

NO RATE REGULATION OF BROADBAND INTERNET ACCESS ACT

MARCH 30, 2016.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2666]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2666) to prohibit the Federal Communications Commission from regulating the rates charged for broadband Internet access service, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “No Rate Regulation of Broadband Internet Access Act”.

SEC. 2. REGULATION OF BROADBAND RATES PROHIBITED.

Notwithstanding any other provision of law, the Federal Communications Commission may not regulate the rates charged for broadband Internet access service.

SEC. 3. EXCEPTIONS.

Nothing in this Act shall be construed to affect the authority of the Commission to—

- (1) condition receipt of universal service support under section 254 of the Communications Act of 1934 (47 U.S.C. 254) by a provider of broadband Internet access service on the regulation of the rates charged by such provider for the supported service;
- (2) enforce subpart Y of part 64 of title 47, Code of Federal Regulations (relating to truth-in-billing requirements); or
- (3) enforce section 8.9 of title 47, Code of Federal Regulations (relating to paid prioritization).

SEC. 4. ADDITIONAL RULE OF CONSTRUCTION.

For purposes of this Act, broadband Internet access service shall not be construed to include data roaming or interconnection.

SEC. 5. DEFINITIONS.

In this Act:

- (1) **BROADBAND INTERNET ACCESS SERVICE.**—The term “broadband Internet access service” has the meaning given such term in the rules adopted in the Report and Order on Remand, Declaratory Ruling, and Order that was adopted by the Commission on February 26, 2015 (FCC 15–24).
- (2) **COMMISSION.**—The term “Commission” means the Federal Communications Commission.
- (3) **RATE.**—The term “rate” means the amount charged by a provider of broadband Internet access service for the delivery of broadband Internet traffic.
- (4) **REGULATION.**—The term “regulation” or “regulate” means, with respect to a rate, the use by the Commission of rulemaking or enforcement authority to establish, declare, or review the reasonableness of such rate.

PURPOSE AND SUMMARY

H.R. 2666, No Rate Regulation of Broadband Internet Access Act, prohibits the Federal Communications Commission (FCC) from regulating the rates charged for broadband Internet access service (BIAS). The bill is intended to prevent the Commission from using the reclassification of BIAS under Title II of the Communications Act of 1934 to engage in rate regulation, whether directly through tariffing or indirectly through enforcement actions.

The legislation defines rates, regulation of rates, and broadband Internet access service. In addition, the legislation carves out specific exceptions from the prohibition on rate regulation, including the Commission’s existing authority to enforce its truth in billing rules, enforcement of the paid prioritization rule from the Open Internet order, and administration of the Universal Service Fund. The bill also clarifies that it does not address roaming or interconnection.

BACKGROUND AND NEED FOR LEGISLATION

The regulation of the relationship between Internet service providers (ISPs) and end users has a long and complex history. Dec-

ades of legislative and regulatory decisions have shaped the way in which that relationship is governed, beginning with early decisions about how to differentiate the various layers of the service. The FCC's 1970s rules differentiated data services that processed information from those that simply transmitted information, setting the stage for a regulatory regime that acknowledged the difference in the delivery of transmissions from the infrastructure that facilitated the delivery.

The more recent debate over the regulatory classification of Internet services forms the basis of the divide over net neutrality rules and where the FCC derives the authority to adopt and enforce such regulations. The history of this debate informs a great deal of current discussions on how to govern this innovative service.

As the Internet first entered the commercial sector and access became a mainstream commercial product, the U.S. government faced a fundamental question: should this new network of networks be regulated under the same laws governing legacy telephone networks—laws first articulated in 1934 and used to regulate a government-sanctioned monopoly—or should the government take a hands-off approach, letting the Internet grow free from the common carrier regulatory regime used to regulate telephony? Through the concerted efforts of the FCC and the administration of President Bill Clinton, policies were put into place to ensure that the Internet would not be subject to common carrier regulations under Title II of the Communications Act of 1934.

There was bipartisan agreement that this light touch regulatory regime was the appropriate approach for this new service, particularly as the passage of the Telecommunications Act of 1996 reacted in many ways to the failures of burdensome legacy regulations. This did not mean that the Internet was entirely free from government oversight; in 2004, former FCC chairman Michael Powell articulated four basic principles of Internet consumer protection. Chairman Powell set forth four “Internet Freedoms” that consumers were entitled to: (1) access the lawful Internet content of their choice, (2) access legal service and applications, (3) connect lawful devices, and (4) have competition among providers of service and content. In the same speech, he asserted that while Internet openness was a vital goal, government regulations were not necessary, and could potentially harm innovation.

