

**Testimony of Randolph J. May**

**Senior Fellow and Director of Communications Policy Studies**

**The Progress and Freedom Foundation**

**On “H. R. \_\_\_\_\_, a Committee Print on the Communications Opportunity,  
Promotion, and Enhancement Act of 2006”**

**before the**

**Subcommittee on Telecommunications and the Internet**

**Committee on Energy and Commerce**

**U.S. House of Representatives**

**March 30, 2006**

## SUMMARY

The Committee should be commended for the substantial progress it has made since the earlier two staff drafts in proposing a bill that will represent sound communications policy. Especially with regard to the national cable franchise proposal, in many respects the proposal furthers the worthy intent stated by Congress when it passed the Telecommunications Act to adopt a “pro-competitive, deregulatory national policy framework.”

As for the Broadband Policy section, it would be far preferable for Congress not to include a net neutrality-specific provision in the bill. There certainly have not been more than a few scattered instances of alleged marketplace abuses. Moreover, in the increasingly competitive broadband marketplace, there is no reason to anticipate that broadband operators will not be responsive to making available services that consumers value. Assuming for the sake of argument that Congress is intent on including a net-neutrality-specific provision, however, it should explicitly tie enforcement of the FCC’s broadband principles to determinations made under a market-oriented unfair competition standard such as the one I suggest in my testimony. Absent clearly tying FCC authority to a competition-based standard that will require the agency to undertake a rigorous fact-based economic analysis of the particular marketplace circumstances that exist at the time, there is a great danger that enforcement of the access mandates at the core of the broadband principles will turn into a general common carrier regime for broadband operators. Extending the non-discrimination obligations and rate regulation requirements that are hallmarks of a common carrier regime, and which may have been appropriate in a monopolistic narrowband era, to the competitive broadband era will certainly stifle new investment and innovation and impose an overall drag on the nation’s economy.

In light of the competition that already exists in the video marketplace, and the potential for even more competition from telephone companies and other new entrants, there is no longer any rationale for local franchising authorities to play a public utility-type economic regulatory role. This is true for new entrants such as the telephone companies and for incumbent cable operators alike. The proposal for a national franchise will speed the development of further video competition and, indeed, the deployment of new broadband networks. At the same time, the Committee should consider further improvements in the video section of the bill suggested in my testimony, such as eliminating the PEG and institutional network mandates.

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Mr. Chairman and Members of the Committee, thank you very much for inviting me to testify today. I am Senior Fellow and Director of Communications Policy Studies at The Progress and Freedom Foundation, a non-profit, nonpartisan research and educational foundation located in Washington, DC. PFF is a market-oriented think tank that studies digital revolution and its implications for public policy. During the past year, I have also co-chaired our Digital Age Communications Age (“DACA”) project. The purpose of this project has been to draft a new model communications law. In order to carry out this purpose, PFF assembled into working groups a diverse group of leading academics and think tank scholars—lawyers, economists, and engineers—who are experts in the field of communications policy. The views I express here today have been informed by the work of the participants in the DACA project. But I want to emphasize at

the outset that while my colleagues at PFF, and other participants in the DACA project, may share many of my views, the positions I express here today are my own.

## I. Introduction

It has been ten years since enactment of the Telecommunications Act of 1996. Recall that when Congress passed the 1996 Act, it stated that it intended “to provide a for a **pro-competitive, deregulatory national policy framework** designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.” While I believe that the 1996 Act could have been much more unambiguously deregulatory, the fact of the matter is that, due in part to the changes in law and policy brought about by the act, and due in even greater measure to rapid-fire and ongoing technological changes enabled by the digital revolution, we now enjoy a communications marketplace characterized by competition and convergence. I am not going to belabor this point here by citing reams of statistics or the very latest (usually this morning’s!) news story about a new competitive entrant or a new communications service or application. For my purpose today, it is sufficient to point out that we live in a world in which firms we still sometimes call “cable television” companies provide voice services to their subscribers at ever increasing rates. Companies we still call “telephone companies” or “telecommunications providers” are racing to provide video services in competition with cable and satellite television providers. New market entrants like Vonage, which calls itself “the broadband telephone company,” utilize super-efficient Internet connections to carry voice traffic. Wireless providers we still sometimes call cellphone companies integrate voice, video and data for delivery anytime, anywhere to a

