half times compared to the basic tier.[12]

Media companies can secure these commitments because of their market power. Six media giants, including the top four broadcasters, dominate the programming landscape, accounting for three-fourths of the most-popular primetime channels.[13] Four are networks (ABC, CBS, FOX and NBC) and two are cable operators (Time Warner and Comcast). The networks use the retransmission consent negotiations for carriage of the local stations they own and operate to leverage local cable carriage of their other channels. These six companies also completely dominate the expanded basic tiers and the realm of networks that have achieved substantial cable carriage. They account for almost 80 percent of the more than 90 cable networks with carriage above the 20 million subscriber mark.

Moreover, cable operators are majority owners of one-fifth of the top 90 national networks.[14] The Government Accountability Office found that vertically integrated distributors or those affiliated with media companies are more likely to carry their own programming, contributing to the size and cost of the expanded basic tier.[15] Program ownership by dominant incumbent cable distributors also provides the incentive to withhold carriage of cable networks they own from competitive video distributors. This is the basis of Verizon's recent complaint against Rainbow Media and Cablevision over sports-channel carriage.[16] Independent, unaffiliated video service providers that do not own their own programming have consistently expressed concerns about exclusionary tactics, contractual bundling requirements, and coercive retransmission consent negotiations that limit their ability to respond to customer demand for lower prices and more choice in program packages.[17] Telephone companies attempting to enter and compete in new markets will face these same barriers.

It is therefore essential that Congress address the anti-competitive practices of cable operators in any franchise legislation that hopes to expand competition in video markets. Failure to do so will impede the ability of any new video market entrant, including Verizon and AT&T, to compete on price or packages. They will be forced to buy the same channels their competitor is carrying; pay the same or greater licensing fees; and offer the same packages. Worse, they will be precluded from offering channels individually or in specialty tiers, even though doing so may give them an opportunity to differentiate their services from the incumbent cable monopoly and respond to strong consumer demand for greater channel choice. The entrance of the ILECs into the video market is an excellent opportunity to expand the diversity of channels offered to consumers — but only if the gatekeepers are eliminated.

Public broadband providers should face no prohibitive barriers to market entry.

Title V – Municipal Broadband

The provisions in S 2686 regarding municipal broadband have been greatly improved in this revised draft. We applaud these changes. We strongly support S. 1294, the Community Broadband Act, sponsored by Senators Lautenberg and McCain. The new language in S. 2686 approaches the spirit of S. 1294 and looks to accomplish the same goals. We look forward to working with the Committee on this important Title.

We are pleased that S. 2686 now prohibits state pre-emption of municipal broadband networks — a critical component of any legislation that seeks to foster competition in data, video and voice services, and expand affordable high-speed Internet access to all Americans. The bill encourages public-private partnerships in broadband networks and opens the door for local governments to serve their constituents. This type of network has been among the fastest-growing sectors of the communications industry. In the past few years, more than 300 towns and cities have built public and public-private broadband networks to bring low-cost services to consumers.

These Community Internet networks are a critical part of reaching President Bush's stated goal of achieving universal affordable access to broadband technology by 2007. These networks have a proven track record of promoting economic development, especially in rural and underserved urban areas. They offer many consumers and businesses an affordable broadband connection, bringing economic and social opportunities to communities in need. In a larger frame, these networks are a critical part of the effort to improve global competitiveness in broadband. These networks will provide an essential catalyst for market competition, economic development and universal, affordable Internet access for all Americans.

Congress should open empty broadcast channels for unlicensed wireless innovation.

Title VI – Wireless Innovation Networks

We strongly support Title VI of S. 2686, and we applaud the continued efforts of Senators Stevens, Allen, Kerry and other supporters of opening unused spectrum for innovative, unlicensed use. Congress has a crucial opportunity to foster universal, affordable broadband Internet services by tapping an underutilized but valuable public resource — the empty broadcast channels, known as "white spaces." Unlocking the public airwaves would allow entrepreneurs to provide affordable, competitive, high-speed wireless Internet services to consumers that lack access completely or have access only to services so expensive they remain out of reach.

The digital divide in the United States is severe in rural areas. Prices are often higher and the quality of service is lower in rural states. More disturbingly, the rural digital divide has not been closing. According to the latest data from the Pew Research Center, 39 percent of urban households have broadband, compared to only 24 percent in rural areas. This gap of 15 percent has remained constant for several years. Also worrying, according to Pew, is that 32 percent of the adult population does not use the Internet — a figure that held steady for the first half of 2005.[18]

These trends must be addressed immediately, and spectrum reform is an important part of the solution. Rural areas typically have very few broadcast stations and a large number of empty broadcast channels — that is, a lot of "white spaces." The logic is simple: The places that need broadband the most also have the largest amount of unused airwaves available to provide it.

