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HOUSE OF REPRESENTATIVES
REPORT
109–541

INTERNET FREEDOM AND NONDISCRIMINATION ACT OF 2006

JUNE 29, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 5417]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5417) to amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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 "Internet Freedom and Nondiscrimination Act of 2006".

SEC. 2. PURPOSES.

The purposes of this Act are to promote competition, to facilitate trade, and to ensure competitive and nondiscriminatory access to the Internet.

SEC. 3. AMENDMENTS TO THE CLAYTON ACT.

The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) by redesignating section 28 as section 29,

(2) by inserting after section 27 the following:

"DISCRIMINATION BY BROADBAND NETWORK PROVIDERS

"SEC. 28. (a) It shall be unlawful for any broadband network provider—

"(1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;

"(2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

"(3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

"(B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

"(4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

"(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

"(b) If a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

"(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures—

"(1) to manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated provider;

"(2) to give priority to emergency communications;

"(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law;

"(4) to offer consumer protection services (such as parental controls), provided that a user may refuse or disable such services;

"(5) to offer special promotional pricing or other marketing initiatives; or

"(6) to prioritize or offer enhanced quality of service to all data of a particular type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or quality of service.

"(d) For purposes of this section—

"(1) the term 'affiliate' means—

"(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or

"(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;

"(2) the term 'broadband network provider' means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;

"(3) the term 'broadband network service' means a 2-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and

"(4) the term 'user' means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.", and

(3) by amending subsection (a) and the 1st sentence of subsection (b) of section 11 by striking "and 8" and inserting "8, and 28".

PURPOSE AND SUMMARY

H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006," preserves an antitrust remedy for anticompetitive and discriminatory practices by broadband service providers. As reported by the Committee on Energy and Commerce, H.R. 5252, the "COPE" Act, vests "exclusive" authority in the Federal Communications Commission to adjudicate complaints alleging violations of

network neutrality principles. This exclusive grant may be interpreted to displace the application of the antitrust laws to remedy anticompetitive and discriminatory misconduct by broadband network providers.

H.R. 5417 reasserts an antitrust remedy for anticompetitive conduct in which the broadband network provider: (1) fails to provide network services on reasonable and nondiscriminatory terms; (2) refuses to interconnect with the facilities of other network providers on a reasonable and nondiscriminatory basis; (3) blocks, impairs or discriminates against a user's ability to receive or offer lawful content; (4) prohibits a user from attaching a device to the network that does not damage or degrade the network; or (5) fails to disclose to users, in plain terms, the conditions of the broadband service. The legislation expressly permits a broadband network provider to take steps to manage the functioning and security of its network, to give priority to emergency communications, and to take steps to prevent violations of Federal and State law, or to comply with a court order. This legislation is not intended to diminish the ability of a broadband network provider to take any otherwise lawful actions to protect copyrighted works against infringement or to limit infringement on the provider's broadband network. In addition, the legislation does not represent a "regulatory" imposition on broadband network providers. Rather, the legislation reaffirms an antitrust remedy for anticompetitive conduct by broadband network providers in order to ensure that the dominant market power of broadband network providers is not employed in a manner that assaults the pro-competitive, nondiscriminatory architecture that has been a defining feature of the Internet's success.

BACKGROUND AND NEED FOR THE LEGISLATION

JUDICIARY COMMITTEE ROLE IN TELECOM COMPETITION

Since 1957, the Committee on the Judiciary has played a central role in promoting competition in the telecom industry. The Judiciary Committee's involvement in promoting competition in the telecommunications marketplace dates back nearly a half century when the Committee held oversight hearings to examine the monopoly power that AT&T wielded because of its control of the local exchange and the Department of Justice's efforts to limit that power through antitrust enforcement.[1]

Section 1 of the Sherman Act of 1890 prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[2] Section 2 of the Sherman Act provides that it is a violation of the antitrust laws to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[3] The principled application of the antitrust laws has served as the primary catalyst for the structural changes that have produced competitive gains and expanded consumer choice in the telecommunications field. The

[1] See The Consent Decree Program of the Department of Justice; Hearings Before the Subcommittee on Antitrust of the House Committee on the Judiciary, 85th Cong. (1957 and 1958); Report of the Antitrust Subcommittee on the Consent Decree Program of the Department of Justice, 86th Cong. (1959).

[2] 15 U.S.C. § 1.

[3] 15 U.S.C. § 2.

legal basis for the elimination of Ma Bell's national telephone monopoly was predicated in the antitrust laws. While the former AT&T had operated in a highly-intensive Federal and State regulatory regime for decades, the government relied on the antitrust laws to provide the robust pro-competitive remedy that regulation could not and does not alone provide. Specifically, the Justice Department successfully alleged that AT&T unfairly limited competition through exclusionary conduct in violation of the Sherman Act. This anticompetitive conduct was manifested by "manipulation of the terms and conditions under which competitors are permitted to interconnect with AT&T's existing services and facilities, including those of the local exchange operators."[4] The Department also successfully alleged that AT&T "imposed a number of cumbersome and unnecessary technical and operational practices on its competitors which increased their costs and lowered the quality of their service, in marked contrast to the efficient interconnection arrangements made available to AT&T's own . . . connections."[5] In the early 1990s, the Committee conducted several legislative and oversight hearings concerning the market dominance exercised by the remnants of the former AT&T monopoly, and in 1995, the Committee conducted hearings to examine the Justice Department's responsibility to aggressively monitor competition in this field.

TELECOMMUNICATIONS ACT OF 1996—THE ROLE OF THE ANTITRUST LAWS IN PROTECTING COMPETITION

The failure of the 1982 consent decree to produce robust competition lent impetus to congressional passage of legislation that was comprehensive and deregulatory in scope. The findings section of the 1996 Act states that its purpose is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid growth of telecommunications technologies." The 1996 Act further states that Congress intended "to provide for a pro-competitive . . . national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[6]

In order to reaffirm the centrality of the antitrust laws in the liberalized regulatory regime established by the 1996 Act, the Judiciary Committee and Congress preserved an explicit antitrust savings clause in the legislation. Specifically, the antitrust savings clause contained in § 601(c)(1) of the 1996 Act provided that: " . . . Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. . . . This Act and the amendment made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments."[7]

The legislative record surrounding consideration of the 1996 Act emphasizes the crucial role of the antitrust laws in promoting com-

[4] See Plaintiff's Memorandum in Opposition to Defendant's Motion for Involuntary Dismissal Under Rule 41(b), *United States* v. *AT&T Co.,* No. 74–1698 (D.D.C., filed Aug. 16, 1981).
[5] Id. at 79.
[6] Id.
[7] Id.

petition and enhancing consumer welfare in the marketplace. The Joint Explanatory Statement of the Conference Committee stated that the antitrust savings clause: "prevents affected parties from asserting that the bill impliedly preempts other laws."[8] Members of both bodies affirmed this principle. Senator Thurmond stated: "[The 1996 Act contains an] unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy."[9] Ranking Member Conyers observed: "[t]he bill contains an all-important antitrust savings clause which ensures that any and all telecommunications mergers and anti-competitive activities . . . [b]y maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers."[10] Senator Leahy stated: "[r]elying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry."[11] In addition, the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anti-competitive conduct.[12] The FCC expressly concluded that: "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252 . . . . [W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws."[13] Finally, former FCC Chairman Powell concluded that "[g]iven the vast resources of many of the nation's ILECs," the FCC's current fining authority of $1.2 million per offense "is insufficient to punish and deter violations in many instances."[14]

RECENT COMMITTEE EFFORTS TO PRESERVE AND PROMOTE COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY

In recent years, the Committee has conducted a number of hearings and considered legislation relating to telecommunications competition. On May 22, 2001, the Committee conducted a legislative hearing examining H.R. 1698, the "American Broadband Competition Act of 2001," and H.R. 1697, the "Broadband Competition and Incentives Act of 2001." On June 5, 2001, the Committee conducted a legislative hearing on H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001." Because the legislation did not contain the safeguards necessary to preserve competition in the broadband industry, the Committee adversely reported it.[15]

On July 24, 2003, the Task Force on Antitrust conducted an oversight hearing entitled "Antitrust Enforcement Agencies: The

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[8] Joint Explanatory Statement of the Committee of Conference, S. 652, H.R. Rep. No. 104–458, S. Rep. No. 104–230, at 201 (1996) ("Conference Report").

[9] 142 Cong. Rec. S687–01 (daily ed. February 1, 1996) (statement of Sen. Thurmond).

[10] 142 Cong. Rec. H1145–06 (daily ed. February 1, 1996) (statement of Rep. Conyers).

[11] 141 Cong. Rec. S18586–01 (daily ed. December 14, 1995) (statement of Sen. Leahy).

[12] First Report and Order, In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, ¶124 (Aug. 8, 1996) (R2–7–A174).

[13] Id. at ¶ 129 (R2–7–A175).

[14] Letter from Chairman Powell to House and Senate Appropriations Committees, May 4, 2001, available at: *http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html.*

[15] H.R. Rep. No. 107–83, Part 2.

Antitrust Division of the Department of Justice and Bureau of Competition." On November 19, 2003, the Committee conducted an oversight hearing entitled "Saving the Savings Clause: Congressional Intent, the Trinko Case and the Role of the Antitrust Law in Promoting Competition in the Telecom Sector." On July 23, 2004, the Committee conducted an oversight hearing on "Regulatory Aspects of Voice Over the Internet Protocol (VoIP)." In addition, on April 20, 2005, the Committee conducted an oversight hearing examining "Industry Competition and Consolidation: The Telecom Marketplace Nine Years After the Telecom Act." Most recently, the Committee adopted a Resolution Establishing a Task Force on Telecom and Antitrust. This Task Force conducted an oversight hearing examining the antitrust implications of network neutrality titled: "Network Neutrality: Competition, Innovation, and Nondiscriminatory Access." This hearing helped establish the legislative record demonstrating the need for H.R. 5417.

THE "INTERNET REVOLUTION" AND MARKET FEATURES OF BROADBAND INTERNET ACCESS: THE NEED FOR A CLEAR ANTITRUST REMEDY

Over the last decade, the Internet has revolutionized the manner in which Americans access and transmit a broad range of information and consume goods. The advent of high speed (broadband) Internet access has dramatically enhanced the ability of Americans to access this medium. Many credit the rapid rise of the Internet to the open architecture that defines it. There is broad recognition that the Internet will further expand the ways in which Americans live, work, and play.[16] However, recent actions taken by the FCC and Supreme Court coupled with increased consolidation of network providers, have heightened the risk of anticompetitive behavior in the telecom marketplace.

Two Supreme Court decisions have particularly had the effect of significantly weakening remedies available either under the antitrust laws or through regulatory actions by the FCC. The first, *Verizon* v. *Trinko*, 540 US 398 (2004), in which the Supreme Court observed that the "regulatory framework that exists in this case demonstrates how, in certain circumstances, 'regulations significantly diminished the likelihood of major antitrust harm.'" The Court then concluded that "against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs." This is precisely the judicial analysis that the antitrust savings clause in the 1996 Act expressly precluded. When viewed in light of H.R. 5252's exclusive grant of authority to adjudicate violations of network neutrality principles, the threat to the continued application of the antitrust laws to ensure against anticompetitive content discrimination by broadband providers is both clear and obvious.

In addition, the Supreme Court's decision in *NCTA* v. *Brand X*, upholding the FCC's determination that cable modem service is an information service, and the FCC's subsequent decision to classify LEC broadband Internet access as an "information service" suggests that antitrust agencies such as the Federal Trade Commission (which is statutorily obligated to defer to FCC oversight in

[16] Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, February 8, 2004.

connection with oversight of services classified as "common carrier" offerings) may have an expanded role to play in setting forth policies that protect consumers against unlawful business practices and illegal restraints of trade. Indeed, the FTC recently concluded that, "in light of [Brand X], the [FTC] views the provision of cable modem services as non-common carrier service subject to the FTC Act's prohibitions on unfair or deceptive acts and practices and on unfair methods of competition."[17]

According to an FCC report released in April of 2006 containing the most recent information on the market features of the high speed Internet access market, Americans have essentially two choices for broadband Internet access.[18] According to this FCC data, 98.8 percent of the "advanced services lines" Americans utilize for Internet access are provided by either cable companies or ILECs. Cable modem service represents 64.9 percent of these lines, while 33.9 percent are DSL connections. Consumer options for "high speed lines" are also limited—98.2 percent of Americans accessing high speed lines by connecting to cable modem service or ILEC lines. Cable modem service represented 61 percent of these lines while 37.2 percent were provided by ILECs. The data also indicates that many Americans (particularly in rural areas) have only one choice of broadband service, and some Americans have none. As a result, most Americans are subject to a broadband duopoly, many to a broadband monopoly, and some Americans (particularly in rural areas) have no access to broadband Internet. Hence, broadband providers exercise considerable market power in most parts of the country, dominant control in others, and monopoly control in the rest.[19]

The exercise of market power to engage in discriminatory or unlawful restraints on commerce or trade is clearly the province of the antitrust laws. Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize.[20] Monopolization or attempts to monopolize are demonstrated by anticompetitive or exclusionary conduct.[21] The Supreme Court held that "if a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[22] The D.C. Circuit Court has also held that "[t]o be condemned as exclusionary, a monopolist's act must have an 'anti-competitive effect.' That is, it must harm the competitive process and thereby harm consumers."[23] The market power of broadband providers can be utilized to unlawfully restrain trade, undermine the competitive process, and limit the ability of consumers to access online content, goods, or services of their choice

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[17] Letter from Deborah Platt Majoras, Chairman, Federal Trade Commission to F. James Sensenbrenner, Chairman, House of Representatives Committee on the Judiciary (Apr. 14, 2006) (on file with the House Committee on the Judiciary).

