

# PRACTITIONER CONTRIBUTIONS

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## Telecom Act Rewrite Is Needed to Return Real Competition to Broadband Sector, *By Alan Pearce, Martyn Roetter and Barry Goodstadt*

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The approval this past summer of an integrated set of partnering arrangements (in effect a cartel) between Verizon and four major cable operators, who had been major competitors and have suddenly become collaborators, signaled the beginning of the end of sustainable, effective competition in the U.S. broadband market. This outcome may soon create dire consequences for the public interest, for the U.S. economy, and for customers in their personal, social, and business contexts.

The historically regulated telecommunications-information-entertainment sector has failed to check the march of the largest network operators (LNOs) towards removing all substantial constraints on their ability to do whatever they please in their own interests. In fact, the largest operators appear to act as non-regulated entities, without regard to impacts on the choices and rights of consumers. Furthermore, these large operators have disregarded the freedom and fairness of access of their competitors to large bases of customers by controlling access to broadband bottleneck facilities.

The precipitous decline in broadband competition has been caused in part by flawed interpretation and enforcement of the current legal regime established by the 1996 Telecommunications Act. A further substantial factor involves the '96 Act's failure to anticipate major changes in technology that have made the competitive model employed by the Act outdated.

In order to ensure that effective competition does not disappear from the U.S. broadband market, other influential economic players, such as Internet and Web companies along with major businesses, must ally with public interest groups to counter the well-financed lobbying efforts of the largest operators. LNOs' efforts that seek to weaken the Federal Communications Commission's (FCC) ability to exercise a strong pro-competitive influence over their priorities and decisions must be curtailed by this alliance. The ultimate aim of such a coalition of internet companies, web companies, and major businesses should be the passage of a new Federal Telecommunications Act. This Act should re-affirm the traditional principles and goals that made the U.S. an admired world leader and pioneer throughout most of the 20th century. In particular this new Telecommunications Act needs to support the principle that network services and applications should be universal, ubiquitous, interoperable, and available and affordable to everyone on an equal and non-discriminatory basis.

The new Act should establish a well- resourced regulatory structure that is adapted to the era of digital broadband converged networks. This structure should be focused on ensuring competition at the level of services and applications independent of the transport technologies exploited to deliver them. It should be robust and not easily made obsolete in the face of significant changes in the technological environment which are inevitable and often unpredictable.

### **'Free' Markets Versus Fair and Open Markets**

Broadband is universally acknowledged to be a key component of the nation's 21st century telecommunications-information-entertainment (T-I-E) infrastructure. Affordable, widespread and powerful broadband services support a healthy economy, generate new opportunities for employment, and enable the efficient delivery of a wide range of critical services, from health care and education, to public safety and social welfare. It is also widely accepted that effective competitive markets are the best means to ensure that broadband services will be available to all at affordable and attractive prices thanks to the stimulus provided by vigorous new entrants who offer imaginative, innovative services and applications.

It is disturbing to witness the largest operators' attempts to eliminate competitive forces in the name of an extreme "free market" ideology that labels virtually any regulation oppressive and outdated. Their version of the "free market" is highly asymmetric. It means complete freedom of action for them to take advantage of their limited "bottleneck facilities."

This anti-competitive movement has been steadily gaining ground since the turn of this century. It has achieved notable successes, most recently in the creation of a cartel between the leading telephone company, Verizon, and four of its major competitors in the cable TV sector. Reversing this trend will require coordination and cooperation among other influential stake-holders, both in the telecommunications sector itself and outside, that have been quiescent or ineffectual until now. These stakeholders must now marshal convincing, comprehensive and cohesive, fact-based evidence for U.S. lawmakers and policymakers to refute the misleading claims from the LNOs.

