

Testimony of Wayne Rehberger
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Before the
House Energy & Commerce Committee
Subcommittee on Telecommunications and the Internet
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Mr. Chairman and Members of the Committee, thank you for inviting me here today. I am Wayne Rehberger, Chief Operating Officer of XO Communications, Inc. of Reston, Virginia. Today I am testifying on behalf of XO Communications and COMPTEL, the competitive communications industry trade association of which XO is a board member.

BACKGROUND ON XO COMMUNICATIONS

XO Communications is the largest independent competitive local exchange carrier providing telecommunications and broadband services. Originally formed in 1996, XO has expanded its telecommunications offerings from its original 4 small markets to 70 metro area markets in 26 states. Our company provides a comprehensive array of voice and data telecommunications services to small, medium, and large business customers. Our voice services include local and long distance services, both bundled and standalone, other voice-related services such as conferencing, domestic and international

toll free services and voicemail, and transactions processing services for prepaid calling cards. XO data services include Internet access, private data networking, including dedicated transmission capacity on our networks, virtual private network services, Ethernet services, and web hosting services.

XO has invested heavily in building its own facilities spending over \$8 billion and constructing over 1.1 million miles of fiber. We have metro fiber rings to connect customers to our network, and we own one of the highest capacity and scalable IP backbones in the industry, capable of delivering data end-to-end throughout the United States at speeds up to 10 Gigabits per second.

BACKGROUND ON COMPTEL

Founded in 1981, COMPTEL is the communications industry association of choice and represents competitive service providers and their supplier partners. Based in Washington, D.C., COMPTEL advances its members' businesses through policy advocacy, education, networking, and trade shows. COMPTEL members are entrepreneurial companies building and deploying next-generation networks and services to provide competitive voice, data, and video services. COMPTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTEL members share a common objective: advancing communications through innovation and open networks. For decades, it has been the innovation of entrepreneurial companies coupled

with market opening regulations that have brought choice to customers and new technologies and services to the market. The Bell companies had DSL years before the 1996 Act, but did not deploy this technology until Covad aggressively deployed DSL. Same is true for VoIP. The Bells had no incentive to offer VoIP, until Vonage paved the way. This tradition of competitive innovation is continuing with the numerous companies that are creating new ways to serve customers using cutting edge technologies. For these reasons, I appear before the Subcommittee to voice significant concerns with the staff draft

STAFF DRAFT

In my testimony today, I will make the following points about the discussion draft.

- 1) **The discussion draft is based on a number of mistaken assumptions.**
- 2) **The discussion draft would create “gatekeepers” to the Internet.**
- 3) **The discussion draft adopts an approach that has been rejected for every other networked infrastructure industry in the United States.**

Mistaken Assumptions

The draft is based on a number of mistaken assumptions, which include the following:

- 1) That the packet-switched Internet and the circuit-switched Public Switched Telephone Network (PSTN) are physically separate networks;
- 2) That competitors can easily build networks that reach end users; and
- 3) That voluntary negotiations without rules or enforcement will work.

A simple example illustrates why the first assumption is mistaken. In your home today there is a wall jack that connects to the PSTN. If you plug a phone into that jack you have voice service. If you plug a fax machine into that same jack, you have an analog data service. If you plug your computer into that same jack, you have dial up Internet access, and if you plug a digital subscriber line (DSL) modem into that very same wall jack, you have high speed Internet access. That high speed Internet access also allows you to get Voice over Internet Protocol – VoIP – from the exact same wall jack from which you have gotten circuit-switched voice service for years.

So, what changed? Clearly the wall jack did not change, nor did you get new wires strung to your house. All that changed were the electronics that you and the phone company attached to that wall jack and wires. The problem is that the draft bill aims to change the regulatory regime based on the type of electronics attached by differentiating between the uses of packet switching different from circuit switching. XO, like many competitive companies, uses a combination of packet and circuit switching in providing services. Under this draft, my company would be forced to operate under two separate and incompatible federal regimes.

What the above example illustrates is that the Internet is not a separate network. Rather it is the term used to describe a multitude of interconnected networks that all use a common protocol to communicate. XO's network is part of the Internet, as are the networks run by AT&T, SBC, MCI, Verizon, Global Crossing, Bell South, Level 3, Qwest, British Telecom, and many others. These networks are interconnected today because section 201 of the Communications Act and the Commission's rules ensure that any party can get interconnection on just, reasonable and non-discriminatory terms.

It's important to understand that the Internet *is* simply the next evolution of the PSTN. Less efficient circuit switching is being replaced with more efficient packet-switching, just as copper and coaxial cable are being replaced with fiber because fiber is cheaper to maintain and has far greater bandwidth. Like new parts added to an older car to "supe it up" and make it go faster, fiber and newer electronics have been plugged into the existing networks to convey information faster. It's improved, but it's *not* a new network. Same with the old car that contains a new fuel injection system or new tires: it's improved, but it's not a new car.

The second mistaken assumption is that anyone who wants to compete can build a network that reaches end user customers. COMPTEL members can assure you that nothing is further from the truth. In fact, the only ubiquitous wireline networks that exist today were all built in a monopoly environment. The incumbent phone companies like Verizon, SBC, BellSouth, and Qwest each had decades in which to build out their networks to all homes and businesses. Likewise, the incumbent cable companies like

Comcast, Time Warner, Cablevision, and Cox all had at least a decade of protected franchises in which to construct their networks to residential users. In contrast, wireline competitors to the incumbent phone and cable operators have had to build their networks in the face of a competitor who already has a network and customers, and consequently a revenue stream with which to pay for upgrades and improvements to the network.

The story is somewhat different for wireless services, but only slightly. In that case new PCS licenses were granted before the two existing cellular licensees were firmly entrenched, but even so the two largest network operators are owned by incumbent phone companies who were holders of the original cellular licenses.