screen you carry in your pocket. They now distribute popular “television” programming. And popular web sites, such as those operated by Yahoo, Google, Microsoft, and thousands and thousands more that are not as dominant but which have their own intensely loyal “viewers”, compete with traditional broadcasters and cablecasters, not to mention newspapers and magazines, for consumers’ eyeballs.

So while we may quibble around the edges about degree, competition and convergence of services are realities in today’s communications marketplace. That being the case, any communications law reforms enacted should be consistent with the pro-competitive, deregulatory, and national policy goals Congress articulated in the 1996 Act, and it is against those objectives that I will consider the present bill.

Before addressing more specifically the bill before us, I do want to sketch briefly what I believe, ideally, communications reform legislation should include.<sup>1</sup> In light of the realities of the current communications marketplace, ideally, Congress would jettison most of the current statute, that at its core is grounded in many different service definitions (“telecommunications”, “information service”, “cable service”, “mobile service”, and so on). These existing service definitions are based on what I have called “techno-functional constructs.”<sup>2</sup> I use this term because the service definitions are all tied to some combination of technical characteristics or functional capabilities. In a world of convergence driven by technological change, drawing distinctions for regulatory

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<sup>1</sup> Not surprisingly, much of what I sketch here is embodied in the work of PFF’s DACA Project. For all of the reports and other materials that have been published thus far in connection with the project, see <http://www.pff.org/daca/>.

<sup>2</sup> See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L. J. 103 (2006).

purposes between and among the variously-denominated services becomes a largely metaphysical exercise.<sup>3</sup>

In today's digital age, this regime of so-called "stovepipe" regulation should be replaced by a new market-oriented regulatory paradigm based on competition law principles grounded in antitrust-like jurisprudence enforced by the Federal Communications Commission.<sup>4</sup> Under the DACA proposal, most of the FCC's regulatory actions would be subject to an "unfair competition" standard—akin to the standard employed by the FTC under the Federal Trade Act. This unfair competition standard, which would be at the heart of the new communications law, would anchor the FCC's regulatory activities firmly in market-oriented competition analysis. I will say more about this proposed regime, which like antitrust law, makes competition and consumer welfare paramount, when I discuss Title II, the bill's broadband provision. Here I just want to add that, in light of the radical marketplace changes I have described, ideally Congress would enact a comprehensive reform of the nation's communications laws that would include, in addition to the change in regulatory paradigm, (1) alteration of the division of jurisdictional authority that recognizes the increasingly national and international nature of communications; (2) reform of the universal service system of subsidies that recognizes the extent to which consumers in rural areas and low income consumers have opportunities to avail themselves of new, lower-cost communications technologies than those traditionally supported by the subsidies; and (3) reform of spectrum policy that

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<sup>3</sup> Id. And see Randolph J. May, *The Metaphysics of VoIP*, CNET News, January 5, 2004, available at [http://news.com.com/The+metaphysics+of+VoIP/2010-7352\\_3-5134896.html](http://news.com.com/The+metaphysics+of+VoIP/2010-7352_3-5134896.html).

