TESTIMONY OF KYLE McSLARROW
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on

THE COMMUNICATIONS, CONSUMERS' CHOICE, AND BROADBAND DEPLOYMENT ACT OF 2006

before the

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

June 13, 2006

Chairman Stevens, Co-Chairman Inouye and members of the Committee, thank you for the opportunity to appear today to comment on the June 9 staff draft revisions to S. 2686.

In my testimony last month I explained that NCTA found much to commend in the introduced bill, including the elimination of outmoded economic regulation of cable services and movement in the direction of a level playing field in video as well as voice competition. In addition, we strongly supported the very thoughtful approaches to difficult issues like net neutrality and the digital transition in the introduced bill, and are pleased to see those approaches preserved in the June 9 staff draft. My May 18 statement also included a detailed discussion of the provisions in the bill and where those provisions have not changed, I respectfully incorporate them there.

Today, therefore, I would like to focus my testimony on the staff draft's proposed changes to the introduced bill.

In a number of these areas, the staff draft suggests changes that we believe improve the bill.

Voice Competition. We believe the staff draft significantly improves the provisions on voice competition. We agree with the staff draft's proposal to limit the rights, duties, and obligations of carriers under sections 251 and 252 of the Communications Act to *facilities-based* VOIP providers, which 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.

We are also pleased that the staff draft addresses 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.

Universal Service. As I have testified before, the cable industry supports the principles underlying the universal service regime. We agree that universal service reform is needed, but urged you to reform the disbursements side of the Universal Service Fund (USF) as well as contributions to the USF. Thus, we are pleased that the staff draft offers a number of helpful improvements on the disbursement side. For instance, it adds competitive neutrality as a universal service principle and appropriately proposes to substitute more technology- and provider-neutral eligibility requirements in lieu of the ILEC-centric obligations in the introduced bill. In particular, the draft would require a competitor to offer service throughout its service area rather than the ILEC's. It would also not condition a competitor's universal service eligibility on a commitment to offer local usage plans comparable to those offered by ILECs or to provide equal access to long distance carriers. Competitors should not have to mimic ILEC service offerings or network architecture or geographic coverage to qualify for universal service support.

Second, the staff draft would eliminate the requirement that all universal service fund recipients deploy broadband. While broadband deployment is a goal strongly shared by the cable industry, incorporating it into universal service eligibility would have appeared to validate -- even if indirectly -- using funds for broadband deployment. 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.

Finally, we are pleased to see that the draft extends the fiscal oversight proposed in S. 2686 for the "E-rate" programs to the rural and high-cost programs as well.

Level Playing Field for Cable Operators and Video Service Providers. The bill's opt-in opportunities for existing operators are essentially unchanged from the introduced bill. As I explained last month, these opportunities remain too limited. While the introduced bill is a fair start, we again urge you to ensure the availability of opt-in for every existing cable provider beginning on the date of enactment.

Role of Local Governments; Prohibition on Discrimination. The staff draft would give the State public utility commissions the responsibility for enforcing the prohibition on the denial of video service to potential subscribers on the basis of race or religion, in addition to income. While an improvement from the introduced bill, under which only the FCC had enforcement authority, we continue to believe that local

governments are best suited to investigate and determine instances of discriminatory conduct.

Other Issues Related to Franchising and Regulation. The staff does not address many of the franchise- and regulatory-related issues I described in my May 18 testimony on S. 2686, and in some cases even adds provisions that create additional concerns. We look forward to continuing to work with you and your staff on these issues.

First, the draft still lacks a definition of franchise area. Such a definition is essential to ensure meaningful compliance with the antidiscrimination requirement. Second, the draft revises the new definitions of “video service” and “video service provider,” but it may preserve a loophole for AT&T’s IPTV service by defining video service as the "one-way transmission" of video, carrying forward the language from the current definition of cable service that AT&T and the Connecticut DPUC relied on to exclude IPTV from that definition. These definitions must be carefully constructed to bring all providers of functionally equivalent video services within the same franchising and regulatory scheme, regardless of the delivery technology they use.

Third, the draft would put upward pressure on cable rates by increasing government fees on video services. The draft would authorize PEG and institutional network (INET) support payments in excess of the 1% of gross revenue proposed in the introduced bill if the incumbent cable operator was contributing more than that in a

franchise area, while eliminating the proposed offset for INET operating costs incurred by an incumbent cable operator that opts in or otherwise becomes subject to the new scheme. It would also broaden the definition of gross revenues -- the base for calculating franchise fees -- to include home shopping and advertising revenues. Finally, the staff draft lacks any requirement for cost-based permitting and rights-of-way management fees.

Program Access. We are disappointed that the expansion of program access law remains in the staff draft and that it has, on one hand, been further broadened. In this regard, the staff draft would bar "permanent foreclosure strategies" and "terms or conditions that have the effect, in their application, of discriminating against an MVPD based on its technology, delivery method, or capacity constraints." Both of these vague and undefined concepts will lead inevitably to disputes and litigation over business practices that are lawful today even under the program access law. On the other hand, the staff draft narrows the program access provisions of the bill to permit exclusive arrangements between DBS and non-vertically integrated national sports programming services. As we have previously said, we would urge you to drop this entire provision. As currently drafted, the provisions solve no existing problem in the marketplace and are likely to add confusion and unfairness.

Conclusion

Thank you again for this opportunity to testify. We appreciate your openness to our perspective and our suggestions and look forward to continuing to work together to craft a framework that promotes innovation and consumer choice.