

**Statement of**  
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**Before the**  
**United States Senate**  
**Committee on Commerce, Science and Transportation**  
**Hearing on**  
**S. 2686, the Communications, Consumers'**  
**Choice, and Broadband Deployment Act of 2006**  
**May 25, 2006**

Good morning, Chairman Stevens, Co-Chairman Inouye, and Members of the Committee. My name is Paul Misener. I am Amazon.com's Vice President for Global Public Policy. Amazon belongs to a coalition that includes eBay, Google, IAC/InterActiveCorp, Microsoft, and Yahoo!, that was formed to express our shared concerns about the topic of this hearing. Thank you very much for inviting me to testify on this important matter. I respectfully request that my entire written statement be included in the record.

I. INTRODUCTION

Mr. Chairman, the phone and cable companies will fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, and regulatory permission to restrict American consumers' access to broadband Internet content, including music and movies, and have announced their plans to do so.

Amazon.com is an Internet-based retailer and retail platform with over fifty million customers worldwide. We believe the open paradigm of the Internet is important for society and innovation. More specifically, we want to ensure that consumers, including our customers, retain their longstanding freedom to access the broadband Internet content of their choice, including that content available from Amazon.com. Currently, consumers pay network operators for Internet access, and have the freedom to select lawful content from providers like Amazon, who pay network operators millions of dollars a year for Internet access.

In essence, we fear circumstances in which broadband network operators with market power are permitted – based on payments, political or religious viewpoints, or any other non-technical discriminatory factors – to prefer some content and thereby restrict consumer access to other content.

As already noted, many large Internet content companies including Amazon.com, eBay, Google, IAC/InterActiveCorp, Intel, Microsoft, and Yahoo! are very concerned about network operators' ability and plans to restrict content choice. A few weeks ago, the chief executive officers of these companies, Jeff Bezos, Meg Whitman, Eric Schmidt, Barry Diller, Paul Otellini, Steve Ballmer, and Terry Semel, wrote the Chairman and Co-Chairman of this Committee to say that

[t]he open marketplace of the Internet, or what has become known as "network neutrality," empowers America's citizenry, fuels our engine of innovation and is central to our global leadership in Internet technology and services. The rules of the road that preserved openness were

eliminated last summer by the Federal Communications Commission, and it is critical that Congress moves quickly to reinstate them.

The Internet has succeeded precisely because of these rules, which have prevented network operators from using their control over Internet access to dictate consumers' Internet experience. Likewise, innovators large and small, as well as investors, have relied on market and regulatory certainty coupled with their own ingenuity to develop new and better online offerings. This "innovation without permission" is, from our perspective, the essence of the Internet.

These seven CEOs then urged the Committee "to enact legislation preventing discrimination against the content and services of those not affiliated with network operators and thereby preserve network neutrality," and cautioned that

"[a]bsent such safeguards, the fundamental paradigm of the Internet will be irreparably altered and that most worthy of preservation will be lost. American consumers will lose basic Internet freedoms, the engine of innovation will be hobbled, and our global competitiveness will be compromised."

Lastly, the CEOs expressed their desire to work for legislation "to re-establish longstanding net neutrality protections."

Our companies believe that Congress must act to preserve longstanding consumer freedoms. The telco and cable operators must not be allowed to extend their market power over broadband Internet access to market power over broadband Internet content.

This is not just a "big Internet company" issue, however. Ultimately, this is a consumer and much broader industry issue, and we are part of a coalition of well over 100 organizations that have joined together to support legislative safeguards to preserve the openness of the Internet. As of last month, these organizations included the AARP,