Another telling example is the current state of facilities based competition in the business market. XO operates exclusively in the business market today, which is more concentrated. It is a fact that fewer than 10 percent of the office buildings in the U.S. have alternative fiber connected to them. Instead, for over 90 percent of the buildings, incumbents and competitors alike use the high speed fiber connection to the building that is owned by the incumbent. In this largely deregulated business marketplace, the market has decided that it is not economically efficient to build multiple networks to connect to the same building. Instead, what XO and other competitors have been doing in an efficient and cost effective manner is building fiber rings in metro areas to carry traffic aggregated from numerous business customers, and also building long distance networks to carry aggregated traffic between metropolitan areas. What this illustrates is that the assumption in the bill that those who want to compete in offering communications

services to business and residential customers can simply build their own network is mistaken due to basic economically realities.

Finally, some view the voluntary commercial negotiations for interconnection under Section 103 in the draft as a solution to provide access to incumbent's networks at rates that will allow the competitor to compete. Again, a simple review of actual behavior in the marketplace demonstrates that this assumption is also mistaken.

Today all interconnection with networks that reach end users has been accomplished by rule of law. Competitive carriers like XO get interconnection to incumbent phone companies through under sections 201 and 251 of the Communications Act. Cable companies also get the interconnection they need to provide Internet access and VoIP through section 251, and also make use of special access circuits available under section 201. Wireless carriers get access to the incumbent phone networks under sections 201, 251, and 332(c) of the Communications Act. Each of these sections not only require interconnection of networks, they also require that such interconnection be on just, reasonable, and non-discriminatory terms and conditions and provide enforcement mechanisms. Yet for packet switched services this draft essentially eliminates those requirements.

In the absence of such requirements, the market has already demonstrated repeatedly that voluntary commercial negotiations will not work. The requirements cited above were adopted by Congress in 1934 because AT&T was refusing to interconnect

independent providers, in 1993 because incumbent phone companies were refusing to interconnect to wireless carriers, and in 1996 because incumbent phone companies were refusing to interconnect with competitors. Competitors have also found it difficult to negotiate their way onto cable networks. Currently, none have been able to do so.

Interestingly, the draft bill itself recognizes that voluntary negotiations will not work to provide competition with respect to video services. Section 304(a)(1)(E) of the bill would require the FCC to apply to Broadband Video Service providers the same programming ownership restrictions and regulations that are currently imposed on cable operators. Those programming provisions were adopted by Congress precisely because cable operators were refusing to permit competing satellite providers to have access to programming shown on cable networks. The Bell Companies, as new entrants into the video marketplace, need those access requirements in order to offer competing video service. If it is okay for the Bell companies to use their network ownership to deny access to competitors except where voluntary agreements provide such access, why then shouldn't the cable operators be able to use their interests in video programming to deny video content to Bell Companies except where the Bell Companies can negotiate such access on a voluntary basis? COMPTEL and XO understand the need for those programming access provisions to provide video competition, and believe that the need for those provisions underscores the need to continue similar requirements to ensure competition in communications marketplace.

Finally, speaking from XO's own experience, I can assure the committee members that in every instance in which the Regional Bell Operating Companies have been relieved by the FCC of statutory requirement regarding interconnection or access to unbundled network elements, they have either refused to negotiate at all with respect to allowing XO or other competitors to use their networks, or else have imposed onerous terms and conditions that drive up customer prices and limit competition. In some instances, XO may be able to negotiate, given its size and scale. However, subjecting the entire industry to a one-size fits all negotiation regime would amount to the equivalent of trying to negotiate with a school bully for your lunch money while he has you in a headlock.

Internet Gatekeepers

Because of its reliance on false assumptions, the draft bill would result in the establishment of "gatekeepers" to the Internet. This bill would create a world where the few companies that control the network portals that reach end-users, the "on-ramps" to the Internet, would be able to control access to the Internet from both the consumer perspective and from the perspective of companies that must connect to the Internet to conduct business. The reason they would be able to exert this control is that everyone who seeks to offer content and services over the Internet – whether it is Amazon seeking to sell books, Yahoo! or Google offering search services and content, Disney seeking to offer movies, Vonage seeking to offer VoIP, or XO offering communications to businesses -- all of us need to reach end users in order to offer our services. Those who

control the access to end users ultimately control the Internet if there is no obligation to permit competitors to access those end users on reasonable terms and conditions.

The “net neutrality” provisions in section 104 of the draft bill would do nothing to prevent incumbent network operators from acting as gatekeepers for two reasons. First, because the interconnection requirements in section 103 of the draft bill include no requirements for direct interconnection on reasonable and non-discriminatory terms and conditions, providers of content and services that compete with those offered by the network operator that controls access to the end user, the network operator will simply demand uneconomic terms and conditions that effectively prevent competitors from offering services over the operator’s network. And for those competitors that nonetheless attempt to provide service notwithstanding uneconomic interconnection terms and conditions, the exceptions in section 104(b) for network management, security, and provision of video or premium services eviscerate the consumer protections purportedly provided in section 104(a).

The U.S. Economy Is Made Up Of Various Shared Networks

I think it is essential point out that the staff draft would carve out the telecommunications industry as the *only* networked industry in the history of America that does not operate under some form of regulated network sharing. The electricity, gas, railroad and airline industries all operate under a shared network structure that requires network owners to provide access to their competitors in exchange for cost plus a

reasonable profit. It should apply the same principle to the communications industry of today, and the future: access to all public networks upon reasonable request at just and reasonable terms, rates and conditions.

The draft before us today would allow competition *only if* competitors were to first build redundant infrastructure to every home and business in America. But time and again Congress has decided that such redundancy is uneconomical. Furthermore, rational market players would never undertake such an endeavor. As I mentioned earlier, XO has invested over \$8 billion in its own facilities. However, even with this extensive network, we are nowhere close to having ubiquitous on-net coverage. To build such a network would require over \$100 billion and many decades to construct – not to mention monopoly rights like the Bells have had. Instead, we reach most customers by procuring facilities or circuits from other providers.

