Dissenting Views of Mr. Markey, Mr. Largent, Mr. Waxman, Mr. Pickering, Ms. Eshoo, Mr. Stupak, Ms. McCarthy, Ms. DeGette, Mr. Luther, Ms. Capps & Mr. Doyle on H.R. 1542

Congress has taken action on a number of occasions in recent years to update antiquated communications laws. The challenge for policymakers has been to reform such rules in a way that substitutes a sound competitive policy framework, consistent with the public interest, for hitherto monopoly provided services and the rules by which such monopolies were regulated and safeguarded from competition. We believe a competition-based policy is preferable because it maximizes consumer choice, job creation, technological innovation, service quality and price reductions. In addition, the economic interests of the United States are most advanced in the global marketplace by fully establishing competition in our domestic telecommunications markets.

The legislation that most broadly addressed this challenge was the landmark Telecommunications Act of 1996 (P.L. 104-104). We believe that the Telecommunications Act of 1996 (the '96 Act) contains the essential blueprint to encourage the deployment of advanced communications technologies by injecting competition into the market for local telecommunications services. The competition unleashed by the Telecommunications Act has spurred technological advances and innovation, and has helped to promote the deployment of digital services, at lower prices, to ever more American homes and businesses. We strongly endorse retention of this competitive model for our telecommunications marketplace.

However pending telecommunications legislation, H.R. 1542, fundamentally departs from the competitive model upon which we have sought to reform our laws and, over time, to eliminate unnecessary regulations. This legislation eliminates key market opening provisions of the Telecommunications Act and allows the Bell companies into long distance for so-called "high speed data" services. This highly controversial bill was approved by the Telecommunications and the Internet Subcommittee on a 19-14 vote, and recently passed the Full Energy and Commerce Committee on a 32-23 vote.

We oppose H.R. 1542 because it is highly flawed. In short, we believe it is unnecessary, "un-digital," and unfair. It favors monopolies more than it breaks them down and encourages communications consolidation more than it creates new economic opportunities for small businesses and entrepreneurs. It benefits the 4 regional Bell companies yet vastly diminishes the economic prospects for hundreds of other high tech companies and their employees. And in legislation that affects multibillion dollar issues and every American who owns a telephone or a computer, it is woefully deficient in protecting consumers from potential monopoly abuses, or empowering them with new technology.

Bipartisan Concern

The pro-competitive framework embodied in the '96 Act, as well as it's subsequent implementation by the Federal Communications Commission (FCC), was not the product of

one party. On the contrary, both liberals and conservatives, Republicans and Democrats, have insisted on such rules and developed them in bipartisan fashion over a number of years.

In fact, all of the decisions implementing the key market-opening provisions of the '96 Act at the FCC were unanimous, garnering votes from both Republican and Democratic commissioners alike. Moreover, the nature of the votes at the markups in both the Telecommunications and the Internet Subcommittee as well as in the Energy and Commerce Committee make evident that opposition to this bill is broad and bipartisan.

We turn now to an examination of the provisions of H.R. 1542 and the apologia of our opposition.

It's Unnecessary

This bill is unnecessary. Prior to proposing myriad "solutions" to a problem, it is useful to identify clearly and convincingly the problem legislation purports to remedy. As the sole hearing this Committee held on the proposed legislation this session indicated, and what the close votes in the Subcommittee and the full Committee markups also amply demonstrated, is that there is little consensus on what, if any, problem needs fixing, or if statutory revisions are required to effectuate any needed change in policy.

The fact is that the Bells don't need legislation in order to provide high speed data services. They can and do offer DSL services today. The Bells don't need legislation to offer Internet access. Again, they offer such services today.

Moreover, the Telecommunications Act allows the Bells into long distance after they've met the requirements of a competitive checklist in a State. They've done this in 5 States. In other words, the key to entering the long distance market is in their own hands.