<sup>4</sup> For a bill that embodies this new market-oriented regulatory paradigm, see S. 2113, the "Digital Age Communications Act," introduced by Sen. Jim DeMint on December 15, 2006. Sen. DeMint's bill is modeled on the recommendations and legislative proposal contained in the DACA Regulatory Framework Working Group Report, Release 1.0, which may be found at <http://www.pff.org/issues-pubs/other/050617regframework.pdf>.

recognizes that increased flexibility of use and more secure property-like rights leads to more efficient and consumer-welfare enhancing use of this valuable resource.<sup>5</sup>

## II. The Net Neutrality Provision

Now I want to turn to the bill before us. Although it is only two pages, I first want to address Title II, “Enforcement of Broadband Policy Statement.” This section is very important, in a fundamental sense, to the future development of the broadband and Internet markets, and, indeed, to the future of sound communications law reform. In essence, this section provides that the FCC has authority to enforce, through adjudications and not rulemakings, the four “connectivity” principles the agency adopted in August 2005. The bill provides that if “the Commission determines that such a violation [of the principles] has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein.”<sup>6</sup>

The FCC’s September 2005 policy statement describes the broadband principles as follows: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and services

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<sup>5</sup> For the DACA Project’s proposal in each of these areas, see Report from the Working Group on Federal-State Framework, Release 2.01, at [http://www.pff.org/issues-pubs/books/051026daca\\_fed\\_state\\_report2.01.pdf](http://www.pff.org/issues-pubs/books/051026daca_fed_state_report2.01.pdf); Proposal of the Universal Service Working Group, Release 2.0, at <http://www.pff.org/issues-pubs/books/051207daca-usf-2.0.pdf>; and Report from the Working Group on New Spectrum Policy, Release 1.0, at <http://www.pff.org/issues-pubs/books/060309dacaspectrum1.0.pdf>.

<sup>6</sup> Proposed new Section 715 (b)(2).

providers, and content providers.<sup>7</sup> (Note here that this last principle, as I read it, appears to extend the FCC purview to application and content providers, such as Google, EBay, and Yahoo, perhaps providing a basis for complaints to the FCC that the market segments in which they participate are not “competitive”.) When adopted, the Commission characterized the principles as “guidance”, not rules in the sense of positive law, although it said that “to ensure consumers benefit from innovation that comes from competition, the Commission will incorporate the above principles into its ongoing policymaking activities.”<sup>8</sup>

The FCC’s principles embody the bundle of access rights that are often referred to as “Net Neutrality” mandates. I want to explain first why it is far preferable for Congress **not** to enact into law any specific net neutrality provision mandating access rights and non-discrimination obligations. And then I want to explain why, assuming for the sake of argument that it nevertheless does so, any such net neutrality-specific provision, such as the one included in the bill, should be revised as I suggest below.

It is important to emphasize again here the increasing competitiveness, and the existing contestability, of the broadband marketplace, makes it very unlikely that broadband operators will take any actions of the type intended to be prohibited by the net neutrality prohibitions which consumers value. If they did, consumers would switch broadband providers. Broadband operators are in the distribution business. Consumers don’t demand “bare” broadband by itself, of course; they want the content that broadband

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<sup>7</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-151, CC Docket No. 02-33, September 23, 2005.

<sup>8</sup> Id. Indeed, shortly thereafter, when the agency approved the mergers of SBC Communications, Inc. and AT&T Corp. and Verizon Communications Inc. and MCI, it incorporated into its approval a condition requiring that the merger applicants “conduct business in a way that comports with the Commission’s Internet policy statement....”

distribution provides. If they are going to invest billions of dollars building out new broadband networks, it is safe to assume that the operators will not find it in their interest to block or impede subscribers from accessing services and content that the customers find valuable.

It is also true that when broadband operators contemplate investing billions of dollars in new high-speed networks, the ability to bundle distribution with content, and to enter into efficient business arrangements with unaffiliated content and applications providers, may be crucial to providing the incentive to invest. In this regard, the ability of an operator to differentiate its service from that of another operator, or even in some circumstances to discriminate among unaffiliated providers, may be critical to the decision to invest in new networks and service applications. As the members of the DACA Regulatory Framework Working Group explained in a recent joint statement: “Competitive markets often involve legitimate price and service discrimination, and network owners often are pursuing legitimate technological or business objectives in particular cases.”<sup>9</sup> To take one example, new broadband wireless entrant Clearwire apparently gave Bell Canada exclusive rights to distribute VoIP over Clearwire’s broadband network in exchange for a \$100 million investment by Bell Canada. Would consumers be better off if this “discrimination” were prohibited and Clearwire’s new network not built? I don’t think so.