Acopia Networks, Adaptive Marketing LLC, Adobe, Advancedmultimedia.com, Aegon Direct Marketing Services, Airespring, Amazon.com, American Association of Libraries, AnalogZone, AngleBeds.com, Ask.com, Association of Research Libraries, Awow Communications, Bandwidth.com, Bloglines, Borsetti & Co., BT Americas Inc., Business Software Alliance, CALTEL, Cendant, Chemistry.com, CinemaNow, Circumedia LLC, CitySearch, CommPartners Holding Company, COMPTEL, Comunicano, Inc., Consumer Electronics Association, Consumer Federation of America, Corliant, Cornerstone Brands, Inc., Dagdamor Media, Dave Pettito Direct, DiMA, Domania, Downstream, Dreamsleep.com, Dresses.com, EarthLink, eBay, eBrands Commerce Group, Economics & Technology, Inc., Educause, Elaine P. Dine, Electronic Retailing Association, Entertainment Publications, Evite.com, Excite, Expedia, Free Press, Free World Dialup, GetSmart, Gifts.com, Google, GotVoice, Inc., Graceline Canada, Hawthorne Direct, Home Shopping Network, Hotels.com, Hotwire, HSE24, IAC/InterActiveCorp, Iceland Health Inc., iFreedom Communications, iNest, InPulse Response, INS, Interactive Travel Services Association, InterMetro, Internet2, Interval International, Intervox.com, IntraISP, Invens Capital, Isen.com, LLC, IVR Technologies, iWon, J. Arnold & Associates, JohnnyZip, Lafayette Group, Inc., Law Offices of James Tobin, LendingTree, Lingo, Inc., Listyourself.net, Livemercial, Match.com, McFadden Associates, MCM Telecom, Media Access Project, Media Partners Worldwide, Mercury Media, Merrick Group, Microcom, Microsoft, Miller & Van Eaton, National Retail Federation, Nationalblinds.com, NetCoalition, Objectworld, Pac-West, PointOne, PRC, Primus Telecommunications, Product Partners LLC, Public Knowledge, Pulver.com, RealEstate.com, ReserveAmerica, Rifftone.com, S & B Technical Products, Savatar,

Savvier, ServiceMagic, Shelcomm, Shoebuy.com, Skype, Sling Media, Sling Media Inc., SOHOolutions, Sonus Capital Management, Sony Electronics Inc., SunRocket, Symercy Financial Corp., Techviser, Telekom Austria, Telephia, TELLO, Ticketmaster, Tier1Research, TiVO, TNS, Tonystickets.com, Tranquilitymattress.com, Travelocity, update.com, VI Technologies, Vivox, WCW Networks, and Yahoo!

I hope that all of these entities' views and, most importantly to Amazon.com, the interests of our customers, will be thoroughly considered.

Moreover, this is not merely a dispute between American network operators on one hand, and American consumers and content providers on the other. Rather, it is the first and precedent-setting battle in a worldwide conflict. Recent news reports confirm that foreign network operators such as Deutsche Telekom and Telecom Italia also are interested in extending their market power over their networks to market power over content. Thus, if U.S. policymakers were to allow American network operators to extract oligopoly rents from American content providers, our policymakers would be simultaneously setting a precedent for allowing foreign operators to exercise the same leverage over world-leading American Internet content companies and their customers.

In my time this morning, I will describe the market power of network operators and the details of how they intend to extend that market power to limit consumer choice of content, such as movies, television, and music. I then will describe the need for Congress to require adoption of regulations to confront this clear and present danger; how

failure to act will set a dangerous international precedent that will harm American competitiveness overseas; and how legislation that would grant national video franchising relief should not be enacted without such provisions. Lastly, I will propose modest safeguards to preserve Americans' longstanding freedom of Internet content choice.

## II. NETWORK OPERATORS HAVE MARKET POWER: CONSUMERS HAVE LITTLE OR NO CHOICE OF BROADBAND INTERNET ACCESS

Mr. Chairman, as much as we wish it were otherwise, consumers have little or no real choice of broadband Internet access. For the foreseeable future, nearly all Americans will have two or fewer providers available: the phone company, the cable company, or both. And, unfortunately, consumers will continue to face discouragingly high costs of switching between them; equipment swaps, inside wiring changes, technician visits, long term contracts, and the bundling of multiple services all contribute to these costs.

