H.R. 5252, the "Communications Opportunity, Promotion, and Enhancement Act of 2006"
Dissenting Views of Representatives John D. Dingell, Henry A. Waxman, Edward J. Markey, Anna G. Eshoo, Lois Capps, Michael F. Doyle, Jan Schakowsky, Hilda L. Solis, and Tammy Baldwin

We oppose H.R. 5252, the "Communications Opportunity, Promotion, and Enhancement Act of 2006", (COPE Act) as reported. While some consumers may see more cable and broadband competition from this bill, far too many will be worse off after the bill than they are today. This reality cannot be ignored, so we cannot support the legislation.

The COPE Act represents a dramatic departure from historic communications policy goals of universal service, localism, and diversity. It abandons universal service in a way that will result in higher cable rates for certain customers, shoddy service quality, or outright withdrawal of cable service. It undermines localism in the delivery of cable service and resolution of disputes. It overturns a decade of forward-thinking policies fostering broadband networks and a hands-off treatment of the Internet by blessing the broadband designs of network operators at the expense of innovators, entrepreneurs, and individual citizens.

In short, this bill is bad for consumers, bad for communities, and bad for citizens of the Internet. We offered amendments that would have addressed several shortcomings, yet those amendments were defeated, mostly along party lines. Without curing the bill's many infirmities, we remain concerned that this bill does consumers and Internet users more harm than good.

The Bill Overturns Longstanding Cable Universal Service Requirements

Supporters of the bill tout its potential to accelerate competition to cable, a worthy goal. But the competition they envision will not extend to all consumers in all parts of town. New wireline competitors to cable may very well result in lower prices and better services for residents of the areas facing head-to-head competition, but everyone else may be worse off. As explained below, people living in areas bypassed by the competition could see higher prices, diminished quality of service, and deteriorating facilities, and be foreclosed from the innovative features and services yet to come.

The bill grants new cable operators access to a community's public rights-of-way without any obligation to serve the entire community. All national franchisees, including new entrants and incumbent cable operators, will be able to select the most lucrative households to serve while ignoring others. This is a reversal of decades of Congressional policies designed to ensure universal service to communications services. If there is value in the universal availability of cable service, then this value will be lost.

Currently, cable operators must offer their services throughout entire franchise areas. Commonly referred to as a "buildout" requirement, this universal service principle is a recognition that as part and parcel of using the public rights-of-way, cable operators must extend service to all the public. The Communications Act specifies that a local franchising authority

must allow a reasonable period of time for a cable operator to become capable of providing cable service to all households in the franchise area. The COPE Act eliminates this requirement – not just for new entrants, but for incumbent cable operators once a new entrant has offered service anywhere in the franchise area.

Several consequences flow from eliminating a buildout requirement on incumbent operators and allowing new entrants to cherry pick their customers. At a hearing on the bill in the Subcommittee on Telecommunications and the Internet, a cable industry representative testified that the industry could not pledge (1) they would not withdraw service in certain areas, (2) they would not target service upgrades only to competitive neighborhoods, or (3) they would not increase rates in some areas to subsidize lower rates in competitive areas.

First, some consumers could actually lose cable service altogether. Once cable companies switch to a national franchise, they can choose not to continue serving all of the households they currently are required to serve. Without a buildout requirement, those abandoned customers have little recourse to complain about the withdrawal of their service. For those who believe that cable operators with facilities already in the ground are unlikely to withdraw service, can we be confident that is the case in areas like the Ninth Ward of New Orleans following a hurricane or other areas where disaster strikes? There may be other areas where, in order to focus on competing in other areas, the incumbent operator may choose to stop serving outlying parts of the franchise area, or sell off systems to a smaller operator with more limited means of obtaining programming. If this bill were to pass in its current form, those residents may lose their only provider of cable service. That would represent a radical departure from this Committee's commitment to universal service.

Second, even if service is not withdrawn, the bill lets operators avoid maintaining or upgrading facilities in certain neighborhoods, which could result in differing levels of service depending on the demographics of a neighborhood. Some parts of town may receive high-quality, cutting edge services as families across town see their service and facilities deteriorate. Although the incumbent's cable system has already been built, the system will require upgrades, maintenance, and expansion, particularly where population growth occurs. Removing the universal service requirement may mean that it is no longer profitable for an incumbent cable operator to incur the costs of upgrading service in the areas not facing competition, as it deploys more resources into competitive areas. The lack of equitable upgrades of cable facilities has sparked consumer backlash in the past, and will likely do so again.