### **The '96 Act is Outdated and Unenforced**

The 1996 Telecommunications Act was a rare example of bipartisan legislative reform during the Democratic Clinton Administration. Indeed, one of its principal authors was then-Sen. Larry Pressler, a Republican. The goal of the law, as stated in its first paragraph, was to "let anyone enter any communications business—to let any communications business compete in any market against any other." The Act sought to foster competition between companies that use similar underlying network technologies, e.g., circuit-switched telephone networks, to provide a single category of service, e.g., voice. Thus the Act created separate regulatory regimes for carriers providing voice telephone service and providers of cable television, and a third for information services. The aim of the regulatory structure that was established was to foster intra-modal competition within each of these three regimes. The Act did not anticipate the inter-modal competition that has subsequently developed, such as the competition between: (1) mobile voice and fixed voice services; (2) VoIP (Voice over Internet Protocol) and traditional voice service (both fixed and mobile), and (3) Broadband services over telephone company facilities and broadband services delivered via cable TV modems.

Since 1996, there have been two major changes in the regulatory structure foreseen in the Act. First, provisions for intra-modal competition based on so-called "unbundling" of monopoly telephone company access networks to make them available to other services providers in a wholesale regime have been removed by the FCC. The change was justified on the grounds that competition was about to thrive through inter-modal competition, most notably that between telephone companies and cable TV companies. Since cable operators, unlike telephone companies, were not subject to unbundling obligations it was seen as illogical and unfair to continue to impose obligations on one group of companies but not on another in a market where they had become direct competitors. However, approval of the extensive partnering arrangements between Verizon and four major cable operators is now putting the basis of this intermodal competition in peril. In the absence of effective competition of either an intra- or inter-modal type there can be no effective competition in the U.S. broadband market.

The second critical change since 1996 was the FCC's premature decision in 2005 to categorize "broadband" as an "information" service, thus effectively removing it from any regulatory obligations, such as those to which the major providers of telecommunications services have been subject ever since the original Communications Act of 1934. It was AT&T's abuses of its regulatory obligations under this earlier Act that led to its divestiture in 1984, specifically for the purpose of upholding the principle of effective competition by restructuring the market and establishing rules to prevent large players from abusing their market power in anti-competitive and customer-hostile ways.

Today the inexorable and already well-advanced trend in telecommunications is toward integrated networks in which ALL forms and modes of traffic—from very narrowband text to narrowband voice to broadband video, image and "Big Data" files—are carried over the same broadband infrastructure. In light of this trend, it makes no sense to try to regulate some traditional telecommunications services while broadband access services are unregulated.

If the 1996 Telecommunications Act had been properly implemented to adhere to its pro-competitive intent in both letter and spirit then:

- Broadband would never have been declared as unregulated (FCC Decision of 2005);
- Cable modem services and capacity and fiber local loops would be subject to a wholesale regime;
- Interoperability of wireless broadband devices and applications would be mandated and enforced;
- The United States would take the lead in maximizing the amount of internationally harmonized spectrum, instead of acting as a "rogue" nation with the most disharmonious structure of spectrum for mobile broadband of any major market;
- Financial penalties for anti-competitive behavior by major operators would amount to a sizable proportion of their profits with a corresponding effect on their stock price and the compensation of their senior executives; and
- Operators would not be allowed to include and enforce clauses in their contracts with customers that, in the event of a dispute, only allow them to submit to arbitration or go to small claims court to obtain compensation.

### **The U.S. Market Is Falling Behind**

There are at this point two fundamentally different views of the U.S. broadband market. The first asserts that the U.S. broadband market is effectively competitive. If this were true, then only minimal regulation would be required; competitive forces, would ensure that the public interest and access to customers of smaller often more innovative competitors—including new entrants—would be well served.

The alternative view is that the U.S. broadband market is not truly competitive and is becoming less so. Supporting this latter view is data showing that the United States has been falling behind other countries in terms of the capabilities of the services available to and the prices paid by customers.

