

Public Telecommunications Policy, 2006:

Wholesale Revision or Piecemeal Change?

Revisions to the Telecommunications Act would redefine Internet data, and more

By Stan Fendley ■ *Corning*

In a regulated industry like telecommunications, public policy decisions have a huge impact on consumers and companies. The 1996 Telecom Act is a case in point. It is widely credited for creating competition and consumer choice in basic telephony services. But it is also held responsible for creating speculative activity resulting in the telecom bust of 2001. Moreover, the 1996 Act is criticized for focusing primarily on voice service rather than the much more dynamic medium of the Internet.

Ten years later, policymakers are eager to make up for their oversights. Some say a major rewrite of our basic telecommunications law is badly needed, pointing to the United States' lack of a national broadband policy and precipitous drop in the race for broadband penetration – from third in 2000 to 16th in 2005 in percent of households subscribing to broadband.

Others question the need for a new law, saying many of the issues raised by the 1996 act have been resolved through the courts and the Federal Communications Commission. An example is the Supreme Court's 2005 "Brand X" decision that cable modem broadband service is properly treated as a lightly regulated "information service" rather than a heavily regulated "telecommunications service," and the FCC's subsequent decision that digital subscriber line (DSL) broadband service merits equal treatment. For those of us in the

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fiber-to-the-home (FTTH) space, nothing has been bigger than the FCC's 2003 decision to lift from FTTH the so-called "unbundling" requirements – that is, telephone companies' obligations to lease their networks to competitors at below-market rates – and Verizon's decision to launch a major FTTH deployment a few months later.

Regardless of who is right – those calling for new telecom laws or those calling for none – Congressional proposals to address the changed technological landscape are picking up speed on Capitol Hill, and a major rewrite could be considered as early as this year.

As of early January, the most widely discussed federal telecom bills are the Barton-Upton Draft Telecom Reform Bill, the Video Choice Act, the Community Broadband Act, the Preserving Innovation in Telecom Act, the Broadband Investment and Consumer Choice Act,

and the Universal Service Fund for the 21st Century Act.

Some bills would loosen video franchise rules. Others would make it easier for municipalities to build their own broadband systems despite restrictions in many states. Several redefine data, recognizing how zeros and ones travel on broadband networks today.

Each proposed bill is outlined below.

Barton-Upton Draft Telecom Reform Bill

This legislation from U.S. Representatives Joe Barton (R-Texas) and Fred Upton (R-Mich.) would define new categories of data, voice and video services that would be subject to light regulation – free from FCC and state or local government regulation of rates, charges, terms or conditions. The categories are:

- BITS – A "broadband Internet transmission service" would be defined

as a packet-switched transmission service that, regardless of the facilities used, transmits packetized information to or from a subscriber in a packet-based protocol, including TCP/IP or a successor protocol; includes any features, functions, and capabilities, as well as any associated packetized facilities, network equipment, and electronics, used to transmit or route packetized information in a packet-based protocol. BITS may include Internet access services. The BITS definition does not include time division multiplexing features, functions, and capabilities more typical of cellular telephone communications.

- VoIP – Defined as a packet-switched voice communications service provided over BITS that enables a subscriber to send or receive voice communications in TCP/IP protocol or a successor protocol to or from any subscriber with a telephone number under the North American Numbering Plan (or any such other identification method as is designated by the Commission to be a significant alternative or successor to the existing telephone number system). It would assign to the subscriber such a number or other identification method. VoIP as defined in the legislation could include integrated, enhanced features, functions, and capabilities.

- Broadband Video Service – Defined as a two-way, interactive service that is offered in a manner that enables subscribers to integrate a video programming package with customizable, interactive voice and data features, functions, or capabilities. These could include caller identification, call management, and the ability to access information derived from the Internet. Such a service could be included or offered with, but not be treated as subsumed in or subsuming, VoIP service or BITS.

- Other communications services not meeting the definition of BITS, VoIP or broadband video service would continue to be regulated under current law.

- The bill would advance municipal broadband by prohibiting state laws that prevent governmental entities from providing BITS, VoIP services, or broadband video services. The bill would, however, also prohibit governmental en-

tities that provide such services from receiving preferential treatment from the government that owns or controls such entities as compared to other providers of such services.

At this writing, the legislation remains in draft form. Hearings are expected in early 2006. No Senate companion bill has been introduced. To see the draft legislation, visit www.bbpmag.com/BITS_draft.pdf.

Preserving Innovation in Telecom Act of 2005

Another bill that would prohibit state laws preventing municipal governments from providing advanced telecommunications capability or services is S. 1294, from Senators Frank Lautenberg (D-N.J.) and John McCain (R-Ariz.). As of this writing, this legislation has been referred to the Senate Committee on Commerce, Science and Transportation. A Senate hearing will occur in early 2006. No House companion bill has been introduced. Visit <http://thomas.loc.gov/cgi-bin/query/z?c109:S.2726>; to read the legislation.

Community Broadband Act of 2005

HR. 2726, by Representative Pete Sessions (R-Texas) would do just the opposite, prohibiting municipal governments from offering telecommunications services, information service, or cable TV service. It would, however, allow existing municipal services to continue. This legislation was referred to the House Subcommittee on Telecommunications and the Internet in June 2005. At this writing, however, no hearings have occurred and no Senate companion bill has been introduced. Visit <http://thomas.loc.gov/cgi-bin/query/z?c109:HR.2726>; to read the legislation.

