Consumer Federation of America

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Entitled

"The Merger Tsunami is Drowning Competition in the Communications Marketplace"

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SUMMARY

The recent wave of proposed mergers in the telecommunications industry -- SBC attempting to gobble up AT&T, and Verizon trying to swallow MCI -- **mark the ultimate demise of the era in which consumers could expect more and more choices and lower prices** for local, long distance, wireless, and new Internet-based services exploding on the market.

The Consumer Federation of America (CFA) [1] and Consumers Union[2] believe that **the drumbeat of consolidation and ill-conceived regulatory policies have already undermined consumers' greatest hopes for ongoing and expanding competition.** If not rejected or dramatically altered, these mergers could set the marketplace back to a world more akin to monopoly than competition.[3]

OVERVIEW OF THE INDUSTRY

The Failure of Vigorous Competition for Residential Customers

We urge you to ponder the following anecdote from the computer world, which demonstrates the level of competition consumers would like to see in the telecommunications sector – particularly the increasingly consolidated wireless and wireline industries. When asked about whether his company would buy another computer manufacturer, Michael Dell is reported to have said: "I like to acquire my competitors one customer at a time." That competitive ethic simply never took hold among the Regional Bell Operating Companies (RBOCs).

Instead of entering one another's service territories and competing to win customers in a new location, our nation's largest telecommunications companies chose to merge and buy each other up. As the companies acquired a larger and larger footprint, it became harder and harder for new entrants to gain a toehold in the market. The proposed SBC-AT&T and Verizon-MCI mergers, if approved, will be the final nails in the coffin of the local competition experiment the Congress launched in the 1996 Act.

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[1] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] I am making available to the committee for the record several studies prepared by our organizations in the past year that document how anticompetitive behavior and regulatory failures made it impossible to develop the vigorous competition that Congress hoped for in the 1996 Telecommunications Act.

The residential consumer today is faced with at most only two facility-based alternatives – the local telephone and cable companies. These two form what *Business Week* has called a "crummy duopoly."[4] They do not compete vigorously on price or innovate. They are more concerned about protecting a core franchise product (phone or cable services) rather than in competing against the other's core product through lower price or better quality. Because their prime profit-maximizing customer base consists of upper-income households that purchase many telecom and video services, they tend to offer high-priced bundles of services that the majority of consumers either do not want or cannot afford. As a result, to get a variety of good marketplace choices and prices, consumers must buy extra services – DSL tied to local phone service, or cable modem service tied to a cable video package or cable Internet Service Provider (ISP). In order to get the benefits of this "bundle-only" competition, the average household must double or triple its spending.[5]

At the end of the day, the Bell behemoths will have reconstituted and extended a dominant "Ma Bell-type" company in their service areas. They will have about a 90 percent market share in residential local wireline,[6] 70 percent in long distance,[7] and 40-50 percent in wireless.[8] They will have the incentive and opportunity to discriminate by using a price squeeze against competitors (both ISPs and telephone service providers, TSPs) that need access to the local or interstate long-haul networks.[9] If these mergers are not blocked or substantially altered

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[4] Yang, Catherine, "Behind in Broadband," *Business Week,* September 6, 2004

[5] *A Nation Online*, (Washington, D.C.: National Telecommunications Information Administration, September 2004), Current Population Survey Data Base, for subscription to specific services. Zimmerman, Paul R., *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service* (Washington, D.C.: Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission) for local and long distance bills. Bundle prices are from visits to web sites of major carriers. Comparisons based on average basic local plus average long distance. Cable modem service costs about $45 per month. DSL service costs about $30. However, the local phone companies serving 85 percent of the nation require DSL customers to also take voice, making the basic connectivity costs for a high speed line that will support VOIP even more expensive. *UNE Fact Report 2004, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, October 2004. Federal Communications Commission, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, 2004.

[6] Federal Communications Commission, *Local Telephone Competition: Status as of June 31, 2004*, December 2004, Tables 6, 11, show this figure at just over 80 percent of SBC and just under 80 percent for Verizon. This is prior to the impact of the UNE-P decision.