[18] Federal Communications Commission, High Speed Services for Internet Access: Status as of June 30, 2005, (2006), available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264744A1.pdf.*

[19] Id.

[20] 15 U.S.C. § 2.

[21] Phillip E. Areeda & Herbert Ovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Applications ¶ 651 (2d ed. 2002).

[22] See *Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

[23] See *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

in a nondiscriminatory manner, and this conduct has already occurred.[24]

Firms that control networks that provide access to the Internet may exercise market power to discriminate against rival services or competing technologies, or limit the ability of consumers to access online information or services in a neutral manner. Abuse of this market power threatens the open architecture that has been a key feature of the Internet's success and utility. H.R. 5417 will help to ensure that those injured by anticompetitive discriminatory conduct by broadband service providers are provided a cause of action under the Clayton Act and an administrative remedy through antitrust enforcement agencies.

NETWORK NEUTRALITY—DEFINITION, SUPPORT, AND OPPOSITION

While significant efforts have been made to confuse the definition, "network neutrality" refers to the fundamental architecture of the Internet that allows for "end-to-end" communications that are both uninhibited and transmitted without priority based on content. The open nature of the Internet has served as a catalyst for innovations mainly from those with little connection to the owners of the physical network itself.[25]

Former FCC Chairman Michael Powell stressed the importance of net neutrality when he enunciated broad "Internet Freedoms" in a speech at the University of Colorado Law School. As Chairman Powell described, these Internet freedoms include:

(1) Freedom to Access Content: Consumers should have access to their choice of legal content;

(2) Freedom to Use Applications: Consumers should be able to run applications of their choice;

(3) Freedom to Attach Personal Devices: Consumers should be permitted to attach any devices they choose to the connection in their homes; and

(4) Freedom to Obtain Service Plan Information: Consumers should receive meaningful information regarding their service plans.[26]

Chairman Powell explained that these principles should not preclude network providers from ensuring a quality broadband experience and that reasonable limits could be allowed in circumstances where service contracts exist. However, Powell was insistent that these limits be both explicitly stated and as minimal as necessary in order to foster an environment that allows for the greatest amount of innovation. "Since no one can know for sure which 'killer' applications will emerge to drive deployment of the next generation high-speed technologies, the industry must let the market work and allow consumers to run applications and attach devices unless they exceed service plan limitations or harm the provider's network."[27]

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[24] See In the Matter of Madison River Communications, available at: *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf. See also, http://static.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf*, pps. 19–24.

[25] Network Neutrality: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 109th Cong. (2006) (statement of Lawrence Lessig, Professor of Law at Stanford Law School).

[26] Id.

[27] Supra at 16.

ADVOCATES OF NET NEUTRALITY

The concept of net neutrality has been widely supported by traditional entertainment companies, providers of Internet-based applications, software companies, content providers, and device manufacturers. These entities argue that net neutrality is a fundamental and necessary component of their willingness to invest significant amounts of capital necessary to promote innovation and free market competition. Advocates of net neutrality emphasize that meaningful remedies for network neutrality violators are necessary to preserve competition and consumer choice. These groups also assert that network providers not only have a clear market incentive to discriminate, there is a documented record of such abuse.[28] Advocates also point to regulatory inaction by the FCC and highlight insufficiencies in current law to curb abuse. Groups in favor of Internet nondiscrimination are broad and diverse, ranging from the American Association of Retired Persons, Financial Service Roundtable, Gun Owners of America, the Christian Coalition, National Religious Broadcaster, content providers such as Google and Microsoft, Intel and others.[29]

OPPONENTS OF NET NEUTRALITY

Providers such as incumbent local exchange carriers and some cable companies have argued that the proponents of net neutrality have raised only speculative concerns. For example, AT&T and others have defended the practice of access-tiering.[30] Access tiering is "any policy by network owners to condition content or service providers' right to provide content or service to the network upon the payment of some fee. These fees are independent of basic Internet access fees. . . . '[A]ccess tiering' adds an additional tax on network innovators based upon the particular service being offered."[31] The network providers argue that by instituting the concept of access-tiering they are addressing the possibility of network congestion. Some have proposed that to remedy the possibility of congestion, network providers institute a fee based on the amount of network congestion the user causes. However, the transactional costs of this arrangement render this type of fee impractical. The proposed solution by the network providers is to assess which activities are most likely to account for significant portions of the bandwidth and apportion fees accordingly, which is essentially the theory behind access tiering. Stanford Law Professor Lawrence Lessig counters that access tiering may pose some serious issues. He states:

> Access-tiering will create an obvious incentive among the effective duopoly that now provides broadband service to most Americans. By effectively auctioning off lanes of broadband service, this form of tiering will restrict the opportunity of many to compete in providing new Internet service. For example, there are many new user generated video services on the Internet. . . . The incentives in a

[28] John Windhausen, Good Fences Make Bad Broadband, Public Knowledge White Paper 17-22, (2006), *http://www.publicknowledge.org/content/paperspk-net-neutrality-whitep-20060206*.
[29] See *Savethenet.com*.
[30] See Telcos Propose Web Tiers, Red Herring (January 31, 2006)
[31] Supra at 3.

> world of access-tiering would be to auction to the highest bidders the quality service necessary to support video service, and leave to the rest insufficient bandwidth to compete. That may benefit established companies, but it will only burden new innovators.

The broadband network service providers (primarily cable or telephone companies) have also argued that network neutrality is a "solution in search of a problem." They assert that there is no need to establish clear prohibitions on content discrimination by broadband providers because there has been no extensive documentation of abuse. Despite the network service providers' claims, there have been several accounts of discriminatory behavior. The most notable example of abuse involved the Madison River Telephone Company obstruction of access to Voice-Over Internet Protocol (VoIP) services provided by Vonage. In this case the FCC initiated an investigation of allegations that Madison River violated non-discriminatory obligations contained in section 201(b) of the Communications Act. However, this case demonstrated that the FCC lacks explicit regulatory or enforcement authority to prevent this type of discriminatory behavior.[32]

INDUSTRY COMMENTS ON NET NEUTRALITY

The following are excerpted quotations from executives within the telecommunications industry commenting on the issue of net neutrality.

SBC Chief Executive Officer, Ed Whitacre, was quoted in the Financial Times as stating, "I think the content providers should be paying for the use of the network—obviously not the piece from the customer to the network, which has already been paid for by the customer in Internet access fees—but for accessing the so-called Internet cloud . . . . If someone wants to transmit a high quality service with no interruptions and 'guaranteed this, guaranteed that', they should be willing to pay for that . . . . Now they might pass it on to their customers who are looking at a movie, for example. But that ought to be a cost of doing business for them. They shouldn't get on [the network] and expect a free ride." [33]

Mr. Whitacre was also quoted in Business Week in response to a question regarding his speculation about future competition from Internet upstarts.

> How do you think they're going to get to customers? Through a broadband pipe. Cable companies have them. We have them. Now what they would like to do is use my pipes free, but I ain't going to let them do that because we have spent this capital and we have to have a return on it. So there's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes? The Internet can't be free in that sense, because we and the cable companies have made an investment and for a

[32] Madison River Communications, LLC, Consent Decree File No. EB–05–IH–0110, available at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA–05–5423A2.pdf.*

[33] Paul Taylor, AT&T Chief Warns on Internet Costs, Fin. Times, Jan. 31, 2006, available at *http://news.ft.com/cms/s/3ced445e–91c5–11da–bab9–0000779e2340.html.*

Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!" [34]

BellSouth Chief Technical Officer, William Smith, confirmed in MarketWatch that BellSouth "is pursuing discussions with Internet content companies to levy charges to reliably and speedily deliver their content and services." Smith was quoted as characterizing such fees as "the shipping business of the digital age." [35]

Qwest Chief Executive Officer, Richard Notebaert, asserted in CNET News.com that online companies should be allowed to work out deals with network providers in an effort to get a leg up over their competitors. "Would this give some content providers an advantage over others? Well, yeah. We're all trying to provide a little bit of differentiation for a competitive edge. That's what business is about." [36]

And finally, Verizon Chief Executive Officer, Ivan Seidenberg, was quoted by the Wall Street Journal as aligning with AT&T in pursuing agreements that favored certain content providers over others, "[W]e have to make sure [content providers] don't sit on our network and chew up our capacity." [37]

COMMITTEE CONSIDERATION

On May 25, 2006, the Committee met in open session and ordered favorably reported the bill H.R. 5417 with an amendment by rollcall vote of 20 to 13 with one vote as present, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee sets forth the following rollcall votes that occurred during the Committee's consideration of H.R. 5417:

Final Passage. The motion to report the bill, H.R. 5417, favorably as amended to the House was agreed to by a rollcall vote of 20 yeas to 13 nays, with one member voting present.

ROLLCALL NO. 5 DATE: 5–25–06

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

109th CONGRESS 2nd SESSION

SUBJECT: Motion to Favorably Report H.R. 5417, as amended, which was agreed to by a rollcall vote of 20 ayes, 13 nays, and 1 present.

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[34] Patricia O'Connell, at SBC, It's All About "Scale and Scope," Business Week, Nov. 7, 2005, available at *http://www.businessweek.com/@@n34h*IUQu7KtOwgA/magazine/content/05__45/b3958092.htm*.

[35] Frank Barnako, BellSouth Wants New Fees, MarketWatch, Jan. 16, 2006, available at *http://www.marketwatch.com/News/Story/Story.aspx?guid=7B02432D2D-1EE0-4037-A15F-54B748D6CF26%7D&siteid=mktw&dist=*.

[36] Marguerite Reardon, Qwest CEO Supports Tiered Internet, CNET News.com, Mar. 15, 2006, available at *http://news.com.com/Qwest+CEO+supports+tiered+Internet/2100-1034__3-6050109.html.*

[37] Dionne Searcey and Amy Schatz, Phone Companies Set Off a Battle Over Internet Fees—Content Providers May Face Charges for Fast Access; Billing the Consumer Twice?, Wall Street Journal, Jan 6. 2006.

	Ayes	Nays	Present
MR. HYDE			
MR. COBLE		X	
MR. SMITH		X	
MR. GALLEGLY		X	
MR. GOODLATTE	X		
MR. CHABOT		X	
MR. LUNGREN	X		
MR. JENKINS	X		
MR. CANNON	X		
MR. BACHUS		X	
MR. INGLIS	X		
MR. HOSTETTLER		X	
MR. GREEN		X	
MR. KELLER		X	
MR. ISSA		X	
MR. FLAKE			
MR. PENCE			
MR. FORBES		X	
MR. KING		X	
MR. FEENEY		X	
MR. FRANKS		X	
MR. GOHMERT			
MR. CONYERS	X		
MR. BERMAN	X		
MR. BOUCHER	X		
MR. NADLER	X		
MR. SCOTT	X		
MR. WATT			
MS. LOFGREN	X		
MS. JACKSON LEE	X		
MS. WATERS	X		
MR. MEEHAN			
MR. DELAHUNT			X

	Ayes	Nays	Present
MR. WEXLER	X		
MR. WEINER	X		
MR. SCHIFF	X		
MS. SANCHEZ	X		
MR. VAN HOLLEN	X		
MRS. WASSERMAN SCHULTZ	X		
MR. SENSENBRENNER, CHAIRMAN	X		
TOTAL	20	13	1

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 5417, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

H.R. 5417—Internet Freedom and Nondiscrimination Act of 2006

Summary: H.R. 5417 would prohibit providers of Internet service from discriminating between different types of content, applications, or services when providing Internet access to their customers. Under the bill, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) would enforce the bill's provisions by filing antitrust actions in federal court in the event of violations. Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 5417 would cost about $10 million over the 2007–2011 period. Enacting the bill would not affect direct spending or revenues.

H.R. 5417 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs to state, local, and tribal governments, if any, would be small and would not exceed the threshold established in that act.

H.R. 5417 would impose private-sector mandates as defined in UMRA on broadband service providers. Because of uncertainty about how the mandates would affect certain business practices, CBO cannot estimate whether the aggregate costs of all of the mandates in the bill would exceed the annual threshold established by UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 5417 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit) and 750 (administration of justice). For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2007. Based on information provided by the FTC and DOJ, CBO estimates that implementing the bill would cost those agencies about $10 million over the 2007–2011 period for the FTC and DOJ to enforce the bill's provisions regarding access to Internet services.

	By fiscal year, in millions of dollars—				
	2007	2008	2009	2010	2011
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	2	2	2	2	2
Estimated Outlays	2	2	2	2	2

Estimated impact on state, local, and tribal governments: H.R. 5417 contains an intergovernmental mandate as defined in UMRA because it would prohibit providers of Internet services, some of which are intergovernmental entities, from charging additional fees for providing certain services and content. In general, state and local governments that provide services to access the Internet do not currently charge such fees nor do they have plans to do so in the future. Therefore, CBO estimates that the costs to intergovernmental entities, if any, would be small and would not exceed the threshold established in UMRA ($64 million in 2006, adjusted annually for inflation.)

