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112–51

DISAPPROVING THE RULE SUBMITTED BY THE FEDERAL COMMUNICATIONS COMMISSION WITH RESPECT TO REGULATING THE INTERNET AND BROADBAND INDUSTRY PRACTICES

APRIL 1, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.J. Res. 37]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the joint resolution (H. J. Res. 37) disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices, having considered the same, report favorably thereon without amendment and recommend that the joint resolution do pass.

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99–006

LEGISLATION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Federal Communications Commission relating to the matter of preserving the open Internet and broadband industry practices (Report and Order FCC 10–201, adopted by the Commission on December 21, 2010), and such rule shall have no force or effect.

PURPOSE AND SUMMARY

Resolution of disapproval H.J. Res. 37 nullifies the "network neutrality" rules regulating the Internet that the Federal Communications Commission adopted Dec. 21, 2010. *See In re* Broadband Industry Practices, WC Docket No. 07–52, *Report and Order,* FCC 10–201 (rel. Dec. 23, 2010). The Committee also intends the resolution to prevent the FCC from reimposing the same or substantially similar rules through reclassification of broadband under Title II of the Communications Act or through any other claimed source of direct or ancillary authority. The purpose of the resolution is to prevent the harm the rules would cause to broadband deployment, innovation, competition, and jobs, as well as to stop the FCC from asserting authority over the Internet that Congress has not granted it.

Rep. Greg Walden, chairman of the House Energy and Commerce Committee's Subcommittee on Communications and Technology, introduced the resolution pursuant to the Congressional Review Act, 5 U.S.C. §§ 801–08. The CRA allows Congress to nullify agency rules by enacting a joint resolution of disapproval. *See id.* at § 801(b)(1). Once Congress enacts such a resolution, the agency may not impose the same or substantially similar rules unless Congress enacts a new law specifically authorizing the agency to do so. *See id.* at § 801(b)(2). Under the CRA, a disapproval resolution requires only a simple majority in both chambers of Congress and is filibuster-proof in the Senate. *See id.* at § 802(d).

BACKGROUND AND NEED FOR LEGISLATION

The Internet is open and thriving today thanks to the government's historical hands-off approach. As Democrat FCC Chairman William Kennard stated in a 1999 speech rebuffing calls to force open access, "[t]he fertile fields of innovation across the communications sector and around the country are blooming because from the get-go we have taken a deregulatory, competitive approach to our communications structure—especially the Internet." FCC Chairman William Kennard, Address at the Federal Communications Bar, Northern California Chapter (July 20, 1999), *available at http://www.fcc.gov/Speeches/Kennard/spwek924.html.* Indeed, Clinton-era Solicitor General Seth Waxman explained in an April 2010 letter that:

> [b]roadband Internet access service has never been regulated under Title II. From the advent of the Internet, the Commission has instead treated broadband Internet access as an 'information service' without a separate 'telecommunications service' component, subject only to the Commission's ancillary authority under Title I.

Letter from Seth P. Waxman, Counsel for the U.S. Telecom Ass'n, to FCC Chairman Julius Genachowski 6 (April 28, 2010).

The Internet started as a 1960s defense agency project using phone lines to connect computers at several research facilities. Not until the government turned the Internet over to the private sector in the 1990s did it become the incredible engine for communication and economic growth that it is today.

The FCC laid the foundation for that growth with its *Computer Inquiries*, where the FCC chose to leave data processing services unregulated in light of their widespread availability and the lack of economic barriers to market entry. The FCC distinguished "basic services," which provide pure "transmission capacity for the movement of Information," from "enhanced services," which "employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information." Basic services would be treated as telecommunications services subject to Title II common carrier requirements; enhanced services would not. *See In re* Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Services & Facilities (First Computer Inquiry), *Final Decision*, 28 FCC 2d 267 (1971); Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC 2d 384 (1980); Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report & Order*, 104 FCC 2d 958 (1986).

