

**SECTION-BY-SECTION ANALYSIS OF S. 2430
BROADBAND REGULATORY PARITY ACT OF 2002
(as introduced April 30, 2002)
[commentary in boldface]**

Section 1 (Short Title).

The Broadband Regulatory Parity Act of 2002.

Section 2 (Findings).

Sets forth the findings of Congress regarding cable modem service and digital subscriber line (DSL) service: that they are functionally equivalent and compete; that they are subject to disparate regulatory treatment at the federal, state and local levels; and that the deployment of DSL service has been restrained by regulatory requirements that are inappropriate for a competitive service offered by various non-dominant providers. Finds further that competing and functionally equivalent products and services should be regulated in the same manner, regardless of who provides them; that the FCC is best positioned to determine what the regulatory requirements for broadband access services should be and should be required to ensure that providers of broadband services are regulated in an equivalent manner; that government regulation should not favor or advantage one class of competitors among competitors offering similar products or services; that inappropriate regulation imposes needless costs and results in higher consumer costs; that lower consumer costs will accelerate demand for high-speed Internet access services; that regulatory certainty and parity will provide incentives to increase deployment of high-speed Internet services and the community will benefit from those services; that the United States lags behind other countries in the deployment of high-speed data services; and that when all providers of broadband services compete under the same rules, consumers will benefit from increased choices and lower prices.

The findings use a number of terms interchangeably (broadband service, broadband access service, high-speed Internet access service, high-speed Internet service, high-speed data service), most of which are undefined (only “broadband service” and “broadband access service” are defined; see Section 3(b), *infra*). Findings relating to one type of service are used to support conclusions relating to a different type of service.

The findings state incorrectly that existing regulation is impeding DSL deployment and that deregulation will lead to broadband choice and competition. The facts are precisely the opposite. The Bells are aggressively deploying broadband facilities and services in today’s regulatory environment, largely in response to competitive pressure. In its February 2002 “706” Report, the FCC found that “advanced telecommunications is being deployed to all Americans in a reasonable and timely manner.” Deregulation of Bell broadband facilities and services and the elimination of critical market-opening provisions of the 1996 Telecommunications Act will only enable the Bell companies to remonopolize the local telecommunications market.

The findings also assume, incorrectly, that the Bell companies are being disadvantaged by disparate regulation. In fact, existing regulatory disparities benefit the Bells. Only the Bells enjoy free use of the rights-of-way in most places; exclusive access to many buildings; access to capital at much lower interest rates than new entrants; subsidies for broadband facilities from the universal service program; and little or no regulation or fees at the local level. Bell companies are regulated not unfairly, but differently -- because they built their networks with a guaranteed monopoly profit while competitors have taken substantial risks in reliance on the 1996 Telecommunications Act, and because the Bells continue to dominate their core business. The Bells still have over 90 percent of the market for voice, and after sitting on DSL technology for ten years, they are rapidly gaining market share in broadband.

Section 3 (Parity in Regulatory Treatment of Broadband Service Providers and Broadband Access Service Providers).

Section 3(a) adds a new section 262 to the Communications Act (“Parity in Regulatory Treatment of Broadband Service Providers and Broadband Access Service Providers”). New section 262(a) requires the FCC to prescribe regulations to ensure that all broadband and broadband access services are subject to the same regulatory requirements (or none); that all providers of such services are subject to the same regulatory requirements (or none) with respect to the provision of such services and the facilities and equipment used to provide such services in the provision of such services; and that there is no increase in the current regulatory requirements applicable to such services, any provider of such services, or any facilities and equipment used to provide such services (when used to provide such services).

By requiring “parity,” the bill effectively deregulates the Bell companies’ broadband offerings. Oversight of the Bells would be reduced to the lowest common denominator, without regard to the Bells’ market dominance and despite any evidence that today’s competitive and consumer safeguards are deterring their investment in broadband facilities and services.

More specifically, the bill would require the FCC to hold that the transmission component used by ILECs to provide high speed Internet access is non-common-carrier “telecommunications,” rather than a “telecommunications service” subject to the unbundling, interconnection, and collocation requirements of section 251 of the Act. Competitors that want to offer the voice and data services that consumers are demanding would have to build new networks entirely from scratch, an unrealistic burden that will effectively crush competition.