[7] Precursor, *Telecom Vital Statistics: Pillars of the Bell 2005 Competitive Respite Thesis,* January 24, 2005, put Verizon and SBC long distance market shares at close to 40 percent at year-end 2004, and predicted a gain of another 10 percent, without the mergers. AT&T and MCI national market shares were approximately 30 percent and 20 percent, respectively, as reported in Industry Analysis and Technology Division, *Trends in Telephone Service* (Washington, D.C.: Federal Communications Commission, May 2004), p. 9-5. Because of their respective geographic foci, the in-region market share of the long distance companies being acquired respectively is likely to be higher than the national average. Thus, a 70 percent residential market share is a cautious estimate.

[8] Consumer Federation of America and Consumers Union, Letter to Chairman Michael Powell, September 16, 2004.

[9] See Cooper, Mark, *The Public Interest in Open Communications Network* (Washington, D.C.:

by the Antitrust Division of the Department of Justice (DOJ) and the Federal Communications Commission (FCC), these so called Baby Bells will become regional Behemoth Bells that swallowed up their original parent company (AT&T) and its main competitor (MCI), leaving consumers almost no better off than they were before the old Bell monopoly was originally demolished.

Making matters worse, the cable industry is dominated by behemoths as well. What's more, cable's two largest companies – Comcast and Time Warner – are threatening to become even larger with an acquisition of the Adelphia properties. The average cable operator has over a 75 percent market share in video[10] and over an 80 percent market share in advanced services for high speed Internet.[11] They too have an incentive to discriminate against ISPs and TSPs.[12]

Administrative and Congressional Action That is Needed to Protect Consumers

The proposed telecommunications mergers would lead to such high levels of concentration that we believe the antitrust and regulatory authorities should not allow them to proceed without imposing extensive nondiscrimination requirements and requiring substantial divestitures of assets to restore competition in numerous in-region markets dominated by SBC and Verizon. These mergers must not be allowed to proceed until public policy ensures that these companies will not have the opportunity to squeeze out their competitors through inflated access charges or other anti-competitive practices.

However, even if regulatory and antitrust authorities diminish the anticompetitive effect of these two mergers, the vigorous competition Congress had envisioned during passage of the 1996 Telecom Act has failed to materialize. Congress must take action to correct fundamental errors in the FCC's implementation of the Act.

Consumer Federation Of America, July 2004), Chapter IV, for a discussion of past anticompetitive practices of telephone companies against CLEC and ISPs. For a discussion of the problem of vertical leverage against intermodal competitors see "Petition to Deny of Consumer Federation of America and Consumers Union," *In the Matter of Application for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services Inc., and Its Subsidiaries to Cingular Wireless Corporation,* WT Docket No. 04-70, May 3, 2004 and "Reply of Consumer Federation of America and Consumers Union," *In the Matter of Application for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services Inc., and Its Subsidiaries to Cingular Wireless Corporation,* WT Docket No. 04-70, May 20, 2004.

[10] On a national average basis, cable has just under an 80 percent share of the MVPD market (see Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report* MB Docket No. 04-227, February 4, 2005, Table B-3). Since the market share of head-to-head cable competitors (overbuilders) is only about 1 percent (*Eleventh Annual Report,* pp. 48-49), the cable market share is certainly greater than 75 percent. Moreover, the competitive overlap between cable and satellite is not perfect, with satellite still having a substantial rural base. Thus, on a market-by-market basis, cable's market share may be over 80 percent.

[11] Federal Communications Commission, *High-Speed Services for Internet Access*, June 30, 2004, Table 4.

[12] The vertical problem in the cable video and high speed Internet markets are discussed in Cooper, Mark, *Cable Mergers and Monopolies: Market Power in Digital Communications Networks* (Washington, D.C.: Economic Policy Institute, 2002), Chapters 4 and 5; see also The Public Interest in Open Communications Networks, Chapter IV.

Congress must restore the obligation of nondiscriminatory interconnection and carriage that the FCC has abandoned. Communities must be allowed to meet the needs of their citizens to ensure ubiquitous, affordable service. This would also 0ensure that communities have the right to jump-start competition by providing telecommunications services. Policymakers must expand the availability of unlicensed use of the spectrum so that entrepreneurs and citizens are no longer dependent upon monopoly networks to expand competition across all telecommunications and media services. And Congress must reaffirm the goal of universal service, taking action to bring affordable telephone and broadband services to all citizens.