In either of these scenarios it is clear that the 1996 Telecommunications Act has become outdated. The Act is no longer credible as a policy and as a legal and regulatory structure on which the FCC can base its regulatory decisions. Even in the illusory first scenario of allegedly effective broadband competition, the Act should be gutted in favor of a new version that would ratify the current status quo. In the second scenario of ineffective and decreasing broadband competition, of course, a new Act must be enacted to restore healthy competition.

A guiding tenet in the formulation and evaluation of such a new structure is that there has been until now, and must and should be in future, a substantially greater number of competitors at the level of services than the number of operators of broadband networks upon which all these competitors depend for access to customers. These services providers include the network operators themselves, unless as in some countries it is decided to exclude them from services markets other than transport. It is important to keep in mind that the vast majority of new services and applications delivered over networks, from voicemail to web services, have originated outside the network sector itself. Hence

it is vitally important, as a matter of national economic and societal interest, to ensure that services providers and innovators with no connections to network operators are not unfairly inhibited in their access to, and use of, the latter's broadband facilities. A new Act would have to establish a regulatory structure that stimulates and sustains intra-modal or/and inter-modal competition in the provision of network or transport services to meet and enforce this condition.

### **How the Verizon/Cable Cartel Slipped Past Regulators**

The approval of the Commercial Agreements (CA) and Joint Operating Entity (JOE) between Verizon and four cable giants (Comcast/NBC-Universal, Time Warner, Bright House & Cox) with minor, ineffective conditions was due in significant measure to the failure of opponents in the industry to coordinate their arguments and present a fully "dots connected" set of arguments and evidence that laid out clearly and unequivocally the long term, as well as the imminent harm, to broadband in the United States that will ensue from their implementation. Opponents also failed to present alternative approaches to market structure and regulation that can produce better outcomes for U.S. customers, help reinvigorate the U.S. economy, and sustain the competitive health of the U.S. broadband market.

Each opposing interest group—other mobile operators, other fixed telephone companies, satellite services providers, over-the-top (OTT) players (third party services suppliers who depend on broadband facilities to reach their customers)—tended to focus on its own specific and often short-term concerns. Each group ignored the overlaps and intimate connections with other affected interests that underlie forward-looking, cohesive, comprehensive and irrefutable arguments in opposition to Verizon and its cable TV allies. The result was that neither the FCC nor the Justice Department (DOJ) were presented with convincing evidence from third parties that they could rely on to justify rejection of the transactions.

In contrast, Verizon and its allies were able to pursue an approach of "divide and conquer." This approach became most visible in their success at persuading one of their key opponents, T-Mobile USA, to change its position and support the transactions (abandoning its allies in the Alliance for Broadband Competition a mere six weeks after its formation) once it was offered additional spectrum that it needed as part of the overall set of deals which Verizon was orchestrating.

The FCC and DOJ ultimately received ineffective rebuttals from the organizations with the most to lose in the face of relentlessly repeated claims by Verizon and its allies about the benefits that would flow from the transactions, as well as Verizon's urgent need for access to the spectrum assets involved. These claims were largely unsupported and often were internally contradicted by other evidence from Verizon itself.

One of the most egregious claims was Verizon's assertion that its alleged superior spectrum efficiency would mean that it soon would exhaust all available means to exploit its existing spectrum to meet rapidly rising demand for network capacity. The metric used to support this claim was spurious, as we showed in a May 2012 [filing](#) to the FCC that Verizon never attempted to rebut. Moreover if this metric were valid Verizon would be less than one-third as efficient in its use of spectrum as China Mobile, a calculation that was also submitted to the FCC and ignored by Verizon.

A second statement, belied by Verizon's own marketing material and plans for new product development, concerned the alleged independence of Verizon's wireless services from its wireline operations. This was asserted in order to support the proposition that the set of spectrum and commercial arrangements between Verizon and the cable TV operators were separate transactions and not complementary aspects of an integrated strategy. But there is such a strategy, which involves cooperation between major competitors in both wireless and wired broadband markets and in developing integrated wireline and wireless services. Such conduct raises obvious and legitimate concerns about antitrust violations.

