Communications and E-commerce

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Playing Catch-Up with Technology: A Comparison of the Leading Telecom Reform Bills Pending in Congress

Telecommunications law reform is once again on Capitol Hill's agenda. Spurred by a consensus that the law has not kept up with massive changes in the communications marketplace—in particular, the development of sophisticated IP-based services that allow many types of broadband providers to offer full suites of video and data services—members of both the House and Senate have introduced bills purporting to advance competition while protecting consumers' interests. These bills aim to streamline the process of franchising new video competitors, address end users' access to their choice of information over the Internet and reform the system of universal service subsidies that support the availability of telecommunications services to all Americans.

This Briefing Series update surveys and compares how the leading comprehensive reform bills in each house of Congress—the Stevens Bill in the Senate and the COPE Act in the House of Representatives—as well as several other pending bills would affect the law in several key areas. This Briefing Series update is necessarily only a snapshot in time. The landscape changes quickly and continuously as each bill moves through the legislative process, and as new ones are introduced. Before turning to a discussion of specific substantive proposals, we briefly summarize the status, at the time of this writing, of each of the key bills:

The Stevens Bill. Senate Bill S. 2686, the "Communications, Consumer's Choice, and Broadband Deployment Act of 2006," was introduced on May 1 by Senate Commerce Committee Chairman Ted Stevens (R-Alaska). The comprehensive legislation consists of ten separate titles, addresses a variety of telecom and media policy issues, and calls for substantial FCC rulemakings to implement the legislation. The bill is likely to change further: Senator Stevens himself has described his bill as only "a working draft intended to stimulate discussion," and Senator Daniel Inouye (D-Hawaii), the Ranking Member of the Commerce Committee and co-sponsor of the bill, has noted his "numerous, substantive objections to the bill in its current form," particularly in the areas of consumer protection and universal service funding.

The first of three public hearings to consider the bill was held on May 18, 2006. Concerns about the role local authorities would retain in the video franchising process, as well as concerns over universal service funding, figured prominently in the hearing. And even though it was not scheduled to be part of the first hearing, the so-called "net neutrality" debate (concerning service provider access to broadband networks, explained further below) arose as a hotly contested, polarizing issue. As this Briefing Series update goes to press, a second hearing is being held on May 25 to discuss net neutrality and interconnection. Senator John McCain (R-Arizona) and Senator Inouye are co-chairing the hearing. A revised, substitute version of the bill, to be circulated by Senator Stevens, will be reviewed at a third hearing on June 13. The Commerce Committee's Executive Session to markup and vote on the legislation will be held on June 20.

The COPE Act. In the House of Representatives, H.R. 5252, the "Communications, Promotion, and Enhancement Act of 2006" (the COPE Act) was approved 41-12 by the Energy and Commerce Committee on April 26. In general, the COPE Act is narrower than the Stevens Bill, with a primary focus on video franchising and net neutrality. Now that the House Parliamentarian has rejected a request by the House Judiciary Committee for referral to it of portions of the bill, the COPE Act is expected to reach the House floor during the first full week of June.

Other legislation. A number of other competing bills in both the Senate and the House address important communications issues. For example, S. 2917, the "Internet Freedom Preservation Act," would establish several specific net neutrality obligations for broadband providers; H.R.

5417, the "Internet Freedom and Nondiscrimination Act of 2006," would institute less extensive net neutrality requirements on broadband providers by amending the Clayton Act (antitrust law) rather than any telecommunications statute; and H.R. 5072, the "Universal Service Reform Act of 2006," would reform the universal service fund by expanding the fund's contribution base and altering its distribution rules.

The remainder of this Briefing Series update compares these and other bills as they pertain to six important issues: (1) net neutrality; (2) video franchising reform; (3) universal service reform; (4) the digital television broadcast flag; (5) program access; and (6) municipal broadband.