In 2005, under then-Chairman Kevin Martin, the FCC adopted a set of principles based on Powell's freedoms. These principles were intended as policy guidelines to promote adoption and use of Internet services. At the time of their adoption, Chairman Martin stated that the principles were not enforceable and that the competitive marketplace would preclude the need for any regulation. However, in 2008, the enforceability of these principles was tested when the FCC attempted to order a broadband provider to cease certain network management practices and adhere to the principles. In *Comcast Corp. v. FCC* (2010), the U.S. Circuit Court for the D.C. Circuit (“D.C. Circuit”) ruled that the FCC did not demonstrate the statutory authority necessary to issue the order enforcing the principles.

As the Court was deliberating the Comcast case, the FCC, under the direction of then-Chairman Julius Genachowski, was working

to promulgate new net neutrality rules codifying the principles under a new theory of statutory authority. Following the Court's decision, the FCC initially proposed reclassifying broadband Internet access service as a telecommunications service, subject to the common carrier rules of Title II. Ultimately, the FCC instead relied on Section 706 of the Telecommunications Act of 1996, claiming it as a statutory grant of authority. The 2010 Order imposed requirements for disclosure and transparency on providers, and banned blocking and discrimination of network traffic, subject to reasonable network management. The rules differentiated between fixed broadband providers—typically those providing service to the home—and mobile broadband providers, based on the technological differences in the two platforms.

The rules were again challenged in court on the grounds that the FCC lacked statutory authority, the decision to implement the rules was arbitrary and capricious, and that the rules were in violation of laws prohibiting the FCC from treating broadband providers as common carriers. In January of 2014, the D.C. Circuit upheld the Commission's rule requiring broadband providers to disclose network management practices, but struck down the rules banning blocking and unreasonable discrimination. Unlike in previous challenges, the court ruled that the FCC had demonstrated that it has the authority under Section 706 to regulate broadband network management practices, but that the rules adopted were essentially common carrier regulations, which conflicted with prior Commission decisions classifying broadband as a non-common carriage "information service."

Following the Court's decision to partially overturn the Open Internet rules, the FCC, under Chairman Tom Wheeler, launched a proceeding to seek public comment on how to implement net neutrality rules. A May 2014 Notice of Proposed Rulemaking sought comment on the various options for legal authority for implementing rules. In November 2014, President Barack Obama weighed in on the net neutrality debate, calling on the FCC to enact strong rules under Title II of the Communication's Act, including no blocking, no throttling, increased transparency, and no paid prioritization. The President also called for mobile broadband services to be included, and acknowledged that there should be some exceptions for reasonable network management and specialized services. While calling for reclassification of broadband consumer access as Title II services, the President urged the FCC to forbear from rate regulation of broadband.

In February 2015, the FCC voted to adopt rules that reclassified broadband Internet access service as a Title II telecommunications service, consistent with President Obama's preferred approach. The Commission adopted rules to prevent blocking, throttling, and paid prioritization. Additionally, the FCC chose to forbear from select provisions of Title II.

Despite the Commission's forbearance, the reclassification of broadband Internet access service as a Title II service poses a serious risk for the regulation of rates charged by providers for the delivery of Internet traffic, which would be an unprecedented move in the market. Though Chairman Wheeler has repeatedly stated that the Commission does not intend to regulate rates, including during a hearing before the Subcommittee on Communications and

Technology, it is not clear that this is an assurance the Chairman can make, particularly given the fact that this Commission expressly overturned the decisions of prior Commissions.

There are two ways the Commission regulates rates under Title II: through its tariffing authority and through its authority to prohibit unjust and unreasonable rates. Whereas tariffing is before-the-fact regulation of rates, the Commission's authority to regulate through the adjudication of complaints provides for after-the-fact regulation of rates. The FCC chose to forbear from the provisions of Title II that deal with pre-existing tariffing requirements, which addresses much of the concern surrounding *ex ante* rate regulation. However, two major problems remain. First, FCC forbearance is an agency decision that can be reversed by a future Commission decision, creating an atmosphere of uncertainty. Additionally, the Order still applies Sections 201 and 202 of the Communications Act to broadband Internet access service, which grant the Commission authority over unjust and unreasonable rates. These rules leave open the possibility for future regulation of rates through the FCC's enforcement authority, a potential that creates immense uncertainty for providers seeking to implement innovative and novel pricing or delivery plans for consumers.