Ironically, because there is widespread agreement that U.S. broadband performance is lagging (see the National Broadband Plan Report), and that spectrum availability in particular is a major concern, a loud, consistent call to action, however unfounded, is likely to win against incoherent and divided opposition. So, the very problems that Verizon and its allies have caused help them to drown out a fragmented set of objections to their transactions. Verizon's opponents did not present a convincing or cohesive positive alternative beyond either "just say no" or a range of proposals for conditions for approval that were uncoordinated and only addressed the specific, self-serving individual interests of each opponent.

### **The Cartel Will Finish Off Broadband Competition**

There are two bases of competition to support the goals of the 1996 Act: (i) Intra-modal competition, which has already been eliminated by the removal of unbundling or wholesale access obligations on the telecommunications companies in 2005, and (ii) Inter-modal competition, between telecommunications companies and cable TV operators, which will be eliminated by their collaboration now that these transactions have been approved by the DOJ and the FCC subject only to ineffectual conditions.

The conditions imposed for approval of the Verizon/Cable transactions are supposed to ensure that they will not lead to any significant harm to broadband competition. But in the real world it is certain that the conditions will be ineffective. For example, one of the key conditions for approval of the Verizon/Cable transactions is the sunset clause on the parties' development joint venture (JOE). The JOE will be shut down after 2016, unless the parties request and receive permission for its continuation, under conditions which are not now clearly established. But it will be easy for JOE members to launch development initiatives whose schedules will extend beyond 2016 and then claim it is unfair and too costly and harmful to innovation to shut these programs down prematurely. Even if the JOE ceases to exist after 2016 the parties will have had ample time to introduce new proprietary standards, technologies and products, available ONLY to their members and so will be able to build high walls around their customer bases. These technologies will be exploited by the JOE members to exclude other innovators from reaching their customers, which these third parties can only do over the access networks that the JOE members operate.

These broadband access networks are today essentially unregulated. They are therefore not subject to any effective supervision regarding the conditions under which competitors of the JOE members may connect to them, as they must, in order to communicate with customers who depend on them for access to the Internet and other online services.

The approval of the Verizon/Cable transactions, with ineffective conditions, is tantamount to giving the green light to cartels. Approval of this cartel creates a precedent that will make it impossible to stop other major players with the greatest market power, most notably AT&T, from forming their own cartels.

The threat to effective competition posed by the cartel is not a distant prospect but an immediate consequence. There are already duopolies (combined market shares of 90 percent) of one telecommunications company and one cable operator for the supply of fixed broadband services to U.S. customers. A significant number of these duopolies involve Verizon and one of its four proposed cable TV partners, while others involve AT&T and a cable operator, and CenturyLink or another local telephone company franchise and a cable operator.

Monopolies of cable operators—most notably Comcast and Time Warner Cable—in the provision of broadband services at speeds above the basic levels of which DSL is capable, already exist in areas where Verizon has decided not to deploy FIOS and AT&T has decided not to deploy U-Verse. In these areas, as well as most of the areas served by other telephone companies, competition with the cable operators' broadband services is ONLY slower DSL, which has been characterized as "obsolete" by the CEO of AT&T. Absent a major rapid program of expansion of fiber-to-the-home deployments, which none of these telephone companies is planning, it is likely that over half of U.S. households (depending on the source, the United States currently contains between 120-130 million households) will only have one source for broadband access even at the global average fixed broadband speed, let alone at higher speeds. Cisco's Visual Networking Index (VNI) Forecast (2011-2016) predicts that this average speed will increase from 9 Mbps in 2011 to 34 Mbps in 2016 whereas DSL can only support 3-6 Mbps depending on the length of the copper pair from the DSL multiplexer or in the case of U-verse up to 12 Mbps (or 24 Mbps if the customer does not subscribe to a bundle that includes U-verse TV service) thanks to its mix of fiber-to-the-node with short copper extensions to users' locations.