Estimated impact on the private sector:H.R. 5417 would impose private-sector mandates as defined in UMRA on broadband service providers. The bill defines broadband network service as a two-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction. The bill would impose mandates by amending the Clayton Act to make it unlawful for broadband service providers to:

- Provide broadband network services to any provider of content, network applications, or services in a discriminatory manner;
- Prevent users from attaching any device to the network that does no harm to or otherwise degrades the network;
- Interconnect with other broadband network service providers on discriminatory terms or conditions; or
- Use surcharges for enhanced quality of service or prioritization.

Because of uncertainty about how the mandates would affect certain business practices, CBO cannot estimate whether the aggregate costs of all of the mandates in the bill would exceed the an-

nual threshold established by UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

Prohibition on the sale of broadband network services on discriminatory terms

H.R. 5417 would amend the Clayton Act to make it illegal for broadband service providers "to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service . . ."

Currently, cellular telephone providers offer proprietary content, such as ring-tones, music, and video clips. Most cellular networks do not yet meet the legislation's definition of broadband (a transmission of 200,000 kilobits per second in either direction), but the industry is investing in technology and facilities to reach that goal. It is unclear, however, how much of the proprietary content was delivered over the Internet. As cellular providers achieve broadband speeds, they would have to allow other content or service providers increased access to their networks and, consequently, to their subscribers under the bill.

The costs of the mandate would include the expenditures necessary for converting systems to allow other providers to offer alternatives to the cellular phone company Internet-based proprietary services and products. CBO has no information about the future market size of the Internet-based proprietary content and services or the cost of allowing providers access to such a network. Consequently, CBO cannot estimate the cost of complying with this mandate.

Prohibition on restricting users from attaching devices to the network

H.R. 5417 would amend the Clayton Act would make it unlawful for a broadband service provider "to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network . . ."

At present, cellular networks control which telephone handsets can attach to their networks. Telephone handsets are typically manufactured by large electronics companies and customized for each cellular network. The most important aspect of customization provides for the efficient use of the spectrum and the network for each cellular provider. Some aspects of customization, however, have nothing to do with the efficient operation of the cellular network but allow cellular providers to choose which features of the cellular telephone to make available to subscribers depending on their commercial strategy. This bill would limit the control of cellular service providers over the types of handsets that have access to their networks.

According to Telecommunications Industry Association data, roughly 200 million handsets are attached to cellular networks in the United States. Not all handsets are broadband capable, but at least 170 million are capable of transmitting on the proprietary

data networks and many provide access to the Internet. Industry experts project that many more such handsets will become broadband capable in the near term. Cellular companies providing such broadband services would be affected by this mandate.

The direct costs of the mandate would include the expenditures necessary for operating the cellular telephone system using a wider array of handsets than are currently used by each network. According to engineering sources, the data are not currently available to determine the costs of complying with the mandate.

Prohibition on the interconnection with broadband providers on discriminatory terms

The bill would make it illegal "to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions. . . ." Currently, the Internet service industry operates on a tiered charge system. Large providers of Internet services carry each other's traffic at no charge but charge the smaller companies for carrying their traffic. If H.R. 5417 were enacted, the large companies would no longer be allowed to charge small firms differently than larger firms for carriage. The contracts for carriage are currently negotiated by the firms individually and the terms of exchange are confidential. Consequently, CBO has no basis to estimate the cost of this mandate.

Prohibition on surcharges for enhanced quality of service

The bill also would require a broadband network provider, if it offers enhanced quality of service for any type of data, to offer enhanced quality of service for all data of that type, regardless of the ownership of the data, without imposing a surcharge.

At present, few if any broadband network providers offer enhanced quality of service on open networks. Enhanced quality of service is offered regularly on smaller private networks, but rarely, if ever, on public networks, most notably the Internet. The principal reason is that thousands of networks have connected to the Internet and no single provider controls more than a fraction of the Internet traffic routes worldwide. The delivery of messages and packets on the Internet depends on the coordination of many providers with different operating conditions on their own networks and on the interconnections between networks. For this reason, most Internet service providers do not currently offer such priority services. The cost of the mandate would be the loss in net income from not being able to use a surcharge for certain services. CBO has no basis to estimate the cost of this mandate.

Previous CBO estimate: On May 3, 2006, CBO transmitted a cost estimate for H.R. 5252, the Communications Opportunity, Promotion, and Enhancement Act of 2006, as ordered reported by the House Committee on Energy and Commerce on April 27, 2006. Title II of that bill contains provisions related to access to Internet service. Difference between these bills are reflected in CBO's cost estimates.

Estimate prepared by: Federal Costs: Melissa Z. Petersen. Impact on State, Local, and Tribal Governments: Sarah Puro. Impact on the Private Sector: Philip Webre.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5417, is intended to preserve an antitrust remedy for anticompetitive and discriminatory practices by broadband service providers.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in art. I, § 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title

This section would provide that the legislation may be cited as the "Internet Freedom and Nondiscrimination Act of 2006."

Sec. 2. Purposes

This section would specify that the purposes of the Act are to promote competition, facilitate trade, and ensure competitive and non-discriminatory access to the Internet.

Sec. 3. Amendments to the Clayton Act

Section 3(1) amends the Clayton Act by redesignating the existing section 28 as section 29. Section 3(2) inserts a new section 28 with the following provisions:

Paragraph (a) of the new section would prohibit the following five actions by a broadband network provider: (1) refusing to provide to third parties on reasonable and nondiscriminatory terms any broadband network service that it provides to itself or any affiliate; (2) refusing to interconnect its facilities with those of another broadband network provider on reasonable and nondiscriminatory terms and conditions; (3) blocking, impairing, discriminating against, or interfering with any person's use of a broadband network service to access, use, send, receive, or offer lawful content, applications or services over the network or the Internet, or to impose any additional charge to avoid interference; (4) prohibiting a user from attaching any device to, or using any device in connection with, the operator's network that does not damage, make unauthorized use of, or materially degrade other users' utilization of the network; or (5) failing to clearly and conspicuously disclose accurate information to the public regarding all terms and conditions for use of its broadband network and any services provided over that network.

Section 28(a) should not be interpreted to limit the ability of a broadband network provider to protect copyrighted works or prevent copyright infringement.

Paragraph (b) of this section would require that if a broadband network provider prioritizes or offers enhanced quality of service to

data of a particular type, it must prioritize or offer the same enhanced quality of service to all comparable data without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

Paragraph (c) of this section would preserve certain authorities of network operators. The section provides that a network operator may take reasonable and non-discriminatory actions intended to manage the functioning of its network to protect the security of its network; to give priority to emergency communications; and to prevent any activity that is unlawful under any federal, state, or local law or comply with any court-ordered law enforcement directive.

Paragraph (d) defines the following terms for the Act: affiliate, broadband network provider, broadband network service, and user.

"Affiliate" means a person that directly or indirectly controls or is controlled by another person or a person that has a contract with a content or service provider concerning access to, or distribution of, such content or such service.

"Broadband network provider" means a person or entity engaged in commerce that owns, controls, operates, or resells and controls, any facility used to provide broadband network service to the public, by whatever technology and whether provided separately or as part of a bundled package of services for a few in exchange for an explicit benefit, or for free.

"Broad network service" means the provision of two-way transmission capacity that transmits information at an average rate of at least 200 kilobits per second in at least one direction. Such term does not include any transmission capacity used exclusively for the transmission of information used for financial transactions.

"User" means any person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.

Section 3(3) of the bill further amends the Clayton Act to provide an administrative remedy for the non-discrimination provisions contained in the new Section 28. Specifically, Section 3(3) would add Section 28 to the existing provisions of the Clayton Act that may be enforced by the Federal Trade Commission or other designated administrative agencies pursuant to Section 11 of the Clayton Act. Section 11, which is codified at 15 U.S.C. § 21, provides for administrative hearings to enforce designated substantive provisions of the Clayton Act. If a violation is found, the relevant administrative agency shall issue a cease and desist order requiring the violator to cease the violation. The administrative remedy provided for in Section 11 is in addition to, and does not preclude, the possibility of government or private lawsuits brought in Federal court to enforce Section 28.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CLAYTON ACT

* * * * * * *

SEC. 11. (a) That authority to enforce compliance with sections 2, 3, 7, [and 8] *8, and 28* of this Act by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, [and 8] *8, and 28* of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, Board, or Secretary requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, Board, or Secretary, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission, Board, or Secretary. If upon such hearing the Commission, Board, or Secretary, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission, Board, or Secretary may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, Board, or Secretary may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under

this section, whenever in the opinion of the Commission, Board, or Secretary conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

* * * * * * *

DISCRIMINATION BY BROADBAND NETWORK PROVIDERS

SEC. 28. (a) It shall be unlawful for any broadband network provider—

(1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;

(2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

(3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

(B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

(4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

(b) If a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures—

(1) to manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated provider;

(2) to give priority to emergency communications;

(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law;

(4) to offer consumer protection services (such as parental controls), provided that a user may refuse or disable such services;

(5) to offer special promotional pricing or other marketing initiatives; or

(6) to prioritize or offer enhanced quality of service to all data of a particular type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or quality of service.

(d) For purposes of this section—

(1) the term "affiliate" means—

(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or

(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;

(2) the term "broadband network provider" means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;

(3) the term "broadband network service" means a 2-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and

(4) the term "user" means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.

SEC. [28] *29*. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

MARKUP TRANSCRIPT

BUSINESS MEETING

THURSDAY, MAY 25, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

[Intervening business.]

Chairman SENSENBRENNER. Okay. Pursuant to notice, I now call up the bill, H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006" for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point, and the Chair recognizes himself for 5 minutes to explain the bill.

[The bill, H.R. 5417, follows:]

I

109TH CONGRESS
2D SESSION

H. R. 5417

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 2006

Mr. SENSENBRENNER (for himself, Mr. CONYERS, Mr. BOUCHER, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Internet Freedom and Nondiscrimination Act of 2006''.

SEC. 2. PURPOSES.

The purposes of this Act are to promote competition, to facilitate trade, and to ensure competitive and nondiscriminatory access to the Internet.

SEC. 3. AMENDMENTS TO THE CLAYTON ACT.

The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) by redesignating section 28 as section 29,

(2) by inserting after section 27 the following:

''DISCRIMINATION BY BROADBAND NETWORK PROVIDERS

''SEC. 28. (a) It shall be unlawful for any broadband network provider—

''(1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;

''(2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

''(3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

''(B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

''(4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

''(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

''(b) If a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

''(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures—

''(1) to manage the functioning of its network to protect the security of such network and broadband network services if such management does not result in discrimination among the content, applications, or services on the network;

''(2) to give priority to emergency communications; or

''(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law.

''(d) For purposes of this section—

''(1) the term 'affiliate' means—

''(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or

''(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;

''(2) the term 'broadband network provider' means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;

''(3) the term 'broadband network service' means a 2-way transmission service that connects to the Internet and transmits information at an aver-

age rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and

''(4) the term 'user' means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.'', and

(3) by amending subsection (a) and the 1st sentence of subsection (b) of section 11 by striking ''and 8'' and inserting ''8, and 29''.

○

Chairman SENSENBRENNER. The Internet has revolutionized the way Americans access and transmit a broad range of goods, ideas, services and information. The central pro-competitive feature of the Internet is the nearly unrestricted ability of anyone to connect to it to access and post information, download content and consume goods and services without discrimination.

According to FCC data released last month, 98.2 percent of Americans access high-speed broadband lines by connecting to either cable modem or digital subscriber lines. As a result, most Americans are subject to a broadband duopoly, while others, particularly in rural areas, are subject to a broadband monopoly. These conditions create an environment ripe for anticompetitive and discriminatory misconduct.

Since the 1950's and throughout my chairmanship, the House Committee and the Judiciary has played a critical role in fostering competition in the telecommunications industry. While the technological dynamics of the telecom marketplace have changed over time, the threat of dominant firms abusing their market power to restrain competition and consumer choice has not. The lack of competition in the broadband marketplace prevents a clear incentive for providers to leverage dominant market power over the broadband bottleneck to preselect, favor or prioritize Internet content over their networks. When this market power is utilized to violate the nondiscriminatory features that drive Internet innovation and consumer choice, then antitrust remedy is clearly needed. This bill preserves the remedy.

Specifically, H.R. 5417 prohibits anticompetitive conduct in which the network provider fails to provide service and interconnection on nondiscriminatory terms, blocks or impairs the lawful content, prohibits users from attaching devices to its network, or fails to inform consumers about the terms of the broadband service. These protections do not restrict broadband network providers from taking steps necessary to manage networks in a nondiscriminatory manner, or to give priority to emergency or law enforcement communications.

In addition, I will offer a bipartisan manager's amendment with Ranking Member Conyers to further clarify that nothing in this legislation restricts broadband networks from offering controls to protect against the transmission of objectionable content or manage their networks in a nondiscriminatory manner.

This legislation is timely for a number of reasons. In the Brand X decision last summer, the Supreme Court upheld FCC efforts to repeal nondiscriminatory safeguards against broadband misconduct. Recently, the Committee of Energy and Commerce reported legislation that vests the FCC with exclusive authority to define and adjudicate discriminatory broadband packages, while expressly prohibiting the FCC from issuing any rules and regulations to establish meaningful sanctions for this misconduct. These provisions displace the application of the antitrust laws in this field and transgresses the authority of this Committee. H.R. 5417 restores these protections.