In the pre-broadband era of dial-up service, the FCC did require phone companies that provided enhanced services over their own telecommunications facilities to make basic transmission service available on a nondiscriminatory basis to competing enhanced services providers. The FCC did not, however, regulate retail provision of enhanced services. Thus, the FCC regulated the dial-up telecommunications service a phone company provided to connect subscribers to an Internet service provider. It did not regulate the Internet access service that the phone company or a competing Internet service provider offered to connect the subscriber to the Internet. *Id.*

Recognizing that this regime was responsible for the accelerating growth of data services, Congress codified "enhanced services" as "information services" in the 1996 Telecommunications Act. *See* 47 U.S.C. 153(20); H.R. Conf. Rep. No. 104–458, at 114–15 (1996). It also added section 230 to the Communications Act, making it U.S. policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Chairman Kennard reaffirmed this approach. During his chairmanship, the FCC stated in a 1998 universal service report that Internet access service "offers end users information-service capabilities inextricably intertwined with data transport," and so is "appropriately classed as an 'information service.' " *In re* Federal-State Joint Board on Universal Service, CC Docket No. 96–45, *Report to Congress*, FCC 98–67 at ¶ 80 (rel. April 10, 1998). This culminated in the FCC's 2002 ruling under Republican Chairman Michael Powell that cable Internet access is an information service, a decision upheld by the Supreme Court in 2005. *See In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00–185, *Declaratory Ruling, FCC 02–77 (rel. March 15, 2002), aff'd, Nat'l Cable and Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Thus, despite claims to the contrary, the retail availability of Internet access service was never regulated. Nor was it ever reclassified from a telecommunications service to an information service. It was an information service from the start. In light of the Supreme Court ruling and the recognition that broadband Internet access service is available not just from phone companies but across multiple platforms, in 2005 FCC Chairman Kevin Martin eliminated the legacy requirement that phone companies providing broadband Internet access services over their own telecommunications facilities make telecommunications transmission available on a nondiscriminatory basis to competing Internet access providers. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02–33, *Report and Order*, FCC 05–150 (rel. Sept. 23, 2005).

It is true that it was Chairman Powell, in a February 2004 speech, that first articulated "four Internet freedoms"—the freedoms of consumers: 1) to access legal content, subject to reasonable network management; 2) to run applications that do not exceed their service plan limits or harm the network; 3) to attach devices that operate within their service plan limits, do not harm the network, or enable theft of service; and 4) to obtain meaningful information about their service plans. He made clear, however, that they were just a "road map," that they should apply not just to Internet access providers but to "all facets of the industry," and that they were meant *in lieu of regulations*. "[T]he case for government imposed regulations regarding the use or provision of broadband content, applications and devices is unconvincing and speculative," he said. "Government regulation of the terms and conditions of private contracts is the most fundamental intrusion on free markets and potentially destructive, particularly where innovation and experimentation are hallmarks of an emerging market," he explained. "Such interference should be undertaken only where there is weighty and extensive evidence of abuse." FCC Chairman Michael K. Powell, Address at Silicon Flatirons, Univ. of Colo. School of Law (Feb. 8, 2004), *available at http://hraunfoss.fcc.gov/edocs*l*public/attachmatch/DOC-243556A1.pdf*.

Notwithstanding a lack of the extensive evidence that Chairman Powell had spoken of, Chairman Martin formally adopted the freedoms as four "principles" in a September 2005 FCC policy statement. *See In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00–185, *Policy Statement*, FCC 05–151 (rel. Sept. 23, 2005). He emphasized in a news release when the FCC adopted the statement, however, that policy statements "do not establish rules nor are they enforceable documents." News Release, FCC Adopts Policy Statement (Aug. 5, 2005), *available at http://hraunfoss.fcc.gov/edocs*l*public/attachmatch/DOC-260435A1.pdf*.

Three years later, he nonetheless sought to enforce the principles against Comcast. Comcast had begun noticing that network demand by heavy users was impeding the ability of other subscribers to use its broadband service. To address the issue, Comcast engineers devised a way to intermittently hold traffic from peer-to-peer applications so that performance did not suffer for the majority of subscribers. Free Press and Public Knowledge filed a complaint alleging that Comcast's network management techniques were unreasonable and discriminatory. The FCC ordered Comcast in August 2008 to cease the network management practices. *See In re Broadband Industry Practices*, WC Docket No. 07–52, *Memorandum Opinion and Order*, FCC 08–183 (rel. Aug. 20, 2008). Comcast appealed on the grounds that the FCC had only issued a policy statement, rather than actually adopted network management rules, and lacked the authority to enforce such rules in any event.