Among the existing cable monopolies for broadband speeds above basic or DSL speeds are cities such as Boston, Baltimore, Albany, Syracuse, and Buffalo, including affluent as well as low-income neighborhoods. Now that the CAs and JOE have been approved, Verizon will not expand its FIOS coverage further in order to establish even a duopoly market for high speed broadband. If AT&T chooses to establish similar arrangements with cable MSOs, the coverage of these two cartels will cover an array of markets that include the majority of U.S. households. The FCC's recently released [Eighth Broadband Progress Report](#) reported that fewer than 20 percent of U.S. households are passed by fiber access facilities.

Hence, absent major investment programs in new fiber deployments that, as of November 2012, are nowhere in sight, about 80 percent of U.S. households will soon find themselves in a monopoly supply situation for broadband services at speeds above a basic and increasingly inadequate level.

In light of this analysis, whose findings are easily verifiable, the complaints and pressure from the LNOs to oblige the FCC to declare the broadband market as "effectively competitive" cannot be justified. It is vitally important that the FCC receive inputs and information from as many sources as possible about the true state of broadband in the United States, including comparisons and benchmarking with other developed economies, to refute the misleading and inaccurate statements and claims of the leading U.S. operators about their achievements and the allegedly superior price/performance of broadband services in the United States.

The reverberations and harm resulting from the elimination of competition in the U.S. broadband market will be felt throughout the entire U.S. economy. The new cartel, or cartels combining a major U.S. telecommunications company and cable TV companies will be free to act as unassailable gatekeepers in the effectively unregulated broadband market to choose unilaterally which applications and services are to be made available to U.S. customers (residences and businesses) and under what terms, timing, conditions, pricing and performance. The members of the cartel will be able to set prices at their sole discretion and as unregulated entities implement traffic management schemes that favor their own services or the services of their preferred partners over those of direct competitors who depend unavoidably on their broadband facilities to reach customers.

This situation will be harmful for U.S. innovation. In their own interest, the gatekeepers will control and restrict opportunities for companies such as those in Silicon Valley and other centers of U.S. entrepreneurship, as well as frustrate the legitimate business ambitions and goals of other network operators outside the cartels, who will have no recourse against their actions.

#### **No Competition Without Interoperability**

Broadband platforms represent the future of all telecommunications-information-entertainment services and applications for the foreseeable future (including voice, data and video services). It is therefore critical that broadband remain a competitive, rather than a duopoly or even worse a monopoly/cartelized service. Interoperability is a key characteristic of telecommunications services and networks, if they are to promote effective competition. The principle of interoperability that is embedded in the traditional fabric of U.S. telecommunications is that everyone should be able to use whatever terminal device they wish and enjoy access to whatever services, applications and content they are interested in, subject to minimum constraints imposed by considerations of safety, disruption to the interests of others, and the prevention of illegal activities.

Many legitimate interests are involved in sustaining this principle, including network operators, multiple small and large services providers and applications developers, content owners, and equipment and device suppliers, as well as (last and definitely not least) all of us as consumers. It is therefore unacceptable and profoundly dangerous for any one interest or set of interests to be able to decide unilaterally what constitutes and justifies limits on interoperability and what does not. Yet that is precisely the situation that has arisen in the mobile broadband arena, where AT&T and Verizon have decided and continue to argue on technical grounds in favor of the need for and even the value of non-interoperability between them and other wireless networks in the very important 700 MHz or "digital dividend" band which they dominate.

In the wireless arena claims of "interference" are frequently little more than a cover for attempts to shut out competition. Interference is a fact of life for wireless systems that does need to be managed efficiently in the best and balanced interest of all stakeholders. But the solutions proposed should be formulated and assessed objectively and openly, not imposed by one party with a strong vested interest in a specific outcome that, as in the 700 MHz band, is harmful to its competitors and even in the long run to its own customers.