Net Neutrality

The "net neutrality" issue concerns whether the owners of the broadband facilities that provide the infrastructure for the public Internet—particularly, cable and telephone companies—should be subject to various nondiscrimination rules with respect to their carriage of their own and competitors' services, applications and content. Proponents of net neutrality regulation maintain that new rules are necessary to: (1) ensure that consumers can access the lawful content of their choice; (2) ensure that consumers may use the lawful applications and services of their choice; (3) ensure that consumers can connect to the network any legal devices that do not harm the network; (4) promote unfettered competition among network, content, application and service providers; and (5) prohibit network infrastructure providers from discriminating among content, application and service providers. Opponents claim that such rules are unnecessary, because the competitive broadband market creates powerful disincentives to discriminate or otherwise limit customer access to competitive content or services. They argue that restrictive rules that seek to dictate the terms of the market will result in under-investment in infrastructure and economically inefficient outcomes in content and service availability. Currently, there are no net neutrality statutes or regulations in effect, although the FCC did adopt a general policy statement in August 2005 endorsing the first four principles laid out above, and Verizon and AT&T agreed in the context of their recent mergers to follow such principles.

Senate

The current version of the Stevens Bill does not contain specific net neutrality mandates. Instead, Title IX of the bill directs the FCC to make annual reports to Congress for five years regarding the development of the Internet, including the transmission of information over the Internet. The FCC could include recommendations to address any problems it identifies in its annual reports, but the bill would preclude the FCC from adopting any net neutrality rules on its own or even recommending additional rulemaking authority for itself.

By contrast, the "Internet Freedom Preservation Act," S. 2917, sets forth specific net neutrality obligations for broadband service providers. The bill was introduced on May 19 by Senators Olympia Snowe (R-Maine) and Byron Dorgan (D-North Dakota), both members of the Commerce Committee. The bill would amend the Communications Act to require broadband service providers to operate their networks in a nondiscriminatory manner with regard to content, applications and services. Broadband service providers would be prohibited from blocking, degrading or offering preferential service on their networks. The bill would further require broadband service providers to give consumers the option of purchasing a stand-alone broadband connection not bundled with cable television, telephone or VoIP service. The FCC would establish a complaint-based enforcement procedure to resolve complaints within ninety days of their filing. The FCC would also submit annual reports to Congress on the delivery of content, applications and services into and over broadband networks.

House

The COPE Act would give the FCC explicit statutory authority under Titles IV and V of the Telecom Act to enforce its network neutrality policy statement, described above, while at the same time explicitly prohibiting the FCC from adopting additional rules other than procedures to adjudicate complaints of violations of the broadband policy statement.

Under the COPE Act, companies that violate the FCC's broadband principles would be subject to a $500,000 fine for each violation. The FCC would have the exclusive authority to adjudicate complaints of violations of its broadband policy. Unlike the Stevens Bill's requirement that the FCC conduct studies on net neutrality once a year for the next five years, the COPE Act would give the FCC 180 days to conduct a study to gauge the broadband policy's effectiveness in achieving the goals of encouraging broadband deployment and preserving and promoting the open and interconnected nature of the public Internet.

The COPE Act does not seek to define or explain the terms of the FCC's broadband policy. During the Commerce Committee's markup of the COPE Act, the Committee rejected a wide-ranging net neutrality amendment that would have spelled out what net neutrality means by establishing specific duties for broadband providers and a complaint process to deal with violations. After the Committee rejected the amendment, its main sponsor, Representative Edward Markey (D-Massachusetts), introduced the amendment on the House floor on April 26 as a stand-alone bill—H.R. 5273, the "Network Neutrality Act of 2006"—with the hope that it would be considered as an amendment to the COPE Act when it makes it to the House floor. Like the Snowe/Dorgan Bill on the Senate side, the Markey Bill contains non-discrimination requirements, although they are not as expansive as the non-discrimination provisions in the Snowe/Dorgan Bill. The Markey Bill simply prohibits a broadband provider from discriminating in favor of **itself** in the allocation, use or quality of broadband services or interconnection with other networks.

After the House Judiciary's requests for referral to it of the COPE Act and for time to amend the bill were denied, Judiciary Committee Chairman Sensenbrenner (R-Wisconsin) introduced his own net neutrality bill, the "Internet Freedom and Nondiscrimination Act of 2006," H.R. 5417, on May 18. This bill would amend the Clayton Act to allow for antitrust sanctions against broadband providers that discriminate against unaffiliated Internet content, application or service providers. Specifically, the bill would amend antitrust law to require that broadband providers: (1) refrain from interfering with customer access to lawful content, services and applications; (2) allow for interconnection with their facilities on reasonable and nondiscriminatory terms and conditions; and (3) operate their networks in a nondiscriminatory manner so that content, application and service providers unaffiliated with the broadband provider have an equal opportunity to reach consumers. Chairman Sensenbrenner's bill, like Rep. Markey's net neutrality bill, would also require that if a broadband provider offers enhanced prioritization or quality of service for a specific type of data, it must offer the same enhancement to all data of the same type, regardless of who owns or originates the data, without charging extra fees or requiring other consideration.