THE REINTEGRATION AND RECONSOLIDATION OF THE TELECOMMUNICATIONS INDUSTRY

Today, RBOCs claim that they are no longer monopolies and face substantial competition within the wireline market and from cross-technology competitors. This is not even the case today, pre-merger. If there is even further consolidation in the market, the problem will only grow worse for consumers.

Local Voice Competition

Those who point to competitive local exchange carriers (CLECs) as the source of competition had better look again. SBC and Verizon have litigated, stymied, and strangled local voice competition until it has almost completely withered, and the CLECs that were supposed to offer so much competition to the dominating Bells are dying in droves.[13] Born as local monopolies, the RBOCs have remained anti-competitive to the core. Once the 1996 Act was signed into law, the RBOCs immediately set out to bulk up their local monopolies into regional monopolies through mergers and acquisitions. In the end, they never competed in one another's regions as envisioned by Congress.

There was a moment, however, soon after the 1996 Act passed when these telecom giants were considering whether to take on one another. Instead of growing by competing, however, they decided to do the opposite – to expand by merging, bringing more consolidation to the industry and less competition. Rather than earning an out-of-region market share one customer at a time, the way that Michael Dell had envisioned, the RBOCs decided to buy the entire out-of-region market, to create a bigger footprint. Verizon dominated the Northeast through the merger of Bell Atlantic and NYNEX and added to its heft with the acquisition of GTE. Texas-based SBC dominated the middle of the country as a result of its acquisition of Ameritech and held outposts on the coasts, with its acquisition of Pacific Telesis and Southern New England Telephone.

Even when they promised to compete out of region, as a *quid pro quo*, as in SBC's "national local strategy" pledge in the Ameritech merger, they never did.[14] It was (and remains)

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[13] Cooper, Mark, *Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996* (Consumer Federation of America, January 1998); *Competition At The Crossroads: Can Public Utility Commissions Save Local Phone Competition?* (Consumer Federation of America, October 7, 2003)

[14] Cooper, Mark, *The Consumer Case Against the SBC-Ameritech Merger* (Consumer Federation, et. al, January 20, 1999)

always the next merger that should unleash competition, but it never does. Only in the fantasy world of industry-funded think tanks do we get competition without competitors.

And in the residential market, SBC and Verizon today have about an 80 percent market share,[15] and that number will go up as a result of the latest acquisitions and the decision of the FCC to eliminate unbundled network element platforms (UNE-Ps), which AT&T and MCI – the two largest local-residential service competitors – relied on to compete.[16] By buying up their largest competitors and eliminating UNE-P, the market share of these two behemoths will likely exceed 90 percent in the residential sector.

The big business service market, known as the "enterprise" market in the industry, appears to be only barely more competitive. On average, these two companies have about a 75 percent market share for medium and large business lines.[17] These two proposed mergers, if allowed to go through, will increase this market share substantially. Because AT&T and MCI are the largest players in the enterprise market and because of the geographic patterns of competition, the in-region market shares of SBC and Verizon in the enterprise market for voice would rise to the mid-80 percent range.[18] These regional fortresses would also anchor their dominance of national corporate accounts.

Given this increasingly consolidated market for landline services, and especially considering the demise of the CLECs, it is critical for policymakers to consider the geographic distribution of the SBC and Verizon markets when analyzing these two mergers. MCI had its most intense competitive presence in Verizon's service territory; the MCI-Verizon merger will eliminate Verizon's most vigorous in-region competitor.[19] The situation with SBC –AT&T is similar. AT&T has a large presence in SBC's service territory. If these mergers go through, SBC and Verizon will effectively be buying market power to eliminate their strongest in-region competitors. The market is concentrated enough now; these mergers would make it much more so.

Long Distance

SBC and Verizon have run a brutal bait-and-switch game with long distance service.

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[15] See note 6 above.

[16] Facilities-based competition accounted for only about one-fifth of total competition (Local Competition, Table 10). Most of this competition was in the medium or large business market.

[17] Local Competition, Tables 6 and 11.

[18] Matt Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times,* February 2, 2005, C-4, puts AT&T's national market share for the "corporate telecommunications market" at 15 percent and MCI's at 12 percent.