Opponents of this legislation have sought to portray efforts to provide a meaningful remedy for anticompetitive misconduct by broadband providers as regulatory in nature. However, the antitrust laws have served as a competitive backstop against competi-

tive abuse by market dominant forces for over a century. Opponents of this bill have also argued that meaningful restrictions on the ability of broadband providers to abuse their market power to discriminate against online conduct is a solution in search of a problem. If this is the case, then this legislation merely represents a "trust but verify" approach, and that worked 15 years ago to make the world a better place.

Finally, opponents of this legislation have attempted to transform this debate into a partisan issue. Contrary to the specious arguments advanced by broadband network providers, efforts to perfect online businesses and consumers against predatory and discriminatory practices that produced a broad and diverse coalition in support of this legislation. The coalition includes the Christian Coalition, the National Retail Federation, AARP, Financial Services Roundtable, Intel Microsoft Content Providers, the Gun Owners of America, the Parents TV Council, and the National Religious Broadcasters. And I ask unanimous consent to include their statements of support on Internet freedom in the record at this point.

[The information referred to follows:]



American Council on Education
Office of the President

May 24, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Democratic Member
House Judiciary Committee
2142 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

On behalf of the American Council on Education and the associations listed below, I write to express support for your bill, "The Internet Freedom and Nondiscrimination Act of 2006" (H.R. 5417). This legislation contains the kind of strong and enforceable net neutrality provisions America's colleges and universities need to meet their educational and research goals. Our colleges and universities helped create the Internet, and, from the beginning, we designed the Internet so that it would operate on an open platform that would be available and accessible to all Americans. Your legislation would restore this basic principle and ensure that the Internet remains an engine for innovation, productivity and economic growth.

In the past few decades, the Internet has become central to our mission as educators. We depend on it for teaching, research, and outreach to our communities. In order to provide first-class distance education for our students, tele-health for our medical schools, and advanced applications for our researchers, we must have an Internet that is open to all persons, all applications and all lawful content on a nondiscriminatory basis.

We are concerned that recent policy changes have effectively eliminated this basic nondiscrimination safeguard. In an environment where 94 percent of Americans have little choice in their broadband provider, some companies may prefer their own content and place limits on universities' access to the Internet.

Your legislation correctly restores the fundamental principle of nondiscrimination that has served the Internet well since its inception. Specifically, The Internet Freedom and Nondiscrimination Act of 2006 would prohibit broadband providers from blocking traffic or discriminating against Internet applications and services that are not affiliated with the broadband provider. Additionally, H.R. 5417 would forbid broadband providers from assessing additional fees on web services or applications. Finally, your bill recognizes broadband providers' legitimate rights to protect the security of their networks as long as they act in a nondiscriminatory manner. We believe these provisions strike an appropriate balance in this area and will serve to protect the openness of the Internet for many years to come.

One Dupont Circle NW, Suite 800, Washington, DC 20036-1193
Telephone: (202) 939-9310 • Fax: (202) 659-2212

We have considered this matter carefully and appreciate the complexity of the issue. We have concluded that Congress should restore the original, enforceable policy that protects the openness of the Internet so that colleges and universities can meet their educational goals in the future, and we look forward to working closely with you and your staff to obtain enactment of your legislation this year.

Sincerely,

David Ward
President

DW/cms

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Indian Higher Education Consortium
Association of Community College Trustees
Association of Jesuit Colleges and Universities
EDUCAUSE
Hispanic Association of Colleges and Universities
Internet2
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of State PIRGs (USPIRG)
National Association of State Universities and Land-Grant Colleges

National
Religious
Broadcasters

9510 Technology Drive
Manassas, Virginia 20110
Phone: 703-330-7000
Fax: 703-330-7100

Capitol Hill Office:
119 C Street SE
Washington, DC 20003
Phone: 202-543-0073

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info@nrb.org

Christian
Communicators
Impacting
the World

NRB

April 21, 2006

The Honorable James Sensenbrenner, Chairman
The House Judiciary Committee
2138 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman:

I write you today to express concern about the future of the Internet and to ask that Congress take steps to put back in place Network Neutrality rules for the Internet as it considers telecommunications legislation this year.

Until late last year, the Internet developed and expanded under non-discrimination rules that provided an important foundation upon which thousands of businesses and non-profit organizations flourished. As part of a broad order, these rules were lifted last year by the FCC, and now the full benefits of an open and unfettered Internet are no longer assured.

This is a critical issue for NRB members. As you may know, NRB is an international association of Christian communicators with more than 1400 member organizations representing millions of viewers, listeners, and readers. The vast majority of our members have already made substantial commitments in extending their broadcast reach through the Internet. We currently use the Internet for audio and video streaming, pod-casting, web-casting, event registration, member communications and making resource information available for downloading. Our future plans include a variety of other services including IPTV.

If Network Neutrality is not adopted, NRB members (the majority of whom are non-profit organizations) would be forced to pay additional access fees to the phone and cable companies simply to avoid being discriminated against. If we don't pay these "fast lane" fees, our Internet users will face a frustrating wait every time they try to view, stream or download programs, resources and information offered by our members. Being relegated to an Internet "slow lane" will have an enormous deleterious effect on our ability to reach the broadest possible audience with the Gospel's message of hope and reconciliation.

The openness of the Internet has been a key driver of innovation, which has helped the Internet become the vibrant marketplace of ideas that it is today. I am very concerned that without any open access rules in place the future benefit of the Internet will be severely limited and our members, and the 141 million Americans who listen to and watch Christian broadcasting could be significantly disadvantaged.

My hope is that as Congress considers telecommunications legislation, any bill being debated would contain meaningful rules to keep the Internet free from discrimination.

Thank you for your leadership on this and so many issues vital to the Nation. I look forward to speaking with you about Network Neutrality in the near future.

Sincerely,

Frank Wright, Ph.D.
President & CEO

AARP

May 24, 2006

RECEIVED
MAY 26
Committee on the Judiciary

The Honorable F. James Sensenbrenner, Jr.
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

AARP commends you and the bi-partisan leadership of the House Committee on the Judiciary for introducing H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006," to amend the Clayton Act to protect competitive and nondiscriminatory access to the Internet.

A growing number of mid-life and older Americans are online and increasingly rely on unfettered access to content and services on the Internet. H.R. 5417 will help prevent broadband network operators from using their market power over broadband Internet access, acting as gatekeepers of the Internet, with the ability to block or degrade consumers' access to online content or services offered by their competitors.

Without the protection that H.R. 5417 provides, network operators will be able to cut deals with certain content providers to allow for faster access to only *their* information, at the expense of their competition. They will be able to charge content developers for the "right" to gain access to their customers, and they will be able to block or discriminate against various Internet applications offered by independent companies. This is in direct contrast to how the Internet works today, and this bill takes an important step in preserving the accessibility and openness of the Internet.

The Internet should remain an open and innovative platform, accessible to all consumers, and AARP is pleased that the Judiciary Committee leadership has recognized this important objective. We look forward to working with the members of the Committee to advance this legislation. If you have any further questions, feel free to contact me, or have your staff call Debra Berlyn of our Federal Affairs staff at (202)434-3800.

Sincerely,

David P. Sloane

David P. Sloane
Senior Managing Director
Government Relations and Advocacy

National Office | 601 E Street, NW | Washington, DC 20049 | 202-434-2277 | toll-free 1-888-OUR-AARP (1-888-687-2277)
toll-free TTY 1-877-434-7598 | Erik D. Olsen, President | William D. Novelli, Chief Executive Officer | www.aarp.org

National Retail Federation
The Voice of Retail Worldwide

May 18, 2006

The Honorable James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

On behalf of the retail industry, I am writing to thank you for your authorship of H.R. 5417, the "Internet Freedom and Non-discrimination Act of 2006." As you know, online and multi-channel retailers have spent the past decade revolutionizing the way Americans shop by giving each and every consumer greater access to a wide variety of goods and services at highly competitive prices. In recent years, the growth of online retailing has consistently continued to outpace that of brick and mortar stores. In May 2005, Forrester Research published the State of Retailing Online 8.0, a Shop.org annual study of 137 online retailers. According to Forrester, online sales soared to $141 billion in 2004, up 24 percent over the prior year. This figure now accounts for 6.5 percent of all retail sales. The study further predicted online sales should grow another 22 percent in 2005 to $172 billion.

Because of the importance of this medium to the retail industry, NRF hopes that the Internet will remain the open highway of commerce that has fueled the growth documented above. Recent interest in a system of tiered Internet usage as expressed by major telecommunications companies threatens to eliminate network neutrality, forcing the Internet into a system more like cable TV, where retailers and other content providers could have to pay for the best access to consumers. Without specific protections the Internet could become a "pay to play" communications medium – stifling growth and eliminating now robust competition in the retail space. Further, if large telecommunications and cable companies begin to restrict the amount of content that users can readily access, it could lessen overall value of the Internet for American consumers.

By way of background, the National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.4 million U.S. retail establishments, more than 23 million employees - about one in five American workers - and 2005 sales of $4.4 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Again, we commend you for the introduction of this pro-competitive legislation and look forward to an earnest debate on this important issue over the coming months.

Sincerely,

Steve Pfister
Senior Vice President
Government Affairs

Liberty Place
325 7th Street NW, Suite 1100
Washington, DC 20004
800.NRF.HOW2 (800.673.4692)
202.783.7971 fax 202.737.2849
www.nrf.com

Pat Robertson
Founder

Roberta Combs
President

Christian Coalition of America

June 6, 2006

The Honorable David Dreier

Chairman, House Rules Committee

United States House of Representatives

Washington D.C. 20515

Dear Chairman Dreier,

Christian Coalition of America strongly supports Net Neutrality legislation in Congress in order to prevent the large phone and cable companies from discriminating against web sites. We are asking that the Rules Committee make in order an amendment sponsored by Committee on the Judiciary Chairman F. James Sensenbrenner, Jr. This amendment is similar to H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006," which was reported by the Judiciary Committee by a margin of 20-13. We are committed to working on behalf of our supporters to ensure that the Internet remains the free marketplace of ideas, products and services that it is today and Chairman Sensenbrenner's amendment will ensure this outcome.

Under the new rules contained in H.R. 5252, there is nothing to stop the cable and phone companies from not allowing consumers to have access to speech that they do not support. One of our concerns is this: What if a cable company with a pro-choice Board of Directors decides that it doesn't like a pro-life organization using its high-speed network to encourage pro-life activities? Under the new rules, broadband service providers could block, impair, or otherwise limit access to a pro-life web site, harming their ability to communicate with other pro-lifers. Chairman Sensenbrenner's amendment has the support of a true Right-to-Left coalition. Net Neutrality has the support of the Parent's Television Council - Brent Bozell's organization, the Christian Coalition of America, MoveOn.org, Gun Owners of America, and Dr. Frank Wright, President and CEO of the National Religious Broadcasters.

Liberal and conservative grassroots organizations use our websites to inform and interact with Americans - conservative and liberal - about important issues. All of these groups are supporting Net Neutrality because we know that if the Internet is controlled by the big phone and cable companies, our ability to communicate with Americans will be harmed, limited and controlled. In fact, every organization that uses the Internet to connect with Americans should be alarmed.

Anyone who is concerned at the prospect of their Internet activities and websites falling under the control of corporations should care about Net Neutrality. Christian Coalition of America supports Chairman Sensenbrenner's amendment in order to prevent the large phone and cable companies from discriminating against web sites. We urge you to allow a vote on Chairman Sensenbrenner's amendment on the House floor which will go a long way in saving the Internet as we know it today and which will allow ideas rather than money to control what Americans can access on the World Wide Web. Thank you for your consideration.

Respectfully yours,

cc: Speaker of the House J. Dennis Hastert

Roberta Combs, President
Christian Coalition of America

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Washington, DC 20003
Phone: 202-543-0073

www.nrb.org
info@nrb.org

Christian
Communicators
Impacting
the World

April 21, 2006

The Honorable Joe Barton, Chairman
The House Energy & Commerce Committee
2125 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman:

I write you today to express concern about the future of the Internet and to ask that Congress take steps to put back in place Network Neutrality rules for the Internet as it considers telecommunications legislation this year.

Until late last year, the Internet developed and expanded under non-discrimination rules that provided an important foundation upon which thousands of businesses and non-profit organizations flourished. As part of a broad order, these rules were lifted last year by the FCC, and now the full benefits of an open and unfettered Internet are no longer assured.

This is a critical issue for NRB members. As you may know, NRB is an international association of Christian communicators with more than 1400 member organizations representing millions of viewers, listeners, and readers. The vast majority of our members have already made substantial commitments in extending their broadcast reach through the Internet. We currently use the Internet for audio and video streaming, pod-casting, web-casting, event registration, member communications and making resource information available for downloading. Our future plans include a variety of other services including IPTV.

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My hope is that as Congress considers telecommunications legislation, any bill being debated would contain meaningful rules to keep the Internet free from discrimination.

Thank you for your leadership on this and so many issues vital to the Nation. I look forward to speaking with you about Network Neutrality in the near future.

Sincerely,

Frank Wright, Ph.D.
President & CEO

VIA EMAIL AND HAND DELIVERY

May 22, 2006

Chairman James F. Sensenbrenner
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

We congratulate you, Ranking Member Conyers and the Members of the Judiciary Committee on the introduction of H.R. 5417, "The Internet Freedom and Nondiscrimination Act of 2006". We are grateful that the Committee recognizes the importance of meaningful and enforceable Net Neutrality legislation to ensure that the Internet continues as vital force for innovation and economic benefit to all Americans.