Video Franchising Reform

Existing law requires all entities seeking to provide cable television service to obtain franchises from local franchising authorities on a jurisdiction-by-jurisdiction basis. Localities have sought to enforce these laws against telecommunications companies such as Verizon and AT&T that seek to launch new video services across the country over their broadband networks. Some telcos claim the laws do not (and should not), by their terms, apply to their video services, while all telcos agree that the franchising requirements will delay if not entirely deter new video entry. The telcos argue that the process is slow, cumbersome and costly, that it was designed for the market entry of monopoly incumbent cable providers rather than new competitors, and that it makes no sense to subject national broadband and video competition policies to thousands of local governments. Meanwhile, even the cable incumbents have conceded that it might make sense to update the law—for **all** providers.

Senate

Title III of the Stevens Bill streamlines the franchising process. Negotiation of franchising agreements would continue at the local level; however, municipalities would be required to grant a video service provider's standardized franchise application within thirty days. Failure to do so would result in the automatic grant of the franchise for a term of fifteen years. The bill limits franchising authority discretion to the following substantive terms: (1) franchise fees (limited to no more than five percent of the provider's defined gross revenue) and additional fees to support Public, Educational and Government (PEG) programming (no more than one percent of the provider's gross revenues); and (2) the number of PEG channels (no lower than the number provided by the incumbent operator). It also appears that the franchising authority may be entitled to negotiate with the video provider concerning the franchise term (between five and fifteen years). Any existing franchise agreement would remain in effect until its expiration, unless a new video service provider submits an application to the franchising authority to provide service in the same area. In that scenario, the bill's "competition trigger" would permit an incumbent cable operator to utilize the streamlined franchise application procedure to replace its existing agreement.

Local governments would continue to govern the use of public rights of way under the Stevens Bill, but would be prohibited from doing so in a manner that creates a barrier to entry or delays the provision of video service. Permit fees would be limited to the local franchising authority's estimated direct costs.

The bill would eliminate build-out requirements, but would prohibit discrimination based on income, race or religion. Violations of this anti-discrimination provision would be subject to Commission penalties based on state anti-discrimination laws and, in the event of repeated and willful violations, license revocation by the local franchising authority.

Finally, the FCC would be authorized to promulgate consumer protection and customer service regulations that the state utility commissions would enforce. Local franchising authorities would be permitted to initiate enforcement proceedings and intervene in a proceeding on behalf of consumers in their franchise areas.

The objections raised at the May 18 hearing on the Stevens Bill suggested significant pressure to revise the bill to shift somewhat more authority back to the local franchising authorities from the FCC. How large a shift may occur, if any, and in what areas, remains to be seen.

On May 23, 2006, Senator Kay Bailey Hutchison (R-Texas) introduced her own cable franchising reform bill—S. 2989, the "Franchise Reform Act of 2006"—which is modeled on Texas state law and takes a less centralized approach to streamlining the cable franchising process: it would shift authority over cable franchises from local franchising authorities to state regulatory commissions (instead of to the FCC).

House

The COPE Act goes farther than the Stevens Bill in removing local control over franchising. The Act would force municipalities and states to cede much of their control over cable franchising rights to the FCC. Video providers could obtain a national franchise from the FCC to provide service across the country in place of having to go jurisdiction by jurisdiction. Two groups of parties would be eligible for a national franchise: (1) all parties not providing cable services under Section 621 of the Telecommunications Act or any other law on the date of the COPE Act's enactment; and (2) existing cable service providers that offer services in one or more franchise areas under Section 621 of the Telecommunications Act or any other law on the date of the COPE Act's enactment, to the extent that, on the date the national franchise becomes effective, at least one other party possesses franchise rights to provide cable services in each of the franchise areas that would be subject to the "national" franchise.

To obtain a national franchise, a party would file with the FCC a certification containing basic business information and detailing the franchise areas in which the party intended to provide cable service. These areas must be defined as either a specific municipality in which local cable franchise rights have already been awarded or the geographic area of a local municipality's jurisdiction. Once granted, the national franchise would last ten years, with an automatic ten-year renewal term. In the last year of the ten-year franchise term, all relevant local franchise authorities would have the right to conduct public hearings to assess the national cable franchisee's performance, including the company's compliance with the COPE Act's requirements.