Competitors want the right to build facilities when they determine it makes economic sense to do so. In fact, XO is committed to building additional facilities, but only if sufficient customer revenue exists to justify the cost. However, that is very different from being required to build facilities to every customer to whom one wishes to offer service. If there were no existing facilities, obviously someone wishing to offer service must construct them. But that is a very different proposition from what competitors face today. Today every existing home and business has at least one wireline communications network already constructed to it. Well over 90 percent of those customers, both business and residential, are passed by at least one broadband pipe –

fiber, coaxial cable, or DSL capable copper wire. In light of these existing facilities, the only rational way for competition to exist is by sharing the existing infrastructure – regardless of whether that infrastructure was built by an incumbent or a competitor.

Sharing infrastructure is not an unusual concept. In fact, it is the norm rather than the exception. Congress did not require that alternate energy providers build a second or third set of electrical wires into each home in order to provide competition in energy pricing. Instead, the grid is shared in exchange for cost plus a reasonable profit. Competing railroads are required to allow the use of their tracks by their competition. Gas suppliers must share a common pipeline. Why? Because basic economic realities make it uneconomical to build redundant networks to end users. Telecommunications is no different and should not be treated differently.

CONCLUSION

As my testimony illustrates, the problems created by the draft bill are numerous and complex. If adopted it would create gatekeepers for the Internet, with negative consequences that would ripple through all segments of our Information economy. The bill would re-establish a monopoly over communications services for most businesses in this country, and at best would create a duopoly for most residential consumers. I urge the committee to adopt positive and constructive legislation that will give all competitors, and Internet users, access to communications networks. This legislation need not be complex. It should adopt basic rules that apply to all communications providers that use

public rights of way or spectrum – be they incumbents or competitors and regardless of whether they use packet-switching, circuit-switching, or copper, coaxial cable, fiber, or wireless. The core principles should be service upon reasonable request, non-discrimination, interconnection, unrestricted resale, and net neutrality, with federal rules enforced by State commissions.

The bottom line is that the vibrant and competitive Internet that we all increasingly rely on today is the result of over 30 years of pro-competitive decisions by Congress and the FCC. Those decisions regulated the transmission networks that make up the Internet, while leaving the applications provided over those networks unregulated. By removing the basic regulations governing the transmission networks, this bill would permit private parties – namely the limited number of private parties who built ubiquitous networks in a monopoly environment – to use those networks to control access to the Internet. One only has to refer to recent comments made by SBC’s CEO, Ed Whitacre in a recent *Business Week* interview: “Why should they [competitors] be allowed to use my pipes?” This statement, alone, shows how anti-competitive forces can have a debilitating effect on competition and innovation.

Attached to my testimony is an analysis COMPTTEL had prepared which details specific problems with those provisions that are of the greatest interest to COMPTTEL members. In the interests of time, I respectfully request that COMPTTEL’s analysis be included in the record as part of my testimony. Thank you for allowing me to testify today on behalf of XO and COMPTTEL.



November 3, 2005 House Draft -- Preliminary Summary and Analysis

Section 1. Short Title and Table of Contents.

Section 2. Definitions. The central defined terms are discussed below:

Summary of Provisions:

“BIT” or “broadband Internet transmission” is defined as the transmission of information in a packet-based protocol, regardless of the facilities used.

“BITS” or “broadband Internet transmission service” is a packet-switched service offered to the public, with or without a fee, regardless of the facilities used, that is transmitted in a packet-based protocol to or from a subscriber in a packet-based protocol. BITS includes any features, functions, or capabilities used to transmit or route packetized information in a packet-based protocol and may include Internet access service. BITS does not include any time division multiplexing features, functions, or capabilities. BITS may be included or offered with a VOIP or broadband video service, but will not be treated as subsumed in or subsuming these services.

“BITS provider” is anyone that provides BITS, either directly or through an affiliate, over facilities the service provider or its affiliate owns or controls.

“Broadband video service” is a two-way service offered to the public with or without a fee, regardless of the facilities used, that allows subscribers to integrate a video programming package with customizable, interactive voice and data features, which may include caller ID, call management, and the ability to access information derived from the Internet. Broadband video service may be included or offered with a VOIP or BITS service, but will not be treated as subsumed in or subsuming these services.

“Broadband video service provider” is a person that provides or offers to provide a broadband video service directly to subscribers, or through an affiliate, that is delivered directly to subscribers over facilities that the service provider owns or controls.

“Necessary E-911 infrastructure” describes the routers, databases, trunk lines, etc. necessary to provide E-911 capability.

“Packet-switched transmission service” means any service that routes or forwards packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, or other data units. Packet-switched transmission service does not include circuit-switched forwarding of packetized information.

“Subscriber” is any person who is an end user of, and who consumes, goods or services, whether provided for a fee, in exchange for an explicit benefit, or for free.

“VOIP service” is defined as a voice communications service provided over BITS, offered to the public with or without a fee, that allows a subscriber to send or receive voice communications in TCP/IP or successor protocol over a broadband Internet transmission service. VOIP service may be included or offered with a BITS or broadband video service, but will not be treated as subsumed in or subsuming these services.

Terms not defined in the draft have the meanings set forth in sections 3 and 602 of the Communications Act.