Despite the common misconception intentionally perpetuated by the network operators, the Internet did not grow up in an unregulated environment; its growth and success were due in large measure to the longstanding rules that governed its infrastructure until last year's FCC decision. Although many of the rules were outdated and worthy of deregulation, the Commission erred by completely abandoning non-discrimination requirements before the market became competitive.

The Commission's own semi-annually reported data on the competitive availability of broadband access are fundamentally misleading. These data, which

purport to show multiple broadband service providers in many areas of the country, completely obscure the realities faced by individual consumers. Unfortunately, however, these data also were the basis for the Commission's recent actions.

In the first place, the data count as high-speed broadband any services that deliver as little as 200 kbps in one direction. Although this may have been a reasonable definition of broadband a decade ago, it is preposterously slow today, incapable of delivering even typical TV quality video, let alone HDTV, and is but one five-hundredth the speed being provided to millions of consumers in Korea and elsewhere. Second, the geographic areas analyzed are zip codes, not individual neighborhoods or households. So while there may be three or four true broadband network operators (for example, two telcos and two cable companies) serving small separate areas in a zip code, no one consumer may have access to more than two of them (one telco and one cable company).

The result of these misleading FCC data is that the amount of broadband consumer choice is wildly overstated, particularly when the aforementioned high switching costs are considered. If it really were easy for Americans to switch among five, six, or more true broadband Internet access providers, the market would be competitive and legislated consumer safeguards would not be necessary.

Unfortunately, what exists for the vast majority of Americans is, at best, a duopoly of the local phone and cable companies. Widespread deployment of alternative broadband technologies capable of high quality video remains a distant hope and, with

yet another mega-merger in the works (this time AT&T and BellSouth), the promise of inter-regional local phone company competition is all but dead. In such oligopolistic conditions, consumers are left with fewer services, higher prices, or both.

The FCC's most recent semi-annual broadband deployment data, released last month, verify this bleak assessment. Perhaps the most salient fact revealed in the data is that, of the 34.3 million advanced services broadband lines serving primarily residential end users, *only one half of one percent* use other than telco or cable technology. Given that telco-telco and cable-cable overbuilds are so very rare, this fact confirms that nearly all American consumers are stuck with the telco-cable duopoly.

To be clear, we don't begrudge the phone and cable companies their current market power over broadband Internet access networks. Despite the longstanding desires and noble aspirations of policy makers, America is stuck with this super-concentrated market for the foreseeable future.

Moreover, although we oppose the collection of oligopoly rents, we certainly don't seek to deny network operators a healthy return on their investments. But there are two obvious considerations: what are their investments and are they getting a return? While it is true that there are new investments being made (well before any discriminatory pricing regime has been established), even the operators like to remind regulators that they are, in Verizon's words, potential video service providers "who already have access to the rights-of-way" around the country. But, of course, they did not



obtain these incredibly valuable rights-of-way on the competitive market but, rather, by government grant to a monopoly service provider. In sum, much of their “investment” was either given to them or explicitly protected from competition by the government.

Just as importantly, content providers currently pay network operators for the amount of connection capacity they use, and network operators can charge consumers different prices depending upon how much bandwidth they use. This sort of connectivity “tiering” makes perfect sense. And, of course, network operators will charge consumers for the provision of any ancillary services, such as affiliated video content.

Perhaps the best way to gauge whether they believe their investments without discrimination are providing an acceptable return is to note that the FCC data indicate that telco and cable broadband services are being deployed and taken by consumers at a rapid pace. Given the network operators’ claims (which I believe) that they are not *currently* engaged in much, if any, content discrimination, this is a clear indication that network operators need not discriminate to deploy broadband in America.