The COPE Act would establish certain duties for national cable franchisees including: (1) paying each local franchising authority a franchise fee of up to five percent of the provider's gross revenues in the franchise area; (2) adhering to the COPE Act's PEG/I-Net requirements, which include providing space for PEG channels and paying PEG/I-Net fees of up to one percent of gross revenues; and (3) complying with all existing statutory consumer protection and customer service standards. The COPE Act does not include detailed build-out requirements. It does prohibit national cable franchisees from discriminating against potential subscribers on the basis of income. The FCC would enforce the COPE Act's consumer protection, customer service and anti-discrimination provisions.

Universal Service

Federal universal service funds were established long ago to promote the availability of affordable telecommunications services to low-income consumers and in rural, insular and other costly-to-serve areas. The more than $6 billion in federal universal service funding comprises four programs: (1) need-based subsidies to low-income households; (2) subsidies to phone companies serving rural and other high cost customers; (3) funding for Internet connection costs incurred by schools and libraries; and (4) funding for Internet connection costs incurred by rural healthcare providers. Under the current universal service regime, only "interstate telecommunications providers" are required to contribute to the fund, which they do on the basis of their interstate revenues. But the rules are full of gaps and disparities (e.g., cable modem service providers do not contribute, while DSL providers do), and identifying the pool of eligible revenues is harder in an era of "bundled" local and long distance wireline traffic and all-distance wireless offerings. Further, newer technologies that do not contribute—such as VoIP, email and instant messaging—are increasingly replacing the use of traditional phone service. This means that subsidies are increasingly collected from a smaller pool of services, resulting in levies that claim a greater percentage of contributors' revenues. For all of these reasons, the current mechanism is likely unsustainable.

Senate

The universal service reform provisions contained in Title II of the Stevens Bill modify both contribution and distribution aspects of the universal service fund. The bill expands the fund's contributor base to encompass all providers of telecommunications service, broadband service and IP-enabled voice service (collectively, "communications service" providers). In addition, the FCC would be authorized to adopt a new contribution mechanism. The new contribution mechanism would be based on any combination of the following factors: revenues from inter **and** intrastate communications services, working telephone numbers or similar identifiers, or network capacity.

Moreover, communications carriers receiving universal service distributions would be required to deploy broadband service (with minimum speeds of 3 Mbps in one direction) within their service areas within five years of the passage of the Act. Whether the bill would require build-out to every household in the service area is presently unclear. Waivers from the deployment requirement would be limited to those carriers able to demonstrate that deployment would be too expensive (specifically, that per-line deployment costs would be three times the average cost of deploying broadband service), would not be technically feasible, or would materially impair the carrier's ability to continue providing service throughout its service area. A separate broadband fund capped at $500 million per year would be established to provide broadband service to underserved areas.

House

The COPE Act does not address federal universal service policy. Instead, the lead House bill on the subject is H.R. 5072, the "Universal Service Reform Act of 2006," sponsored by Energy and Commerce Committee members Lee Terry (R-Nebraska) and Rick Boucher (D-Virginia). This bill would greatly expand the contribution base for universal service by requiring all carriers that provide access to the public-switched network, including all broadband service providers, to contribute to the universal service fund. The bill also would impose a number of large-scale changes to the fund's distribution mechanisms and rules, including: (1) making support for the build-out of broadband lines an explicit part of the universal service laws; (2) capping the total amount of universal service support contained in the fund; and (3) limiting the number of telecommunications carriers eligible for universal service support by specifying criteria that every carrier wishing to receive funds must fulfill. This bill was introduced March 30, and referred to the House Subcommittee on Telecommunications and the Internet three weeks later, but there has been no momentum to move it forward since referral.