Analysis of Provisions:

- The definition of “BITS” continues to leave open the question of the proper classification of a provider that combines packet and circuit-switched technologies in its network. A similar ambiguity exists with respect to “VOIP service.” Many VOIP calls are terminated using circuit switched technology to deliver the call from a backbone provider’s point of presence through the central office to the end user. It is unclear in the case of both BITS and VOIP whether the presence of a circuit-switched element takes the service out of the BITS or VOIP category, whether the circuit-switched element is regulated separately, or what the purpose of the circuit-switched/packet-switched distinction is. So long as the definitions include both a service-based criterion (i.e., transmission of information of information or voice communications) and a technology-based criterion (i.e., packet switching versus circuit switching), these ambiguities will be difficult to resolve absent very specific language that spells out in detail how a service or a network that combines circuit switching and packet switching is to be treated.
- Three critical questions arise from the revised definition of “BITS provider,” which now is limited to anyone that provides BITS “over facilities the service provider or its affiliate owns or controls.” First, it is not clear what constitutes “control” over a facility. Does “control” encompass a contractual or tariff-based right to use or transmit information over a facility, a long-term lease or indefeasible right of use (IRU) agreement, or some other level of or evidence of control? Must the right to use necessarily exclude the rights of others to use the facility in order to constitute “control?” Second, the language does not specify whether the provider must *exclusively* use facilities that it owns or controls, or whether a provider that employs *any* owned or controlled facilities would fall within the “BITS provider” definition. Only in very limited circumstances do providers own or control (depending on the meaning of “control”) all the facilities used to provide any given service. Would a provider fall within the definition if it simply owned and used switches or routers? Third, as discussed further in connection with section 103, below, the extent of interconnection rights will be affected by the scope the defined term “BITS provider,” because the section 103

rights are available only to (1) (facilities-owning or controlling) BITS providers, (2) BIT providers, and (3) telecommunications carriers (i.e., providers of circuit-switched services).

- This draft makes clear that the term “subscriber” is meant only to include end users, and does not include content and service providers. This limitation is significant in the context of the net neutrality provisions in section 104, which now has virtually no meaning for competitive carriers because that section does not address the terms and conditions under which carriers gain access to the network in the first place.
- “BITS,” “VOIP service,” and “Broadband video service” all include language in the new draft that indicates that each service can be integrated with the others, but that they will be treated as distinct services in the draft bill. In other words, even though the services may overlap (i.e., VOIP and broadband video service may both be subsets of BITS), each will be governed by its specific title. That said, there is a potential for confusion with respect to the term “broadband video service,” which by definition must include the capability for subscribers to integrate “customizable, interactive voice and data features, functions, or capabilities, which may include caller identification, call management, and the ability to access information derived from the Internet. . . .” The presence of these elements – which include the functionalities that also define “BITS” and “VOIP” – in the definition of “broadband video service” raises the possibility that a broadband video service provider could assert that it has no obligations under Titles I and II with respect to BITS and VOIP functionalities that are bundled with its broadband video services. If such an argument were accepted, it would mean that, with respect to all major network operators, the interconnection, traffic exchange, and network neutrality provisions applicable to BITS and/or VOIP would cease to apply.

TITLE I – BROADBAND INTERNET TRANSMISSION SERVICES

Section 101. Jurisdiction.

Summary of Provisions:

This section establishes the basic regulatory framework for BITS. The section provides for exclusive federal jurisdiction except as expressly otherwise provided, and establishes that neither the Commission nor any State or political subdivision thereof may in any way regulate BITS except as provided in the draft bill. The section also preserves the Commission’s authority over radio spectrum under Title III of the Communications Act of 1934.

Analysis of Provisions:

- With respect to those BITS services that would, absent the draft bill, be classified as telecommunications services under the Communications Act, this section removes all common carrier regulation, except for certain specified provisions

discussed in the sections that follow. The Title II provisions removed include the basic section 201-202 requirements to provide service to the public on reasonable and nondiscriminatory terms and conditions upon reasonable request. As such, the draft represents a fundamental change in approach to the nation's telecommunications infrastructure. Under the Communications Act of 1934 as amended by the Telecommunications Act of 1996, the baseline assumption was that any buyer willing to pay a reasonable price for transmission service would be able to purchase that service on reasonable and non-discriminatory terms and conditions. That right was enforceable both in federal district court and at the FCC. Under the draft bill, with very narrow exceptions, a network provider may choose to refuse service to a willing buyer, and there is no regulatory oversight with respect to the prices, terms, or conditions upon which service may be offered.

Section 102. Registration.

Summary of Provisions:

Section 102 requires BITS providers to register with the Commission, and file a copy of such registration with the State commission in each State in which the provider intends to provide service. A BITS provider shall file the registration statement within 30 days after commencing to offer BITS in such state, or within 30 days after the Commission prescribes the form required by section 402 of this Act, whichever is later. Registration as a BITS provider with respect to any State shall be deemed to authorize the construction and operation of BITS over public rights-of-way. The Commission shall prescribe necessary regulations to implement this section.

Analysis of Provisions:

- The Registration statement provisions applicable to sections 102, 202, and 302 are discussed in section 402 of the draft bill.
- The 30-day advance notice requirement from the previous draft, which arguably had an anticompetitive effect because it essentially gave the incumbents 30 days notice that a competitor will enter a given market, has been removed.
- Registration as a BITS provider under this draft is deemed to authorize the construction and operation of BITS over public rights-of-way.
- Given the revised definition of BITS providers as including only entities offering services over their own facilities, it appears that only facilities-based providers must or may register. As noted in the analysis of the definition of "BITS provider," it is unclear what the scope of that term is.

Section 103. Interconnection and Exchange of Traffic.

Summary of Provisions:

Section 103 states that every BITS provider has the right and duty to interconnect and exchange traffic, directly or indirectly, with other BITS providers, BIT providers, and telecommunications carriers. The rates, terms, and conditions of such interconnection and exchange of traffic shall be negotiated by the parties and subject to the remedies of this Act.

Analysis of Provisions:

- Because only BITS providers (defined as providers that own or control the facilities used to provide BITS) have rights and duties to interconnect, it appears that a provider that is a non-facilities-based provider of BITS has no right to interconnect or exchange traffic under this section. Depending on the scope of that defined term, therefore, the protections of this section may apply to a large number of providers (i.e., those that lease facilities or use any of their own facilities to provide service) or a very small number of providers.
- Even assuming that the intended scope of the definition of “BITS provider” is broad, the practical usefulness of the interconnection and traffic exchange rights is unclear at best. The language in the new draft states that the rates, terms, and conditions of interconnection agreements shall be negotiated by the private parties and subject to the remedies in the draft. This language provides no substantive standards for such agreements, and it provides no mechanism for the Commission to regulate the rates, terms, or conditions of interconnection agreements, or to intervene in interconnection negotiations. Furthermore, even though this language states that such negotiations are subject to “the remedies of this Act,” because the substantive provisions of Title II have been eliminated (e.g., sections 201, 202, 251, 252) and have not been replaced in the draft bill, any procedural remedies provided in the draft are largely meaningless. This approach contrasts sharply with existing law, under which the terms of interconnection must be reasonable and cost-based, and are subject to regulatory oversight and enforcement. As such, even assuming that the basic right to demand interconnection applies to a broad class of BITS providers, the lack of any rate reasonableness requirement or regulatory oversight means as a practical matter that network owners could price competitors off the network while remaining in full compliance with the law.