Even after the digital television (DTV) transition ends in early 2009 (when the number of broadcast channel allocations will be reduced), every one of the nation's 210 TV markets will have unassigned and vacant channels reserved for broadcasting but not being used. Many markets will have dozens of open channels. Vacant TV channels are perfectly suited for Wi-Fi and other unlicensed wireless Internet services. Access to vacant TV channels would facilitate a market for low-cost, high-capacity, mobile wireless broadband networks. Using these white spaces, the wireless broadband industry could deliver low-cost, high-quality Internet access to every American household.

Summary Analysis – White Space in Sample of U.S. Media Markets
(The full analysis of each market with channel data is available at www.spectrumpolicy.org.)

Market	No. of Vacant Channels Between Chs. 2-51 After DTV Transition	Percent of TV Band Spectrum Vacant After DTV Transition
Juneau, Alaska	37	74%
Honolulu, Hawaii	31	62%
Phoenix, Arizona	22	44%
Charleston, West Virginia	36	72%
Helena, Montana	31	62%
Boston, Massachusetts	19	38%
Jackson, Mississippi	30	60%
Fargo, North Dakota	41	82%
Dallas-Ft. Worth, Texas	20	40%
San Francisco, California	19	37%
Portland, Maine	33	66%
Tallahassee, Florida	31	62%
Portland, Oregon	29	58%
Seattle, Washington	26	52%
Las Vegas, Nevada	26	52%
Trenton, New Jersey	15	30%
Richmond, Virginia	32	64%
Omaha, Nebraska	26	52%
Manchester, New Hampshire	23	46%
Little Rock, Arkansas	30	60%
Columbia, South Carolina	35	70%
Baton Rouge, Louisiana	22	44%

Enforceable Network Neutrality protections are essential to any reform package.
Title IX – Internet Neutrality

The most significant shortcoming in S. 2686 is its failure to preserve Network Neutrality. The consequences of this mistake will be irreversible, and we urge the Committee to give the issue the attention and remedy it requires. As drafted, S. 2686 appears to recognize that their may well be a problem if network operators follow through on their promises to create discriminatory tiers of service. The bill orders a study of the issue, but it provides no remedy until years after the problem has been documented. By then, it will be far too late. Once discrimination has been introduced into the architecture of the Internet, there is no going back. The genie will not go back in the bottle.

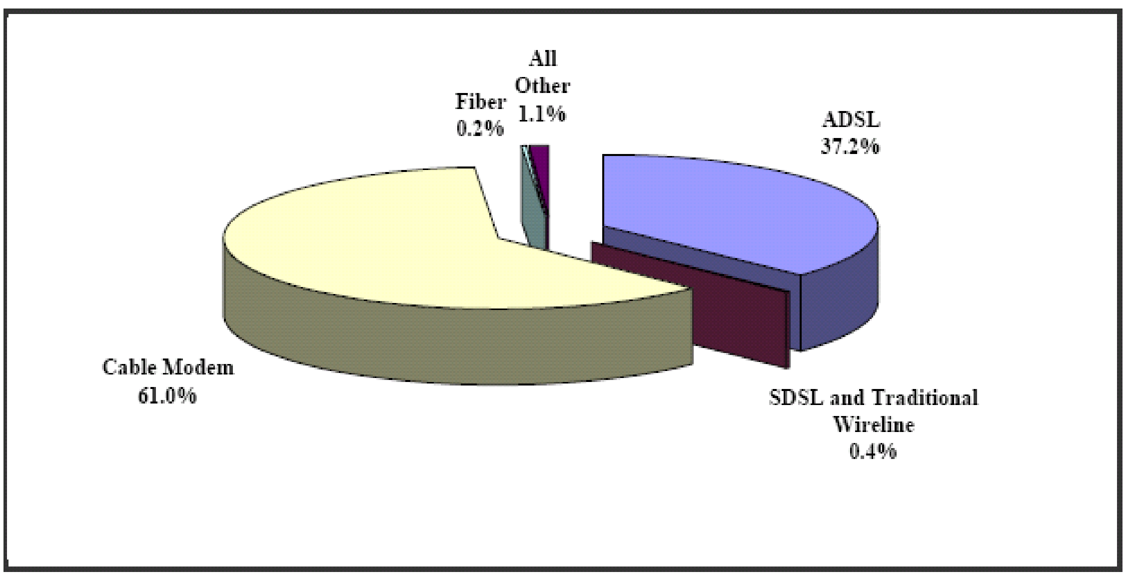
The history is clear. The Internet was born in a regulatory environment that guaranteed strict nondiscrimination. The physical wires were regulated separately from the content flowing over them. The reason was simple: to keep monopoly or duopoly owners of infrastructure from using market power to distort the free market of services on the Internet. This simple protection worked brilliantly. For two decades, the Internet has thrived with low barriers to entry and equal opportunity. It is the greatest engine of economic growth and democratic communication in modern times.