Through our unique experiences and extensive efforts in building businesses, encouraging innovation and establishing dynamic communities – all on the Internet – we believe that the Committee has a duty to protect the original and fundamental laws that govern the Internet. These principles, embodied in Net Neutrality, prevent discriminatory behavior on the Internet, maintain consumer safeguards against monopolistic practices and preserve an innovative spirit of competition that has kept America as the leader in the global marketplace.

As the name of your legislation underscores, Congress, beginning with this Committee, is wise to act in a way that considers the best interests of millions of Internet users and consumers. Over the past half century, the Judiciary Committee has played a critical role in ensuring Federal communications policies preserve the competitive telecommunications landscape; we are hopeful that this legacy will continue as you consider protecting American Internet consumers with meaningful legislation.

Sincerely,

Amazon.com
eBay
Google
IAC/InterActiveCorp
Microsoft
Yahoo!







May 23, 2006

The Honorable James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers,

We strongly support H.R. 5417, the Internet Freedom and Non-discrimination Act and urge its adoption during the Committee's markup this Thursday. The Judiciary Committee's active involvement in revision of the Telecommunications Act is essential to the growing debate over the future of the Internet economy, broadband services and network neutrality.

As the Committee well knows, antitrust action was center stage in shaping the contemporary telecommunications industry and it should remain so. The increasing market power and the record of anti-competitive practices of the telephone and cable industries that own and control broadband networks should likewise be the central focus of policies favoring network neutrality. Unfortunately, those critical issues have largely been obscured in the current debate over restoration of the nondiscrimination rules for broadband networks that were eliminated just last year by the Federal Communications Commission.

The telephone and cable industries fighting efforts to reinstate critical nondiscrimination rules for broadband networks have instead cloaked the issue in anti-regulatory rhetoric, ignoring the crucial and historical role of nondiscrimination regulations in promoting a more competitive and efficient telecommunications sector and protecting consumers from the anticompetitive practices of dominant market players. Indeed, the Internet has become the engine of innovation and economic growth precisely because nondiscrimination rules applied to communications networks, preventing network owners from using their market power to exclude competitors.

Attached is a more in-depth analysis of the important historical role of antitrust law and principles in policing the anti-competitive behavior of telecommunications network owners and the applicability of antitrust principles to the growing debate over how and whether broadband network owners should be allowed to discriminate today.

Thank you for your leadership in refocusing the debate on core antitrust issues. We urge your swift action to favorably report H.R. 5417 and restore broadband network neutrality to the nation's communications sector.

Sincerely,

Mark Cooper	Gene Kimmelman	Ben Scott
Director of Research	Vice President, Federal and Int'l Affairs	Policy Director
Consumer Federation of America	Consumers Union	Free Press







NETWORK NEUTRALITY: THE NEED FOR AN ANTITRUST-BASED BAN ON NETWORK DISCRIMINATION

BACKGROUND

History, law and economic analysis support an antitrust-based ban on discrimination in interconnection and carriage for broadband networks.

The obligation of nondiscriminatory interconnection and carriage in the telecommunications industry goes back almost a century and has been codified under the Communications Act. In fact, the obligation of nondiscrimination in access to the means of transportation and communications stretches back through the founding of the Republic to the English common law that many of the nation's settlers brought with them to America.

However, this principle also has a basis in the most significant antitrust action taken under the Sherman Act to alter the shape of the communications industry. The decisive action of the federal courts applying antitrust law in breaking up the national telecommunications monopoly and the simultaneous imposition conditions of nondiscriminatory access to the local telephone exchange market were vital in promoting the competition we enjoy in parts of the communications and information sectors today.

Those conditions codified in the Telecommunications Act of 1996, have been responsible for the miraculous growth of the Internet economy and were, until recently, applied to the broadband network of the future. However, the 2005 decision of the Federal Communications Commission (FCC) to abandon these conditions and the principle of network neutrality for broadband has proven harmful for consumers and threatens the innovations driven by the open platform of the Internet. The 1996 Act did not contemplate the elimination of these vital conditions and, in fact, contemplated their continuation and extension to local exchange markets in order to develop vibrant competition in telecommunications services. In order to promote competition, protect consumers and ensure market driven innovation, the House and Senate Judiciary Committees must act swiftly to restore network neutrality to the nation's communications sector.

HISTORY AND LAW

January 24, 2006 marked the 50th anniversary of the Final Judgment in *U.S. v. Western Electric Company, Inc. and American Telephone and Telegraph Company Inc.* About two weeks later, we marked the 10th anniversary of the Telecommunications Act of 1996. Those two landmark events in the history of the American telecommunications industry are linked together by the 1982 Modification of Final Judgment (MFJ) in the AT&T Case. The 1996 Act adopted

the essence of the MFJ and preserved the involvement of the Department of Justice in oversight of the key competitive aspects of the law.

Title I of the MFJ broke AT&T up into local and long distance companies, a classical antitrust remedy. Title II forbade the newly divested Bell Operating Companies (BOCs) to "provide interexchange telecommunications service or information services," thereby fencing off the potentially competitive interexchange and information service sectors from the market power in the local exchange market.

Title II of the MFJ also imposed obligations of nondiscriminatory interconnection and access on the BOCs:

> *Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariff basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.*
>
> *No BOC shall discriminate between AT&T and its affiliates and their products and services or other persons and their products and services in the:*
>
> *1. Procurement of products and services*
>
> *2. Establishment and dissemination of technical information and procurement and interconnection standards;*
>
> *3. Interconnection and use of the BOC's telecommunications services and facilities or in the charges for each element of service; and*
>
> *4. Provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.*

The federal courts applying antitrust law and reviewing an antitrust consent decree imposed this strong mixture of antitrust structural separations and communications-like regulation as part of its remedy for good reason: Communications infrastructure is the bloodstream of the information economy. The local exchange network, in today's parlance – the last mile and the central offices to which they are connected – was and is the essential bottleneck facility at the heart of this infrastructure.

Over the years of its jurisdiction, the federal court overseeing this antitrust case lifted the prohibition on provision of information services and issued a number of other waivers to the bar on provision of service. But it never lifted the obligation of nondiscrimination in interconnection and exchange access that is equal in type, quality, and price."

When the Congress passed the Telecommunications Act of 1996, it provided a mechanism for lifting the structural separation between local and long distance service, but there was no intention, implicit or otherwise, to abandon this fundamental principle of

nondiscrimination. Indeed, Congress actually moved in the opposite direction, extending the principle of nondiscriminatory access to unbundled network elements within the local exchange in the hope of stimulating local competition.

Through a convoluted and litigious course of misinterpretation of clear congressional language, the Federal Communications Commission has attempted to repeal the principle of nondiscrimination. It refused to extend the obligation of interconnection and equal access to the telecommunications services offered by cable operators. That interpretation was rejected twice by federal courts of appeals. When the issue arrived at the Supreme Court after five years of litigation, the Justices reversed the lower court, not on the basis of sound public policy, but rather in deference to agency discretion.

In other words, one of the most vital principles of antitrust and communications policy was reversed through the back door. The FCC quickly moved to extend this misinterpretation to the telephone companies by removing the obligation of nondiscriminatory interconnection and access from the telephone companies' broadband networks.

The abandonment of such a fundamental principle of the MFJ and communications law without Congressional action has become the subject of intense debate over the significance of a guarantee of "network neutrality" to ensure the future growth of the Internet. Given this background, the examination of this issue by the Judiciary Committee is not only appropriate, but also critically important.

INDUSTRY STRUCTURE, COMPETITION AND THE PUBLIC INTEREST

More than the legal history and the antitrust laws counsel for a close look at this issue by the Judiciary Committee. The key arguments offered by those advocating abandonment of this principle are essentially claims about the extent of competition in the exchange access market and the incentives of an entity that is vertically integrated across markets with radically different levels of competition. In essence, these are the very same issues that were in play when the federal court imposed the conditions under the antitrust laws a quarter of a century ago.

In economics an expression to describe competition in markets is – "four is few, six is many." When there are fewer than the equivalent of roughly six, equal competitors, a market is considered highly concentrated because economic theory, empirical evidence and a century of practical experience show that markets that are this concentrated do not perform well. In highly concentrated markets, prices are set above costs and innovation declines. With so few competitors, it is easy to avoid vigorous, head-to-head competition, especially when each uses a different technology, specializes in a different service, or concentrates on a different geographic area or user sector.

This concern is heightened for communications facilities, which have characteristics of public goods and economies of scale (as well as other barriers to entry). This means that the number of competitors is likely to be very small. These facilities are also considered infrastructure, which means these industries support a wide range of activities and the external benefits they generate are large are indirect and diffuse. There are many complementary

activities and vertical linkages to other sectors in the economy. Communications is a network, which exhibits strong network economies. In contemporary terminology, they are called platforms. In short, competition at the core of these industries is very feeble, but their influence stretches far and wide. The risk of the abuse of market power is substantial and the harm it may cause is profound.

Public policy must carefully assess where competition can be sufficient to provide the dynamic benefits that we expect from it and where it will not be sufficient to protect the public and promote dynamic innovation. This is precisely what the Court did 24 years ago. This is the balance that the FCC failed to preserve in its 2005 decision to eliminate the obligation of nondiscrimination in broadband.

The fact that the network operators are vertically integrated and seeking the right to discriminate poses a special concern for competition in the complementary markets – Internet services, applications and content – that rely on the network to reach the consumer. The potential to leverage market power in last-mile facilities to favor affiliates and advantage partners at the expense of competitors is very real. Of course, that was the core of the case against AT&T.

More importantly, the Baby Bells seem to have inherited their mother's tendency and inclination to leverage their market power to prevent competition and extend their reach. During the decade of failure to create competition in the local market, they consistently sought to undermine entry of local competitors. As a result, they were fined billions for failing to treat competitors fairly. In broadband, given their ability to discriminate and exclude access to the last mile, network owners have a strong incentive to raise costs for competing service providers and tie more competitive services to less competitive offerings. If the obligation of nondiscrimination is lifted, the behavior will only get worse, but the fines to police the behavior will no longer be available.

THE PERSISTENT PROBLEM OF MARKET POWER IN NETWORK FACILITIES

In the emerging, converging world of 21st century communications, prospects for vigorous competition in the local segment of the industry are not good. At present, there are only two local, last mile communications networks that can provide a fully functional broadband network to the residential consumer – the incumbent local telephone companies and the incumbent cable operators. Two is not a sufficient number to ensure vigorous competition, and both sets of incumbents have a troubling record of anticompetitive, anti-consumer behavior.

The best hopes for a third, last mile alternative were undercut when regulators allowed the most likely candidate – wireless – to be captured by dominant wireline firms through ownership or joint ventures. It stretches credible expectation to assume that a wireless provider owned by an incumbent Bell company, or in partnership with a cable giant, will market a wireless broadband product that directly competes with its wired product. They will offer premium, supplementary services to be sure—but it will not be a true third broadband competitor. Hope and hype surrounding other technologies cannot discipline anticompetitive and anti-consumer behavior where no real alternatives exist. Mergers such as that proposed by

AT&T and BellSouth will only make matters worse. No company with sufficient market power to set monopoly rents will fail to do so absent proper public policy protections. On the current trajectory, consumers are falling into the grip of a "cozy duopoly" of cable and telephone giants that will abuse its market power, abandon its social responsibility and retard the development of our 21st century information economy.

The danger of relying on a "cozy duopoly" is already apparent. The harm has already been done, and its impact is severe. America has fallen behind in the global race to the broadband future, not because there is inadequate incentive to invest or because we are less densely populated than other nations, but because there is inadequate competition to push the "cozy duopoly" to deploy attractively priced services and unleash the Internet economy to develop consumer-friendly services.

If future prospects are determined by our success in the broadband market (which few analysts deny), our current position is untenable. We are now 16th in the world in broadband penetration. Virtually none of our broadband lines can sustain even 1 megabit per second of speed in both directions—up and down the network. We pay $15-$20 per megabit for download speed—20 times more than the global leaders. The current jostling to attract upscale consumers with big bundles of services leaves the majority of Americans behind. On a per megabit basis Americans pay five to twenty times as much for high-speed services as consumers in many other nations. Is there any doubt that the primary cause of the broadband digital divide is price? Now, after leaving the American consumer in a serious predicament, the network giants are insisting on the right to discriminate against content, applications, and services on the Internet, as blackmail for building broadband networks.

REINSTITUTING THE PRINCIPLES OF THE MODIFIED FINAL JUDGMENT

The evidence overwhelmingly supports the proposition that the court got it right in the MFJ and that Congress never contemplated that a principle as vital as network neutrality would be abandoned through an administrative back door that rest on agency discretion, not a proper evaluation of the public policy merits.

The Judiciary Committee should restore the balance the federal court sought under the antitrust laws by adopting H.R. 5417:

> SEC. 28. (a) It shall be unlawful for any broadband network provider—
>
> (1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;
>
> (2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

(3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

(B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

(4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

The direct link between the MFJ language and this legislative proposal is clear. The MFJ made it illegal to discriminate in interconnection and access. That was the correct policy a quarter of a century ago. It is the correct policy today. It exercises the traditional function of antitrust policy to promote competition, where feasible, as the best form of consumer protection. And in this case, it will also guarantee the free flow of ideas, applications and services that has characterized the dynamic Internet economy.

