112TH CONGRESS
1ST SESSION

H. R. 166

To prohibit the Federal Communications Commission from regulating information services or Internet access services absent a market failure, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 2011

Mr. STEARNS introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To prohibit the Federal Communications Commission from regulating information services or Internet access services absent a market failure, and for other purposes.

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

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Internet Investment, Innovation, and Competition Preservation Act”.

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SEC. 2. REQUIREMENTS FOR REGULATING INFORMATION SERVICES OR INTERNET ACCESS SERVICES.

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following:

“SEC. 12. REQUIREMENTS FOR REGULATING INFORMATION SERVICES OR INTERNET ACCESS SERVICES.

“(a) MARKET AND COST-BENEFIT ANALYSIS REQUIRED.—

“(1) IN GENERAL.—To the extent that the Commission has the authority to regulate the rates, terms, conditions, provisioning, or use of an information service or an Internet access service, the Commission shall not regulate such rates, terms, conditions, provisioning, or use unless—

“(A) the Commission first transmits a report to Congress concluding that—

“(i) there is a market failure in the provision of such information service or Internet access service;

“(ii) there is substantial evidence that the market failure is causing specific, identified harm to consumers by preventing a substantial number of consumers nationwide from accessing a substantial amount of lawful Internet content, applications,
and services of their choice on a continuing 
basis; and

“(iii) regulations are necessary to 
ameliorate the specific, identified harm to 
consumers resulting from the market fail-
ure;

“(B) in a notice of proposed rulemaking 
commenced after the transmission of such re-
port, the Commission—

“(i) proposes the specific text of the 
regulation to be adopted to ameliorate such 
specific, identified harm to consumers;

“(ii) conducts a cost-benefit analysis 
determining that the benefit of such regu-
lation exceeds its costs; and

“(iii) explains how imposing such reg-
ulation would not hinder ubiquitous 
broadband availability consistent with the 
national broadband plan that section 
6001(k) of the American Recovery and Re-
investment Act of 2009 (Public Law 111– 
5) requires the Commission to issue;

“(C) in an order issued after such notice 
of proposed rulemaking, the Commission pub-
lishes in the Federal Register the specific lan-

guage of a rule codifying such regulation; and

“(D) the Commission complies with the

transparency requirements under subsection

(d).

“(2) CONSIDERATION.—In conducting the cost-

benefit analysis under paragraph (1)(B)(ii), the

Commission shall consider the impacts of the regula-
tion, including—

“(A) any cost of enforcement;

“(B) any disincentive to investment;

“(C) any detriment to innovation;

“(D) any harm to competition, such as to

the ability of providers of content, services, or

applications to differentiate their content, serv-

ices, or applications based on quality, offerings,

or other factors; and

“(E) any harm to efficiency, such as re-

stricting the ability of broadband network pro-

viders, service providers, application providers,

or content providers to optimize their offering.

“(3) REQUIRED FINDINGS.—The Commission,
in making the determination under paragraph (1)(A)
and in conducting the cost-benefit analysis under
paragraph (1)(B)(ii), shall—
“(A) define the relevant product market;

“(B) determine whether any entity has market power in the relevant product market, taking into account competition among and between broadband network providers (including such providers using wireline, cable, wireless, satellite, and broadband over power line technologies), service providers, application providers, and content providers;

“(C) conduct an economic analysis of whether any such entity has the incentive and ability to exercise such market power in a way that harms consumers and that such entity could continue to profitably exercise that market power; and

“(D) consider—

“(i) the available data on broadband availability, including the broadband maps and other information generated pursuant to the Broadband Data Improvement Act (Public Law 110–385) and the American Recovery and Reinvestment Act of 2009 (Public Law 111–5);

“(ii) the impact of the broadband stimulus loans and grants issued pursuant
to the American Recovery and Reinvestment Act of 2009;

“(iii) the availability of access to the information service or Internet access service from 1 or more sources; and

“(iv) the ease of entry into the relevant product market.

“(b) LEAST RESTRICTIVE REGULATION REQUIRED;

NETWORK MANAGEMENT PERMITTED.—If the Commission decides to regulate the rates, terms, conditions, provisioning, or use of an information service or Internet access service after meeting its obligation under subsection (a), the Commission shall adopt a regulation that—

“(1) shall be the least restrictive necessary to address the market failure and specific harm to consumers identified under such subsection; and

“(2) shall not prohibit managed services, network management to address congestion and quality of service, or measures designed to prevent or deter unauthorized or illegal activity, including copyright infringement.