About a year ago, the FCC yanked the rug out from under the Internet, removing the nondiscrimination protections. Soon afterward, the network operators inevitably announced that — free of limitations on abuse of their market power — they would change the Internet forever and begin offering discriminatory tiers of service. The owners of the Internet's wires would become the gatekeepers of the Internet's content. Is this wild speculation? Far from it. The CEOs of major telephone companies have publicly announced their intentions.[19]

This is a disaster for consumers and producers of Internet content. The egalitarian Internet is far too valuable and far too successful to be sacrificed for the benefit of creating an extra stream of revenue for cable and telephone giants. As they have indicated, if and when Congress ratifies the FCC's decision, the network owners will use their market power to discriminate against Internet content and services. Tiers of service will establish first- and second-class citizens online. For the first time, the equal opportunity network will be a thing of the past. Barriers to entry will rise up and stifle innovation. End-user costs will increase as tollbooth fees are passed along to consumers.

Some argue that it is not in the interest of the network operator to offer exclusive and discriminatory deals, or to block and degrade access to certain Web sites and services. They say consumers would simply drop them and move to another network. But this argument assumes that there is competition in the broadband market. There is not and there won't be any in the foreseeable future. According to the latest data from the FCC, cable providers and telephone companies currently dominate more than 98 percent of the residential broadband market — a slight *increase* in total market share from last year.[20] Cable and telephone companies operate in regional fiefdoms, virtually assuring that every community has a maximum of two viable providers. The GAO confirmed this reality, reporting that the median number of available broadband providers for American households is just two.[21] We have attached as an appendix to this testimony a study on the question of Network Neutrality by Dr. Trevor Roycroft that addresses the central economic issues at stake in this policy debate.[22]

Residential High-Speed Lines by Technology as of June 30, 2005



The principles of nondiscrimination and competitive neutrality are present throughout S. 2686. They are applied throughout this bill to protect consumers and promote free competition — except with respect to the Internet. Under the bill, local franchising authorities must treat competitive video providers in a nondiscriminatory manner in the use of the public rights-of-way.[23] Local governments that propose to build broadband networks must not use city ordinances to discriminate.[24] Under the new program access rules for sports programming, cable operators may not use their market power to make exclusive or discriminatory deals for programming that is denied to other operators.[25] Telecommunications providers must treat facilities-based VOIP providers in a nondiscriminatory manner.[26] USF support must be distributed according to principles of competitive neutrality.[27] Even copyright control technologies under the broadcast flag must be licensed in a reasonable and nondiscriminatory manner.[28]

The only sector that does not enjoy this protection against discrimination is Internet content, applications and services — the most dynamic marketplace in our economy. We should apply the principles of nondiscrimination everywhere in an even-handed fashion. This is the only means to guarantee pro-competitive policies across the communications sector that do not favor one technology or industry over another.

Without anti-discrimination legislation or the threat of meaningful competition, cable and telephone companies that own and control broadband networks now have both the incentive and the ability to discriminate against other content, services and applications transmitted over the wires. We strongly encourage the adoption of amendments to S. 2686 that will guarantee meaningful and enforceable Network Neutrality. The Internet Freedom Preservation Act (S. 2917), sponsored by Senators Snowe and Dorgan, provides an admirable solution to the problem. Its exclusion from the bill is a glaring liability.

CONCLUSION

The goals of this bill are admirable. Consumer organizations support the introduction of new competition into the video and broadband markets. We support the expansion of USF programs and their transition to broadband technologies. We support nondiscrimination rules for cable television programming and protections for public access cable channels. We support municipal broadband networks and opening unused spectrum for unlicensed use. We believe all of these policies will move us toward our overall goal — universally affordable broadband technologies.

However, we must not give away fundamental consumer protections and pro-competitive policies in one arena to bring the prospect of competition in another. Similarly, we must not sacrifice lower prices and service quality for some consumers to bring them to others. There are major problems in this bill which must be remedied to ensure that all consumers benefit from the new policies. The uniform application of nondiscrimination principles and a commitment to universal availability of new technologies must be central to new legislation.

We strongly urge the Committee to incorporate the following key components that are currently absent from S. 2686: 1) meaningful and enforceable Network Neutrality that will preserve the free, open, and nondiscriminatory Internet; 2) reasonable but mandatory build-out requirements for all holders of franchises under the federal framework; 3) consumer protection structures in which local and state authorities can strengthen and enforce federal minimum standards; 4) reforms to cable programming rules that break open the programming bundle and reform retransmission consent; and 5) application of USF programs to broadband. Without these changes, consumers will end up worse off than where they started, with high prices for television and broadband and a fewer choices between content and services.