HEARINGS

The Subcommittee on Communications and Technology held a hearing on January 21, 2015, to examine less burdensome alternatives to the Title II reclassification of the Internet. The hearing, entitled "Protecting the Internet and Consumers Through Congressional Action," considered a discussion draft authored by Chairman Upton and Chairman Walden, which would put into law the bright line net neutrality rules without the threat of rate regulation. The Subcommittee received testimony from:

- Meredith Atwell Baker, CTIA—The Wireless Association;
- Chad Dickerson, Etsy;
- Jessica Gonzalez, National Hispanic Media Coalition;
- Paul Misener, Amazon.com;
- Michael Powell, National Cable & Telecommunications Association; and
- Nicol Turner-Lee, Minority Media & Telecom Council.

On February 25, 2015, just prior to the Commission's vote on the proposed rules, the Subcommittee on Communications and Technology held a hearing entitled "The Uncertain Future of the Internet" to discuss the potential impacts of the reclassification. The Subcommittee received testimony from:

- Rob Atkinson, Information Technology and Innovation Foundation;
- Former Congressman Rick Boucher, Internet Innovation Alliance;
- Larry Downes, Georgetown Center for Business and Public Policy; and,
- Gene Kimmelman, Public Knowledge.

On October 27, 2015, the Subcommittee on Communications and Technology held a hearing entitled "Common Carrier Regulation of the Internet: Investment Impacts" to examine the economic effects of the reclassification and the threat of rate regulation. The Subcommittee received testimony from:

- Nicholas Economides, professor, New York University Stern School of Business;
- Frank Louthan, Raymond James Financial;
- Michael Mandel, the Progressive Policy Institute; and,
- Robert Shapiro of Sonecon LLC.

On January 12, 2016, the Subcommittee on Communications and Technology held a hearing on H.R. 2666 and received testimony from:

- Elizabeth Bowles, WISPA;
- Harold Feld, Public Knowledge; and,
- Robert McDowell, Wiley Rein LLP, former FCC Commissioner.

COMMITTEE CONSIDERATION

On June 4, 2015, Representative Adam Kinzinger introduced H.R. 2666, the No Rate Regulation of Broadband Internet Access Service.

On February 10 and 11, 2016, the Subcommittee on Communications and Technology met in open markup session and forwarded H.R. 2666 without amendment, to the full Committee by a vote of 15 yeas and 11 nays. Two amendments to the legislation, offered by Ranking Member Eshoo and Representative Matsui, were defeated.

On March 24 and 25, 2016, the full Committee on Energy and Commerce met in open markup session. Chairman Walden offered an amendment to the bill to clarify the scope of the prohibition and define terms used in the bill, which was adopted. Ranking Member Eshoo, Representative Matsui, and Representative McNerney offered amendments that were defeated. The Committee ordered H.R. 2666 reported to the House, as amended, by a record vote of 29 yeas and 19 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The following reflects the record votes taken during the Committee consideration:

**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 48**

BILL: H.R. 2666, the "No Rate Regulation of Broadband Internet Access Act"

AMENDMENT: An amendment offered by Mr. Walden, No. 2, to make specific exemptions from the prohibition on rate regulation for Universal Service support, truth-in-billing regulations, and paid prioritization, to provide that broadband Internet access service shall not be construed to include data roaming on interconnection, and to define the terms "broadband internet access service," "Commission," "rate," and "regulation."

DISPOSITION: AGREED TO, by a roll call vote of 28 yeas and 20 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush			
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel		X	
Mr. Pitts	X			Mr. Green		X	
Mr. Walden	X			Ms. DeGette			
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn				Ms. Schakowsky		X	
Mr. Scalise				Mr. Butterfield		X	
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers				Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo	X			Mr. Yarmuth		X	
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loeb sack		X	
Mr. Bilirakis	X			Mr. Schrader	X		
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas		X	
Mrs. Ellmers							
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 49**

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BILL: H.R. 2666, the "No Rate Regulation of Broadband Internet Access Act"

AMENDMENT: An amendment offered by Ms. Eshoo, No. 3, to provide that the Federal Communications Commission may not reverse any forbearance from applying any requirement of section 201, 202, 203, 204, or 205 of the Communications Act of 1934 (47 U.S.C. 201; 202; 203; 204; 205) to broadband Internet access service (as defined in section 8.2 of title 47, Code of Federal Regulations, or any successor regulation), to the extent granted in the Report and Order on Remand, Declaratory Ruling, and Order that was adopted by the Commission on February 26, 2015 (FCC 15-24).

