



## Sen. Ensign Introduces Communications Legislation That Re-writes Telecom Act of '96

Prospects for Passage In this Congress Unclear

July 28, 2005

Yesterday Senator John Ensign (R-Nevada) and Senator John McCain (R-Arizona) introduced communications legislation, entitled the "Broadband Investment and Consumer Choice Act," that would fundamentally alter most provisions of the landmark Telecommunications Act of 1996 and provide incumbent local exchange carriers ("ILECs") with significant regulatory relief from interconnection obligations, while at the same time allowing ILECs to avoid the local franchising process for their planned video services. In addition, the sweeping legislation contains provisions ensuring consumer access to content and applications, including Voice over Internet Protocol (VoIP) and regulates the way that municipalities who want to build and own their own broadband networks can do so. Highlights of the 72 page bill are as follows:

- **State and Federal Common Carrier Regulations Mostly Eliminated:** The bill eliminates most existing state and federal regulation of telecommunications and information services, as well as wireless services, including regulation of rates and service quality;
- **Direct to Home Satellite Services Subject Only to Federal Regulation:** The bill precludes state and local governments from regulating any aspect of direct-to-home satellite services;
- **Mobile Services Subject Only To Federal Regulation:** The bill requires the FCC to forebear from applying any old or new regulations, including any rules in the Ensign bill, to mobile companies providing nationwide service, unless the FCC determines that such regulations are necessary because of a lack of competition

or for public safety reasons. In addition, the bill precludes the FCC from adopting rules that prevent users of IP enabled devices from moving among traditional wireless networks and IP enabled platforms, and ensuring "seamless" network access across platforms;

- **Establishes "Basic Telephone Service" Obligations:** The bill requires ILECs and ETCs to offer "Basic Telephone Service" ("BTS"), which is defined as single line flat rate voice service (which need not provide access to a long distance carrier), to residential and business customers, and caps the rates that can be charged at existing levels until 2010. The bill also requires the FCC to establish federal quality standards governing installation, repair, and quality of BTS, and allows state commissions to enforce the federal rules;
- **Guarantees Broadband Users Access To Content and Applications, Including VoIP:** The bill precludes broadband providers from blocking end users' access to any content, unless the content is illegal or inconsistent with bandwidth or capacity restraints. In addition, the bill specifically provides that broadband service providers may not preclude end users from using a broadband connection to obtain service from a competing VoIP provider;
- **Severely Curtails State Commission Authority:** The bill federalizes rules governing auto dialers, cramming, slamming, obscene and harassing calls, hearing and speech impaired access, billing disputes, use of CPNI and interconnection and intercarrier compensation, however state

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commissions are empowered to enforce the federal rules;

- **Network Interconnection Obligations Removed:** The bill removes most ILEC interconnection obligations and replaces them with a requirement that facilities-based carriers establish “commercial arrangements” with other facilities-based carriers. The only interconnection obligation which remains under this bill is that of facilities-based carriers to interconnect with narrowband communications service providers.
- **ILECs Must Continue to Unbundle Copper Loops:** One of the only unbundling obligations of the '96 Act to survive in this bill is the obligation of ILECs to provide unbundled access to copper local loops. This provision is less meaningful than it appears on its face, given the rapid replacement of much copper plant with fiber in many suburban and urban areas. In addition, ILECs must continue to offer physical and virtual collocation.
- **Statutory Number Portability Standards:** The bill requires that customers switching service providers must have their numbers ported in no more than 5 business days, and authorizes the FCC to open a rulemaking to determine whether early termination fees charged by carriers are hindering consumer choice. This provision is curious, given that (1) the FCC has said that number portability complaints are down since the new rules became effective in late 2003, and (2) most carriers port numbers in a matter of hours, not days.
- **Eliminates Need for Video Service Providers to Obtain State/Local Franchises:** The bill eliminates the need for “video service providers,” defined as any provider of video that uses a public right of way to provide service, to obtain a state or local video franchise, but allows state and local governments to continue to require

payment of a “reasonable video service fee” on an annual basis. The amount of the fee is capped at 5% of the provider’s gross revenues, however a carrier may petition the FCC for a reduction of the fee, and the FCC must act on such petitions within 60 days of their filing;

- **New Rules to Encourage Competition in Multichannel Video Programming Distribution (“MVPD”):** In the interest of promoting MVPD and satellite broadcast programming in rural areas, the bill makes it unlawful for MVPDs or MVPD programming vendors to engage in unfair competition and requires the FCC to promulgate new MVPD ownership and distribution rules;
- **Regulation of Municipal Broadband Networks:** The bill requires any state or local government that seeks to build its own broadband infrastructure to disclose the cost, the services planned, the architecture, and provide an accounting of whether the system will use free or below cost rights of way or have beneficial tax treatment. Following the disclosure, non-governmental entities have the right to bid to build the network. Non-government bidders are to be given preference if bids are identical to the government entity’s bid, and to the extent the state or locality wins the bidding and builds the network, it must allow non-government entities access to poles, conduit and rights of way.

While tackling most of the hot-button issues in the communications world, the bill does not address one of the stickiest issues facing policy makers today, how to fund the Universal Service Fund.

**Please contact Ross Buntrock (202-857-4479) or Mike Hazzard (202-857-4540) if you have any questions regarding this advisory.**

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