Third, many consumers could face higher cable rates as a result of this legislation. When a national franchisee enters only part of an incumbent cable operator's franchise area, the incumbent may respond by lowering prices in that area. To offset this reduction, the cable operator may decide to charge a higher price in the parts of the franchise area where there is no new entry. In that case, the very consumers that do not share in the cable competition will see their cable rates increase. We should give careful consideration to any measure that promises to lower cable rates for some, but increases cable rates for others.

As reported, the bill will create the digital equivalent of gated communities in our cities, towns, and countryside. To correct this injustice, Democrats unsuccessfully sought to amend the bill with a carefully constructed, market-based, buildout amendment. The amendment was based on the simple premise in communications policy that in return for public rights-of-way privileges in a community, all of the public should benefit. Maintaining a buildout obligation would prevent cable operators from engaging in discriminatory behavior and go a long way toward ensuring that all consumers are able to choose from competing cable operators.

The amendment would have required a phased-in buildout approach within a franchise area. The buildout requirement was market-based, applying only if a provider's business plan is successful. It was also incremental, requiring buildout over time. Finally, it was flexible, allowing operators to meet obligations in rural and high cost areas using any comparable alternative technology, such as wireless.

The Democratic buildout amendment would benefit consumers by:

(1) Guarding against economic discrimination through the maintenance of universal service principles and prevention of permanent cherry picking by new entrants.

(2) Creating market-based incremental service requirements for national franchisees in exchange for their use of the public rights-of-way in a manner which would not overburden new entrants in their initial deployment of service and would account for small startup providers.

(3) Creating a level playing field for new entrants by complementing the incumbent cable operator's current requirement to serve the entire franchise area.

(4) Closing the digital divide by ensuring that all consumers benefit from the use of the public rights-of-way and eventually gain access to competitive service providers.

(5) Protecting consumers from operators failing to upgrade or equitably serve portions of the franchise area given that the new competitor will eventually extend comparable service to those areas.

(6) Mitigating against operators charging selective higher prices to different parts of a franchise area in view of the fact that competition will eventually extend throughout the franchise area.

A buildout requirement is not a mere vestige of a bygone monopoly era. Like other franchise requirements, a buildout obligation is part of the pact with the public over the use of public rights-of-way. It is grounded in the use of the public's property, and not in the provision of a monopoly service. In fact, current law prevents localities from granting exclusive cable franchises. Even the Federal Government, when it turns over the public's property rights through spectrum licenses, has traditionally imposed buildout and other requirements on private

companies that gain the right to use government property for their own commercial interests. For example, in wireless service, the Federal Government imposed construction and buildout requirements to foster ubiquitous deployment of service, particularly to rural areas.

Universal service requirements, which are not unique to the cable industry, are grounded in equitable considerations, economic development, and even economic efficiencies in networked industries. Even though the amendment would have imposed a buildout requirement on new entrants five years after their entry into the marketplace, in the end all potential customers in the franchise area would have had the ability to share in the competitive cable service. This Committee has long sought to ensure universal availability of cutting edge communications infrastructure and services throughout the nation. We are not prepared to jettison that principle.

The Bill Imposes a Weak Redlining Protection

As a general matter, reliance upon an after-the-fact redlining complaint process where the onus is on aggrieved households to prove outright economic discrimination is a less-than-satisfactory replacement for a principle of fairness that has served our country well for decades. But if the COPE Act is going to abandon the requirement in current law for cable operators to offer service throughout an entire franchise area, then the bill needs a strong anti-discrimination provision to assure that services are made available equitably across all our communities. Unfortunately, as drafted, the bill contains a provision that purports to prevent discrimination, but it is weak and may prove ineffective. Several Democratic amendments that sought to strengthen the anti-redlining protections were defeated, largely along party lines.

The failure to provide a communications service, or the offering of inferior service, to a certain neighborhood or community through redlining undercuts economic development and could imperil the ability of those communities to participate in the information age.

Numerous parties, in letters and testimony before the Committee, supported strengthening the anti-discrimination provision. According to a joint filing in the Federal Communications Commission's (FCC) local franchising proceeding by 34 organizations,[1] a credible anti-redlining regulatory program should perform the following functions: (1) specify what constitutes discrimination (e.g., discrimination based on race, household wealth, age and condition of the