We also welcome broadband network operators’ innovations within the network. With Moore’s Law at work, network operators ought to be able to deploy innovative new technologies and services that, with increasing efficiency, provide benefits to operators and users alike. And we certainly don’t oppose network operators’ entry into competing businesses so long as they are not allowed to leverage their market power over broadband Internet access to favor these ancillary endeavors.

What we seek is more modest, yet far more important: We ask that Congress keep the telco and cable operators from taking their market power over broadband Internet access and extending it to market power over broadband Internet content.

III. UNLESS CONGRESS ACTS SOON, NETWORK OPERATORS WILL USE THEIR MARKET POWER OVER ACCESS TO RESTRICT CONSUMER CHOICE OF BROADBAND INTERNET CONTENT

Mr. Chairman, unless Congress acts soon, American consumers will receive artificially restricted choice of broadband Internet content. Leveraging their market power, phone and cable companies plan to restrict American consumers' access to such content based in large part on lucrative deals they intend to cut with third parties. And it will be just as easy for the operators to favor content based on political or religious viewpoints or other non-technical discriminatory criteria. By constraining consumer access to content providers, the network operators also would create an artificial "channel scarcity" – essentially a bandwidth cartel – where none previously existed.

After years of administrative proceedings and litigation, last year the FCC reclassified broadband Internet access by wireline service providers, both telco and cable. Although the Commission simultaneously adopted a policy statement that confirms the agency's statutory authority and possible intentions to act, the statement fails to address some likely discriminatory behaviors and, in any case, is explicitly unenforceable. So, with the exception of weak merger conditions that apply the FCC's equally weak policy statement to a few network operators, and expire for no apparent reason in 18 months (the

market certainly won't be competitive by then), telcos and cable companies may restrict consumer access to content at will. Because American consumers' access to Internet content is in jeopardy, Congress needs to act.

Just as it is clear that the network operators have the market power to restrict consumers' choice of broadband Internet content, it has become equally clear that they fully intend to do so. Not only have the telcos and cable companies stridently and steadfastly opposed any meaningful network neutrality rules, their most senior executives have, over the past eight months (noticeably, beginning only after the FCC's final reclassification actions), issued scary yet refreshingly honest statements that reveal their plans for restricting consumer access to content. Simply put, the network operators are planning to restrict consumer choice of broadband Internet content based on deals they intend to strike with content providers and, perhaps, editorial viewpoints or other non-technical discriminatory criteria. This is precisely the opposite of "a la carte" pricing being sought from current, vertically integrated video service providers. Indeed, rather than enhancing consumer choice and flexibility, the network operators are moving retrograde to constrain such choice and flexibility and create an artificial scarcity of content outlets.

Although the network operators have been somewhat less clear on exactly *how* they intend to limit consumer access, their FCC filings and public statements reveal that they plan to do so in three key ways. But before I describe these, please allow me to summarize their technology plans. There are many differences among the technologies

the duopoly network operators intend to use (hybrid fiber-coax by the cable operators and either fiber-to-the-home or fiber-to-the-node plus DSL over copper twisted pair by the telco operators), but all three technologies have been designed to operate the same way in practice, with two downstream components: a very high capacity (“fast lane”) cable-like private network component, and a much lower capacity (“slow lane”) downstream broadband Internet access component. The fast lane will be operated as a closed network, while the slow lane will be more (but not entirely) open.

A. Specific Network Operator Plans

The network operators apparently plan to restrict consumer choice of broadband Internet content in three essential ways: by providing (1) a closed fast lane and an open slow lane; (2) paid ‘police escort’ *within* the slow lane; and (3) preferential “local on-ramps” *into* the slow lane.

1. Closed Fast Lane and Open Slow Lane. First, as noted before, each network operator has or is constructing a fast lane for their affiliated broadband content provided by a sister company and a slow lane for broadband Internet content provided by others. The fast lane they reserve for themselves is a closed, private network. This has always been the case for cable operators and, even for the telco operators deploying broadband, make no mistake: the overall broadband pipes they’re deploying are mostly just another version of cable TV, not broadband Internet. Consumers should recognize that despite the nearly ubiquitous and puffy advertising, it’s not about “your world, delivered,” it’s mostly about *their* world.