The explicit dual jurisdiction – antitrust and communications law – that applies to the communications industry, and has applied for almost a century, reflects the nature of the industry. It is not vigorously competitive, nor is it likely to become so, and there are numerous complementary activities that are touched by the network. The original AT&T antitrust case served the purpose of fencing off the market power in the core of the network from the potentially competitive sectors that build upon it. The vigorous competition in interexchange and information is testimony to the wisdom of network neutrality. The court did not eliminate the need for regulation of the network functions, but it drew an important line where regulation should stop. Congress preserved that line in the 1996 Act. The FCC has incorrectly erased it. The House and Senate Judiciary Committees can and should restore the balance.



May 24, 2006

The Honorable F. James Sensenbrenner, Jr.
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

AARP commends you and the bi-partisan leadership of the House Committee on the Judiciary for introducing H.R. 5417, the "Internet Freedom and Nondiscrimination Act of 2006," to amend the Clayton Act to protect competitive and nondiscriminatory access to the Internet.

A growing number of mid-life and older Americans are online and increasingly rely on unfettered access to content and services on the Internet. H.R. 5417 will help prevent broadband network operators from using their market power over broadband Internet access, acting as gatekeepers of the Internet, with the ability to block or degrade consumers' access to online content or services offered by their competitors.

Without the protection that H.R. 5417 provides, network operators will be able to cut deals with certain content providers to allow for faster access to only *their* information, at the expense of their competition. They will be able to charge content developers for the "right" to gain access to their customers, and they will be able to block or discriminate against various Internet applications offered by independent companies. This is in direct contrast to how the Internet works today, and this bill takes an important step in preserving the accessibility and openness of the Internet.

The Internet should remain an open and innovative platform, accessible to all consumers, and AARP is pleased that the Judiciary Committee leadership has recognized this important objective. We look forward to working with the members of the Committee to advance this legislation. If you have any further questions, feel free to contact me, or have your staff call Debra Berlyn of our Federal Affairs staff at 434-3800.

Sincerely,

David P. Sloane

David P. Sloane
Senior Managing Director
Government Relations and Advocacy

eBay Inc.
1250 Eye Street, NW, Suite 1002
Washington, 20005

May 22, 2006

Honorable James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

On behalf of eBay and the more than 193 million users worldwide, I write to applaud your leadership on Net Neutrality and your efforts to preserve the open Internet that has been key to American competitiveness and economic leadership.

The Internet has enabled innovative companies like eBay to become a resource for tens of millions of Americans and hundreds of thousands of U.S. small businesses. Regrettably, without network neutrality protections, the Internet is likely to become a two-tiered system – where those who can pay a tax will have access to a fast lane and the rest will crawl along in the slow lane. Innovation will suffer, choices will decrease, and entrepreneurship will diminish.

The concept of network neutrality protects the Internet. Without these protections, network operators will be able to use "their pipes" to change the market for Internet content and services – taking this control away from the consumer.

Again, we thank you for taking a leadership role in protecting innovation, competitiveness, and small businesses. We support HR 5417, "The Internet Freedom and Nondiscrimination Act of 2006," which will prevent discrimination and maintains the open architecture of the Internet.

Sincerely,

Brian Bieron
Senior Director, Federal Government Affairs

cc: Members of the House Judiciary Committee



April 25, 2006

The Honorable Ted Stevens
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Daniel Inouye
Co-Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Ranking Member:

We are writing to underscore the importance of an open Internet and to seek your leadership in enacting legislation that preserves the fundamental and critical nature of the Internet.

The open marketplace of the Internet, or what has become known as "network neutrality," empowers America's citizenry, fuels our engine of innovation and is central to our global leadership in Internet technology and services. The rules of the road that preserved openness were eliminated last summer by the Federal Communications Commission, and it is critical that Congress moves quickly to reinstate them.

The Internet has succeeded precisely because of these rules, which have prevented network operators from using their control over Internet access to dictate consumers' Internet experience. Likewise, innovators large and small, as well as investors, have relied on market and regulatory certainty coupled with their own ingenuity to develop new and better online offerings. This "innovation without permission" is, from our perspective, the essence of the Internet.

We call upon you to enact legislation preventing discrimination against the content and services of those not affiliated with network operators and thereby preserve network neutrality. It is our understanding that Senators Snowe and Dorgan plan to introduce legislation that would ensure the Internet remains open and neutral. We commend their effort. We encourage you to include such language in any telecommunications legislation.

Absent such safeguards, the fundamental paradigm of the Internet will be irreparably altered and that most worthy of preservation will be lost. American consumers will lose basic Internet freedoms, the engine of innovation will be hobbled, and our global competitiveness will be compromised.

We look forward to continuing to work with you and other Members of the Committee to re-establish longstanding net neutrality protections.

Sincerely,

/s/ Jeff Bezos
Founder and CEO
Amazon.com

/s/ Paul S. Otellini
President and CEO
Intel Corporation

/s/ Meg Whitman
President and CEO
eBay Inc.

/s/Steve Ballmer
Chief Executive Officer
Microsoft Corp.

/s/ Eric Schmidt
Chief Executive Officer
Google Inc.

/s/ Terry Semel
Chairman and CEO
Yahoo!

/s/ Barry Diller
Chairman and CEO
IAC/InterActiveCorp

Cc: Members of the Committee on Commerce, Science, and Transportation



Press Release

Wednesday, May 17, 2006
President Roberta Combs

For further information contact: Michele Combs 202-479-6900

Christian Coalition Announces Support for 'Net Neutrality' to Prevent Giant Phone and Cable Companies From Discriminating Against Web Sites

Washington D.C. -- Today, Christian Coalition of America announced its support for the effort to amend pending telecom legislation in Congress in order to prevent the large phone and cable companies from discriminating against web sites.

Roberta Combs, the President of Christian Coalition of America said, **"Christian Coalition is joining a broad array of organizations, representing consumers, businesses, and all ends of the political spectrum. The Coalition is committed to working on behalf of our supporters to ensure that the Internet remains the free marketplace of ideas, products and services that it is today."**

Major telecom companies are laying plans to create tiered access to the Internet – and to charge extra fees to consumers and content providers in order to offer select web sites for "fast access" by consumers. Without "Net Neutrality", American consumers who want to pay for fast broadband access to the Internet will find out they do n't actually have what they thought they were paying for. They won't have high-speed broadband access to the entire Internet; just the part that the phone and cable companies allow them to see.

The Internet is what it is today because every site, no matter how obscure, is just as accessible to every individual as any name brand site with a multi-million dollar budget. Every American has the opportunity to create their own site and say what they want to the entire world and have the same access to the world as anyone else. And consumers have the ability to connect with them.

Since the inception of the Internet, it has existed on phone lines, which were covered under what are known as "common carrier" regulations, which prevented discrimination, based on content. This principle helped make the Internet what it is today -- a dynamic engine for free expression and economic growth.

Mrs. Combs said, **"Under the new rules, there is nothing to stop the c able and phone companies from not allowing consumers to have access to speech that they don't support. What if a cable company with a pro-choice Board of Directors decides that it doesn't like a pro-life organization using its high-speed network to encourage pro-life activities? Under the new rules, they could slow down the pro-life web site, harming their ability to communicate with other pro-lifers - and it would be legal. We urge Congress to move aggressively to save the Internet -- and allow ideas rather than money to control what Americans can access on the World Wide Web. We urge all Americans to contact their Congressmen and Senators and tell them to save the Internet and to support 'Net Neutrality'."**

#

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Click here to make a secure online donation

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Christian Coalition of America
P.O. Box 37030
Washington, D.C. 20013
Telephone: (202) 479-6900
Fax: (202) 479-4262
www.cc.org

THE FINANCIAL SERVICES ROUNDTABLE
Impacting Policy. Impacting People.

The Financial Services Roundtable supports "net neutrality" provisions designed to prohibit Internet network operators and ISPs from blocking or slowing access to Internet content based on the amount of money client companies or consumers are able or willing to pay for service. The Internet should not become an exclusive medium for the highest bidders, nor should financial services firms be forced to pay higher prices in order to meet regulatory requirements for security or transaction speed.

- The Roundtable supports inclusion of statutory language in the Telecommunications Act to ensure that broadband services are offered to business and individuals based on reasonableness and non-discrimination.

- Financial firms have invested billions of dollars in e-commerce in an effort to close the digital divide and bring web-based banking and trading to any American with a computer.

- Now, however, network providers are opposing net-neutrality provisions and have made statements suggesting that they will use their ownership of critical network equipment to block or hinder access to the Internet based on content, unless customers agree to pay more for broadband

- In 2005, the FCC issued a policy statement that outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers and content providers.

- However, more recently, the FCC has ruled that broadband providers, unlike dial-up providers, do not have to abide by common-carrier requirements, leaving open the possibility that they will be able to sell biased-services and block content for those who agree to pay more.

- In March 2005, Madison River Communications was forced by the FCC to pay a fine for blocking Vonage VOIP. In November 2005, the chairman of AT&T quipped that "for a Google or a Yahoo or a Vonage or anybody to expect to use these pipes for free is nuts." Bellsouth Chief Technology Officer William Smith said the Internet should become a "pay for performance marketplace."

- For financial firms, the absence of net neutrality could create a significant tension between contracts with ISPs and regulatory requirements.

    - The SEC's "Trade-through Rule" requires "best execution" of on-line trades;
    - GLBA requires financial firms to implement policies and practices to safeguard customer information.
    - There is no regulation requiring online brokers to provide real-time quotes, but undermining real-time quotes could undermine investor confidence and expose on-line traders to unnecessary risk.

- Network owners profit legitimately from the pricing of broadband and other services; online businesses including financial firms pay everyday to use the network. Congress must recognize, however, that network owners are not the only companies that invest and innovate in this space.

- Financial firms and every consumer pays for performance, but the pricing should be offered uniformly to any business or individual and not tied in anyway to the specific content moving through the network.

Chairman SENSENBRENNER. I urge my colleagues to support this legislation, and now recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I rise as the cosponsor of this legislation, and I'm very proud of the fact that it is bipartisan in nature, and I commend the Chairman on the record for making sure that this jurisdiction over this issue remains in the Committee on the Judiciary.

Now, last year, ladies and gentlemen, in August, the FCC voted to change the way it enforces the rules dealing with the Internet, basically eliminating net neutrality. What we are faced with now is an end to net neutrality as we have appreciated it up till now. We're at the final stages, and this is why we've introduced this legislation.

The FCC decision to eliminate, basically eliminate net neutrality has a 1–year phase-in period, and so it's still in effect for the next few months, but after August of this year, there will be no rule or regulation to stop the phone and cable companies, a duopoly, 98 percent, from doing what they've said they want to do, charge content providers for the right to be on their Internet pipes and making special deals with some companies to ensure their sites and services work faster and easier to find—be found by Internet users. That's why it's so critical now that this Committee on Judiciary acts now to protect freedom on the Internet.

And by the way, this comes right to your office door, because many of us enjoy a great deal of interaction and discussion with citizens, and without the open pipes that allow this to happen, if we, without passing this forward today, allow this to be changed as it goes out, expires in August, guess what? You could, I could, we could, be put in the slow lane for our talk, our chats, and the information that we use ourselves. And so it's very important that we understand what's going to happen if we get rid of net neutrality, which we've enjoyed and worked with so far.

The service providers, bless their hearts—I like a lot of them—would be free to block online content or services for any reason. They could also charge websites, assuring that any site that would or that couldn't or wouldn't pay fees, would not be easy to find. It could spell the end of the innovation as small businesses have been control—and would now be controlled by the big telephone and cable companies. If network providers are allowed to control the flow of information, the open and freewheeling nature of the Internet that we respect and like so much would be lost. We'll lose that town hall environment on the Internet, where we talk to one another, exchange views and find information from news, opinions, blogs, and engage in the democratic give and take that has made the Internet so absolutely popular.

And so we already have instances of Internet providers blocking access to the Internet applications that allow you to access your network or share files. We've got several cases that I won't bother to cite here.

Net neutrality has the widest support. It's a matter now of this Committee determining to continue the same principle that has operated so well. Without it, we are going to slide back and goodness knows when we will be able to get it repaired.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. CONYERS. Please support this bipartisan measure, and I return——

Chairman SENSENBRENNER. Without objection, all Members opening statements will appear in the record at this point.

Are there amendments? And the Chair recognizes himself to offer a manager's amendment on behalf of himself and Mr. Conyers, and the clerk will report the amendment.

The CLERK. Amendment to H.R. 5417, offered by Mr. Sensenbrenner. Page 3, strike lines 21 through 25, and insert the following.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The Chair recognizes himself for 5 minutes.

[The amendment follows:]

AMENDMENT TO H.R. 5417

OFFERED BY MR. SENSENBRENNER

Page 3, strike lines 21 through 25, and insert the following:

(1) to manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated provider;

Page 4, after line 5, insert the following (and make such technical changes as may be appropriate):

(4) to offer consumer protection services (such as parental controls), provided that a user may refuse or disable such services;

(5) to offer special promotional pricing or other marketing initiatives; or

(6) to prioritize or offer enhanced quality of service to all data of a particular type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or quality of service.