In any event, although we have yet to see more than a handful of claimed instances of abuse occur, my purpose here is not to argue that, in today’s environment, there might not be some instances in which, due to the particular marketplace circumstances, we ought to be concerned about discriminatory conduct or denial of

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<sup>9</sup> See a Statement of the DACA Regulatory Framework Group attached as Appendix A.

access rights of the type encompassed by the FCC's broadband principles. Perhaps the oft-cited case involving Madison River, in which the dominant local telephone company allegedly refused to provide access to its network to independent VoIP providers is just such an instance. My purpose here is to suggest that it is important that Congress not enact a provision that is—or that even possibly will be turned into—a broad, overly-inclusive net neutrality mandate. Rather, if Congress insists on dealing with this issue in this bill, it should incorporate into the provision the unfair competition standard that is at the heart of PFF's DACA regulatory framework. And it should specifically tie the FCC's authority to enforce the broadband principles to violations of the unfair competition standard.

The bill already adopts one of the key elements of the DACA recommendation in that the Commission must proceed through adjudication in deciding whether the broadband principles have been violated. Because rulemakings, especially as the FCC has conducted them in the past decade or so, often are interminable proceedings that, when completed, lead to overly broad and vague anticipatory prohibitions, the bill's preference for case-by-case adjudications is very commendable. The Committee might consider imposing a time limit upon the Commission for deciding complaints to ensure that net neutrality-like complaints are decided in a timely fashion, and it might make clear that the agency has the authority, upon a strict showing that there is a substantial likelihood the complainant will prevail on the merits and will otherwise suffer substantial and irreparable harm, to issue administrative injunctive relief, pending the prompt final decision.

While the preference for adjudicatory proceedings is positive, alone it is not sufficient to ensure that the new law will not be interpreted by the agency, or by the courts upon review of the agency's decisions, in a way that is essentially equivalent to traditional common carrier principles. Indeed, that is what the net neutrality advocates seek. The hallmark of common carriage is the obligation not to discriminate and to charge "reasonable" rates. In effect, it is a very short (or non-existent) leap from enforcing the principle that consumers are entitled to access any content of their choice to determining that the provider may not differentiate its service from another provider by favoring some content and applications over others. Such common carrier regulation may have been appropriate in an era generally characterized by monopolistic service providers, but it is not appropriate in today's competitive broadband environment. As explained above, in a competitive marketplace, imposing common carrier-like obligations stifles investment and innovation and puts a drag on the overall economy.

Therefore, the Committee should revise the broadband section to provide that the FCC may find a violation of the broadband principles only if it finds that the broadband operator has committed an unfair competitive practice. An unfair competitive practice should be defined as an act that presents "a threat of abuse of significant and non-transitory market power as determined by the Commission consistent with the application of jurisprudential principles grounded in market-oriented competition analysis" such as that commonly employed by the FTC and the Department of Justice in enforcing the antitrust law. Incorporation of this competition standard will force the FCC to ground its decisions in rigorous economic analysis based on the marketplace realities at the time of the complaint. Under the specific circumstances of the case, the FCC would examine

factors such as the number of existing and potential competitors, barriers to entry, technological dynamism in the markets at issue, and impacts on investment and innovation. Thus, for example, in a case such as Madison River, the agency might well find that that the complainant has proved an anticompetitive practice that should be remedied, while in the Clearwire example, the agency might well determine that under those circumstances that the exclusive arrangement does not constitute an anticompetitive practice. Moreover, if the agency does find that an unfair competitive practice has been committed, in the adjudicatory proceeding that the bill wisely envisions, it can tailor the remedy to fit the circumstances. So, in conclusion, if the broadband section is to remain in the bill despite my recommendation that it not be included, a competition standard such as I have suggested should be married with the requirement for case-by-case adjudications.