“(c) PERIODIC RE-EVALUATION REQUIRED.—

“(1) IN GENERAL.—If the Commission regulates the rates, terms, conditions, provisioning, or use of an information service or Internet access serv-
ice, the Commission shall complete a proceeding in
which the Commission shall reexamine the regula-
tion and shall determine whether—

“(A) the market failure identified in the
report under subsection (a)(1)(A) still exists;

“(B) the regulation is effectively amelio-
rating the specific harm to consumers identified
in such report;

“(C) absent continuation of such regula-
tion, such specific, identified harm to con-
sumers will return; and

“(D) the benefit of such regulation con-
tinues to exceed its costs.

“(2) DEADLINE.—The Commission shall com-
plete a proceeding under paragraph (1) by the date
that is 2 years after the effective date of the regula-
tion and not less than every 2 years thereafter for
as long as such regulation remains in effect.

“(3) SUNSET.—Any regulation adopted pursuant
to this section shall be deemed to be repealed if
the Commission fails to determine that all of the
conditions in subparagraphs (A) through (D) of
paragraph (1) still exist within the proceeding dead-
line under paragraph (2).
“(d) TRANSPARENCY REQUIRED.—The Commission shall not regulate the rates, terms, conditions, provisioning, or use of an information service or Internet access service unless the Commission complies with the following:

“(1) Before transmitting a final report to Congress under subsection (a)(1)(A), the Commission shall commence a notice of inquiry to examine the issues required to be addressed in such report and provide—

“(A) notice and an opportunity for comment on such notice of inquiry to the public for a period of at least 30 days;

“(B) public access to comments received under subparagraph (A) on the Commission’s Web site and a period of at least 30 days for replies to such comments;

“(C) to all Commissioners not less than 30 days after the receipt of such replies under subparagraph (B) to consider the record before the Commission provides a draft of the report required under subsection (a)(1)(A) to all Commissioners; and

“(D) at least 30 days to all Commissioners to consider such draft report before the deadline for a vote.
“(2) Before issuing an order under subsection (a)(1)(C), the Commission shall provide—

“(A) notice and an opportunity for comment to the public for a period of at least 30 days on the notice of proposed rulemaking required under subsection (a)(1)(B);

“(B) public access to comments received under subparagraph (A) on the Commission’s Web site and a period of at least 30 days for replies to such comments;

“(C) to all Commissioners, not less than 30 days after the receipt of such replies under subparagraph (B), a draft of the order to be issued pursuant to the notice of proposed rulemaking; and

“(D) at least 30 days to Commissioners to consider such draft before the deadline for a vote.

“(3) Before completing the proceeding required under subsection (c), the Commission shall provide—

“(A) notice and an opportunity for comment to the public for a period of at least 30 days on the determinations made under the proceeding required by such subsection;
“(B) public access to comments received under subparagraph (A) on the Commission’s Web site and a period of at least 30 days for replies to such comments;

“(C) to all Commissioners, not less than 30 days after the receipt of such replies under subparagraph (B), a draft of such determinations; and

“(D) at least 30 days to Commissioners to consider such draft before the deadline for a vote.

“(e) NEUTRAL NETWORK NEUTRALITY.—The Commission shall apply and enforce any regulation governing the rates, terms, conditions, provisioning, or use of an information service (including any transmission component of an information service whether or not the transmission component is offered for a fee directly to the public or to such class of users as to be effectively available directly to the public regardless of the facilities used) or an Internet access service on a nondiscriminatory basis between and among broadband network providers, service providers, application providers, and content providers.

“(f) ENFORCEMENT.—If the Commission regulates the rates, terms, conditions, provisioning, or use of an information service or an Internet access service, such regu-
lution may only be enforced against an entity if the Com-
mission determines, pursuant to a complaint filed by a
consumer, that the entity has engaged in conduct in viola-
tion of that regulation and such conduct caused a specific
and substantial harm to that consumer.

“(g) RULES OF CONSTRUCTION.—Nothing in this
section shall be construed to—

“(1) grant the Commission the authority to reg-
ulate information services or Internet access serv-
ices;

“(2) supersede, repeal, or negate any regula-
tions regarding information services or Internet ac-
cess services that were in effect on January 1, 2010,
including any regulations established pursuant to the
Communications Assistance for Law Enforcement
Act (Public Law 103–414);

“(3) prohibit the Commission from adopting
any regulation it deems necessary to prevent damage
to national security or public safety or to assist or
facilitate any actions taken by a Federal or State
law enforcement agency; or

“(4) mean that an Internet access service is not
an information service.”.