Page 5, line 11, strike ''29'' and insert ''28''.

Chairman SENSENBRENNER. As I noted in my opening statement, I am offering this amendment along with Ranking Member Conyers to further clarify that nothing in the legislation restricts broadband networks from offering controls to protect against the transmission of objectionable content or to manage their networks in a nondiscriminatory manner. I urge Members to support this clarifying amendment, and yield back the balance of my time.

Gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Before running the clock, let me say that we're supposed to have votes at noon. We have one other bill besides this one that we have to act upon. If we do not get finished, we'll be back after lunch.

The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you. I won't take the whole 5 minutes.

Mr. Chairman, in the 19th century, the great super highway of the future was the railroad. Congress recognized that if the railroads, which were granted rights-of-way by the Government, could engage in price discrimination or in discrimination against captive shippers, the Nation's economy and its future would be strangled.

Today the Internet is the super highway of the future. We have a choice, to allow a small number of companies to control that future, or to ensure that the super highway is open to all in a fair and nondiscriminatory basis. The cable and telephone companies have a right to a reasonable return on their investment, another principle established more than 100 years ago. They are not entitled to squeeze competitors or to decide who gets to be a part of the electronic future. This bill embodies that principle. In addition to which I want to make one other comment.

The campaign finance system in this country, everybody agrees is a major problem. What we do about it, a lot of disagreement about. Many observers have suggested that the Internet may very well solve that problem, that years from now people will not do expensive TV ads, but that most communications will be over the Internet and cost essentially nothing or very little, and this will restore democracy to our country in a way that we don't have it now, and will eliminate the necessity to raise large sums of money for campaigns. Maybe they're right, maybe they're wrong, but we shouldn't interfere with that potential. That is just one potential of the Internet. It may liberate our country's democratic process again.

Mr. Chairman, I commend you, and I commend the Ranking Member for their work on this bill. I believe it strikes the appropriate balance between the Nation's interest and reasonable and nondiscriminatory access, and the rights of the Nation's broadband companies. I urge its adoption. I yield back the balance of my time.

Mr. SMITH. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. Okay. The gentleman is recognized.

Mr. SMITH. First I'd like to thank the Chairman for his strong leadership and his determination to protect the prerogatives and

jurisdictions of this Committee. No one has been stronger in advocating for this Committee, and all of us on both sides of the aisle owe him a tremendous debt of gratitude.

The Judiciary Committee has always played a vital role in ensuring fair competition in the telecommunications industry. We must continue to do so in the constantly evolving environment of the Internet, and we will.

Almost all Members would agree that we need to preserve antitrust scrutiny of the industry. The question is, how do we best do that? Do we leave it to the exclusive jurisdiction of the Federal Communications Commission? I think the Commission's record with the 1996 Telecommunications Act shows that that is not the best way to go. Or as this bill does, should we try to set out the rules of competition of a rapidly evolving market before we even know where that market is going? Frankly, I do not believe we have the ability to do that. Rather, I think it is better to leave these decisions to the courts to work out on a case-by-case basis under the antitrust laws.

Every Member of this Committee cares about our jurisdiction, but some of us also have concerns about the substance of the bill. However, if the Commerce Committee bill comes to the floor, there is no guarantee that this bill will be made in order, nor is there any guarantee that it will pass on the floor. It is possible that another kind of amendment might be in order, and could pass and get this Committee a seat on the Conference Committee. So I don't think that preserving our Committee's jurisdiction is necessarily tied to voting for this bill today.

It is a well-intentioned bill that would certainly prohibit some anticompetitive conduct. The problem is that it would also prohibit a lot of conduct that is pro-competitive. Suppose, for example, that an innovative company wants to provide a new video service that requires greater bandwidth than most existing products? Suppose that a broadband provider has the capacity to provide that extra bandwidth to one company, but not to six other companies? Under this bill's prohibition on antidiscrimination and the broadband provider's terms or conditions of service, it would not be able to offer the extra bandwidth to the one innovative company because it would then be required to provide it to all. This is a regulator's dream, but an entrepreneur's nightmare.

Preemptively legislating new regulatory burdens can also have many unintended consequences. I am particularly concerned about the effects on intellectual property protection. For example, the bill says that a broadband provider cannot block access to lawful content. How does that apply when users subscribe to a peer-to-peer file-sharing network that is primarily used for infringing purposes, but may also include some lawful content? It is also unclear how broadband providers would comply with some of the provisions. For example, the bill provides that a broadband provider must clearly and conspicuously disclose to users in plain language accurate information concerning the terms and conditions of its service.

This is so broad and vague that I am unsure how anyone could know what it means as a practical matter. But if the broadband providers violate that requirement, they are subject to all the remedies of the antitrust laws, including treble damages.

The point is that it is very difficult to write rules for how the Internet should grow. Frankly, so far, it's done a pretty good job of growing on its own. Maybe I am wrong. Maybe the legislation would not cause any of these problems, but the uncertain and unpredictable effect of the bill is what makes it worrisome. Even a coalition of first responders has expressed their concern that the bill could potentially affect the development of new technologies to address interoperability.

Instead of writing prescriptive rules to solve speculative problems, it would be better to focus our efforts on preserving the application of current antitrust laws to safeguard against anticompetitive practices on the Internet. This approach would preserve the jurisdiction of this Committee and ensure that we don't put a straitjacket on this important sector of our economy.

While I agree with the good intentions of this legislation, I believe that it reaches too far and could stifle future innovations instead of protecting them. Although I have great appreciation for the Chairman, his strong feelings on this issue, and his devotion to this Committee and its interests, I, frankly, cannot support this bill even with the manager's amendment.

Thank you, Mr. Chairman.

Mr. BERMAN. Would the gentleman yield? I ask unanimous consent that the gentleman have an additional minute?

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH. I'll be happy to yield.

Mr. BERMAN. The one issue I've asked you to just address further, if you feel that having only the FCC do the regulation has been shown not to be appropriate, and if we don't pass this bill, in other words, on what basis do you get the Rules Committee to say something that has an antitrust angle that allows there to be a Justice Department review of questions of concentration of power and restraint of trade, will be made a Member's amendment on a subject which otherwise is not germane, will have the kind of standing that some product coming out of this Committee would have in terms of even a approach that addresses some of the concerns that you have and perhaps I share?

Mr. SMITH. Let me reclaim my time and try to respond to the gentleman's question. First of all, let me reiterate my point that there is no guarantee that this bill will be made an order on the floor, there is no guarantee that it would perhaps pass on the floor. I so think we have options by offering other amendments. It can be written in a way that would be germane, and of course, that's up to the leadership and the Rules Committee whether or not they accept an amendment. And I am simply saying that that is a possibility, and if that possibility does occur, that does preserve the jurisdiction of the Committee because I happen to also feel it is important for us to have a seat on that conference Committee.

So I think that it is possible, just there's a lot of variables involved.

Mr. ISSA. Would the gentleman yield?

Mr. SMITH. And I'll be happy to yield to the gentleman from California.

Mr. ISSA. Thank you. I don't want to take any time on my own, because I know this is important that we move forward. I just want

to associate myself with your comments, and look forward to working on the amendment for the floor should this not prevail today.

Mr. SMITH. I thank the gentleman and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman's time has expired. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, I would like to pose a question, and I don't know if you or any of your colleagues, the sponsors of the bill, might weigh in on it. I think many of us have been wrestling with this over the last couple of weeks, and I think many of us, you know, feel the same way about it, that we like the principle of net neutrality, and think this is still a growing, vibrant e-industry that we don't want to take steps that will chill that growth and development. The question I think posed for many of us is whether using the antitrust laws is the most effective way to guarantee that kind of openness and robustness.

And for me, what it comes down to—and I'm still wrestling with this—and maybe the Chairman, or anyone else would like to jump in—and that is, not all broadband providers are necessarily in the same situation with the same business model, the same market conditions. It's one thing to log onto your computer at home and want to be able to travel to any website equally. It's another potentially if you're Verizon and you've developed a wireless technology that allows people to download content to their cell phone, and you've invested a lot of capital to make that possible for your phones and then you have to provide this now to everyone else, and allow them to piggyback on the market investment you've made in that.

So I think these are tough questions that we'll have to decide in terms of what is really open access and what is freeloading. And my question is, what gives us confidence to believe that the antitrust vehicle and the FTC will do a better job than the FCC or some other regime? Is this the best approach?

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. SCHIFF. Yes, Mr. Chairman.

Chairman SENSENBRENNER. I think the question posed in this bill is a very plain one, and that is, is do we want to have antitrust and anticompetitive decisions being made by a judge, subject to the appeal procedure, or by 7 politically appointed members of the FCC? What this bill says is that the judge makes the decision, just like it's done for the last 100 plus years since the passage of the Sherman and Clayton Acts.

Mr. SCHIFF. Mr. Chairman, if I can reclaim my time. And, again, I'm really searching for an answer here. These aren't rhetorical questions. But is this a question that is subject to judicial determination, or is this really more of a policy question about what circumstances do we want to require absolute equality, and what circumstances would absolute equality chill the development of those new——

Ms. LOFGREN. Will the gentleman yield?

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. SCHIFF. Yes, Mr. Chairman.

Chairman SENSENBRENNER. The Energy and Commerce Committee bill this exclusive authority to determine these questions in the FCC. And what this bill does is it restores the legal construct that we've had since the passage of the landmark antitrust laws over 100 years ago in the Federal Judiciary, and the policy question is who makes the determination of what is anticompetitive?

I cast my vote in having the judges do it because I think they've done it in a fairly responsible manner for over 100 years. The Energy and Commerce Committee wants to change that and to make these determinations done by a regulatory body and not by a judicial body.

Mr. SCHIFF. Mr. Chairman, I would be happy to yield now to the gentlewoman from California.

Ms. LOFGREN. I understand that Members are sorting through. It's a very complicated issue, and that we are all trying to do the very best that we can with this complicated issue.

In the example that the gentleman offered where, let's say, for example, Provider A develops an advanced cell phone that allows for enormous text messaging. The provider, under the bill introduced by Mr. Sensenbrenner and Conyers, could charge an accelerated price for that advanced product and the consumer would pay that price. Under the bill, what they couldn't say is that we are going to allow you for Price A to go only to our websites or to our customers, but if you're going to go outside this network, we're going to charge you an extra price. And that's because the Internet has worked because newcomers and challengers to incumbents have been able to actually have free access to all of their potential customers, and it is the customer who decides who they want to contact, not the provider, who decides who the customers can contact.

And so I think that the ability to actually charge for services is completely provided for in this. It's only the discrimination that monopoly providers of the actual pipes to access the Internet that is controlled by this, and absent this, the ability of consumers to decide how they want to access the Internet is, I think, very much at risk.

And I thank the gentleman for yielding to me.

Mr. CANNON. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. For me, this markup is like a riddle wrapped in a conundrum, and I just wanted to make a couple of things clear. I intend to vote with the Chairman on this issue, but I'd like to talk about net neutrality for a moment. Real net neutrality, whatever else it is, is going to be a function of consumer choice. Consumer Choice is going to be a function of a return on investment, and the problem we have today is that we don't have clarity of law, and that makes it very, very difficult.

We also have this incredibly complicated competitive environment where the cable companies are now offering telephone service, and they are cutting a bunch of businesses out from under the incumbent telephone companies, and what is happening in the Commerce bill is an attempt to sort of even the ground so that telephone companies can also offer content over their lines. If that

doesn't happen, we're going to see some pretty terrific dislocations in our whole system.

So whatever we do here after today, may I suggest that we need to do it with clarity, and we need to do it quickly. We need to be out of the way of the transformation that is taking place around us, and we need to do it in a way that does not constrain, but in fact, encourages new competitors to come into the system so that consumers can say, "I don't need to worry about the constraints on Provider A because Provider B doesn't do those constraints and the price is lower, and I get more service." And so may I just encourage this Committee, whatever we do on this bill, that we need to move quickly and decisively and with clarity so that the playing field works in the future.

And with that, Mr. Chairman, I yield back.

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Mr. Chairman, to listen to some of the interested parties, net neutrality is a cut and dry case, but I have to tell you, this is a complicated issue, one that—much more than what the one pages and the talking points would suggest. The issues are complex. They're arcane, and require a comprehensive understanding of the infrastructure of the Internet, as well as current market conditions and the full array of potential possibilities.

And this, in my opinion, really demands a exhaustive and thorough review. I've heard opponents of net neutrality argue that innovation would be stifled if we don't act because network operators will move away from an open Internet and give preferential treatment to some content, and I've heard the opponents argue that innovation would be stifled if we do act because regulation will hamper network providers' ability to ensure delivery of high bandwidth services such as video. On top of that there are concerns about the impact on deployment and investment in broadband, an area where the United States falls further behind our peers every year. And I believe that we have not, because of time constraints, had the kind of hearings in this Committee that are warranted because of the significance and importance and complexity of this issue.

I understand the issue that the Chairman and Ranking Member's bill is meant to resolve, would have a profound influence on the future of the Internet in the United States. It will also, inevitably have an enormous impact on our economy.

To be very candid, I acknowledge, for one, I have insufficient information at this point in time to take that vote right now. At the same time I recognize that as a Member of this Committee that we have, as others have indicated, a legitimate role in this process, and often timing is not left up to us. There should be no question that this issue falls within the jurisdiction of this Committee, and as others have mentioned, Mr. Chairman, I acknowledge your commitment to defend that jurisdiction. We've disagreed on many issues, and we've worked together, and I would suggest achieved significant results on other issues. But no one doubts your commitment to protecting the jurisdiction of this Committee, and I would state publicly that this is a service for both majority and minority Members on this dais.