[19] The fact that the geographic overlap of assets is more concentrated in specific regions and products than the national average has been noted in the press accounts of the proposed mergers. Almar Latour and Dennis K. Berman, "Qwest Presses Its Bid for MCI," *Wall Street Journal,* February 4, 2005, C-4, the *Wall Street Journal* described Verizon and MCI as follows: "A tie-up between Verizon and MCI also could fact cultural challenges: The companies have been fierce competitors and have been at loggerheads in court." The map accompanying Matt Richtel, "Valuing MCI in an Industry Awash in Questions," *New York Times,* February 2, 2005, C-4, shows a concentration of MCI data centers in the Northeast.

After having been allowed to re-enter the long-distance market because policymakers determined local markets were open – a finding that was overwhelmingly based on the availability of UNE-Ps – they launched a vigorous campaign to eliminate the availability of UNE-Ps. SBC and Verizon's gambit was a success and, as expected, the competition is drying up.

The two corporations each already has about a 40 percent market share in the residential long-distance market within their regions, but if this merger is approved, this will increase substantially to an estimated 70 percent.[20] This is, of course, well above the threshold where antitrust authorities become concerned about the abuse of market power. Once again, this merger would further concentrate and already-too-concentrated market.

Voice Over Internet Protocol (VoIP)

Given that 70 percent of households don't have broadband service and therefore cannot take advantage of Voice over Internet Protocol (VoIP) calling,[21] which requires such a connection, VoIP is not an effective competitor to the traditional landline. It is one thing for big-spending residential customers to consider VoIP as an alternative, notwithstanding its lower reliability (because it does not run when the power goes out) and lack of a fully functional E-911 service.[22] It is quite another to expect those families who pay an average $25 per month[23] for local service to pay another $30-$50 for broadband in order to have access to VoIP, which costs another $25-$30.[24]

Making matters worse, SBC and Verizon also use an anti-competitive bundling tactic to ensure that VoIP can never effectively compete with their basic local voice services. Neither Verizon nor SBC will sell a consumer DSL on a stand-alone basis, what is known as "naked" DSL. Both force consumers to buy their voice service in order to get a DSL line. So a consumer who wants to buy VoIP from a competitor has to pay for local service twice.

While they cite VoIP as a competitive threat, SBC and Verizon are seeking to be excused from the obligation to allow VoIP service providers to have access to the underlying telecommunications network in a just, reasonable, and nondiscriminatory manner. They will do to these unaffiliated telephone service providers (TSPs) exactly what they did to CLECs and what the cable modem operators did to ISPs – foreclose, discriminate, and delay until they wither and die.

Ironically, when AT&T and MCI exited or pulled back from local competition as a result

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[20] See note 7 above.

[21] Cooper, Mark, *Expanding the Digital Divide and Falling Behind in Broadband Falling Behind in Broadband,* (Consumer Federation of America and Consumers Union, October 2004), shows that penetration of the Internet into homes has stalled below 60 percent, while just over half of all Internet households have broadband.

[22] "Comments Of Consumer Federation Of America and Consumers Union," *In The Matter Of IP-Enabled Services, Petition Of SBC Communications Inc. For Forbearance*, Before The Federal Communications Commission, WC Docket No. 04-29, 04-36, July 14, 2004.

[23] Reference Book of Rates, Table 1.6.

[24] These prices are based on web site visits, exclusive of short term promotions.

of the FCC's decision to eliminate UNE-P, they both declared that they would look to VoIP as an alternative approach to putting the bundle of local and long distance together. These mergers, if approved, will remove the two largest potential VoIP competitors from the market where they are needed most – in the home service territories of the two largest RBOCs. AT&T will no longer exist to compete against SBC's wireline business in SBC's service territory. The same holds for MCI, which will no longer compete against Verizon's wireline business in Verizon's service territory.

Wireless

Two critical factors limit the ability of wireless services to effectively compete with wireline. First, even with a big bundle, wireless costs about ten cents a minute for the typical pattern of use of local calls, five times as much, on a per-minute basis, as local flat-rate dialtone, which is the staple of local service. Wireless is also less reliable than wireline and still does not have 100 percent access to the E-911 system. Second, Cingular and Verizon Wireless, the nation's two largest cell phone companies, are owned by two large RBOCs – SBC (with BellSouth) and Verizon, respectively – and therefore have little incentive to compete with their own wireline business.[25] Through mergers and acquisitions, as well as their brand name prominence, SBC and Verizon are each the leading wireless supplier within their local RBOC market.[26]