So what is the problem? Is there insufficient competition? If that's the problem, this bill's remedy is to empty a six-shooter into the heart of new economy companies. This bill doesn't help to create more competition, it serves to shield the Bells from effective competition from competitive local exchange companies (CLECs). It's a competition-killer.

In addition, the bill doesn't give the green light to Wall Street to invest again in innovation. It sends the capital community the opposite message. As Mr. James Henry, managing general partner of Greenfield Hill Capital, testified before the committee at the legislative hearing on H.R. 1542: **"It is my observation as an industry analyst that the investment community's willingness to fund telecomm companies in general and CLECs in particular is adversely impacted by legislative and regulatory uncertainty. The proposed [bill] is illustrative of the kind of legislative uncertainty that will cause investors to move to the sidelines and withhold capital from the emerging local competitors."**

The legislation makes such uncertainty in the marketplace a chronic condition, because even if the bill becomes law it will unleash new rounds of litigation. We've already been through that.

Even as the bill makes it harder for competitors to serve consumers, it solidifies the position of incumbent monopolists and then deregulates them. There's only one thing worse for consumers than a regulated monopoly and that's an *un*regulated monopoly.

It's Un-Digital

This bill is also "un-digital." Section 6 of H.R. 1542 creates an exception for "high speed data services" to the existing "carrot-and-stick" approach to opening the local telecommunications market to competition. (The "carrot-and-stick" approach compels the Bells, in a State-by-State application process for long distance entry, to meet the market-opening standards established in Section 271 -- a provision enacted as part of the Telecommunications Act of 1996.) The legislation then adds a limitation to this "data" exception stipulating that, notwithstanding their ability to offer long distance "data" services, the Bells still could not provide long distance "voice" service.

This is a highly "un-digital" provision. It attempts to justify acceding to Bell company pressure to enter the long distance market prematurely by creating a legislative work of science fiction. Going digital means converting all information into a series of zeros and ones. With digital technology, there is no distinction between voice and data transmissions. It helps to create a "technological Esperanto" – where videos, photos, email, faxes, music, everything can universally be expressed in the language of zeros and ones.

H.R. 1542 takes this harmonious universal language and introduces a Congressional cacophony. It doesn't embrace convergence. It does the opposite. Ripping certain bits out of a network to be treated by regulators differently is not consistent with the technological convergence we are witnessing throughout our telecommunications markets. As a result, this legislation turns back the clock – it's "regulatory retrogression." It presents once again the problem of trying to force certain services into particular regulatory boxes even as digital technology renders such classification antiquated or meaningless.

It is clear that the vast majority of telecommunications traffic traveling over most networks today is data traffic, not voice. Moreover, many experts predict that this data traffic will continue to grow in years to come and that voice bits will actually represent a miniscule percentage of the overall bits travelling through our nation's telecommunications infrastructure. As Mr. Clark McLeod, Chairman of McLeod USA, a facilities-based CLEC, testified before the Committee: **"It is almost impossible to divide the "carrot" as a practical matter. There is no meaningful distinction between voice and data. Whether you are watching voice or data, when they are digitized and transmitted over a fiber optic cable they are both just flashes of light...Furthermore, as voice over the Internet technology continues to develop, the problem grows."**

Concern has repeatedly been raised that the Bell companies may have little incentive to demonstrate the opening of their local networks if they are given the ability to provide long distance high speed data services. Again, as Mr. Clark McLeod, Chairman of McLeod USA, testified: **"If we allow the Mega-Bells to provide long distance service for the Internet, then when voice communication over the Internet becomes widespread, the "carrot" will be gone and there will be no incentive to ease the stranglehold on the**

last mile local loop...If you do not find the pace of local competition acceptable, the solution is to increase the "carrot" or add a "stick," rather than to reduce the carrot. Data services constitute the high-growth, high-revenue segment of the intercity long-distance market. It makes up the largest portion of the "carrot." If it is lost, there will be almost no remaining economic incentive to comply with the 14-point checklist in Section 271 and provide quality access to the last mile local loop." Moreover, since the bill eliminates any FCC or State authority over Bell provision of high speed data services, the legislation's bid to limit Bell long distance authority to "data" transmissions is of dubious enforceability.