2. Paid Police Escort within the Slow Lane. Second, the network operators intend to offer Internet content providers paid prioritization (essentially a paid “police escort”) in the slow lane. Their plan is that, as content enters the operators’ slow lanes from an Internet or other network access point, the speed with which this content transits their network will be determined, in part, based on whether the content owner paid for prioritization. The terms of art the network operators use to describe this prioritization include “quality of service” and “tiering.” Each term is intentionally confusing. I am not suggesting that certain types of services be denied prioritization, just like certain kinds of road traffic, like emergency services, deserve police escort. But such police escort should not be made available for a fee; otherwise those unable to pay the fee will always be stuck in traffic. Put another way, to prioritize some traffic is to degrade other traffic. It’s a zero-sum game at any bottleneck. This fact is intentionally obscured by network operators, who incorrectly claim that they will not degrade anyone’s content. Neutral prioritization (for example, network management whereby all live video streams receive priority above all text files) would be perfectly acceptable. But for an operator to sell priority to the highest bidder, the degradation of service to content providers who can’t or don’t pay would be anticompetitive. Fortunately, it also is predictable and, with modest legal safeguards, avoidable.

As should be obvious, small businesses will have a very hard time innovating if they need to pay for ‘police escort’ prioritization to compete. When some companies like mine have noted this previously, some of the network operators respond with something

to the effect of “beware when big companies are looking out for the interests of little ones.” That response seeks to change the subject and obscure three key points. First, it doesn’t change the underlying fact that small entrepreneurs – facing a possible bidding war among big companies – are going to be hurt unless Congress does something now. Second, many of the big companies noting this imminent throttle on small company innovation were, indeed, innovative small companies only just a few years ago. And, third, on behalf of our customers, we want to ensure that our innovations – essentially new businesses operating in start-up mode by our employees – are not hindered in the same way. We merely want, as Internet pioneer Vint Cerf so clearly puts it, “to innovate without permission” of the network operators.

3. Preferential Local On-Ramps into the Slow Lane. Lastly, the network operators intend to offer downstream content injection (essentially “local on-ramps” to the broadband slow lane) to content providers who are willing to pay. This would enable content to be delivered from geographic locations closer to consumers and provide better user experiences. Such local on-ramps already are provided in a competitive access market by companies such as Akamai, which has servers distributed throughout the United States so that content can be delivered quickly to consumers, rather than having to traverse great distances on the Internet. Although content providers have no expectation that such local on-ramps must be provided for free, network operators must not offer local on-ramps on discriminatory terms.

## B. Network Operator Claims

So how do the network operators discuss these plans? They obfuscate. For example, most network operators say they won't, quote, "block" websites. This relatively new concession is neither noble nor comforting and, in fact, is quite misleading. While they may not actually block access to a particular website, they easily could make that site's content unusable, either by overly constraining capacity (making the slow lane too slow); by providing prioritization only to those willing and able to pay (the paid "police escorts" that make everyone else wait); or by providing downstream injection (the local on-ramps) only on unreasonable or discriminatory terms. So it's a matter of semantics: they may never block content, but still could make it unusable.

Wireless network operators and their representatives are seeking exemption from any non-discrimination requirement enacted, but it is difficult to see on what basis such an exemption would be justified. Technology neutrality dictates equal treatment of copper, glass, and the ether. Consumers need not, and should not, have their access via such various means treated differently by regulation, unless there is some difference among them that legitimizes disparate treatment. The possible differences for wireless are bandwidth, mobility, "closed network," and competition.

If the concern is bandwidth or mobility, wireless providers can rest assured that a non-discrimination requirement would neither require certain levels of bandwidth or performance but, rather, that all sources of technically-similar Internet content be treated

equally. And if a wireless carrier wants to offer a purely private network, without Internet access, then non-discrimination rules would not apply.