Non-interoperability is one of the conditions that monopolies or duopolies can exploit to establish and continue to reinforce their anti-competitive hold over the market and customers. Non-interoperability of devices between networks enables operators to create high switching costs to inhibit customers who may wish to choose another provider but then find—in contrast for example to PC users who have been able to connect to multiple networks with the same standardized Ethernet interface—that they have to acquire new devices in order to make the switch.

Establishing non-interoperability is an especially powerful tactic to reinforce the stranglehold of the largest wireless operators over the wireless or mobile broadband market. All wireless operators rely on critical fixed facilities largely supplied by the companies that own the two largest wireless players, Verizon Wireless and AT&T Mobility, with the cable operators (Verizon's new partners) also becoming more important factors with their fixed assets. All other wireless competitors depend on their larger competitors' cooperation to survive and compete effectively, a situation recognized in antitrust law as ripe for potential abuse. The creation of a cartel between owners of facilities that are essential for cartel-members' competitors will broaden the scope of this abuse. This trend will be exacerbated by the emerging addition of Wi-Fi facilities and Wi-Fi-equipped sites to the roster of essential facilities for mobile operators, which need to offload their rapidly growing data traffic in the most congested areas. Next generation carrier Wi-Fi, which the members of the Verizon/Cable cartel are involved in developing, will expand the importance of Wi-Fi even further.

Abuse of their bottleneck power over critical facilities by members of the Verizon/Cable cartel, added to the non-interoperability barriers they are erecting around their customer bases will harm the quality and capabilities of the services that customers of competing wireless operators will experience. This will drive customers into the embrace of the LNOs, even if they are reluctant to switch. The power of the largest operators to increase prices and impose restrictive contractual conditions on consumers with impunity will be increased.

## **Balanced Pro-Competitive Approaches to Broadband**

Other countries and economies, from France and Sweden in Europe, New Zealand and South Korea in Asia-Oceania, and Brazil and Chile in South America, are tackling broadband issues with a more even set of checks and balances among all the participants (such as network operators, third party services providers, regulators and other government agencies, and consumers). These approaches are in sharp contrast to the unilateral power of the emerging anti-competitive cartel of a handful of large operators that is gaining dominance in the United States. These other countries seem to be more aware than the United States of the necessary foundations for effective competition (facilities-based and/or wholesale) in broadband. They have not fallen into the trap of regarding broadband as an effectively competitive "information services" market that should therefore be deregulated, as if it is a distinctly different market from telecommunications. By any standard of logic and commonsense it is not different, since all telecommunications services from narrowband voice and texts to broadband video and "Big Data" are increasingly and eventually will be entirely delivered over broadband channels.

Broadband is not different or distinct from telecommunications. Basic broadband has become the basis and lifeblood of early 21st century telecommunications, and higher speed broadband will become its basis over the next ten years. The extent and urgency of the problem created by AT&T's and Verizon's introduction of non-interoperability into the U.S. mobile broadband market is highlighted by the conservative estimate that by the end of 2012 there will be at least 30 million non-interoperable mobile broadband devices in service in the United States, fueled by the recent launch of non-interoperable, i.e. operator-specific models of Apple's iPhone 5.

While the circumstances and traditions of the United States preclude its replication of a broadband model of governance, regulation and competition in exactly the same forms adopted in other countries, the principle of checks and balances and countervailing power that is being applied in many of them in different forms is one that should be reaffirmed in the United States. The notion that unregulated and unbridled LNOs should be exempted from effective regulation must be rejected. Checks and balances are profoundly and historically even exceptionally American in spirit and practice. Their effective presence must be one of the core criteria against which proposed broadband policies and regulations should be judged.

## **No Effective Competition Without Regulation**

Regulation can be pro-competitive, as was proved in the late 20th century when the internet emerged. Furthermore, the absence of, or freedom from, regulation creates the environment that leads to monopolies and cartels. The kind of deregulation or no regulation espoused by LNOs in the United States, i.e., affording them the freedom to act in any way they choose, will have the effect of stifling innovation and competition and harming U.S. customers. The foundations of U.S. telecommunications policy, which espouse the virtue and value of affordable access to networks for all Americans and the benefits of effectively competitive markets to achieve and sustain this goal are being systematically and determinedly undermined by the short sighted and selfish strategies and aggressive lobbying of the most powerful U.S. operators, in particular Verizon, AT&T, and Comcast.