Section 104. Access to BITS.

Summary of Provisions:

Every BITS provider has the duty: (1) not to block, impair, or interfere with the offering of, access to, or the use of such content, applications, or services; (2) to permit

subscribers to connect and use devices of their choosing in connection with BITS, including computers, home-networking equipment, and televisions; and (3) not to install network features, functions, or capabilities that do not comply with industry-created guidelines referenced in the draft. However, these requirements do not preclude a BITS provider from: (1) offering service plans that involve reasonable bandwidth or network capacity limitations, or value-added consumer-protection services such as parental controls and spam filters; (2) taking reasonable measures to protect the security and reliability of its network and broadband Internet transmission services or to prevent theft of BITS or other unlawful conduct; and (3) carrying or offering broadband video services or other premium services that require managing the capabilities of a BITS provider's network to provide enhanced quality of service, except that the carrying or offering of such services may not block, or unreasonably impair or interfere with access to lawful content, applications, and services provided over the Internet and may not unreasonably restrict the right of subscribers to connect and use devices with their BITS.

Analysis of Provisions:

- Subsection 104(a)(1) prohibits active interference with transmission associated with content and services provided by companies other than the BITS provider to which the subsection's prohibitions apply in any given circumstance (i.e., the network operator). However, the subsection does not provide any affirmative obligation of BITS providers to provide transmission or network access to other providers in the first instance. (That obligation, to the extent that it meaningfully exists, derives from sections 103 and 105, discussed separately.) Thus, while this provision appears to provide some substantive rights to service and content providers that have negotiated their way onto the network, the practical utility of those protections must be evaluated against the fact that the draft allows the network operator to dictate the terms on which any service or content provider may purchase transmission over the network in the first instance, including outright refusal of service. Put differently, if a network operator has an absolute right to refuse to sell transmission to a would-be service provider, then it means little to say that the network owner may not interfere with that service provider's traffic in the event that the network owner does in fact choose to sell transmission to the service provider.
- Because the term "subscribers" is limited to end users and not content and service providers, subsection 104(a)(2) only protects the ability of the consumer to communicate on a reasonably unimpeded basis with a service or content provider once that service or content provider has negotiated its way onto the network. The section does not address the issue of the terms and conditions under which the content or service provider might be able to purchase transmission capacity to connect to the network in the first place (*see* discussion immediately above).

Section 105. Rights With Respect to Telecommunications Services and Special Access Tariffs.

Summary of Provisions:

Section 105 provides that a telecommunications carrier's rights with respect to unbundled network elements (UNEs) and collocation under subsections 251(c)(3) and (6) of the Communications Act shall not, with respect to a request by that carrier for the purpose of providing a telecommunications service, be affected by such carrier's status as a BITS or BIT provider. No person's rights to or under special access tariffs shall be affected by such person's status as a BITS provider or BIT provider or by the status of such person's provider of special access as a BITS provider or BIT provider.

Analysis of Provisions:

- With respect to UNEs, because the section preserves UNE and collocation rights only with respect to the provision of a “telecommunications service,” and “telecommunications services” after the enactment of the draft bill would be limited to circuit-switched services (i.e., analog voice and possibly dial-up Internet access service), this provision amounts to a repeal of UNE rights for all facilities that support the provision of packet-switched services. Because all Internet-based services and virtually all broadband services are today based on packet switched protocols, carriers relying on UNEs would be precluded from competing with respect to the vast majority of services offered in the communications marketplace, including all broadband services. UNES are especially critical with respect to “last-mile” connections between the end user's premises and the network. There is no economically viable means of replicating the last-mile connections provided today by ILECs and cable companies (neither investors nor consumers could be expected to bear the cost of building such economically wasteful duplicative facilities), and the loss of UNEs for this purpose thus reflects a policy decision that monopoly/duopoly in the last mile is the preferred outcome. In addition, because collocation under section 251(c)(6) is tied to UNEs, carriers would likely lose collocation rights with respect to any equipment used to provide packet switched services, thus further reducing their ability to provide advanced services.
- Subsection 105(b) leaves several fundamental questions unanswered. First, because “special access” is not a defined term, it is unclear what the intended scope of the provision is. Second, because the protections of the subsection turn on access to services offered under tariff, there is a separate unanswered question as to what services would have to be offered at tariff if the draft were enacted, including a question regarding services offered under so-called “contract tariffs.” Existing tariff requirements derive from section 203 of the Communications Act. That provision would no longer apply to packet switched services, which make up the vast majority of the services offered over “special access” lines today. Therefore, although the language of the subsection says that availability of special access services will not be affected by the status of the buying or selling carrier as a BITS provider, the more relevant – and unanswered – question is whether the

draft will remove most special access services from the tariffing requirement upon which this subsection's protections are based. In other words, the proper inquiry goes to the status of the services offered, not whether the companies that request or offer them fall within the definition of "BITS provider." As drafted, the probable outcome under this provision is that carriers will have a statutory right to access tariffs that contain few, if any, services.

- The section is also notable for the provisions that it does not preserve. Only subsections 251(c)(3) and (6) of the Communications Act are purportedly preserved. Subsection (c)(1), duty to negotiate (with its cross-reference to section 252 of the Act), is not preserved; nor are subsections (4) and (5), dealing with resale and notices of network changes. Although interconnection (subsections 251(a)(1) and 251(c)(2)) is addressed to some degree by section 103 of the draft bill, as stated above there remains a serious question regarding the rights of non-facilities based "BITS providers" to interconnect and exchange traffic. Moreover, the lack of a requirement for reasonable rates and a lack of Commission oversight or rulemaking authority make the section 103 interconnection rights virtually meaningless.