DISPOSITION: NOT AGREED TO, by a roll call vote of 20 yeas and 27 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush			
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel	X		
Mr. Pitts		X		Mr. Green	X		
Mr. Walden		X		Ms. DeGette			
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn				Ms. Schakowsky			
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers				Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo		X		Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loeb sack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas	X		
Mrs. Ellmers							
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 50**

BILL: H.R. 2666, the "No Rate Regulation of Broadband Internet Access Act"

AMENDMENT: An amendment offered by Ms. Matsui, No. 4, to provide that nothing in this Act shall be construed to affect specified authority of the Federal Communications Commission.

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas and 29 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush			
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel	X		
Mr. Pitts		X		Mr. Green	X		
Mr. Walden		X		Ms. DeGette			
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn				Ms. Schakowsky			
Mr. Scalise		X		Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo		X		Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loebsack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas			
Mrs. Ellmers							
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 51**

BILL: H.R. 2666, the "No Rate Regulation of Broadband Internet Access Act"

AMENDMENT: A motion by Mr. Upton to order H.R. 2666 favorably reported to the House, as amended.
(Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 29 yeas and 19 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush			
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel		X	
Mr. Pitts	X			Mr. Green		X	
Mr. Walden	X			Ms. DeGette			
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn				Ms. Schakowsky			
Mr. Scalise	X			Mr. Butterfield		X	
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers	X			Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo	X			Mr. Yarmuth		X	
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loeb sack		X	
Mr. Bilirakis	X			Mr. Schrader		X	
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas			
Mrs. Ellmers							
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

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COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held hearings and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal and objective of H.R. 2666 is to prohibit the FCC from engaging in rate regulation of broadband Internet access service through the reclassification of the service under Title II of the Communications Act of 193.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 2666 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 2666 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 29, 2016.

Hon. FRED UPTON,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

Dear MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2666, the No Rate Regulation of Broadband Internet Access Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kathleen Gramp.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 2666—No Rate Regulation of Broadband Internet Access Act

H.R. 2666 would amend existing law to prohibit federal regulation of rates charged for services related to broadband Internet ac-

cess. The Federal Communications Commission (FCC) currently regulates certain aspects of those services, including activities related to blocking, degrading, or charging fees to prioritize content. At this time, the agency does not regulate the prices charged to consumers for broadband services.

Based on information from the FCC, CBO estimates that implementing the bill would have no significant effect on the agency's workload and spending relative to current policies. Moreover, under current law, the FCC is authorized to collect fees sufficient to offset the cost of its regulatory activities each year. Therefore, CBO estimates that the net cost to implement H.R. 2666 would be negligible, assuming annual appropriation actions consistent with the agency's authorities. Because enacting H.R. 2666 would not affect direct spending or revenues, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 2666 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 2666 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Kathleen Gramp. The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2666 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 2666 does not direct any rule making within the meaning of 5 U.S.C. 551, as specified in Section 2(a).

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 provides that the Act may be cited as the “No Rate Regulation of Broadband Internet Access Act.”

Section 2. Regulation of broadband rates prohibited

Section 2 prohibits the FCC from regulating the rates charged for broadband Internet access service, as defined in the rules adopted in the FCC’s 2015 Open Internet Order.

Section 3. Exceptions

Section 3 details specific exceptions from the prohibition, intended to prevent unintended effects, many of which were identified by members and witnesses during Committee consideration of the legislation. This section clarifies that nothing in the legislation shall affect the authority of the FCC to condition receipt of universal service support on the regulation of rates charged by the provider for the supported service. In addition, this section makes an exception for the FCC’s ability to enforce its truth-in-billing rules, an important consumer protection. Finally, this section clarifies that it does not affect the Commission’s authority to enforce its bright line rule on paid prioritization.