### **III. Video Competition**

The section of the bill creating a national franchise for cable operators<sup>10</sup> is a positive step that will further enhance and speed up the development of competition in the multichannel video market and, more broadly, the broadband market. Harking back to the stated goals of the 1996 Act that I mentioned earlier—pro-competitive, deregulatory, and a national policy—the video section generally furthers those goals. Nevertheless, in light of the competition that presently exists and which will continue to develop, the

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<sup>10</sup> It is useful to have in mind that the bill retains the existing “stovepipe” definitions to which I referred earlier, even though convergence is rendering them obsolete. In today’s digital environment the traditional “cable operators” such as Comcast provide voice and data communications over the same broadband “pipes” that they provide video programming, and the new “cable operators” such as Verizon will provide video over the same digital broadband pipes that carry voice and data communications. These services that now go by the name of video, voice, and data are all carried in the same digital stream and are represented by different 1s and 0s traveling along together.

Committee should consider going further to reduce the regulatory requirements applicable to the cable operators, especially in the area of content regulation, where the First Amendment rights of the providers are implicated. And, once it establishes a national framework for cable operators applicable to new entrants and incumbents, as much as possible, it should apply to them in like manner.

Competition in the video marketplace has been increasing steadily over the past decade or so. I went back and examined the FCC Annual Video Competition Report that was issued in January 2000. There, while noting that cable and satellite operators dominated the marketplace, the FCC stated that the following entities were also providing video programming alternatives in some places: wireless cable operators, SMATV systems, local telephone companies, Internet video, home video sales and rentals, and electric utilities. Obviously, not all of these entities (for example, electric utilities or local telcos) were meaningful competitors or even, at that time, exerted meaningful pressure on the market as potential competitors. But, looking ahead, it was easy for the FCC to conclude then that, “[t]he technological advances that will permit MVPDs to increase both quantity of service (ie., an increased number of channels using the same amount of bandwidth or spectrum space) and types of offerings (e.g. interactive services) continue.”<sup>11</sup>

Fast forward to this year. In its 12<sup>th</sup> Annual Video Competition Report, the FCC recently concluded:

In this year’s Video Competition Report, the FCC finds that the competitive MVPD market continues to provide consumers with increased choice, better picture quality, and greater technological innovation. The report concludes that almost all consumers may opt to receive video

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<sup>11</sup> Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, FCC 99-418, January 14, 2000.

services from over-the-air broadcast television, a cable service, and at least two DBS providers. In addition, a growing number of consumers can access video programming through digital broadcast spectrum, fiber to the node or to the premises, or video over the Internet. Moreover, once consumers have selected a provider, technology such as advanced set-top boxes, digital video recorders, and mobile video services give them even more control over what, when, and how they receive information. Furthermore, many MVPDs offer nonvideo services in tandem with their traditional video services.<sup>12</sup>

So, we have seen the video marketplace become increasingly competitive over the past decade, due largely to technological advances. But there is no doubt that the market will become even more competitive—even more quickly—if national franchises are available as an option to replace the more than existing 30,000 local franchising authorities (“LFAs”). In the past, in granting and overseeing franchises to cable operators, the LFAs played a role akin to a traditional public utility regulator. While they served other claimed purposes as well, such as managing the cable operators’ use of public rights-of ways and imposing social obligations such as making available free of charge Public, Educational, and Government (“PEG”) channels and institutional facilities for government use, in essence the LFAs primarily were seen by the local governments as a way to constrain market power. This public utility-type regulatory function demonstrably is no longer necessary. Under a general national franchise regime such as that proposed in the bill, the authority of the LFAs to manage ROWs can still be maintained and properly constrained, and Congress can make judgments concerning, whether in the current and anticipated market environment, it is consistent with sound policy to maintain the non-economic regulatory social obligations.