Under the Telecommunications Act's Section 271 process, fully opening networks to competition in the local exchange market is insisted upon as a prerequisite for Bell companies to enter the long distance market. Once a Bell company obtains such Section 271 approval in a State, the Bell company may offer long distance service in that State for both voice and data services. This construct is consistent with the convergent nature of digital technologies.

It's Unfair

H.R. 1542 is also unfair. In the aftermath of the enactment of the Telecommunications Act of 1996, several new commercial enterprises were launched and they poured over $60 billion dollars into new infrastructure. They delivered on the promise of the '96 Act by deploying new digital services, prompting the incumbents to finally offer such services themselves. Mr. Charles McMinn, Chairman and co-founder of Covad Communications, testified to the Committee that, **"Your decision in 1996 to open local telecommunications markets to competition allowed consumers a choice in broadband services from a variety of competitive providers. The bill you are considering today will take that choice away."**

In essence, this bill tells those dozens of new companies -- and the hundreds of companies that supply them: "*Thanks, but no thanks. We don't need you. We're sorry you borrowed millions of dollars to invest in your business based upon the Telecomm Act, but now we're changing the rules. We're going to rely on the Bell utility phone company to serve consumers. We're going to rely on the Bell utility companies to innovate. We're going to rely on unregulated Bell utility companies to lower prices.*"

We believe that's a policy that seeks our economic future by looking through a rear-view mirror. The Bells do not have a track record of innovation or rapid deployment of new services. We point to an editorial from Business Week that appeared in the April 18, 2001 issue: **"The Bells are not known for their competitive vigor or their willingness to roll out broadband quickly. Indeed, it was only competition from new companies that spurred them to start."**

Far from fostering the kind of facilities-based competition that served to prod the Bells into deploying their own services, this legislation thwarts the growth of facilities-based competition. Only the Bell companies began life after enactment of the '96 Act with a full network and connections to every home – a vast and valuable network paid for, we might add, over and over again by captive ratepayers. This is a tremendous advantage. The Bells would like to make building such a network a prerequisite for any competitor. Congress

wisely looked to the record of building long distance competition in the 80's and early 90s as a model for building ever more competition for local telecommunications services.

The '96 Act certainly permits full bore facilities-based competition. Yet it often takes time, as well as a significant amount of capital and customers, to reach that level of infrastructure deployment. For this reason, the Telecommunications Act encouraged competitive entry through resale opportunities, as well as through evolving facilities-based competition. In the latter scenario, companies could buy the piece-part elements of the network they needed (so-called "unbundled network elements," or "UNEs") and use them in conjunction perhaps with facilities they owned and deployed.

H.R. 1542 abandons the policy of encouraging, through multiple means, competitive entry into the local telecommunications services market. Under the bill, certain types of competitive entry will now be explicitly discouraged. First, H.R. 1542 reverses the pro-competitive thrust of the 1996 Act by rolling back the FCC's unbundling rules.

Much debate in the Committee markup centered around the preservation of these pro-competitive policies generally and, in particular, the importance of preserving the Bell companies' obligation to provide competing carriers with unbundled access to the high frequency portion of the loop. This is the policy known as "line-sharing." Advocates of H.R. 1542 allege that the current rules require only access to copper loops and they articulate a policy whereby competitors could solely access the copper loops. We dispute both the allegation that this is all that current rules require and the policy choice favored by advocates of the legislation.