[1] Minority Media and Telecommunications Council; Advancement Project; American Federation of Television and Radio Artists (AFTRA); American Indians in Film and Television; Asian American Justice Center; Asian Law Caucus; Black College Communication Association; Center for Asian American Media; Fairness and Accuracy in Reporting; Hispanic Americans for Fairness in Media; Labor Council for Latin American Advancement; Lawyers' Committee for Civil Rights; League of United Latin American Citizens; Minority Business Enterprise Legal Defense and Education Fund; National Association for Multi-Ethnicity in Communications; National Association of Black Journalists; National Association of Black Owned Broadcasters; National Association of Black Telecommunications Professionals; National Association of Hispanic Journalists; National Association of Hispanics in Information Technology and Telecommunications; National Association of Latino Independent Producers; National Bar Association; National Coalition of Hispanic Organizations; National Council of Churches; National Indian Telecommunications Institute; National Institute for Latino Policy; National Puerto Rican Coalition; Native American Public Telecommunications; Office of Communication of the United Church of Christ; Puerto Rican Legal Defense and Education Fund; Rainbow/Push Coalition; The Links; Women's Institute for Freedom of the Press.

physical plant, genders of heads of households, rental or home ownership status, local crime rates, supposed creditworthiness, or the cost of obtaining and maintaining insurance in a particular area); (2) define specifically, and in terms understandable to lay people, what constitutes redlining and what services are covered by this definition (e.g., promotional campaigns, responsiveness to service and repair calls, and locations of neighborhood sales and bill-paying offices); (3) apply an impact standard rather than an intent standard; (4) specify who decides when redlining has occurred; (5) specify the evidence needed to compel a hearing or trial to determine whether redlining has occurred in a specific community; (6) broadly afford standing to complain and explain how parties may demonstrate standing; (7) provide meaningful, prompt and enforceable remedies and relief; (8) prohibit mandatory arbitration and provide individuals with other fora in which to adjudicate complaints alleging redlining in the provision of communications services; (9) establish an accessible venue for appellate review; (10) provide for the applicability of the Civil Rights Attorneys Fees Act of 1976 or other provisions to encourage the private bar to assume the risks attendant to bringing these cases; (11) afford a new entrant a means of obtaining pre-clearance of its buildout plans, with such pre-clearance establishing a rebuttable presumption that the company will not redline; and (12) perhaps allow a new entrant (and the incumbent) to choose among regulatory options, such that the fulfillment of the chosen option would be sufficient to allow for buildout to commence without delay while the granular details of anti-redlining reporting are being finalized.

When compared against these criteria, the bill's anti-redlining provision does not measure up. The bill prohibits denial of access to cable service on the basis of income within a franchise area and imposes heavy fines for proven violations. Yet, in practice, the provision does little to assure that discrimination will not take place. Among some of its most glaring deficiencies: First, the provision prohibits only income-based denials of service, potentially leaving unanswered discrimination on the basis of race, color, religion, national origin, sex and other factors. Second, it only addresses denial of access, which, depending on how it will be interpreted, potentially leaves companies able to provide inferior service, unequal upgrades, and less timely repairs. Third, it requires the FCC, with little experience in civil rights issues, not localities, to handle all complaints, and then requires confidential treatment of the investigative materials. Fourth, it appears to require proof of discriminatory intent, rather than the impact standard of traditional civil rights laws. Fifth, even if a violation is proven, it offers no assurance of how quickly the affected consumers will be served beyond an unspecified "reasonable" time.

Several Democratic amendments sought to strengthen the protections against redlining and were defeated. An amendment offered by Rep. Solis would have expanded the prohibited bases of discrimination beyond income to address denial of access on the basis of race, color, religion, national origin, or sex. An amendment offered by Rep. Waxman would have added to the scope of prohibited discrimination by addressing the offering of inferior access, not just denial of access. Consistent with traditional civil rights enforcement, that amendment also would have clarified that the prohibition extends to the offering of service in a manner that has the purpose or effect of discriminating against a group on the basis of income. An amendment

offered by Rep. Baldwin would have given the local franchising authorities with knowledge of the affected geographic areas the responsibility to determine first whether income-based discrimination had occurred, with an appeal to the FCC. These amendments would have gone a long way toward strengthening the bill's anti-discrimination provision so that it could achieve its intended purposes and adequately protect the public. Without them, there is little assurance of equitable deployment of cable service from national franchisees.

The Bill Shifts Too Much Local Control to the FCC

The COPE Act undermines the ability of local governments to protect consumers, enforce local matters, and effectively manage the public rights-of-way.

The bill could be read to make the FCC the final arbiter of local rights-of-way disputes. While purporting to preserve municipal authority over rights-of-way matters, the bill overreaches and imposes a new "reasonableness" requirement over municipal regulation that, depending on how it will be interpreted, could leave communities having to defend the exercise of their municipal rights-of-way authority at the FCC in Washington, DC.