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<sup>12</sup> News Release, “FCC Issues 12<sup>th</sup> Annual Report to Congress on Video Competition,” February 10, 2006.

While endorsing the national franchise approach, and commending the Committee for avoiding the imposition of unnecessary build-out requirements, here are some suggestions to consider for improving the bill further:

- Once a decision is made to implement a national franchise regime in light of the changed competitive environment and lack of need for traditional economic regulation, it is not clear why the LFA should be able to petition to revoke a national franchise obtained by an incumbent cable operator if no new competitor provides service in the franchise area during a one year period. There is a sound policy basis for providing the national franchise option that is not dependent on whether a particular competitor enters or remains in the market.
- Again, in light of the changes in the competitive environment, it is time to consider eliminating the PEG and institutional network mandates. In an environment in which there are a multiplicity of information sources for educational and government programming activities, the rationale for maintaining that “cable operators”, incumbent or otherwise, (as opposed to local newspapers, Internet sites, broadcasters, etc.) must turn over their facilities for PEG channels is very weak. Whatever the original merits of the extraction of these channels for public use, the purposes for which they are intended can be met—and almost certainly are being met today—in the free marketplace absent government compulsion. Certainly government mandates on private communications systems to carry particular types of programming implicates First Amendment free speech interests. And the PEG mandates, along with the mandate for continued support of the institutional networks of the localities implicates the property rights of the private operators under the Fifth Amendment. I suggest that, in the competitive marketplace environment that is now a reality, increased sensitivity to these free speech and property-rights constitutional considerations by Congress will also point the way towards sound communications law and policy.

#### **IV. Conclusion**

The Committee should be commended for the substantial progress it has made since the earlier two staff drafts in proposing a bill that will represent sound communications policy. As for the Broadband Policy section, it would be far preferable for Congress to do nothing at all now to include a net neutrality-specific provision in the bill. There certainly have not been more than a few scattered instances of alleged marketplace abuses. Moreover, in the increasingly competitive broadband marketplace, there is no reason to anticipate that broadband operators will not be responsive to making available services that consumers value. Assuming for the sake of argument that Congress is intent on including a net-neutrality-specific provision, however, it should explicitly tie enforcement of the FCC's broadband principles to determinations made under a market-oriented unfair competition standard such as the one I suggest in my testimony. Absent clearly tying any FCC authority to a competition-based standard that will require the FCC to undertake a rigorous fact-based economic analysis on the particular marketplace circumstances at the time, there is a great danger that enforcement of the access mandates at the core of the broadband principles will turn into a general common carrier mandate for broadband operators. Extending the non-discrimination obligations and rate regulation requirements that are hallmarks of a common carrier regime and which may have been appropriate in a monopolistic narrowband environment to the competitive broadband era will certainly stifle new investment and innovation and impose an overall drag on the nation's economy.

In light of the competition that already exists in the video marketplace, and the potential for even more competition from telephone companies and other new entrants,

there is no longer any rationale for local franchising authorities to play a public utility-type economic regulatory role. This is true for new entrants such as the telephone companies and for incumbent cable operators alike. The proposal for a national franchise will speed the development of further competition. At the same time, the Committee should consider further improvements in the video section of the bill suggested in my testimony.

**The Digital Age Communications Act's Regulatory Framework  
and Network Neutrality**

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**A Statement of the DACA Regulatory Framework Working Group\***

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One of the hottest issues in the current telecommunications reform debate is the discussion of “Network Neutrality,” which generally refers to a nondiscrimination mandate for all broadband Internet networks similar to the common-carrier rule that applied to traditional telecommunications services in a monopolistic era. Most of the legislative proposals for telecom reform include a Network Neutrality rule,<sup>1</sup> and the FCC in 2005 issued a policy statement in which it backed a version of Net Neutrality principles.<sup>2</sup> The exception to this trend is Senator Jim DeMint’s “Digital Age Communications Act.”<sup>3</sup>

Senator DeMint’s bill echoes much of the position taken by the DACA Regulatory Framework Working Group.<sup>4</sup> This release explains the general structure of the DACA proposal, and explains why it provides a better framework for dealing with Network Neutrality issues. In brief, DACA adopts an “unfair competition” standard which is based on competition law and economics and which is robust enough to deal

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\*This statement is adapted from remarks delivered by James B. Speta at the March 9, 2006 Digital Age Communications Act Conference in Washington, DC.