The consequence of the provisions in the bill would be to effectively deprive new entrants to the local exchange market of access to the facilities they need to compete. Limiting line sharing to copper plant would effectively reverse critical FCC clarifications of its line sharing and unbundling rules. As the Bells deploy more fiber, competitors would lose the ability to line share. The bill would also have the effect of forcing certain competitive carriers to abandon serving *residential* consumers because it takes away important unbundling rights and makes "line-sharing" meaningless. Mr. Charles McMinn, Chairman of Covad Communications, testified to this point: **"The sad fact is that competition in local telecom markets, especially in residential broadband services, would be virtually eliminated by this bill."** It makes no sense to us to change current rules in a way that *lessens* the likelihood that residential consumers would receive competitive broadband services.

A key problem is that H.R. 1542 eliminates the Bells' obligation to provide unbundled access to the high frequency portion of the loop at the "remote terminal" that resides between the consumer's home and the central office of the local network. In cases where a Bell company locates its DSL equipment in the remote terminal, competitors cannot use the line sharing equipment they've installed in the central office. In such situations, the only way for a competitive carrier to reach consumers served by this remote terminal to offer high-speed data services is to locate its own equipment at the remote terminal and interconnect there. H.R. 1542 prohibits this. Multimillion dollar investments made by competitive companies in high tech equipment located at the Bell companies' central offices could be rendered useless by this reversal of current rules.

This policy reversal also has the effect of bolstering the competitive position of the incumbent Bell companies. If competitors are functionally prohibited from serving residential consumers through "line-sharing," consumers seeking a bundled service of both high speed data and voice service over a single line to the home will be compelled to turn to one carrier for such bundled service, the Bell company. That's why these provisions are a win-win for the Bells – they not only significantly reduce the likelihood of competition, but perpetuate for the foreseeable future Bell hegemony over local telecommunications services.

These provisions represent a powerful toxin to competition and in our view should be removed from the bill. Both the Largent Amendment, which deleted Section 4 from the bill, as well as the Luther-Wilson amendment, which was designed to restore rules that make "line-sharing" useful to competitors, would have represented important improvements to the bill. The debate on the Luther-Wilson amendment ended in a 27-27 tie vote, indicating again, the great uneasiness that the Committee has with ending the preference for competition embodied in the Telecommunications Act.

Regulatory Quagmire

H.R. 1542 sets up a new regulatory regime for telecommunications in the United States. In Section 4 of the bill, new Section 232(a) states that neither the FCC nor any State shall have any "authority to regulate the rates, charges, terms or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service, or to regulate any network element to the extent it is used in the provision of any such service…". This provision is ostensibly included to prohibit regulation of the new, so-called "data" services.

The legislation, however, in new Section 232(b) states that States will retain authority under the bill to "regulate circuit-switched telephone exchange service." Presumably, this would be authority over circuit-switched-based telecommunications services irrespective of whether they are so-called "voice" or "data" services. Moreover, the legislation in Section 232(c) includes a provision stating that nothing in this new section "shall affect the ability of the Commission to retain or modify…rules pursuant to section 254." Section 254 of the Communications Act deals with universal service issues.

To recap: 1) the FCC and the States have no authority over certain services, namely, the broadly-defined services called "high speed data service," "Internet access service," and "Internet backbone service;" 2) the States retain authority over the newly-named, yet undefined, "circuit-switched telephone exchange service;" and 3) none of the preceding affects the ability of the FCC to modify universal service rules.

This is a regulatory quagmire. It sets up a convoluted new regulatory regime that Rube Goldberg would be impressed with, only Harry Houdini could untangle, and only a monopolist with a well-financed litigation team could love.

Technological Neutrality

The Congress has tried over many years to deal with digital convergence by striving to treat like services in like ways from a regulatory standpoint. The law should address the service offered to consumers, not the particular medium used to deliver that service or the historical antecedents of the company offering the service. Instead of dealing with the marketplace from the standpoint of technological neutrality, H.R. 1542 articulates a new policy of "technological favoritism." By picking technological favorites, the government distorts the marketplace and encourages companies to engage in "technological arbitrage." For example, if a company provides telephone exchange service, but simply uses something other than a circuit-switched technology, that company's offering is deregulated. This is true even if its offering is indistinguishable from that of a company utilizing circuit-switched technology. That's unfair, unnecessary, and un-digital all in one.