We believe strongly that incidents occurring in local rights-of-way are public safety concerns better addressed locally and immediately. The FCC, with no expertise concerning local streets, sidewalks, public safety, or traffic patterns, should not be regulating and second-guessing all local rights-of-way practices and disputes without regard to whether those practices concern run-of-the-mill daily disputes or rise to the level of constituting an overall barrier to entry.

Even beyond rights-of-way issues, the bill shifts too much responsibility to the FCC to handle the flood of cable complaints and requests for resolution of local disputes that may result. Although the bill enables local franchising authorities to enforce the consumer protection requirements and customer service standards, it does not specifically allow the franchising authorities to resolve other types of local disputes that may arise. For example, disputes over the carriage, quality, or interconnection of public, educational, and governmental access channels would seemingly have to be resolved in Washington at the FCC rather than locally.

An amendment offered by Rep. Dingell addressed several local governance matters, and was defeated on a largely party-line vote. First, the amendment would have preserved the status quo concerning the enforcement of municipal rights-of-way disputes by clarifying that the bill was not intended to grant authority to the FCC over enforcement of local rights-of-way matters. Second, the amendment would have required a national franchisee to certify that it will comply with municipal rights-of-way requirements as part of its national franchise certification. Third, the amendment sought to reduce anticipated ambiguity in the "gross revenues" definition and preserve the ability for cities to recover franchise fees on revenue from integrated features, functions and capabilities of video programming. Fourth, recognizing that disputes between a locality and a cable operator over the amount of franchise and other fees may be inevitable, the

amendment would have established a dispute resolution process for monetary disputes that would have encouraged parties to meet and settle their differences before filing a complaint at the FCC. Fifth, the amendment required the FCC, within the time frame outlined in the bill, to consult with and draw upon the expertise of franchising authorities when it establishes the rules and policies necessary to implement the national franchise.

An amendment by Rep. Doyle would have strengthened the overall enforcement of the national franchise by allowing local resolution of complaints in conjunction with the FCC. It would have clarified that, although the requirements of the national franchise would be established federally, the local franchising authorities would be given authority to enforce compliance with all Federal standards. Consumers, public access channel administrators, or anyone else with a complaint regarding the requirements of the national franchise would have been able to go before their local franchising authority for initial resolution of complaints, which would then be appealable to the FCC. The amendment was defeated, largely on a party-line vote.

The Bill Fails to Preserve the Free, Open and Innovative Internet

Background

The Internet was born out of taxpayer-funded projects starting in the 1960's. The pioneering use of "packet-switching," as opposed to traditional circuit-switching, also underscored a key founding feature of the nascent Internet, namely, that of open architecture networking. As an open architecture network, packets could traverse various independent networks from various providers to reach their destinations. In short, this meant that the Internet itself was not "owned" by anyone.

In 1991, the U.S. Government decided to take this Federal network and permit its commercialization. The astounding growth of the Internet since that time is a tribute to the fact that its open architecture permitted individuals to innovate, invest, exchange ideas, and traffic on a nondiscriminatory basis. This, in turn, fostered yet greater expansion of the Internet.

From 1991 to August of 2005, the Internet's nondiscriminatory nature was also protected from being compromised by historic communications laws that required such nondiscriminatory treatment by telecommunications carriers. In other words, no commercial telecommunications carrier could engage in discriminatory conduct regarding Internet traffic and Internet access because it was prohibited by law. The Telecommunications Act of 1996, by removing barriers to greater competition, induced the rapid introduction of broadband service across the country, with a concomitant growth in Internet access and activity.

These broadband networks have become the lifeblood of our digital economy. They also hold the promise of promoting further innovation in and creation of new markets and technologies, applications and services, jobs, and furthering the widespread dissemination of

educational, civic, and cultural information across communities and societies. The worldwide leadership that the U.S. provides in high technology is directly related to the government-driven policies over decades which have ensured that telecommunications networks are open to all lawful uses and all users. The Internet, which is accessible every day to more and more Americans on such broadband networks, was also founded upon an open architecture protocol and as a result it has provided low barriers to entry for that unleashed, explosive growth of web-based content, applications, and services.

In August of 2005, however, the Federal Communications Commission re-classified broadband access to the Internet in a way that removed such legal protections. It did not take long for the telecommunications carriers to respond to that decision. Just a few months later, the Chairman of then-SBC Communications made the following statement in a November 7 *Business Week* interview: "Now what they [Google, Yahoo, MSN] would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. . . ."

In a December 1, 2005, *Washington Post* article, a BellSouth executive indicated that his company wanted to strike deals to give certain Web sites priority treatment in reaching computer users. The article noted this would "significantly change how the Internet operates" and that the BellSouth executive said "his company should be allowed to charge a rival voice-over-Internet firm so that its service can operate with the same quality as BellSouth's offering." Meaning, that if the rival firm did not pay, or was not permitted to pay for competitive reasons, its service presumably would not "operate with the same quality" as BellSouth's own product.