By September 2009, Julius Genachowski was FCC chairman and had announced plans to codify the principles as rules. *See* FCC Chairman Julius Genachowski, Address at the Brookings Institution (Sept. 21, 2009), *available at http://hraunfoss.fcc.gov/edocs*l*public/attachmatch/DOC-293568A1.pdf*. The following month, the FCC proposed network neutrality rules, alleging the commission had ancillary authority to regulate broadband as an information service. *See In Re* Broadband Industry Practices, WC Docket No. 07–52, *Notice of Proposed Rulemaking*, FCC 09–93, at ¶ 83 (rel. Oct. 22, 2009).

In April 2010, however, the D.C. Circuit vacated Chairman Martin's attempt to sanction Comcast, ruling that the FCC failed to demonstrate it had ancillary authority under Title I of the Communications Act to regulate network management. The court explained that Title I would only allow such regulation if doing so was reasonably ancillary to fulfilling an explicit FCC responsibility codified in another section of the Communications Act, and that the FCC had failed to show such a connection. *See Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. 2010). This called into question the foundation of Chairman Genachowski's proposed codification of network neutrality.

Chairman Genachowski next proposed reclassifying broadband Internet access service as a common carrier service so the FCC could regulate it under Title II. *See* FCC Chairman Julius Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework" (May 6, 2010), available at *http://hraunfoss.fcc.gov/edocs*l*public/attachmatch/DOC-297944A1.pdf*. The FCC pivoted again, backing away from its reclassification approach, when approximately 275 members of the House and Senate from both sides of the aisle objected. *See, e.g.*, Letter from Rep. Gene Green et al. to FCC Chairman Julius Genachowski (May 24, 2010); Letter from Sen. Kay Bailey Hutchison et al. to FCC Chairman Julius Genachowski (May 24, 2010); Letter from Rep. Joe Barton et al. to FCC Chairman Julius Genachowski (May 28, 2010).

The FCC did, nonetheless, still adopt network neutrality rules Dec. 21, 2010. The rules allow the FCC: 1) to regulate how fixed and mobile broadband carriers disclose their network management practices, performance characteristics, and terms of service; 2) to regulate how fixed and mobile broadband carriers provide access to content, applications, services, and devices; 3) to determine whether the way fixed broadband providers carry network traffic is unreasonably discriminatory; 4) to regulate how fixed and mobile broadband carriers charge for carriage of traffic; and 5) to determine whether fixed and mobile providers' network management techniques are reasonable. *See In re* Broadband Industry Practices, WC Docket No. 07–52, *Report and Order,* FCC 10–201 (rel. Dec. 23, 2010).

These rules will stifle broadband deployment, innovation, and jobs. They "will sweep broadband ISPs, and potentially the entire Internet, into the Big Tent of Regulation," according to an editorial by Dr. David J. Farber, grandfather of the Internet and former FCC chief technologist, and Dr. Gerald R. Faulhaber, Professor Emeritus at the University of Pennsylvania's Wharton School and former FCC chief economist.

> What does this mean? When the FCC asserts regulatory jurisdiction over an area of telecommunications, the dynamic of the industry changes. No longer are customer needs and desires at the forefront of firms' competitive strategies; rather firms take their competitive battles to the FCC, hoping for a favorable ruling that will translate into a marketplace advantage. Customer needs take second place; regulatory "rent-seeking" becomes the rule of the day, and a previously innovative and vibrant industry becomes a creature of government rulemaking. Advocates of government-mandated network neutrality have argued this is necessary to permit new and resource-poor innovators to bring their products to market; in fact, it will have exactly the opposite effect: innovators are better at fighting it out in the market with better products rather than fighting it out in front of the FCC with high-priced lawyers; they will lose out.

Dr. David J. Farber & Dr. Gerald R. Faulhaber, *Net Neutrality: No One Will Be Satisfied, Everyone Will Complain*, THE ATLANTIC, Dec. 21, 2010, *available at http://www.theatlantic.com/technology/archive/2010/12/net-neutrality-no-one-will-be-satisfied-everyone-will-complain/68326/*.