Section 106. Coordination for Interconnectivity.

Summary of Provisions:

Section 106 provides that the Commission may participate in industry standards-setting organizations dealing with interconnectivity and services for individuals with disabilities.

Analysis of Provisions:

- Whereas the Commission arguably had an advisory/oversight role with respect to the interconnection of networks under the previous draft, the revised language in the new draft makes clear that the ultimate resolution of disputes is essentially up to private negotiation. Given the language of Sec. 401, which specifically limits the Commission's authority to prescribe regulations that are "expressly required or authorized" under this Act, the absence of the FCC's ability to intervene is significant.

TITLE II – VOIP SERVICES

Section 201. Jurisdiction.

Summary of Provisions:

Section 201 provides that the provisions of the draft bill are the only source of authority over VOIP service, and that VOIP services are interstate services subject to exclusive federal jurisdiction, except as otherwise expressly provided in the draft bill.

Section 202. Registration of VOIP Service Providers.

Summary of Provisions:

In language that parallels the BITS registration requirements of section 102 of the draft bill, section 202 requires any provider of VOIP services to register with the Commission, with a copy to State authorities. A VOIP provider shall file the registration statement within 30 days after commencing to offer BITS in such state, or within 30 days after the Commission prescribes the form required by section 402 of this Act, whichever is later. The Commission shall prescribe necessary regulations to implement this section.

Section 203. Exchange of Traffic.

Summary of provisions:

Section 203 provides that each VOIP service provider has the right and duty to exchange voice communications traffic, directly or indirectly, with other VOIP service providers and telecommunications carriers. The rates, terms, and conditions of such exchange of traffic shall be negotiated by the parties.

Analysis of Provisions:

- Similar to section 103, this section states that the rates, terms, and conditions of traffic exchange agreements shall be negotiated by the private parties and subject to the remedies of this Act. Additionally, the language from the previous draft bill relating to reciprocal compensation has been removed. Therefore, there is no mechanism under which the Commission may regulate the rates, terms, and conditions governing the exchange of voice communications traffic. Because of the complete lack of any reasonableness or non-discrimination requirements applicable to the rates, terms, and conditions governing exchange of traffic, this section would effectively allow network operators to price competing VOIP providers off the network. Coupled with the draft's impact on UNEs and collocation, the lack of any meaningful access to transmission services for VOIP providers that do not operate end-to-end networks means that the draft will substantially restrict competition in the market for VOIP services.

Section 204. Emergency Services.

Summary of Provisions:

Section 204 distinguishes two types of VOIP providers. “Receive-only providers” are VOIP providers that enable a subscriber to receive voice communications in TCP/IP protocol or a successor protocol form, but not to send such communications to a telephone number or other identification method designated by the Commission. “Send-and-receive providers” allow subscribers to send and receive voice communications in TCP/IP protocol or a successor protocol to and from any subscriber with a telephone number or other identification method. Section 204 provides that each send-and-receive VOIP provider has a duty to ensure that 911 and E-911 services are provided in accordance with Commission regulations. Further, the section provides that, until revised by the Commission, the Commission’s current regulations on the date of enactment of this draft shall be applicable. Each entity with ownership or control of necessary E-911 infrastructure is required to provide each requesting VOIP provider with nondiscriminatory access to such infrastructure. The section preserves the right of States, political subdivisions thereof, and Indian tribes to charge a nondiscriminatory and equitable fee for the sole purpose of support of 911 and E-911 services. The section sets a technical feasibility standard for Commission regulations on E-911, including for portable VOIP service, and contains provisions that address subscriber notice when E-911 capability is not available.

Analysis of Provisions:

- The provisions in the draft substantially track existing Commission regulations, with the notable exception that the draft, unlike the FCC’s regulations, explicitly requires that infrastructure owners make E-911 infrastructure available to requesting VOIP providers.

Section 205. Revision of Universal Service Requirements.

Summary of Provisions:

Section 205 instructs the Commission to complete a study within 180 days of enactment of the draft bill addressing the question of whether the USF contribution base should be expanded to include VOIP providers. If the Commission concludes that the contribution base should be expanded, it is directed to complete a rulemaking within 180 days of making that finding implementing the necessary changes to its USF rules.

Analysis of Provisions:

- Under this section, the only potential new class of providers contributing to the universal support mechanisms are VOIP providers. BITS providers are not and could not be required under this draft bill to support universal service.

Section 206. Number Portability and Access to Numbers.

Summary of Provisions:

Section 206 mandates that subscribers and prospective subscribers to VOIP services shall have the right to number portability in accordance with Commission regulations. The Commission shall also make available telephone numbers under the NANP to each VOIP service provider that complies with the Commission's regulations regarding numbering resource optimization and portability with which telecommunications carriers must comply.

Section 207. Provision of Relay Service.

Summary of Provisions:

Section 207 directs the Commission to ensure that VOIP subscribers having a hearing or speech disability shall have access to relay services to the extent possible. VOIP providers are required to offer such services within 18 months after enactment, pursuant to regulations that the Commission is to issue within 6 months of enactment.

TITLE III – VIDEO SERVICES

Section 301. Jurisdiction.

Summary of Provisions:

Section 301 provides that the draft bill is the sole source of regulation for “broadband video services,” and that such services are subject to exclusive Federal jurisdiction except as expressly set forth in the draft.

Section 302. Registration of Broadband Video Service Providers.

Summary of Provisions:

Before providing broadband video service in any local franchise area or other area in any state, Section 302 requires any broadband video service provider to file a registration statement with the Commission, if that provider is not previously registered with the Commission. If previously registered with the Commission, that provider must file an amendment to such registration statement. At the time of filing the registration statement or amendment, the provider must transmit notice of such filing to the local franchising authority for the covered service area.