Section 4. Additional rule of construction

Section 4 clarifies the scope of the legislation, instructing that for purposes of this Act, broadband Internet access service shall not be construed to include data roaming or interconnection. In the Open Internet Order, as well as this bill, the FCC defines broadband Internet access service as “a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints. . . .” Though interconnection and roaming are not mass-market retail services and therefore not subject to the prohibition on rate regulation for purposes of this bill, the rule of construction removes any ambiguity that might exist.

Section 5. Definitions

Section 5 defines relevant terms for the purposes of this bill. For the term “broadband Internet access service,” the bill adopts the meaning given to the term in the FCC’s Open Internet Order. This section clarifies that the term “Commission” refers to the Federal Communications Commission.

This section also defines the term “rate” as the amount charged by a provider of broadband Internet access service for the delivery of broadband Internet traffic. It also defines “regulation” and “regulate” with respect to a rate as the use by the Commission of its rulemaking or enforcement authority to establish, declare, or review the reasonableness of such rate. This definition is intended to reach one of the motivating concerns behind the bill: after-the-fact rate regulation through enforcement.

The Committee intends that the term “rates” be interpreted broadly, extending beyond a simple price to any provider-offered fee, rate level, rate structure, discount, incentive, or similar customer-facing proposal. This approach is consistent with the inter-

pretation of that term by the Commission itself and by Courts that have addressed the question in the context of rates charged by providers of communications services.

For instance, in the context of interpreting Section 332(c) of the Communications Act governing commercial mobile radio service (CMRS) providers, the Commission has found that “regulation of rates includes regulation of ‘rate levels and rate structures,’ such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls.” In other contexts, the Commission has found that a rate or price of zero is considered a “rate.” In the context of broadband Internet access service, the Committee likewise intends that the Commission interpret the term “rates” broadly, including by considering zero-rating (i.e., not charging for certain kinds of data) a “rate” because it involves the pricing of certain data at zero.

Courts have agreed with the FCC’s expansive definition of the term “rates” in the context of communications services, noting that a “rate” includes those practices that have a relationship to the amount charged to or paid by the customer for service. Similarly, in *Aubrey v. Ameritech Mobile Communications, Inc.*, a federal district court held that a plaintiff’s challenge to a wireless service provider’s early termination fee (ETF) was preempted by Section 332 of the Act because the ETF itself was a “rate charged.” The Committee intends that courts also interpret the term “rates” broadly in the context of assessing any efforts by the Commission to regulate how broadband Internet access service is offered.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

These Democratic dissenting views offer the minority’s explanation of its opposition to the passage of H.R. 2666—the No Rate Regulation of Broadband Internet Access (No Rate Regulation Act). Proponents claim this bill is merely an attempt to prevent the Federal Communications Commission (FCC or Commission) from using its 2015 reclassification of broadband Internet access service under Title II of the Communications Act to engage in rate regulation. Democratic members of the Committee have publicly stated our agreement with the intent behind the bill. We have noted, however, that as drafted and reported out of Committee, H.R. 2666 goes far beyond its stated goal.

Nonetheless, Democrats attempted to arrive at a compromise with the Republican majority through negotiations and by offering substantive amendments at both the subcommittee¹ and full committee markups.² Such a compromise would have significantly improved H.R. 2666. Unfortunately, the Republican majority declined all of the Democratic amendments. Additionally, the majority’s eleventh hour changes to the bill failed to sufficiently narrow the bill’s expansive reach and would continue to leave consumers unprotected.

I. BACKGROUND

The FCC adopted net neutrality rules in February 2015 to protect consumers, free expression, and innovation. The FCC rooted its decision in multiple sections of the Communications Act. Most significantly, the FCC’s Order relied on a decision by the D.C. Court of Appeals in *Verizon v. FCC*, to reclassify broadband Internet access service as a telecommunications service under Title II of the Communications Act.

Based on the Court’s remand instructions, as well as its own record, the FCC determined that many aspects of Title II were not relevant to modern broadband service. Accordingly, for broadband Internet access service, the FCC chose not to apply over 700 provisions in Title II, including parts of Sections 201 and 202. In particular, the FCC chose not to apply its regulations related to rate setting, tariffing, and last-mile unbundling. Yet, despite the FCC’s forbearance from regulating broadband Internet access service

¹At the subcommittee markup of the bill, Democrats offered amendments to help address Democratic concerns with H.R. 2666. In particular, Ranking Member Anna Eshoo (D–CA) offered an amendment to codify the FCC’s decision to not set broadband rates. Rep. Doris Matsui (D–CA) also offered an amendment, retaining the existing language in H.R. 2666, but reserving specific FCC authority in areas unrelated to rate regulation.