Backbone Services

These mergers also pose severe problems because they would increase the vertical integration of assets (i.e., when a firm owns the inputs into the process, making it that much more difficult for competitors to get those inputs). AT&T and MCI are large providers of Internet and interstate transport (backbone). As independent companies, their interest is in maximizing traffic. SBC and Verizon are larger purchasers of Internet and interstate backbone services. As unaffiliated buyers, they make up a large portion of the market. From a competition standpoint, it is important to keep SBC and Verizon, which need the Internet and interstate backbone services as inputs, separate from AT&T and MCI, which provide this critical input. Otherwise, SBC's and Verizon's competitors will have difficulty gaining this input and are more likely to go out of business.[27]

The result of these proposed mergers – called "upstream integration" in the parlance of economics – would therefore likely have a dramatic impact on the rest of market for Internet and interstate backbone traffic. SBC and Verizon would have an incentive to abuse their control over those assets to diminish competition for their retail businesses, rather than maximize the revenue flowing over those assets.

As a vertically integrated entity, both of the resulting behemoth companies would have an incentive to maximize profits by using their leverage in the form of a price squeeze.

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[25] "Petition to Deny" and "Reply Comments," see note 9 above.

[26] Letter to Michael Powell, September 16, 2004.

[27] See Cable Mergers and Monopolies, note 12 above, and "Petition to Deny" and "Reply Comments," note 9 above.

Unfortunately, the opportunity to run a classic price squeeze will be readily available in the form of excessive access charges. The RBOCs have been overcharging for access, particularly special access that was prematurely deregulated by the FCC. AT&T and MCI were the leading critics of the access charge system. Should these mergers go through, those who profit from those overcharges will have swallowed those who sought lower access charges that drive down prices for consumers. These mergers should not be allowed to proceed until access charges are reformed.

This prediction is no paranoid delusion, but the logical extension of SBC and Verizon's current activities. In Court cases like *Brand X*, regulatory proceedings such as the wireline proceeding, and petitions to the FCC including those Bell South, Verizon and SBC, SBC and Verizon both support the elimination of the obligation to interconnect and carry traffic on just, reasonable, and nondiscriminatory rates terms and conditions. They are buying the assets that provide critical inputs for their competitors, but at the same time they are seeking the right to discriminate against those competitors. These mergers would undoubtedly exacerbate the price-inflating, anti-competitive dangers that already exist in today's market.

Intermodal Competition

Intermodal competition is also limited, with a "crummy duopoly" an ineffective base of competition, and it is not substantial enough to protect the public from abuse. For evidence, just look at a parallel industry – cable – where operators were also born as monopolists and have faced only limited competition from satellite.[28] Not surprisingly, they have remained anti-competitive to the core in order to maximize their profits.

Cable prices have been unaffected by intermodal competition from satellite (which lacks the capacity to deliver high-speed Internet, a critically-valued bundled product, particularly among the desirable high-income customers). Since the passage of the 1996 Act, the average monthly cable bill has more than doubled. Consumers are offered almost the very same type of choice they were nine years ago: take the bundle, switch to a similarly high-priced satellite alternative, or live without a decent package of television programming.

Cable operators continue to have a market share in the 75 percent range in the multi-channel (MVPD) market[29] – well above the minimum threshold level to count as a monopoly under antitrust law. Their high-speed Internet market-share in the residential sector is also in the same range.[30] In fact, when one looks at what the FCC calls "advanced services" (those with at least 200k in both directions), cable has over an 80 percent market share.

Cable companies bundle their services in a brutally anti-consumer and anti-competitive fashion. They discriminate against unaffiliated VoIP service providers, reserving for themselves quality-of-service guarantees, while relegating others to best effort delivery of voice traffic.[31]

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[28] Cooper, Mark, *The Failure of 'Intermodal Competition in Cable and Communications Markets* (Consumer Federation of America and Consumers Union, April, 2002).

[29] See note 10 above.

[30] See note 11 above.

[31] Scovill, Kim Robert, "Cable/Telephony IP Network Basics and the Relationship to Comcast

They force consumers to pay for their affiliated ISP and foreclose competition for Internet access services.[32] This has the effect of undermining ISP competition over the cable wire/platform. They create a virtual tie between the provision of video and Internet service. Consumers who only want to buy cable modem service are charged $55 to $60, but for those who buy the underlying cable service, the price is lower – $40 to $45 dollars.