This bill compounds the problem of discerning between voice and data on packet-switched networks. It does so by asserting that States can't regulate the service – they can only address consumer welfare if it's delivered a certain way, namely, utilizing a "circuit-switched" technology. This sweeping evisceration of FCC and State authority raises several questions about what rules and regulations may no longer apply. Under the preemption language in the legislation, embodied in the new Section 232, unless "high speed data service," "Internet access service," or "Internet backbone service," are "expressly referred to" in the Communications Act, the FCC and States have no authority over rates, charges, terms or conditions, for such services. This means that many important rules, including consumer protection rules, may be inadvertently swept away.

For example, such preemption language raises the question as to whether the provisions of Section 222, addressing subscriber privacy apply to such services. Likewise, Section 310(a) of the Act, addressing foreign *government* ownership of telecommunications facilities. In addition, FCC and State utility commission "slamming" and "cramming" rules would not apply to such services. Further, the following additional provisions would not apply to these services: Section 223 of the Communications Act, relating to obscene or harassing telephone calls; section 225, relating to telecommunications services for hearing-impaired and speech-impaired individuals; section 228, dealing with pay-per-call services; section 229, relating to compliance with the Communications Assistance for Law Enforcement Act; section 231, relating to access by minors to harmful material; or section 255, addressing access to persons with disabilities.

Without question, the rise of Internet-based services may require adjustment of many existing rules and regulations. And the elimination of many other rules will be warranted if innovation flourishes, competition fully takes root, and the rules no longer serve a useful purpose. In the area of broadband policy, policymakers may decide that many of the above rules should apply to non-circuit-switched services, many perhaps should not -- and some may be deemed necessary but only in a modified form.

The point is that the Committee has not fully analyzed or debated the nature and extent of the preemption in the bill, the full implications of the new statutory definitions for services, nor the new regulatory regime erected by the bill. Such abrupt and ill-considered changes – with profound implications for competition and consumer protection – should not be rushed through the House.

Back to the Future

It is important to recognize that if the legislation proceeds as currently crafted, this flawed framework will require major and multiple policy adjustments to protect consumer welfare and ensure timely deployment of services. While we prefer a competition-based policy to induce the marketplace paranoia in corporation mindsets that promotes deployment of new services, increases service quality, and lowers prices, H.R. 1542 fails to advance such a policy. Unfortunately, the absence of a competition-based policy will require policymakers to return to the regulatory model of a previous era, when dominant providers had to comply with government mandates for service deployment.

Since the bill severely limits the ability of competitors to reach consumers, it is clear that the government would have to set benchmarks and timetables for deployment of services to the inner city and to rural areas. The Stupak-Largent-Strickland amendment was crafted to ensure reasonable and timely deployment of services to such consumers. It was a pro-consumer amendment that would have meant that millions of consumers would gain access to services from the Bell companies, particularly in areas where, in the absence of a competitive threat, the Bell companies are unlikely to deploy. Although this amendment was defeated, we continue to believe that if the bill is to proceed it must be amended to ensure timely deployment of service, especially to rural areas of the country, with serious repercussions for a Bell company's failure to deploy.

Conclusion

Instead of preserving and strengthening the principles of competition and consumer choice, this bill undermines them. We believe its provisions are anti-competitive, anti-consumer and contrary to the public interest. Instead of looking to the future, these provisions return us to the policies and practices of the past.

It is our hope that this bill undergo major legislative surgery so that its monopoly-enhancing provisions can be removed, its vague new statutory definitions eliminated, and its "un-digital" regulatory regime scrapped. In their place, if Congress chooses to legislate at all, pro-consumer and pro-competitive provisions could be added to ensure greater consumer choice, robust entrepreneurial access to markets, and more vigorous enforcement of existing rules and laws.

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