The rules will also threaten broadband deployment and the very Internet itself. A bulletin by investment analyst Dr. Anna-Maria Kovacs explains why. Under the order, broadband providers' traffic management options are restricted, yet they are still expected to meet the growing demand for capacity over time. Moreover, the broadband companies are prohibited from receiving payments from content, application, or service providers for the added capacity needed to serve their traffic. As a result, the broadband providers would be forced to make substantial additional investments at the same time that their avenues for recovering their costs are narrowed. This jeopardizes the infrastructure upon which the Internet depends. The prohibition on content, application, or service providers paying broadband providers for priority also prevents new entrants from entering into business arrangements that might help them compete against web incumbents, which can afford to buy or lease capacity from content delivery networks. *See* Dr. Anna-Maria Kovacs, *FCC's Open Internet Order—A Financial Translation* (Dec. 31, 2010). Dr. Kovacs concludes, therefore, that:

> [o]ver time, the order represents a direct transfer of wealth from broadband access providers to those whose content rides over the network. That means that it provides those who ride the network with a strategically vital financial weapon to use against [broadband providers] who in many cases are their

> competitors. To put it another way, it takes all the bargaining power away from the [broadband provider]—who is making a very large investment for low returns—and giving it to the content provider who is making relatively little or no investment to enable it to access end-users and in some cases is already getting very high returns.

Id. at 7. This is particularly significant, since "network providers make far greater capital investments in the Internet ecosystem and create far more and better-paying jobs than application and content providers." *See In re* Broadband Industry Practices, WC Docket No. 07–52, Reply Comments of Communications Workers of America, at ii (filed April 26, 2010). *See also* Dr. T. Randolph Beard et al., Phoenix Center Policy Bulletin No. 25 (October 2010), *available at http://www.phoenix-center.org/PolicyBulletin/PCPB25Final.pdf.*

The order will hurt smaller providers who can't "absorb the hit" like the bigger players and send teams of lawyers to camp out at the FCC. As BendBroadband CEO Amy Tykeson has pointed out:

> The cable industry has invested billions of dollars of private capital to build broadband infrastructure to cover 90% of American homes. Commissioners are looking in the rearview mirror, attempting to regulate the Internet of yesterday absent any market failure. How will companies like BendBroadband be able to compete if we bear the brunt of the regulations while the giants, like Google, Amazon and Netflix, go free? . . . The Chairman has picked winners and losers in this recent effort to impose "net neutrality" regulations. These efforts will cost jobs, stall innovation and dampen investment.

Letter from Amy C. Tykeson, CEO, BendBroadband to Rep. Greg Walden (Feb. 22, 2011). Dr. Kovacs has pointed out that the order ironically will also hurt the very Internet users and web companies the FCC claims it is trying to protect. "More universally damaging perhaps is the rules' potential to destroy the ability of infrastructure providers to raise capital. That would threaten the infrastructure on which both consumers and content providers rely." Kovacs, *FCC's Open Internet Order* 3.

Even larger phone, cable, and wireless companies have concerns, notwithstanding the claims of network neutrality proponents that the companies support the order. Closer reading indicates that the companies are actually damning the rules with faint praise. What they are really saying is that bad is better than worse, and they would rather live with the order as adopted than reclassification under Title II.

For example, AT&T CEO Randall Stephenson did say at a Jan. 12, 2011, Brookings event that "we've landed at a place where we have line of sight. We know what we have. We can commit to these 10-year and 15-year horizon investments." He also said, however, that "[r]egulation creates uncertainty," that "I would be lying if I said I was totally pleased with it," and that "we didn't get everything we'd like to have had. I'd like to have had no regulation, to be candid, but that wasn't going to happen, obviously." AT&T CEO Randall Stephenson, Address at the Brookings Institute (Jan. 12, 2010), *available at http://www.c-spanvideo.org/program/297463-1.*

A large cable association wrote in a letter to the House Energy and Commerce Committee that while it agreed to the order, these rules are "a solution in search of a problem," that it "would much rather see (and believe it would be more equitable to have) a light regulatory touch for everyone in the Internet ecosystem, than a heavy and counterproductive regulatory regime on part or all of the Internet ecosystem," and that as a result of the order "there could certainly be an adverse economic impact by chilling the willingness to deploy these new services." Letter from NCTA CEO Kyle McSlarrow to Rep. Fred Upton et al. (March 7, 2011), *available at http://republicans.energycommerce.house.gov/Media/file/Letters/112th/030711McSlarrow.pdf.*

A large wireless association wrote in a similar letter that it does "not believe that net neutrality rules are necessary for the wireless industry," that by removing the "specter" of Title II regulation the order provides a level of certainty but that some uncertainty over FCC implementation remains, that none of its members have indicated they believe the order will promote the economy or jobs, and that "increased regulation tends to depress rather than accelerate investment." Letter from CTIA CEO Steve Largent to Rep. Fred Upton et al. (March 7, 2011), *available at http://republicans.energycommerce.house.gov/ Media/file/Letters/ 112th/030711Largent.pdf.*