<sup>1</sup> The most recent bill to be introduced is S. 2360, Senator Ron Wyden’s “Internet Non-Discrimination Act of 2006.” This bill provides that a network operator shall not “interfere with, block, degrade, alter, modify, impair, or change any bits, content, application or service transmitted over the network of such operator.” And it also provides that “a network operator shall...offer just, reasonable, and non-discriminatory rates, terms, and conditions” for all its broadband services.

<sup>2</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-151, CC Docket No. 02-33, September 23, 2005.

<sup>3</sup> S. 2113, Digital Age Communications Act, December 15, 2005. S. 2113 embodies the proposals released by The Progress and Freedom Foundation’s Digital Age Communications Act (“DACA”) Regulatory Framework, Federal-State Relations, and Universal Service Working Groups.

<sup>4</sup> See Proposal of the Regulatory Framework Working Group, Digital Age Communications Act (Rel. 1.0, June 2005) (available at <http://www.pff.org/daca>).

with truly anticompetitive instances of exclusion on the Internet, but without prejudging business practices that may spur investment and deployment of new facilities and services. DACA's case-by-case approach to Network Neutrality is superior, because it avoids thickets of ex ante rules while maintaining the availability of ex post relief.

### *The DACA Regulatory Framework In General*

The DACA framework is designed to respond to two well-known and, in our view, largely incontestable developments. First, communications markets are increasingly competitive. Although that competition is not perfect and does not mirror the stylized markets of microeconomics textbooks with very large number of competitors, technological developments have increased – and are likely to continue to increase – competition in communications. Second, those same technological developments mean that service-based regulatory categories – one kind of regulation for telecommunications carriers, another for information services, and another for cable services – are no longer sustainable.<sup>5</sup>

The DACA is a technologically neutral regulatory paradigm, in that the Federal Communications Commission is given the same regulatory authority over all electronic communications networks. That regulatory authority is two-fold. The agency's principal authority is to punish and prevent "unfair methods of competition," which is a phrase intentionally borrowed from the Federal Trade Commission Act. The core idea is to punish and prevent practices that violate competition law principles (or that potentially would do so). Thus, DACA charges the agency to condemn "practices that present a threat of abuse of significant and non-transitory market power" consistent with market-oriented competition principles.<sup>6</sup>

Beyond the general incorporation of competition law principles, DACA also states that it is an unfair method of competition to substantially impede the interconnection of public communications facilities and services in circumstances in which the denial of interconnection causes substantial harm to consumer welfare. This "interconnection authority" is not necessarily dependent on traditional antitrust doctrine. Given the result of the *Trinko* case<sup>7</sup> and the importance of interconnection in communications markets, the DACA provides separate authority for the FCC to order interconnection. But this authority, under DACA, must still be linked to a theory of consumer welfare.<sup>8</sup> It is important to recognize that net neutrality is linked to the welfare of independent content and applications providers, but not to a sound theory of consumer or aggregate welfare. Even the most nuanced versions of network neutrality limit a network's ability to charge an application that imposes comparatively high costs on a network accordingly, leaving the network to recover at least some of those costs through subscription prices paid by consumers. Net neutrality thus risks being regressive:

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<sup>5</sup> See, e.g., Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. Com. L. J. 103 (2006).

<sup>6</sup> DACA § 4(a).

<sup>7</sup> *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>8</sup> DACA § 4(b).

relatively low use consumers within a service tier may end up subsidizing those consumers whose use imposes relatively high costs on the network.