Even as to broadband common carrier services, the “parity” mandate would accord nondominant treatment to the Bell companies. Deeming the Bells’ broadband services “nondominant” -- an issue that is currently the subject of an FCC rulemaking -- would allow them to set the price of the service without any regulatory oversight, despite the requirement that such services be provided on rates, terms, and conditions that are “just and reasonable.” The bill eliminates the 1996 Act’s requirement that the Bells lease access

to their network under a price standard -- cost plus a reasonable profit -- that the U.S. Supreme Court just said was reasonable.

The bill's blanket deregulation may also prevent the FCC from adapting the Communications Assistance for Law Enforcement Act (CALEA) to the Internet era. It could likewise leave the FCC powerless to apply basic consumer safeguards -- including privacy protections, limitations on spamming, cramming and slamming, and access for the disabled -- to the provision of broadband services.

The parity mandate could also preclude the FCC from requiring universal service contributions from any provider of broadband service, and even require the Commission to eliminate the existing contribution obligation imposed on the Bells' broadband offerings. This means that as carriers shift away from traditional telephone service to high speed data service, Internet access, and new offerings like IP telephony, contributions to the universal service fund could decline. Either the remaining contributors will have to pay more, or the size of the fund will shrink. A smaller fund would mean less money to keep basic service in rural areas affordable, less money to sustain "lifeline" programs for low income Americans, and less money for E-rate grants to bring high speed access to schools and libraries.

New section 262(b) would prohibit states from exercising jurisdiction over broadband or broadband access services or the facilities and equipment used to provide such services in the provision of such services.

This broad language removes State oversight of the quality and price of high speed service provided to consumers, CLECs, and ISPs. States could not adopt or enforce performance standards for the provision of special access and network elements. State commissions have been at the forefront of consumer protection, but under the bill States would lack any authority to adopt or enforce rules against fraudulent accounting, billing and other similar practices. The California PUC is currently investigating PacBell for overcharging customers for Internet services and hiding evidence of complaints from regulators. No similar oversight of high speed services would be possible under the bill. Similarly, States could not adopt or enforce any other consumer protection standards, such as prohibitions on cramming and slamming, and protecting subscriber privacy. States may even be precluded from regulating basic voice service and associated facilities, if the State regulation interferes with the bill's deregulation of broadband service or if voice service is provided to consumers in a package with broadband.

New section 262(c) would require ILECs to provide all ISPs with the telecommunications necessary for ISPs to provide broadband access service to its subscribers at rates, terms and conditions that are just and reasonable.

This provision establishes a hollow obligation; it allows competitors only to buy transport at whatever inflated rate the Bell chooses to charge itself on paper.

New section 262(d) clarifies that section 262 does not affect the requirements of section 271; does not affect ILECs' obligations under section 251(c) to provide requesting telecommunications carriers with services and access to facilities and equipment necessary for the provision of "switched band voice telecommunications service;" does not affect any tariff filed by NECA, and such tariffs may continue to include broadband services; and does not affect section 251(f).

The Bells need only provide competitors with access to network facilities that are necessary for the provision of "switched band" voice telecommunications. This provision overrides important existing FCC and State rules allowing competitors access to the incumbent networks. Competitors would no longer have access to fiber *or copper* lines for data services. Even the Tauzin-Dingell bill allows competitors to lease copper facilities (*i.e.*, "line share) for high-speed offerings. S. 2430 would force competitors to build new networks entirely from scratch if they want to offer the data and voice services consumers are demanding. That is wholly unrealistic.

By pushing broadband competitors out of the marketplace, the bill would deprive hundreds of thousands of CLEC customers of their existing broadband service. Some of those customers will have no other source of broadband service. Others will be left with a broadband monopoly, or at best a cable-Bell duopoly.

Section 3(b) adds definitions of "broadband service" and "broadband access service" to the Communications Act. "Broadband service" is defined as "any service that is used to provide access to the Internet and consists of or includes the offering of a capability to transmit information at a rate that is generally not less than 256 [kbps] in at least one direction." "Broadband access service" is defined as "a service that combines computer processing, information storage, protocol conversion, and wire routing with transmission to enable users to access Internet content and services."

The low threshold for defining "broadband" -- one-way transmission of only 256 kbps, far slower than today's DSL service -- has the perverse effect of expanding the scope of the bill's deregulation to services and facilities.