Thus, none of these providers were saying the FCC's rules would promote investment and deployment that would not otherwise have occurred. What they said was that the FCC minimized some of the uncertainty it had itself created by threatening network neutrality rules in general, and Title II reclassification in particular. This did not stop the FCC, however, from selectively editing industry statements to leave the impression they were pleased with the order. *See* Letter from Rep. Joe Barton to FCC Chairman Julius Genachowski (Dec. 3, 2010, *available at http://republicans.energycommerce.house.gov/Media/file/Letters /12.03.10%20; Letter%20to%20FCC%20Chairman% 20Genachowski.pdf.*

If the Internet is to continue to flourish, especially in the face of demands for ever more sophisticated content, service, and applications, we must maintain the historical hands-off approach. As Chairman Kennard explained in a June 1999 speech:

We have to get these pipes built. But how do we do it? We let the marketplace do it. If we've learned anything about the Internet in government over the last 15 years, it's that it thrived quite nicely without the intervention of government. In fact, the best decision government ever made with respect to the Internet was the decision that the FCC made 15 years ago NOT to impose regulation on it. This was not a dodge; it was a decision NOT to act. It was intentional restraint born of humility. Humility that we can't predict where this market is going.

FCC Chairman William Kennard, Address before the NCTA (June 15, 1999), *available at http://www.fcc.gov/Speeches/Kennard/spwek921.html.*

There is no crisis warranting the FCC's departure from that hands-off approach. Advocates argue that the FCC must adopt network neutrality rules to keep the Internet open and innovative. Yet the FCC has failed to demonstrate a market failure or provide an economic analysis justifying intervention. The FCC even confesses in the order—albeit in the footnotes—that it conducted no examination of market power. *See In re* Broadband Industry Practices, WC

Docket No. 07–52, *Report and Order*, FCC 10–201, at n.49 (rel. Dec. 23, 2010). In response to a Committee letter asking the FCC to identify any economic analysis in the order, the agency pointed to paragraphs that do little more than summarize the comments of parties and provide conclusory statements. *See* Letter from FCC Chairman Julius Genachowski to Rep. Fred Upton (March 7, 2010), *available at http://republicans.energycommerce.house.gov/ Media/ file/Letters/ 112th/030711Genachowski.pdf*. The order did not conduct the type of cost-benefit analysis that President Obama's January 18, 2011, executive order now calls for and that Chairman Genachowski endorsed in an email to his staff. There is no serious quantification of an actual problem, let alone of the costs the rules would have on the economy.

The FCC hangs almost its entire case for network neutrality rules on Comcast's past attempt to combat network congestion by managing peer-to-peer traffic. But Comcast and the peer-to-peer community resolved that issue by gathering their engineers and developing alternative solutions that advanced traffic management techniques to everyone's benefit. No network neutrality rules were in place, and the D.C. Circuit overturned the FCC's enforcement action because the FCC failed to demonstrate it had any authority in the matter. The FCC also cites a 2005 case in which Madison River Telephone Company was accused of blocking ports used for voice over Internet protocol applications. But that case was settled by consent decree. Everything else the order discusses is either an unsubstantiated allegation or speculation of future harm.

Opponents of the disapproval resolution say the network neutrality order does not regulate the Internet, but instead creates minimally intrusive rules of the road that everyone agrees with. But if the rules are nonintrusive and universally accepted, why does the FCC need to force them on industry? Why is the FCC shielding web companies and selectively enforcing the rules only against broadband providers? Claims the rules don't regulate the Internet also ring false. On-ramps are part of the highway. The FCC is micromanaging how services and applications flow and the business arrangements broadband providers and web companies may enter.

Opponents of the resolution also claim the rules are needed because broadband providers have the incentive and ability to favor some Internet content, applications, and web sites. But web companies also have an incentive and ability to discriminate. Google can influence its search results. *See* Barbara Ortutay and Michael Liedtke, *Google Tweaks Search to Punish "Low-Quality" Sites,* Associated Press, *available at http://news.yahoo.com/s/ap/ 20110225/ap—on—hi—te/ us—tec—google—search*. Nothing prevents Google from favoring affiliated or preferred entities. If the FCC has conducted no market power analysis and relies on speculation of future harm, there is no principled reason to treat companies operating at the core of the Internet differently from companies at the edge. Instead of promoting competition, such picking of winners and losers will stifle the investment needed to perpetuate the Internet's phenomenal growth, hurting the economy. We want innovation at the edge and the core of the Internet. Engineers, entrepreneurs and consumers acting in the marketplace should determine how carriers manage their networks and business arrangements, not as few as three unelected commissioners.