So with that in mind, and because of my respect for you and Mr. Conyers, I intend to vote present on this particular proposal. With that, I yield back.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. DELAHUNT. Mr. Chairman, I yield to the gentlelady.

Ms. JACKSON LEE. I thank the distinguished gentleman, and I thank him for his thoughtfulness.

I want to just make the point that we're all friends in this room. I think we can find, if you will, a pathway of recognition of our friendship. I think it's important to note that we are talking about a very unique product and a very limited product. We know that the broadband pipes is limited, and new applications and services are consuming more and more of it. And we also realize that this is a moment in time to be able to assert jurisdiction to work with our friends.

I might commend my colleagues to the Texas model, where we talked about protecting consumers and consumer cost. In order to get there, I think it's important for us to make a statement about the competitive issue, and I believe that Mr. Smith, Lamar Smith, had a very valuable thought, and a very valuable potential amendment, and I also think that as we make our way to the floor, we'll be able to assert a better formula for working together——

Chairman SENSENBRENNER. Time of the gentleman has expired. The question is——

Ms. JACKSON LEE. Let me just say as I close——

Chairman SENSENBRENNER.—on the amendment offered by——

Ms. JACKSON LEE.—that I think this is a valuable amendment and a valuable——

Chairman SENSENBRENNER.—by the gentleman from Michigan, Mr. Conyers——

Ms. JACKSON LEE.—statement on jurisdiction, and I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Michigan and myself. Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment is agreed to. Are there further amendments? If there are no further amendments——

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. WEINER. To strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEINER. Mr. Chairman, I disagree with you and Mr. Conyers and the other sponsors of this legislation on many key points, but agree with you on one. You know, I agree that we in this Committee and we in this House have to foster innovation. I think that it was the innovation of the content providers that dragged the dinosaurs of the telcos and the cable companies into providing better access, and that will continue to happen. I think that, frankly, if it weren't for our need to download music for our iPods, we probably would still have a 33 whatever it is modem I our computer.

And I think that now after years of kicking and screaming, it seems that the cable companies and the telcos get it. It seems that

they understand that content and the ability for people to get content is going to be how the winners and losers in the future of this are going to be defined. I don't believe that they have shown any instinct, despite some intemperate remarks from their leadership, they haven't shown any instinct, at least up to now, to close off the pipe, which is the fear of so many who advocate.

I think that the winners, the i-tubes, the sling boxes of the future, they are going to be the winners, telcos are going to be the winners, cable companies are going to be the winners when we allow as much access to content.

What concerns me is about those that we don't know, the smaller companies we're unaware of that might not have access. That's a reasonable complaint. But I have to say the very same people who are advocating for net neutrality were at the vanguard of advocating that we in Congress take a libertarian view of these issues. Stay out of these fights, we were constantly told by these content providers. We said that these fights will go on. Everyone will claim that big guy is going to squash me, and then 5 years later that big guy was getting squashed by someone who seemed like a little guy. Stay out of it we were argued.

And it turned out to be wisdom, I believe. I believe we shouldn't weigh in in these gambling issues by forcing credit card companies to get involved. I believe we shouldn't weigh in, as abhorrent as some things are on the Internet. Stay out, it's a bad idea to legislate in this area. Now those very same libertarians are saying, "Wait a minute. We need a new law. We call it net neutrality. Let's put it on top of everything." I disagree with the Chairman and the Ranking Member in that regard. But I agree with them in a very important way. The way the Energy and Commerce bill is written, it is clearly to deny this Committee, and frankly, most citizens, a right to remedy.

On page 43 of the Energy and Commerce bill the adjudicatory authority says, the Commission, the FCC, shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement, those four freedoms that are articulated by the FCC and are enshrined in this legislation, and the principles incorporated therein.

A little further down on that same page it has limitations. Nothing in this section shall include authorization for the Commission to adopt or implement rules regarding enforcement. It's almost as if they say you can go to the FCC and have this adjudicated, but you can't do anything else. You can't have rules. You can't have any public input, and the way I read this: "shall have exclusive authority" means that there's no meaningful—if a court has to decide whether or not you can have an antitrust challenge brought, I read this to be, to guide any court to say no, that Congress believes there's not going to be any antitrust jurisdiction here. Why would you do that? If you say we want this essentially to allow the marketplace to work, why would you then put in language that makes it so difficult for the people to have any effort to make sure that it does work?

Mr. CONYERS. Would the gentleman yield very briefly?

Mr. WEINER. Certainly.

Mr. CONYERS. Thank you so much.

Mr. WEINER. Certainly.

Mr. CONYERS. The only reason this measure is before us today is that it is expiring. In August of this year there won't be any practice. We're continuing what we already have, my friend——

Mr. WEINER. Yes, I——

Mr. CONYERS. And that the antitrust provision is the only way that each small company will have a right to get in it. FCC doesn't work. FTC does their own thing——

Mr. WEINER. And reclaiming my time, and I understand that, and I disagree fundamentally with the idea that we want to put another regulatory scheme on top, and I believe that we have to let kind of the currents of this fight go its various ways. One of the ways is to go to the courts and say, you know what, the duopoly power that is controlled right now by the cable companies or the telcos, we shouldn't be legislating it, but there are going to be disputes about that, and they may wind up in the courts and we may have judges and juries deciding these things. And this is why at the end of the day I believe that the Sensenbrenner-Conyers bill is a wise idea, and for something else.

We should want to, in this Committee, be fighting every single day to make sure intellectual property discussions don't just go on in the Energy and Commerce Committee. This is more than about energy and more than about commerce. It's also about a fundamental desire that we all have to make sure that speech is fostered, to make sure that technology is fostered. So I take the view that while I think we shouldn't legislate this area, we can slam the door shut on these other areas where people can——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WEINER. This is the big ending, Mr. Chairman. In that fundamental way, I——

Chairman SENSENBRENNER. The gentleman's time has expired. The Chair will once again reiterate that either we get this bill done before the votes, which are coming imminently, or we will be back here no later than one o'clock. Now, the question is——

Mr. ISSA. Move to strike the last word, Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California seek recognition?

Mr. ISSA. Mr. Chairman, I move to strike the last word. I will be incredibly brief.

Chairman SENSENBRENNER. Okay.

Mr. ISSA. Although I do have an amendment at the desk, I've been convinced by staff that we can continue working on the question of the bit rate that's in the underlying Sensenbrenner-Conyers bill, because 200 kilobits is, in my opinion, old technology and far too slow, and it does entrap, as the debate spoke about, it does entrap the existing broadband cellular networks unnecessarily, and my amendment would have raised that to the one MIP or thousand kilobit speed, and I look forward to working with the Chairman, and with that, I yield back.

Chairman SENSENBRENNER. The Chair would ask Members to consider whether they want to continue talking. If the Chair recognizes another Member, we will be back at one o'clock.

The Committee is recessed until one o'clock.

[Recess.]

AFTERNOON SESSION

Chairman SENSENBRENNER. The Committee will be in order. When the Committee recessed, the pending question was on the motion to report the bill, H.R. 5417, favorably as amended. The bill is open for amendment at any point.

The gentleman from Maryland, for what purpose do you seek recognition?

Mr. VAN HOLLEN. I move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I too, like others before the break, want to commend you and Mr. Conyers for your leadership on this issue. I also want to associate myself with others who made the point that this is a difficult and complicated issue, and I do think it's important that as a Congress we move carefully in this area. I believe, as I think all of us on this Committee and in Congress do, that we want to maintain the Internet as a free and open space in cyber space for the exchange of ideas, products and services. And the question is, what's the best way to do that? And I think there is a fair debate as to the best approach to do that.

Like others—and Mr. Weiner discussed this in his comments—I do disagree with the approach taken by the Energy and Commerce Committee. And he, I think very ably, made the point that the bill that came out of the Energy and Commerce Committee both vested the FCC with exclusive jurisdiction, at the same time gutted in many ways the meaningfulness of that jurisdiction.

I would just like to relate a letter from the Federal Trade Commission, the FTC, addressed to Mr. Conyers, April 14th, because it relates to this issue. And question No. 8 there was, is there anything the FTC would ask of Congress in order to clarify jurisdictional divisions and/or facilitate the FTC's work with regard to protecting consumers in the broadband Internet access marketplace.

And in their response to that question, they say, "As Congress considers legislation on broadband Internet access, the Commission believes that any such legislation should clearly preserve the FTC's existing authority over activities within its jurisdiction such as broadband Internet access. We note that some recent legislative proposals would assign to the FCC specific competition and consumer protection authority regarding such activities, and could be misread to oust the FTC from its established jurisdiction." In other words, its jurisdiction over anticompetitive behavior.

While I have to say that I don't think that the bill before this Committee is the very best way to deal with that issue, I think there are better ways. For example, I think the best approach would be to go into the bill that came out of the Energy and Commerce Committee, get rid of the exclusivity provision, make some other changes. I do think it's the best vehicle before us to send a very strong signal that we don't like what is in the Energy and Commerce Committee bill, and I don't know——

Mr. CONYERS. Would the gentleman yield?

Mr. VAN HOLLEN. I'd be happy to yield.

Mr. CONYERS. I just want him to know that's precisely what we tried to do. This is our fallback position. What we want to do is give individuals and companies a right to sue themselves—sue in their own rights, and that the only way we can do it is through

antitrust. As we all know, FCC is like a moss pit, there's nothing that can happen there. And I thank the gentleman for his evaluation and mentioning our communication with FTC because it's so important.

Mr. VAN HOLLEN. I thank you as well. And again, I do have some concerns that the language of the bill before us with respect to antidiscriminatory practices could have some unintended consequences. Mr. Schiff, in his earlier comments, mentioned a particular hypothetical. And I am concerned that if it was to be enacting the law in its current form, it could curb creativity, it could hamper investment, and it could do in some things that we would be inconsistent with the very intent of what we're trying to do. And so I am at this time going to be supporting this legislation, with the understanding that its primary purpose from my perspective is to put the rest of the Congress, put the Energy and Commerce Committee on notice we have concerns with what they did and we want that addressed in some fashion, even if this isn't the final solution.

Mr. CONYERS. Would the gentleman yield briefly again?

Mr. VAN HOLLEN. I'd be happy to.

Mr. CONYERS. I just want him to know that those concerns are the same as mine, and we want all these companies that are out there—I'm sure they want the same kind of things for themselves that you want for them too. So I think we've got a broad mandate from a large part of the telecom community to make those kinds of improvements if we can. And I thank the gentleman.

Mr. VAN HOLLEN. I thank you.

Chairman SENSENBRENNER. The question is on reporting the bill favorably as amended——

Mr. SCHIFF. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from California, Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman. I move to strike the last word. I just want to associate myself with the comments by Mr. Van Hollen. I think the bill is a blunt instrument, and yet I think it does send a message that it's important to retain jurisdiction for the Justice Department and for antitrust issues. But I would hope in the interim between this bill coming up or the other bill coming on the floor, there will be an opportunity to visit in greater detail some of the issues to improve upon the work product, and on that basis, I yield back.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. SCHIFF. Yes.

Ms. JACKSON LEE. I thank the gentleman. Listening to both of you, I just want to reiterate that this compromise or this approach in a bipartisan way has worked, and it has worked in the State of Texas, where there was an ability to focus on I think your concern, one jurisdiction, but more importantly, consumers having choice, having protection. And I hope that everyone understands that's all this legislation is attempting to do, is to provide that kind of protection.

I am hoping as well, as I said earlier toward the end of the gavel, that we can work our will toward the floor and make the kind of, I think, holistic opportunity for the broadband providers, but also for what I think is important, consumers, who I know that they are

respectful of. So my support is based upon that contention, and I thank the gentleman for yielding. I yield back.

Mr. SCHIFF. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on reporting the bill favorably as amended. A reporting quorum is present. Those in favor will say aye.

Opposed, no.

Chairman SENSENBRENNER. The ayes appear to have it.

Mr. SCHIFF. Mr. Chairman, I'd like a recorded vote, please.

Chairman SENSENBRENNER. A recorded vote is ordered. Those in favor of reporting the bill, H.R. 5417, favorably as amended, will as your names are called answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

[No response.]

The CLERK. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks, no. Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mrs. Wasserman Schultz?
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Mrs. Wasserman Schultz, aye. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members who wish to cast or change their votes? Gentleman from California, Mr. Lungren.
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? Gentlewoman from California, Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Chairman SENSENBRENNER. Gentleman from Massachusetts, Mr. Delahunt?
Mr. DELAHUNT. Present.
The CLERK. Mr. Delahunt, present.
Chairman SENSENBRENNER. Gentleman from New York, Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. Further Members who wish—gentleman from California, Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Chairman SENSENBRENNER. Gentleman from Wisconsin, Mr. Green.

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Further Members who wish to cast or change their vote? Gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.

[Pause.]

The CLERK. Mr. Chairman, there are 20 ayes, 13 nays and one present.

Chairman SENSENBRENNER. And the motion to report the bill favorably is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted here today. Without objection, the staff is directed to make technical and conforming changes, and all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.

[Intervening business.]

[Whereupon, at 1:53 p.m., the Committee was adjourned.]

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