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[1] Free Press is a national, nonpartisan, nonprofit organization with more than 300,000 members working to increase informed public participation in crucial media and communications policy debates.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than 50 million individual members.

[4] Testimony of Consumers Union, Free Press, Consumer Federation of America, Senate Committee on Commerce, Science and Transportation, May 18, 2006, http://commerce.senate.gov/public/_files/kimmelman051806.pdf
[5] National Cable & Telecommunications Association, 2006, "The Bell Monopolies Want a Special Break to Enter the Video Business," http://www.ncta.com/pdf_files/Bell_Myths_FINAL_03.06.06.pdf
[6] Comments of NCTA, Hearing on Committee Print of the Communications Opportunity, Promotion, and Enhancement Act of 2006, Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, March 31, 2006.
[7] **"**Cable, phone companies duke it out for customers," *USA Today*, June 22, 2005.
[8] U.S. Census Bureau. Median Family Income; Counties within the U.S., 2004 American Community Survey.
[9] S 2686, Section 628 (4)(D), (page 98).
[10] "How we pay for cable may be about to change; 'A la carte' programming picking up support over expanded-basic bundle," *USA Today*, March 2, 2006.
[11] "FCC Top Economist Trumpets a la Carte," *Multi-Channel News*, May 10, 2006.
[12] Mark Cooper, *Time to Give Consumers Real Cable Choices,* Consumer Federation of America & Consumers Union, July 2004, p. 5.
[13] MM Docket No. 92-264, Comments of CFA, CU, Free Press, *In the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits and Attributions Rules,* August 8, 2005.
[14] "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," October 2003, GAO-04-8 http://www.gao.gov/new.items/d048.pdf, p. 27.
[15] Id. at 29.
[16] "Verizon Seeks FCC Intervention to Free Cablevision's Stranglehold on Sports Programming," March 21, 2006, http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93328
[17] EchoStar Communications Corporation, Testimony of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation before the Senate Committee on Commerce, Science and Transportation, January 19, 2006; Testimony of Bennett Hooks, Chief Executive Officer, Buford Media Group on behalf of the American Cable Association, before the Subcommittee on Telecommunications and the Internet, July 14, 2004.
[18] See John Horrigan, "Rural Broadband Internet Use," Pew Internet and American Life Project, February 2006, http://www.pewinternet.org/pdfs/PIP_Rural_Broadband.pdf; and John Horrigan, "Broadband in the United States: Growing but Slowing," Pew Internet and American Life Project, September 21, 2005, http://www.pewinternet.org/PPF/r/164/report_display.asp
[19] See for example: "At SBC, It's All About 'Scale and Scope'," *BusinessWeek Online*, November 7, 2005; Jonathan Krim, "Executive Wants to Charge for Web Speed," *Washington Post*, December 1, 2005; Dionne Searcey and Amy Schatz, "Phone Companies Set Off a Battle Over Internet Fees," *Wall Street Journal*, January 6, 2006.
[20] "High-Speed Services for Internet Access: Status as of June 30, 2005," FCC, Wireline Competition Bureau, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264744A1.pdf (Chart depicted, p. 8).
[21] "Broadband Deployment is Extensive Throughout the United States, but it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas," GAO, May 2006, http://www.gao.gov/new.items/d06426.pdf
[22] See Appendix: Trevor Roycroft, "Economic Analysis and Network Neutrality," June 2006.
[23] S 2686, Section 331 (a)(2)(B): "A State or local government shall apply its laws or regulations in a manner that is reasonable, competitively neutral, nondiscriminatory, and consistent with State statutory police powers…" (p. 60); Section 331 (b)(a): "A franchising authority may not discriminate among video service providers in imposing or collecting any fee assessed under this section." (p. 61-62).
[24] S 2686, Section 502 (d)(1): A public provider of broadband must apply its ordinances and rules "without discrimination in favor of itself or any other advanced telecommunications capability provider that such public provider owns…" (page 115-116).
[25] S 2686, Section 628 (b), "It is unlawful for an MVPD, an MVPD programming vendor in which an MVPD has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition…" (page 92); Section 628 (c)(2)(B), "The regulations required under paragraph (1) shall—prohibit discrimination by an MVPD programming vendor in which an MVPD has an attributable interest…" (page 93-94).
[26] S 2686, Section 715 (a): "A telecommunications carrier may not refuse to transport or terminate IP-enabled voice traffic solely on the basis that it is IP-enabled." (page 26).
[27] S 2686, Section 253: "Competitive Neutrality Principle"; (7) "Universal service support mechanisms and rules should be competitively neutral." (page 34-35).
[28] S 2686, Section 452 (d) (3).