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Video Choice Act of 2005

This bill would exempt competitive video services providers from state and local franchise requirements. The Senate version is S. 1349, sponsored by Gordon Smith (R-Ore.) and Jay Rockefeller (D-W.Va.). The House version is HR 3146, by Representatives Marsha Blackburn (R-Tenn.) and Albert Wynn (D-Md.).

The term “Competitive video services provider” is defined as any provider of video programming, interactive on-demand services, other programming services, or any other video services who has any right, permission, or authority to access public rights-of-way independent of any cable franchise (that is, incumbent telcos).

Such providers would be subject to standard franchise fees. They would also be subject to today’s social obligations of cable franchisees, including retransmission, must-carry, consumer protection, PEG (Public, Educational or Government) channels, and so forth.

This legislation has been referred to the House Subcommittee on Telecommunications and the Internet and Senate Commerce Committee. Senate hearings will probably be held early this year. Visit <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1349>; to read the legislation.

Broadband Investment and Consumer Choice Act

S. 1504, by Sen. John Ensign (R-Nev.) would more broadly preempt state authority over telecommunications, information, and cable services. Video service providers would not be required to obtain franchises, build out in any

particular manner, or provide access to other video service providers. Video service providers would be subject to “franchise” fees of up to 5 percent of gross revenues. They would also be subject to social obligations, including retransmission, must-carry, consumer protection, PEG and so forth. Unbundling would still be imposed on copper networks under the proposal. S. 1504 would also:

- Prohibit all government regulation of rates, terms, prices or quality of any communications service.
- Define “narrowband” as 64 kbps or less and “broadband” as over 64 kbps.
- Maintain federal regulation on narrowband services. But for “broadband services,” it would repeal Title I (Information Service), Title II (Telecommunications Service), and Title VI (Cable TV Service) of the 1996 Telecom Act.

The bill contains provisions to develop competition and diversity in the multi-channel video programming market.

Municipalities, prior to providing communications services, must take bids from the private sector to provide the same services, with any advantages enjoyed by the municipality – no taxation, free rights-of-way, free use of public buildings, and so forth. It would grandfather existing municipal services.

This legislation was referred to the Senate Committee on Commerce, Science, and Transportation in July 2005. At this writing, no hearings have occurred. No House companion bill has been introduced. Visit <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1504>: to read the legislation.

Universal Service for the 21st Century Act

S. 1583, by Senator Gordon Smith (R-Ore), Byron Dorgan (D-N.D.) and Mark Pryor (D-Ark.) would modernize the Universal Service Fund, which currently subsidizes rural and high-cost telephone service through a tax on interstate long distance calls. Specifically, S. 1583 would:

- Create a broadband account under USF to provide financial assistance for the deployment of broadband communications services to unserved areas;
- Expand the contribution base of

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USF by including *intrastate* long distance calls;

- Require the FCC to revise its definition of broadband to require a data rate greater than 200 kilobits per second.

This legislation was referred to the Senate Committee on Commerce, Science, and Transportation in July 2005, and the committee will hold hearings on the bill in early 2006. No House companion bill has been introduced.

Visit <http://thomas.loc.gov/cgi-bin/query/D?c109:1:./temp/~c109qALt17::> to read the legislation.

State and Local Government Activity

Actions by the federal government are not the only public policy influence on broadband deployment. Local and state governments are involved as well. Currently, the main concern of state and local officials is to ensure citizen access to high-quality services and consumer choice.

The debates are centered on video franchising and municipal broadband.

In the area of video franchising, developments in Texas could impact policies in other states.

In September 2005, Texas enacted legislation allowing statewide franchising for video services, while maintaining franchise fees for municipalities.

The laws of most other states require video providers to obtain a cable franchise from each municipality in which services would be provided. Although the effect of the Texas law on other states remains to be seen, a similar requirement is now under consideration in New Jersey.

Regarding municipal broadband, local governments argue that they are

driven to build their own broadband networks when there is a lack of private broadband options to serve their citizens.

Local governments often desire broadband technology for economic development and to provide expanded services to schools, hospitals and government buildings.

Many municipalities view broadband as another utility, similar to roads, power and water. This often offends commercial providers, who argue that such activity interferes with the private sector.

As a result, we are likely to see state multiple bills both for and against municipal networks in the near future, as we are already seeing at the federal level.

It is impossible to say at this moment where the current activity to modify national telecom policy will lead.

Consensus appears to be forming most firmly around the reform of local video franchising requirements. By mid-2006, a clear picture may develop as to the direction policymakers will take.

One hopes the consensus will be one that gives competitive markets relief from regulations and that rewards investment in non-competitive markets. **BBP**

About the Author

Stan Fendley is Director of Legislative and Regulatory Policy for Corning Incorporated. From 1993-2000, Fendley served as counsel to the U.S. Senate Committees on Finance and Small Business. This article expands and updates one that originally appeared in Corning's GuideLines Online Magazine, available at www.corning.com/opticalfiber/guidelines_magazine.