A last, general point about DACA: the regulatory framework is expressly tilted towards resolving competition problems that arise through adjudication and *ex post* remedies. The agency is still given rulemaking authority, although it must meet a higher evidentiary burden before promulgating rules. But the statute contemplates, and we prefer, the agency to act not through the development of a thicket of rules, but through case-by-case considerations.

### *Net Neutrality Claims Under the DACA Framework*

Although there is some – indeed, it is fair to say, much – disagreement about how a network neutrality rule would operate in practice, such a rule is essentially an attempt to impose on the Internet the sort of nondiscrimination rule that traditional common carrier regulation has long imposed on telephone companies. The supposed point of network neutrality is to ensure access for applications and content providers, against the alleged incentives that network providers might have to deny or degrade access to certain unaffiliated content and services.

DACA proposes to handle these issues without the necessity of a specific rule, and without the need for a blanket rule that tries to anticipate every imaginable harm, and which would present opportunities for regulatory litigation. Antitrust law and economics has a well-developed body of learning about acts of vertical foreclosure – which is what denials of access would be.<sup>9</sup> Network neutrality may be a new label, but it is just a specific example of a more general competition issue with which there is over a century of enforcement experience and accumulated knowledge. Antitrust analysis takes into account the possibility of foreclosure, but also looks on a case-by-case basis for justified or efficient business arrangements. Competitive markets often involve legitimate price and service discrimination, and network owners often are pursuing legitimate technological or business objectives in particular cases. The “unfair competition” prohibition in DACA provides sufficient authority for the FCC to condemn and prevent anticompetitive violations of network neutrality. Indeed, DACA goes beyond antitrust law by giving the FCC authority to regulate vertical interconnection where necessary to protect consumers. For Congress to legislate such interconnection in advance of actual market experience to justify its necessity risks economic harm to consumers and producers—harm that has not been adequately considered in the case for network neutrality. An *ex ante* approach to actual harm, backed by the FCC’s proposed authority under DACA, provides a more targeted approach to real harms. To take only the most famous case to date of a Network Neutrality complaint, the Madison River foreclosure of a competing VoIP provider,<sup>10</sup> antitrust analysis would handle this as a classic monopoly maintenance scenario. At the same time, DACA’s case-by-case approach preserves the

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<sup>9</sup> For one excellent summary of the economics as applied to Internet access, see Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech. 85, 117-18 (2003).

<sup>10</sup> In the Matter of Madison River Communications, LLC, 20 F.C.C. Rcd. 4295 (2005).

space companies need to develop new network facilities and services and to enter into new business arrangements.

In addition, DACA's interconnection authority would also achieve a substantial amount of the same openness that network neutrality proponents claim to be seeking. In particular, net neutrality would allow applications and content providers to reach users of all interconnected carriers, so long as they are able to reach a negotiated agreement with some carrier. The necessity of one negotiated agreement is an important check on regulatory opportunism, however. It channels efforts at entry into the marketplace and away from litigation at the FCC.

### *Conclusion*

Given that DACA has the analytic power and the regulatory tools necessary to handle truly anticompetitive network neutrality issues, institutional design becomes all important. And the institutional design of the DACA framework and the way that it would handle net neutrality issues comes back to its fundamental premises. One of DACA's fundamental premises is that, given developing competition, an extensive web of *ex ante* rules would have unintended consequences that would harm consumers and likely stifle markets. DACA is also premised on the view that infrastructure providers will act, in general, to promote applications and services that consumers want. Consumers do not purchase bandwidth for its own sake; they buy connections if those connections provide services and applications that consumers want.<sup>11</sup>

And so, if the evidence supports the requisite conditions – that the markets will be reasonably competitive, that the risks of truly anticompetitive actions are reasonably small, and that antitrust-based competition analysis is powerful enough to address it when it happens – then DACA is the right framework through which to address net neutrality.

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<sup>11</sup> For this argument, *see, e.g.*, James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (2000).