It is important to recognize that, as competitive as the mobile wireless market may appear on the surface, it would not exist on this issue because the competing wireless providers are almost all owned by the uncompetitive telcos who oppose non-discrimination rules. Although Sprint/NexTel is independent, T-Mobile is owned by Deutsche Telekom (which has announced its intention to discriminate), Cingular is owned by AT&T and BellSouth, and Verizon Wireless is owned by Verizon. On the issue of Internet content non-discrimination, therefore, policymakers cannot expect the wireless market to behave competitively.

Other network operators say, dismissively, that this is a “solution in search of a problem,” or that policymakers should wait for a problem to arise before acting. This wait-and-see approach was endorsed by the FCC last year. But what further proof is needed? The time to act is now. To ignore the network operators’ market power, their strident and steadfast opposition to meaningful safeguards, their boldly announced intentions, and their increasingly clear specific plans, is truly to turn a blind eye to a clear and present danger to consumers.

This situation is eerily similar to that facing Congress a few years ago with respect to Internet access taxes. Congress correctly foresaw the future problem of state and local governments imposing burdensome taxes on Internet access and moved



peremptorily to ban such taxes by enacting then extending the Internet Tax Freedom Act. Today, the functional equivalents of the state and local tax collectors are the oligopolistic telco and cable network operators, and Congress should likewise recognize and peremptorily thwart the threat they pose to the Internet.

IV. FAILURE TO PROTECT AMERICAN CONSUMERS ALSO WILL ENABLE FOREIGN NETWORK OPERATORS' ANNOUNCED PLANS TO RESTRICT AMERICAN CONTENT COMPANIES' ACCESS TO OVERSEAS MARKETS

To make matters worse, foreign broadband Internet access network operators have plans to restrict world-leading American content companies' access to overseas consumers. Deutsche Telekom and Telecom Italia have already announced their plans. Earlier this year, for example, Kai-Uwe Ricke, the CEO of Deutsche Telekom said that "the Googles, Yahoos, eBays and Amazons" "need infrastructure"; that "[i]t cannot be that infrastructure providers like [Deutsche] Telekom continue to invest, while others profit from it"; and that "Web companies that use infrastructures [sic] for their business should also do their part." But, of course, Amazon.com and others already do their part by paying for Internet connections. What Mr. Ricke actually wants, of course, is exactly what our domestic network operators want: to use market power to charge consumers once and American content providers twice, all for the same thing.

American policymakers must consider the effects of our domestic regulatory actions on our global competitiveness. American content companies like Amazon.com are world leaders today, in part because our access to consumers in other markets has not been impeded. If foreign network operators, almost all of which face no competition and

are fully or partly owned by foreign governments, with obvious incentives to favor non-American content companies, are allowed to extract discriminatory rents from American content companies, our competitiveness both as an industry and a nation will suffer. Put another way, even if it were sound policy for Congress to allow American network operators to extract oligopoly rents from American content companies, it could not be sound policy to set the precedent for foreign network operators to extort payments from world-leading American content companies. How could our trade representatives challenge such actions abroad if we permit them here at home? Clearly, we must not lay the groundwork for every network operator around the globe to extort payments from American Internet companies. The only way we can hope to prevent this outcome is to hold the line domestically: we must not allow consumer choice of content to be artificially restricted by network operators with market power.

V. IF CONGRESS FAILS TO ACT, THE MOST LIKELY RESULT WILL BE TO LEAVE AMERICAN CONSUMERS WITH DRAMATICALLY REDUCED CONTENT CHOICE; TO STALL AMERICAN ONLINE INNOVATION; AND TO WOUND U.S. GLOBAL INTERNET COMPETITIVENESS

Mr. Chairman, if Congress fails to reinstate essential consumer safeguards recently abandoned by the FCC, the most likely result would be to leave American consumers with dramatically reduced content choice; to stall American online innovation; and to wound U.S. global Internet competitiveness. Here's the likely way that unfortunate result would be reached:

- For the next five to ten years, phone and cable companies will maintain their duopoly market power over consumer broadband Internet access.