Most outrageously, Verizon is now in federal court (Verizon v. FCC, D.C. Cir., No. #11-1355) invoking the First (speech rights) and Fifth Amendments (".. nor shall private property be taken for public use, without just compensation") to justify a completely unregulated status for its business, free of any public interest obligations. In this status it will be able to pursue the objectives of maximizing market share and profits in the United States with an agenda that has nothing to do with the goals and ideals embodied in the 1934 and 1996 Communications Acts. These ideals and their implementation in practice made the United States the envy of the world and an undisputed global leader in telecommunications throughout most of the 20th century.

The policies promulgated by these LNOs and their political and ideological supporters are not forward-looking in a 21st century context as they like to proclaim by dismissing the principles and practices of regulation they have been trying to dismantle as so "20th century." To the contrary, they seek to revert to a more distant past with visions and recommendations favoring unregulated and untrammelled oligopolies that are reminiscent of the 19th century.

## **Telecom is Too Important to Leave to Network Operators**

The fragmented responses of the traditional telecommunications sector to the proposed creation of a cartel between Verizon and four cable operators gave insufficient ammunition to the FCC and DOJ to reject it. They have to be augmented by actions from other powerful forces in the U.S. economy. These forces must realize that the imminent concentration of bottleneck power over broadband in the hands of a few major operators is profoundly inimical not only to the broad economy and the public interest but also to their own business prospects.

The remarkable surge of internet- and web-related innovation in applications and services and the world-beating U.S.-based companies that have been able to flourish—from Google and Facebook to Apple and eBay—would not have been possible without the pro-competitive regulations introduced from the 1970s into the 1990s that broke up earlier long-established network monopolies in the U.S. telecommunications sector. Moreover, those earlier telecommunications monopolies were under legislatively mandated and regulated public obligations in exchange for their protected monopoly status. In contrast, today's emerging oligopolies deny that they should have any such obligations on the basis of an extreme form of a "free market" ideology, i.e., freedom for them, even at the expense of freedom of choice for customers and freedom of access for other competitors. According to this theory, either miraculously or through some "invisible" law of nature, the decisions of these oligopolies or cartels will always be consistent with the public interest. In other words, what's good for Verizon (or AT&T or Comcast) can only be good for the United States.

The open, interoperable Internet first developed as an outcome of a productive combination of initial government support and private entrepreneurial initiatives. The development of the fundamental technology of packet switching was funded by the Department of Defense, while the first browser emerged from CERN, the Swiss-based multi-government funded consortium European Organization for Nuclear Research or Organisation Européenne pour la Recherche Nucléaire. These developments, among others, were then exploited commercially by entrepreneurial organizations, primarily by U.S.-based companies, with a few exceptions (e.g. Skype).

The large U.S. network operators followed only later. Fortunately they were not in a position to impede the flourishing of the Internet thanks to a series of decisions by regulators and the courts to make sure that large established network operators could not exert and assert unilateral or unchallengeable bottleneck control over the innovative devices, applications, and services that the Internet delivers to customers from many sources.

The Internet has been a marvelous vehicle for the application of true free market principles that have allowed a plethora of new firms to succeed, whose origins lie both within, and for the most spectacular of them, outside the traditional sphere of telecommunications. It is time for these companies, some of which have become world-renowned household names to come to the defense of the principles and practices of the open Internet in the new broadband era for all network access technologies, wireless and wired (copper and fiber).