This anticompetitive strategy substantially weakens satellite's ability to compete with cable. Moreover, cable companies bundle video programming and use it as lever to exclude competition (directly by refusing to sell programming they own and distribute through coaxial cable/fiber optic lines and indirectly where they can leverage their power over distribution to deny competitors unaffiliated programming).

Unfortunately, the telecommunications industry looks like it is headed in the direction of cable. SBC and Verizon are scrambling to put together their own bundles. To do so, they want to be excused from the public interest obligations of video service providers, such as community-wide buildout and local access channels. For example, in one of the most outrageous examples of corporate chutzpah in recent years, SBC and Verizon are seeking to be excused from serving "undesirable customers" and simultaneously seeking to prevent local governments from serving those very same customers. This is redlining taken to a new level; "we won't serve these customer and you cannot."

THE ECONOMIC AND SOCIAL CONSEQUENCE OF THE FAILURE OF TELECOM COMPETITION

The "crummy duopoly" that now confronts residential customers – a cable wire centered on defending its franchise video market and a telephone wire centered on defending its franchise voice product – simply will not serve the public or the nation well, especially if these two wire owners are excused from the obligations of nondiscriminatory interconnection and carriage. The vigorous competition that we have enjoyed in the applications marketplace created by the Internet is being strangled. Regulators have allowed feeble facilities-based competition to strangle vigorous applications-based competition, and antitrust authorities have allowed huge cross-platform, vertically integrated behemoths to dominate the telecommunications marketplace.

Policymakers have made a gigantic public policy mistake, and all of us are paying a huge economic price for it. The United States has slipped from third in the world in broadband to fifteenth.[33] Americans pay more on a megabit basis for broadband than a dozen countries around the world, and the explanation is not population density or government subsidies; rather, it is the lack of competition and the abuse of vertical market power. With lagging penetration, innovation in the applications layer has gone abroad. Jobs follow the exit of innovation.

Digital Voice," *Pennsylvania Public Utility Law Conference,* PBI NO. 2005 – 3354, Vol. III, p. 433.

[32] Public Interest in Open Communications, Chapter IV.

[33] Expanding the Digital Divide.

Moreover, the digital divide that FCC Chairman Michael Powell belittled in his first press conference as a "Mercedes Benz divide"[34] has substantially worsened during his tenure. Penetration of the Internet in households has stagnated. Half of all households with incomes above $75,000 per year have broadband; half of all households below $30,000 do not even have the dial-up Internet at home.[35] Black and Hispanic households are particularly hard hit by Chairman Powell's "Mercedes Benz" divide; white households are fifty percent more likely that Black or Hispanic households to have Internet access at home and twice as likely to have high speed access.

The false characterization of the ever-increasing digital divide as a "Mercedes Benz" divide highlights the reason why the bundled quadruple-play (local phone, long-distance/wireless, video and broadband) competition that the cable and telcos are pushing does not do the average consumer any good. There is little competition for voice, video, and high-speed Internet. Three-quarters of Americans do not have high-speed Internet access, so they can't benefit from VoIP. In order to get the "benefit" of intermodal competition the average American household has to double or triple its monthly bill.

THE POLITICAL LANDSCAPE

Policymakers and authorities in various arenas and at all levels of government could take action to alleviate some of these concerns. Here is a preview of what lies ahead:

The Supreme Court's review of the *Brand X* case has the potential finally to press the FCC to restore the obligation of nondiscrimination in interconnection and carriage. The 9th Circuit Court of Appeals held, properly in our view, that the advanced telecommunications services offered by cable operators to the public are telecommunications services and therefore are subject to regulation and open access. The 9th Circuit decision might have finally persuaded the FCC to enforce the obligation for nondiscrimination on the advanced telecommunications networks of the 21st century. Even if the Supreme Court upholds the Ninth Circuit, the FCC seems determined to go in the opposite direction, which the Congress should not allow.

We hope the Department of Justice and the FCC will understand the brutally anticompetitive in-region impact of the SBC-AT&T and Verizon-MCI mergers and order large-scale divestitures of long distance/backbone capacity and impose nondiscrimination/fair access charge requirements as they review the mergers. Unfortunately, this is an equally unlikely outcome.