- The phone and cable companies also will continue to invest and deploy broadband, as they have for many years under non-discrimination rules, and they will continue to realize returns on their investments by being handsomely paid for access by consumers and content providers alike.
- Although the network operators will continue to promise that they won't, quote, "block" access to websites, they will firm up their plans to degrade access to some websites as a consequence of giving priority, "fast lane" access to others.
- The telcos also will start providing proprietary video service, and will continue to seek accelerated franchise grants without build-out requirements, based in part on the existence of Internet video competition which, simultaneously, they are moving to quash.
- At some point, the phone and cable companies will present a simple ultimatum to major Internet content providers: pay us for prioritization or, if you don't pay, your content will be degraded relative to those who do pay.
- Similar deals may be struck based on political or religious viewpoints or other non-technical discriminatory factors.
- In this way, the network operators will extend their market power over access to market power over content. They will use their monopolies to monopolize.
- A bidding war will quickly ensue. The top tier Internet content companies will bid up the price of prioritization on each of the half dozen or so major Internet access networks.
- Smaller companies will recognize that they have no hope of competing in this bidding war, and independent venture capital for new online businesses will dry up. The new way for an entrepreneur to take a business online will be to seek permission from the phone and cable companies.
- A flurry of antitrust actions will then be filed against the network operators, but even if the courts don't find that the plaintiffs fail to state a claim, these actions will take far too long to be effective.
- Meanwhile, the foreign network operators, such as Deutsche Telekom, almost all of which are wholly or partially owned by a foreign

government, will follow through on their already-announced plans to use discrimination as a great way to make more money off the world-leading American Internet content companies. In effect, foreign network operators will restrict access of American Internet companies to foreign markets.

- Congress or the FCC will soon thereafter realize that it was a mistake to allow the network operators to control Internet content, and will rush to pass remedial legislation.
- Unfortunately, it will be too late, because the lost years of innovation will be forever lost; the network operators will have wastefully invested in equipment designed for discrimination instead of speed; and the foreign governments certainly won't reverse themselves just because America reconsidered.
- So, the result of Congress's unwillingness to address this clear and present danger will be to leave American consumers with dramatically reduced content choice; to stall American online innovation; and to wound U.S. global Internet competitiveness.

Mr. Chairman, this sorry tale is eminently avoidable. I urge you and your colleagues to recognize that, despite how we wish it were otherwise, the market for broadband Internet access is not competitive and that the network operators – both domestic and foreign – fully intend to extend their market power over access to market power over content. I therefore urge that Congress act now to reinstate meaningful, enforceable, bright line safeguards that preserve consumers' longstanding freedom of Internet content choice.

**VI. ANY LEGISLATION GRANTING VIDEO FRANCHISING RELIEF MUST ALSO AFFIRMATIVELY PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT**

Mr. Chairman, the preservation of American consumers' longstanding freedom of choice of Internet content should be addressed in the context of national video

franchising relief. The reason for granting such relief is, of course, the introduction of additional video competition for consumers, so it would be counterproductive to facilitate the delivery of content of one additional competitor (the phone company), while limiting the availability of thousands of other competitors via the Internet.

Moreover, in support of their opposition to requirements for system build-out and service to rural areas, the telcos recently have repeatedly cited the competition from Internet content providers (“Internet streaming video” and “Internet-downloaded video,” in AT&T’s words). As Verizon reported to the Commission in opposition to video build-out requirements, there is “significant competition in access to video programming through myriad means, including internet and satellite sources . . . .” BellSouth went so far as to tell the FCC that Internet content competition would diminish unless telcos were given video franchising relief: “[i]f LFAs [local franchising authorities] are permitted to delay or prevent broadband providers from also [in addition to cable] offering video service, then competition will be greatly (and probably permanently) impeded. This is particularly true given the plethora of new [Internet-based] video offerings that require robust broadband networks.”