Finally, on January 6, 2006, the CEO of Verizon, in an address to the Consumer Electronics Show, also indicated that Verizon would now be the corporate arbiter of how traffic would be treated when he said the following: "We have to make sure [content providers] don't sit on our network and chew up our capacity."

The corrosion of historic policies of nondiscrimination by the imposition of artificial bottlenecks by broadband network owners endangers economic growth, innovation, job creation, and First Amendment freedom of expression on such networks. Broadband network owners should not be able to determine who can and who cannot offer services over broadband networks or over the Internet. The detrimental effect to the digital economy would be quite severe if such conduct were permitted and became widespread. The COPE Act permits such conduct and as a result, puts the Internet in jeopardy.

Flawed Provisions in the COPE Act

In response to this threat to the open, nondiscriminatory nature of the Internet, the COPE Act, as reported, contains in Title II a purported "network neutrality" provision. This provision

permits the FCC to enforce its so-called "broadband policy statement." That policy statement, however, is a broadly-worded, imprecise statement of "feel-good" rhetoric intended to guide future agency decision-making but not, as the FCC Chairman indicated, to result in any enforceable protections or specific behavior requirements. It was not adopted subject to the thoroughness of the Administrative Procedures Act's (APA) notice-and-comment process. It was not adopted with any notion of enforcement attached to it. In essence, the COPE Act requires the FCC to enforce something that is of highly dubious enforceability.

For instance, the policy statement does not define broadband service. It does not indicate whether it covers wireless services, asynchronous satellite-delivered broadband services, or narrow bandwidth services. In addition, as an example of the vague nature of the FCC's statement, the "4th principle" reads as follows: "Consumers are entitled to competition among network providers, application and service providers, and content providers." How does the FCC enforce that? How can an entity be justly found in violation of that? Competition across all markets is a noble aspiration, but can the lack of it legitimately lead to FCC fines? Simply directing the FCC to enforce this statement may prove unworkable.

Compounding this error, the COPE Act explicitly bars the FCC from actually turning its policy statement into more effective rules. We do not recall other legislation approved by this Committee that proposed to statutorily tie the hands of the expert agency in order to prevent it from doing its job consistent with its historic practice and the APA.

These are some of the ways in which the COPE Act is wholly deficient in substantively protecting the Internet. The principle of non-discrimination is not encompassed explicitly in the FCC's policy statement and the bill contains no directive on it. The COPE Act fails to address in any way the stated aims of the telephone industry to begin instituting a broadband tax on web-based businesses. It contains no provision addressing the discriminatory prioritization of data through networks. It effectively condones this practice as well as the discriminatory charging, or withholding, of "quality of service" functionality and management by broadband network owners.

The Network Neutrality Amendment

In the Subcommittee and Committee markups, a network neutrality amendment was offered by Representatives Markey, Boucher, Eshoo, and Inslee, to remedy these many deficiencies in the COPE Act's approach to network neutrality. The amendment stated clear, substantive, and explicit statutory protections for consumers and Internet-based entities. It articulated clear, reasonable exceptions to address network security, emergency communications, parental controls, and other consumer-protection measures. And it contained an expedited enforcement provision to ensure speedy resolution of complaints.

At its heart, the amendment preserved the Internet as we today know it. It told broadband behemoths to keep their hands off the Net. And without its inclusion, the COPE Act blesses the broadband designs of a small handful of large corporations over the aspirations of thousands of smaller companies, entrepreneurs, innovators, and individual citizens. The network neutrality amendment must be added to this bill.

Conclusion

We support the goal of having a national cable franchise structure in an effort to spur cable competition and bring consumers the promise of choosing among competing providers for video, voice, and data. But the COPE Act as reported will not fulfill that promise. It risks harming many consumers by removing protections that they have today. Why should some consumers lose their current cable service, be forced to pay higher prices, or receive worse service so that other consumers can receive more cable choice? This result is unwise and contrary to decades of telecommunications policies designed to ensure that everyone has access to cutting-edge communications service. Consumers and Internet users will also be harmed by the injection of private taxation onto the Internet, and the allowance of discriminatory treatment and interference by network operators. The free, open, and innovative Internet has flourished under network neutrality legal protections until last year. We are not prepared to turn over control of the free flow of the Internet to the whims of cable and telephone companies without stronger and better protections to ensure the continued innovation, entrepreneurialism, and freedom that has marked the most powerful communications tool we have ever seen.