²For example, an amendment offered by Rep. Jerry McNerney (D–CA) at full committee was similarly voted down. Mr. McNerney’s amendment would have preserved the FCC’s authority to act in the public interest, convenience, and necessity in spite of H.R. 2666’s sweeping prohibition.

rates, Internet service providers have voiced fears that Title II reclassification makes it easier for a future FCC to regulate rates.

II. FEARS OF FCC'S DESIRE TO REGULATE BROADBAND INTERNET ACCESS RATES ARE EXAGGERATED

Fears that the current FCC, or a succeeding commission, will regulate broadband rates are exaggerated based on the current marketplace for broadband Internet access service and the FCC's action in choosing not to apply the rate setting provisions of Title II. Indeed, this Commission has acted reasonably and prudently. There is no reason to believe, nor has any good one been articulated, that future commissions will ignore or depart from this precedent, absent good reason for doing so.

The regulation prohibition, as contained in the bill reported out of our full committee, takes a very static view of the market for broadband Internet access service. It also completely ignores the reasonableness and even-handedness of the Commission's approach to date in defining and deciding to what extent broadband Internet access service should be regulated. Despite this, Democrats attempted to ameliorate the Republican's concerns regarding the possible actions of a future FCC.

Ranking Member Eshoo (D-CA) offered an amendment—at both Subcommittee and full Committee markup—that would permanently prevent the FCC from setting rates for broadband service. In effect, Ms. Eshoo's amendment would prevent the FCC from ever telling a broadband provider what it could charge consumers. Despite the consistency between Ms. Eshoo's amendment and the stated goal of H.R. 2666, Republicans defeated this amendment in a party line vote.

Additionally, Representatives Matsui (D-CA) and McNerney (D-CA) tried to curtail some of the bill's harms that the Republicans claimed were unintended. They offered two straightforward amendments that would have set out a non-exhaustive list of issues that were supposedly beyond the scope of the bill, such as the FCC's continued ability to act in the public interest and to protect consumers from discriminatory practices. These amendments were rejected on a party line vote.

III. H.R. 2666 COULD LEAD TO UNDESIRE EFFECTS

The No Rate Regulation Act has the potential to harm consumers far more than it would benefit them. The central issue raised by H.R. 2666, as introduced, was the bill's failure to define what it was prohibiting. Without defining the term "rate regulation," experts asserted that the bill could result in vast unrelated effects, impacting the FCC's authority to act on wholly unrelated issues,³ including truth in billing practices and discriminatory data caps; ensuring broadband availability through the universal service fund (USF); addressing rate-related issues in merger reviews; and ensuring enforcement against paid prioritization, among others.

³House Committee on Energy and Commerce, Subcommittee on Communications and Technology, Hearing on Four Communications Bills, 114th Cong. (Jan. 12, 2016) (Testimony of the Honorable Robert McDowell).

Two hours before the Committee's markup of H.R. 2666, Chairman of the Subcommittee on Communications and Technology Greg Walden (R-OR) submitted, and the Committee adopted on a party line vote, an amendment to specifically preserve the FCC's authority over some issues and to add definitions for the terms "rate" and "regulate." The amended bill, however, would do nothing to protect the FCC's authority under significant parts of the FCC's open Internet rules, the FCC's merger review mandate, the FCC's authority to act in the public interest, or the FCC's authority to address unfair or discriminatory practices.

Many Democratic members raised concerns that despite decades of law and regulation on similar issues in a number of contexts, the definitions of rate and regulate were not tethered to any other source of law or authority. Moreover, the definitions—first presented to the Democratic members of the Committee two hours before the markup—seemed so broad as to leave unaddressed many of the concerns raised about the underlying bill. Without any time to review or negotiate these novel and broad definitions, Democratic members were forced to oppose the amendment.

IV. CONCLUSION

H.R. 2666 would have far reaching consequences that could drastically affect the Commission's authority to continue its work. For these reasons, we cannot support the passage of H.R. 2666, as it is currently drafted, and we strongly urge our colleagues in the House to withhold their support for the measure as well.

FRANK PALLONE, JR.,

Ranking Member,

Committee on Energy and Commerce.

ANNA G. ESHOO,

Ranking Member,

Subcommittee on Communications and Technology.