Large U.S.-based businesses constitute another potentially influential, albeit disparate group of companies that has so far been quiescent in debates about the future of broadband, and the danger of allowing large operators to act as they please with no effective regulation. Their own competitiveness and efficiency against foreign competitors, and the relative attractiveness of alternative locations, domestic and globally, for their investments increasingly are a function of the costs and capabilities of the broadband services that they can exploit in the United States throughout their operations, both to implement new business strategies and to enhance the productivity and meet the expectations of their most valuable individual employees.

These two groups of influential companies—over-the-top services providers and applications developers, and major U.S. corporations in all sectors of the economy—must work with public interest groups to turn back the well-financed tide of anti-competitive, pro-oligopoly, cartel-friendly policies being promulgated by the major U.S. broadband network operators.

#### **LNOs Misrepresent the State of Broadband in the U.S.**

The leading U.S. network operators argue that they are in some respects still world leaders, e.g., with respect to the efficiency with which they exploit the spectrum allocated to them. The metric used and repeated by Verizon to “prove” this claim is spurious, however, a finding we have demonstrated in a filing to the FCC as referenced earlier. Verizon’s metric claims to show that U.S. mobile operators are between two to eight times more efficient in this respect than their counterparts in Western Europe and Asia as well as Canada and Mexico. “Facts” such as these are a major source of the confusion about and lack of awareness of the dangerous direction in which the U.S. broadband market is headed. We also noted in our filing to the FCC that the application of this metric to China, a country not included in the comparisons that should surely be covered in a forward-looking perspective, yields the result that China is more than three times as efficient as the United States.

Leading U.S. network operators also argue that where they fall short they are being held back primarily by outdated regulations imposed by the FCC. We agree that the regulatory structure under which the FCC is operating needs a fundamental overhaul, but it is disingenuous to claim that these huge companies with their vast resources are not at least in part to blame for the relative decline of the United States with respect to the performance and price levels of broadband services compared to other countries. Solid evidence of the less than stellar performance of broadband pricing in the U.S. compared to other countries can be found in the Google-sponsored work on International Broadband Pricing at <http://googleworldwide.blogspot.com/2012/08/international-broadband-pricing-study.html>.

In a forward-looking broadband perspective it is irrelevant for AT&T and Verizon to continue to point to the price of a mobile voice minute in the “buckets” of minutes they offer that include hundreds or even well over 1,000 minutes per month as being among the lowest if not the lowest in the world. The proper metric for today and the future, is the price of mobile broadband data where other countries such as Sweden, which is not otherwise known for its low cost structure and low retail prices, offers substantially lower pricing than U.S. operators (see <https://wirelessintelligence.com/analysis/2012/08/european-lte-operators-look-to-new-pricing-strategies-to-boost-mobile-broadband-revenues/345/>).

#### **Restoring Core Principles of U.S. Telecom Policy**

Until the present time, the United States has had an impressive and enviable record of leadership in telecommunications, in establishing globally adopted standards from Ethernet and the Internet Protocol to Wi-Fi and DOCSIS (the standard for broadband cable modems), and indeed the fundamental structure of cellular networks. The United States also historically set the standard in making affordable telecommunications services available to as many residents as possible, while demonstrating the value of competitive markets and the role of rules, i.e., regulations, in sustaining competition.

This hard-won legacy is now being repudiated, and the bases of global U.S. leadership dismantled, by the actions of a handful of leading U.S. operators, who invoke a discredited “free market” ideology. This ideology proclaims that government and regulators can only do harm and the private sector can only do good and that this thesis will inevitably benefit customers and the economy, while private enterprise focuses solely on maximizing “shareholder value.” These operators reject the idea that they have any other responsibility or special obligation to serve the public interest, even though their businesses depend upon the exploitation of public resources, such as spectrum and rights-of-way, and involve franchises awarded by public authorities, such as the FCC, state and local governments.

It is time to re-affirm and protect the basic principles and goals enshrined in previous eras of telecommunications in order to ensure that the U.S. regains and sustains a position, which is now slipping away, as a global leader in the quality, performance, affordability and innovativeness of universally available and affordable broadband services for all its citizens, residents, and businesses.

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