On the state front, we hope state legislatures will resist the efforts by the RBOCs to

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[34] To quote Michael Powell's exact words: "I think the term ["digital divide"] sometimes is dangerous in the sense that it suggests that the minute a new and innovative technology is introduced in the market, there is a divide unless it is equitably distributed among every part of society, and that is just an unreal understanding of an American capitalist system… I think there's a Mercedes Benz divide, I'd like one, but I can't afford it… I'm not meaning to be completely flip about this – I think its an important social issue – it shouldn't be used to justify the notion of, essentially, the socialization of deployment of infrastructure

[35] Expanding the Digital Divide.

completely deregulate basic phone service based on the smoke and mirrors of competition from wireless—owned by the very same Behemoth Bell—and from VoIP—available only to those households that can afford broadband and only if the cable and telephone behemoths do not strangle VoIP competitors with discrimination and price squeezes. As important, state legislatures must stop RBOC-led campaigns to prevent local communities from meeting the needs of their citizens, by banning community Internet systems. There are tough fights brewing all across the country and the outcome is up in the air.

THE ROLE OF CONGRESS: THE TELECOM ACT REVISITED

Given the troubling track record of the regulatory authorities and the behavior of these two "crummy duopolists," it is imperative that in its review of the Telecommunications Act of 1996, Congress takes a critical look at the communications landscape.

This time, Congress will have to restructure the landscape to ensure the existence of competitive markets and provide as little room as possible for the FCC to flaunt the will of the Congress. This will be even more important if the telecommunications market becomes even more concentrated through the approval of the proposed mergers. At the very least, Congress will have to address the following issues to even begin to create a semblance of competition.

Nondiscriminatory Interconnection and Carriage

Congress must clearly establish that the obligation to provide nondiscriminatory access to the means of communications, which has been part of our national and cultural heritage for centuries, is inviolable. The tried and true principle of nondiscrimination is clearly stated in the Act

> All charges, practices, classifications, and regulation for and in conjunction with such service, shall be just and reasonable. … It shall be unlawful … to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communications service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

This sounds good to consumers. Congress defined telecommunications service providers clearly in the 1996, **regardless of the facility used.** The FCC ignored this language and invented a new definition to let cable operators escape form the obligation of nondiscrimination. It is seeking to let the telephone companies evade the obligations as well. Just as the Congress recently took away the authority of the FCC to set the cap on national broadcast ownership, Congress should remove from the FCC the ability to abrogate the most basic right of nondiscriminatory treatment.

Community Access to the Public Airwaves

Congress must reaffirm the interconnected principles of community-based provision of

local services, which has been part of our heritage since the founding of the Republic, and public ownership of the airwaves, which has been recognized for almost eighty years. When Congress says that "**any entity**" should be allowed to provide communications services, it should mean any entity, not just the ones the Bell or cable behemoth want.

Unlicensed use of the spectrum, which is the transmission medium that supports Wifi and community Internet applications, must be expanded. The practice of licensing the public's spectrum for exclusive use by a single entity was adopted as an expedient, second-best solution eighty years ago in a response to weak technologies that could not handle interference well. Technological progress over the past century has rendered this expedient, second-best solution unnecessary. Allowing unlicensed use of the spectrum by all citizens subject to simple rules of noninterference is far more deregulatory and pro-competitive than the *status quo* and serves the aspiration of the First Amendment to ensure "the widest possible dissemination of information form diverse and antagonistic voices" far better than the current regime of exclusive licenses.

Universal Service

Congress must give much more precise meaning to the goal of universal service, which has been the cornerstone of the communications marketplace for seventy years. The Act has

> the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin or sex, a rapid, efficient, nationwide and worldwide wire and radio communications service with adequate facilities at reasonable changes.
>
> More specifically, it set forth the following requirement:
>
> Consumers in all regions of the Nation including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

The FCC must be required to take this goal seriously and not cut advanced telecommunications services off from universal service by misclassifying them as information services.[36] A Mercedes Benz divide has nothing to do with today's problem of affordable telephone and high-speed Internet services.

Sometimes traditional values are the best. The balance that this nation struck between private investment and public obligations has worked remarkably well since the founding of the republic. We need to return to those basic principles.

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[36] "Brief for the Respondents States and Consumer Groups in Opposition to Petitioners," *National Cable & Telecommunications Association, et. al. v. Brand X*, Nos. 04-277 & 04-281.