Digital Television (DTV) Broadcast Flag

DTV broadcast flags are controversial signaling mechanisms that allow copyright holders to impose terms of use for digital content. To work, broadcast flags require the use of television tuners that can detect the flag and prevent the redistribution of flagged recordings. The FCC's previously adopted broadcast flag regulations were invalidated in federal court on the ground that the FCC did not have the statutory authority to ban the manufacture of non-compliant television tuners. See *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

Senate

Subtitle IV.C of the Stevens Bill would revive and specifically authorize the FCC's broadcast flag regulations, while expressly permitting the retransmission of: (1) short excerpts of broadcast digital television; (2) broadcast programs used for distance learning; (3) news and public affairs programming (excluding sports) where the broadcaster determines that the principal value of the programming depends on timeliness; and (4) broadcast content over a home or other local network. Any technology approved by the FCC for redistribution control would be subject to licensing on reasonable and nondiscriminatory terms.

House

There is no legislation with any momentum in the House that addresses broadcast flag issues.

Program Access

The current program access rules, added by the Cable Act of 1992, require cable companies to provide programming in which they have an interest on reasonable terms to providers of rival Multichannel Video Programming Distribution (MVPD) platforms. This ban on exclusive self-dealing by cable companies is due to expire in October 2007. The current rules apply only to programming that is delivered to a cable system's headend by satellite, opening a potential loophole for exclusive self-dealing of programming delivered by fiber optic lines or other terrestrial means. Supporters of the program access rules argue that their continued existence (and the closing of the so-called terrestrial loophole) is necessary to promote competition in the MVPD market, since otherwise new video entrants could not easily obtain the programming (such as regional sporting events) that they need to compete in a given market.

Senate

Subtitle IV.A of the Stevens Bill would amend the existing program access provisions and leave program access requirements in place for at least ten more years. The bill would specifically apply the program access rules to terrestrially-delivered programming. It would exempt individual video programs produced by MVPDs for local distribution, but not if they involve transmission of a sporting event. The new rules also would specifically prohibit exclusive agreements concerning to the transmission of live sports events programming regardless of whether the program owner is vertically integrated with the cable provider. Exclusive agreements involving terrestrial delivery that were entered into prior to July 1, 2003, would be grandfathered until the end of their term.

The FCC would be required to decide program access complaints on an expedited basis, within 120 days. The bill also would give the FCC express authority to require submission of a defendant's carriage agreement to the Commission in program access discrimination proceedings.

House

The COPE Act touches on the issue of cable program access in a much more limited manner than the Stevens Bill and does not specifically address terrestrial programming. The COPE Act deals with cable program access only by imposing certain restrictions on content providers in which a cable operator has an attributable interest. Specifically, such content providers would be prohibited from denying access to their programming to unaffiliated cable operators with a national franchise solely because the unaffiliated operator originates its service from a headend that it shares with a different, unaffiliated cable operator.

Municipal Broadband

"Municipal broadband" refers generally to broadband Internet access networks—typically provided on a city- or neighborhood-wide basis—that are established or funded in whole or part through local government support. Governmental participation can take different forms, from merely providing the right to use public infrastructure to attach equipment used to establish a broadband network, to the building and operation of broadband network facilities. In general, these situations involve public-private partnerships. Some state laws have been construed to limit municipalities' rights to embark on such projects. At the same time, many incumbent telecommunications and cable companies believe that municipal broadband should be prohibited, claiming that government competition in this space is unfair and an inefficient use of public resources.

Senate

Although Title V of the Stevens Bill would permit municipal broadband services, it strongly encourages municipalities to enter public-private partnerships for provision of those services. If the public provider decides to enter the market without a private-sector partner, the public provider would be required to provide public notice of its intent and give private companies a thirty-day right of first refusal. The public provider would be permitted to proceed only if no private company submitted a bid to provide equivalent services at the same or lower cost to consumers. (This right of first refusal would not apply to municipal broadband arrangements in existence, proposed or under construction prior to April 20, 2006.) Municipalities that pursue a public-private partnership would be required to solicit bids through an open bidding process. To the extent the public provider regulates competing providers of advanced communications, the public provider would be prohibited from discriminating in favor of its own services.

House

The COPE Act would enhance the ability of municipalities to act as public service providers by prohibiting the use of the Communications Act of 1934, or any state statute, regulation or legal requirement as a basis for barring a public provider from providing telecommunications, information or cable services. However, the COPE Act would bar states or local municipalities from granting preferential treatment to public providers that the state or municipality owns or with which they are affiliated—specifically requiring that state and local governments apply their ordinances, rules and policies to all providers in a non-discriminatory manner. The FCC would have one year from the COPE Act's enactment to conduct a study on the status of publicly provided telecommunications, information and cable services.

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