So the network operators have the temerity to cite the presence of competitive Internet-based video programming as justification for preempting local government rules and dodging reasonable build-out obligations, all while planning to quash that competition by restricting consumer access to Internet content.

In the interests of competition and consumer choice, therefore, video franchising relief must not be granted without meaningful broadband Internet content safeguards; otherwise, consumers will receive *less*, not more, choice of content.

These safeguards must keep the network operators from cutting “paid police escort” deals that would adversely affect the traffic of other content providers who can’t or don’t pay. And they also should keep the operators from insisting upon unreasonable or discriminatory terms for leasing “local on-ramps.” In short, the most likely and dangerous anti-consumer discriminatory behaviors of broadband network operators must be thwarted in advance by legislation and regulation.

Mr. Chairman, we appreciate that S. 2686 includes a title on “Internet Neutrality.” Unfortunately, its provisions do not confront the clear and present danger facing the Internet as a platform for consumer choice. Rather, this title would direct the FCC to study the issue and report annually to Congress, while limiting the Commission’s ability to recommend how to address any problems the agency finds. As the FCC recognized in its final broadband reclassification order last August, the agency has the authority to act in this area. So I respectfully submit that Congress either needs to direct the Commission to act under its current authority, or to enact other meaningful safeguards for protecting American consumers and competition.

VII. CONGRESS SHOULD REINSTATE LONGSTANDING REGULATORY SAFEGUARDS TO PRESERVE CONSUMER FREEDOM OF CHOICE OF INTERNET CONTENT

Mr. Chairman, we respectfully ask that Congress enact modest but effective safeguards to reinstate limited protections that the FCC recently abandoned, and thereby preserve American consumers' longstanding freedom of choice of Internet content. Without much effort, these regulatory safeguards can be narrowly drawn so that operators' private networks are not invaded and so that operators are appropriately compensated for the services they provide.

Two essential consumer safeguards we seek can be summarized as follows:

- (1) Content transiting an operator's broadband Internet access network may be prioritized only on the basis of the type of content and the level of bandwidth purchased by the consumer, not ownership, source, or affiliation of the content. (That is, for traffic within the broadband network's Internet access lane, "police escort" may be provided only based on the technical nature of the traffic or whether the consumer has a paid more for a somewhat higher speed limit.)
- (2) The terms for local content injection must be reasonable and non-discriminatory; network operators must not be allowed to give preferential deals to affiliated or certain other content providers. (That is, "local on-ramps" into the Internet access lane need not be free, but the road owner must not charge unreasonable or discriminatory rates to favor their own or only some others' traffic.)

Note that we are not seeking to have broadband Internet access reclassified as common carriage. To the contrary, we think that with modest safeguards, appropriately drafted and clarified, and with mandatory and meaningful agency enforcement, American consumers could be confident that their longstanding choice of lawful Internet content will not be limited by network operators.

## VIII. CONCLUSION

In conclusion, Mr. Chairman, the phone and cable companies will fundamentally alter the Internet in America unless Congress acts to stop them. They have the market power, technical means, and regulatory permission to restrict American consumers' access to broadband Internet content, and they've announced plans to do so.

For the foreseeable future, American consumers will have little or no real choice of broadband Internet *access*. And – unless Congress acts soon to reinstate modest and longstanding consumer safeguards – consumer freedom to choose broadband Internet *content* will be artificially limited. I urge you and your colleagues to recognize that, despite how we wish it were otherwise, the market for broadband Internet access is not competitive and that the network operators – both domestic and foreign – fully intend to extend their market power to restrict consumer choice of content by discriminatorily constraining consumer access to American content companies. I also urge that, simultaneous to any grant of video franchising relief, Congress enact safeguards to preserve American consumers' longstanding freedom of Internet content choice.

Thank you. I look forward to your questions.

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