Analysis of Provisions

- There are three points related to broadband video services that indicate that participation in the market will be restricted to operators that build their own networks. The first factor is the definition of “broadband video service provider” as an entity providing service “directly to subscribers over facilities the service provider or its affiliate owns or controls.” The second relevant factor is that Title III, unlike Titles I and II, contains no provision for interconnection or exchange of traffic. The third factor is that, again unlike Titles I and II (which require registration only after service commences), Title III requires registration before service begins. Taking these provisions together, it is clear that, as is the case with “cable service” under Title VI of the Communications Act today, there is no concept of common carriage or public networks associated with “broadband video service.” Moreover, as noted in the analysis of the definitions in section 2 of the draft, the definition of broadband video service includes as necessary elements the capacity of subscribers to integrate the functionalities that also define BITS and VOIP. Thus, there is a possibility that broadband video service providers could escape the requirements of Titles I and II by offering a broadband video service.

Section 303. Broadband Video Service Franchising.

Summary of Provisions:

Section 303 provides that a broadband video service provider’s franchise shall be deemed to commence once the registration statement or amendment is effective, the provider transmits notice to the local franchising authority, and the provider has designated an agent with respect to such local franchise area. The Commission is charged with setting a uniform term of duration for franchises under this section. The section also provides for the payment of any applicable franchising fees. The section provides that any franchise under this section shall be deemed to authorize the construction and operation, over the public rights-of-way, of a broadband video service within the area to be served by the broadband video service provider.

Section 304. Application of Video Regulations to Broadband Video Service Providers.

Summary of Provisions:

Section 304 imposes a list of Communications Act requirements applicable to cable operators on providers of broadband video services, including retransmission requirements, ownership controls, carriage of local television and educational television signals, requirement for a basic tier service (without rate regulation), emergency alerts,

PEG requirements, etc. The section includes a prohibition on income-based redlining, but does not include a build-out requirement.

Section 305. Regulation of Carriage Agreements.

Summary of Provisions:

Section 305 requires the Commission to establish regulations to prevent a broadband video service provider from requiring a financial interest in a program service as a condition of carriage, to prevent a broadband video service provider from coercing a vendor for failing to provide exclusive rights, and preventing conduct that unreasonably restrains an unaffiliated video programming vendor from competing fairly.

Section 306. Implementation.

Summary of Provisions:

Section 306 states that within 90 days the Commission shall take all necessary steps to implement sections 302 and 303 of this Act.

TITLE IV – GENERAL PROVISIONS

Section 401. Regulations.

Summary of Provisions:

Section 401 gives the Commission the authority to prescribe “only such regulations as are expressly required or expressly authorized by this Act.” All regulations must be implemented within 180 days of enactment.

Analysis of Provisions:

- Although it was unclear whether the language in section 401 of the previous draft bill was intended to grant more narrow powers to the Commission than it holds under the Communications Act, it is quite clear under the language in this current draft that after enactment the Commission would no longer possess Title I ancillary authority as it did under the Communications Act. Instead, with respect to packet-switched services, the Commission would only be empowered to prescribe regulations that are “expressly required or authorized” under this Act.
- Given the extent to which the Commission relied on its Title I ancillary authority in its *Cable Modem Declaratory Order* and *Wireline Broadband Order*, this limitation of authority is significant.

Section 402. Registration Statements.

This section provides that registration statements under sections 102, 202, and 302 shall contain: (1) a business information statement, (2) a description of the business to be conducted by the provider, and (3) information required under a Federal law other than this Act. A registration statement is effective upon filing provided the Commission does not disapprove the statement for failure to include the above items. This section requires the Commission to maintain electronic public availability of all registration statements and amendments and also requires the Commission to prescribe regulations specifying the requirements for the timely correction of registration statements.

Analysis of Provisions:

- The requirements that providers file registration statements under sections 102, 202, and 302 have been streamlined in this section. The new draft bill makes it far more difficult for the Commission to disapprove a registration statement. Essentially, if the basic information listed above is provided, the registration statement is effective.

Section 403. National Consumer Protection Standards.

Summary of Provisions:

Section 403 requires the Commission to establish regulations setting forth national consumer protection standards with respect to BITS, VOIP services, and broadband video services. Such standards shall: (1) require clear communications on rates, terms, and conditions of service, (2) prohibit charges for any service or equipment that the subscriber has not affirmatively requested, (3) require service providers to establish clear dispute resolution mechanisms, and (4) protect consumers from unfair and deceptive practices. The Commission is authorized to adopt regulations on these subjects that are comparable to similar requirements applicable to common carriers. State commissions are authorized to require compliance with the national consumer protection standards, but States may not promulgate any new standard or expand or modify any Commission standard.

Section 404. Protection of Consumer Privacy.

Summary of Provisions:

Section 404 contains detailed requirements regarding the collection, use, and availability of consumer information.

Analysis of Provisions:

- The provisions in many respects closely follow existing customer privacy protections in title II and title VI of the Communications Act.

Section 405. Access By Persons With Disabilities.

Summary of Provisions:

Section 405 requires manufacturers of equipment used for BIT, BITS, VOIP service, or broadband video service to ensure that such equipment is designed to be accessible to and usable by persons with disabilities. The section further requires that providers of each of the services covered by the draft bill shall ensure that the services that they provide are accessible to persons with disabilities, unless doing so would result in an undue burden. The Commission has one year to adopt regulations implementing the section

Section 406. Management of Rights-of-Way.

Summary of Provisions:

Section 406 provides that BITS, VOIP, and Broadband video service providers, when using the public rights-of-way and easements that have been dedicated to compatible uses, shall ensure that the safety, functioning, and appearance of the property, as well as the safety of other persons, are not adversely affected by the installation or construction of the facilities. The section also provides that the costs of such installation, construction, and operation shall be borne by the provider or a subscriber to the provider's service, or a combination of both. The authority of local franchising authorities to enforce these requirements is preserved, as well as the authority to impose reasonable time, place, and manner restrictions on the use of public rights-of-way.

Section 407. Access To Poles, Ducts, Conduits, and Rights-Of-Way.

Summary of Provisions:

Section 407 requires that a utility shall provide a BITS provider, BIT provider, or broadband video service provider access to poles, ducts, conduits, and rights-of-way on a basis that is nondiscriminatory as compared to access provided to any telecommunications carrier, cable operator, or other BITS provider, BIT provider, or broadband video service provider. The section also requires BIT providers, BITS providers, or broadband video service providers to provide a cable television system, a telecommunications carrier, or any other BITS provider BIT provider, or broadband video service provider nondiscriminatory access to poles, ducts, conduits, and rights-of-way. The section allows for denial of access on a nondiscriminatory basis if there is insufficient capacity, and for reasons of safety, reliability, and generally applicable

engineering purposes. The section provides that the term “utility” shall have the same meaning as in section 224(a) of the 1934 Act. The Commission is charged with prescribing regulations that are necessary to implement this section.

Analysis of Provisions:

- It is unclear how the nondiscrimination provisions are intended to work in light of the different pole attachment rates specified in section 224 of the 1934 Act. On its face, section 407 appears intended to establish parity across all service providers. Section 224, however, allows for different rates for attachments used solely to provide cable service and attachments used to provide telecommunications services. Accordingly, the concept of nondiscrimination stated in section 407 may lead to disputes.
- Because of the general prohibition on State regulation in the draft bill and the lack of any countermanding provision in this section, section 407 would appear not to recognize any State authority over regulation of pole attachments. If that is the outcome, then there is the possibility of the anomalous result that States could regulate some attachments (for cable and telecommunications services) under section 224 of the 1934 Act, but not attachments for BITS, VOIP, and broadband video services, a result that could further complicate implementation of the nondiscrimination requirement.

Section 408. Standard Setting.

Summary of Provisions:

Section 408 authorizes the Commission to recognize standards developed and adopted by standards-setting organizations for equipment used to provide services covered by the draft bill.

Analysis of Provisions:

- Whereas the Commission was authorized to investigate and resolve disputes with respect to stand-setting organization’s approval of standards in the previous draft, this draft limits the Commission’s oversight role to merely “recognizing” these standards.

Section 409. Government Authority to Provide Services.

Summary of Provisions:

Section 409 states that neither the 1934 Act nor any State law may prohibit any public provider of BITS, VOIP service, or broadband video service from providing such

services to any person. Any State or political subdivision thereof that does provide such service, however, must not grant any preference or advantage to its provider, and such government-controlled providers must comply with all applicable rules.

Section 410. Preservation of Existing Laws.

Summary of Provisions:

Section 410 saves State laws of general applicability, and states that nothing in the draft bill shall be construed to restrict the Commission's authority with respect to emergency communications systems.

Section 411. Complaints to the Commission.

Summary of Provisions:

Section 411 provides that any person may "complain to the Commission of anything done or omitted to be done in violation of" the draft bill. The section requires the Commission to forward the complaint to the relevant party, and requires that such party answer within the time set by the Commission. The Commission is required to investigate the complaint and issue an order concluding its investigation within 90 days of the date that the complaint was filed. The Commission may extend that period for a single additional 90 days. The Commission is authorized to mediate or arbitrate any issue arising under the complaint. The Commission may also issue an order requiring a BIT, BITS, VOIP, or broadband video service provider to continue to provide service while the Commission investigates and resolves the complaint. The Commission may issue orders protecting the status of the parties, the rights of subscribers, or both, pending resolution of the complaint. Finally, the Commission is authorized to direct a service provider to pay damages to the complaining party for any violation of the draft bill or regulations promulgated thereunder.

Analysis of Provisions:

- There remains an open question as to the intent of the drafters with respect to judicial appeal of an order issued as the result of a Commission investigation and resolution of a complaint. Section 411 is modeled closely on section 208 of the Communications Act. Section 208(b)(3) contains an express provision regarding judicial review. Section 411, however, contains no such provision.
- There is no provision parallel to section 207 of the 1934 Act, which allows an injured party to seek redress either at the Commission or in district court. Similarly, there is no provision here that is parallel to the private rights of action in sections 401(b) (action other than for payment of money) and 407 (action for

payment of money) to pursue enforcement of a Commission order in federal district court.

- Moreover, there is no parallel to section 406 of the 1934 Act, which authorizes a mandamus action to obtain improperly withheld service.

Section 412. Commission Authority Over Documents.

Summary of Provisions:

Section 412 provides that the Commission shall have authority to require the filing of any contract, agreement, or arrangement related to the provisions of the draft bill.

Section 413. Revocation of Registration.

Summary of Provisions:

Section 413 authorizes the Commission to revoke a registration for false statements knowingly made, conditions coming to the Commission's attention that would have warranted disapproval of the statement when filed, or for wilful or repeated violations of the draft bill or regulations thereunder.

Analysis of Provisions:

- As is the case with the complaint provisions in section 411, section 413 does not contain any provisions for judicial review.

Section 414. Additional Remedies.

Summary of Provisions:

Section 414 provides that the draft bill will be enforced by the Commission under Titles IV and V of the 1934 Act. The section further provides that a violation of any provision of the draft will shall be treated as a violation of the 1934 Act, and a violation of a regulation issued under the draft bill will be treated as a violation of a regulation issued under the 1934 Act.

Analysis of Provisions:

- Because of the language in the first sentence of section 414 stating that the draft bill "shall be enforced by the Commission," the section suggests that there is no private right of action under the draft beyond the complaint procedure at the Commission as set forth in section 411.

- The provisions stating that violations of the draft bill and its regulations shall be treated as violations of the 1934 Act and its regulations similarly shed no light on the private rights question. More fundamentally, given that virtually all of the substantive provisions of Title II have been removed and not replaced with new parallel provisions, there are essentially no substantive rights or causes of action to which the procedural remedies in the new draft would apply in any case.