Even apart from the harm the network neutrality rules will cause, the FCC's underlying theory of authority for the order would allow the commission to regulate almost any interstate communication service on barely more than a whim and without any additional input from Congress. The FCC claims it has authority to enact the rules under Section 706 of the 1996 Telecommunications Act relating to the promotion of advanced telecommunications capability, and under Titles II, III, and VI of the 1934 Communications Act relating to the promotion of voice, audio, and video services. *See In re* Broadband Industry Practices, WC Docket No. 07–52, *Report and Order*, FCC 10–201, at ¶¶ 117–37 (rel. Dec. 23, 2010). Section 706(a) provides that the FCC and state commissions:

shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 U.S.C. § 1302(a). Section 706(b) states that the FCC "shall take immediate action to accelerate deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," if such capability is not "being deployed to all Americans in a reasonable and timely fashion." *Id.* at § 1302(b). Title II governs the provision of telecommunications services. *See id.* at 201–76. Title III governs the provision of broadcast radio and television services and wireless voice services. *See id.* at §§ 301–399B. Title VI governs the provision of subscription video services. *See id.* at §§ 601–653. None of these claims of authority are persuasive.

The FCC's reliance on section 706 flies in the face of its own precedent and the section's language. The FCC has held "that in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority." *See In re* Deployment of Wireline Servs. Offering Advanced Telecom. Capability, CC Docket No. 98–147, *Memorandum Opinion and Order*, FCC 98–188, at ¶ 77 (rel. Aug. 7, 1998). Instead, section 706 directs the FCC to use *authority in other provisions*, including its deregulatory, section 10 forbearance authority, to encourage deployment of advanced services. *Id.*

Subsections (a) and (b) also focus on "removing barriers to infrastructure investment" and "promoting competition in the telecommunications market." 47 U.S.C. 1302(a), (b). By contrast, the FCC's order creates obstacles to infrastructure investment by regulating broadband providers, increasing their costs, and restricting the ways they may do business, price their services, and earn a return on their investments. The order also does not focus on competition *in the telecommunications market*. Rather, it tips the scales in favor of web-based companies that exist on the edge of the Internet, and that are far less involved in infrastructure investment than the broadband providers at the core. *See* Dr. Anna-Maria Kovacs, *FCC's Open Internet Order—A Financial Translation* (Dec. 31, 2010).

Also problematic is the language in subsection (b) about accelerating deployment of advanced telecommunications capability if such capability is not "being deployed to all Americans in a reasonable and timely fashion." While the FCC concluded in July 2010 that overall deployment is not occurring in a reasonable and timely fashion, *see In re* Inquiry Concerning the Deployment of Advanced Telecom. Capability, GN Docket No. 09–137, *Sixth Broadband Deployment Report*, FCC 10–129 at ¶ 2 (rel. July 20, 2010), that conclusion strains credulity. Indeed, the FCC's National Broadband Plan reports that approximately 95 percent of the country has access to broadband, that two-thirds subscribe, and that the number of users has skyrocketed to 200 million from 8 million in ten years. See Connecting America: The National Broadband Plan, at XI, 3, *available at http://download.broadband.gov/plan/national-broadband-plan.pdf*.

The FCC's claim that Titles II, III, and VI authorize the network neutrality rules also falls short. These titles allow the FCC to regulate traditional voice, audio, and video services, not data services. Rather than rely on these titles as a direct source of authority, the FCC makes an indirect argument. For example, the FCC argues that competition from voice over Internet protocol service creates a check on the rates, terms and conditions of telecommunications service, that promoting VoIP with network neutrality rules therefore promotes telecommunications services, and that its network neutrality rules therefore fall within its Title II mandate. *See In re* Broadband Industry Practices, WC Docket No. 07–52, *Report and Order*, FCC 10–201, at ¶¶ 125–26 (rel. Dec. 23, 2010). But as discussed above, section 230 makes it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). While statements of policy do not create statutorily mandated responsibilities, they can help delineate the contours of statutory authority. *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. 2010). In light of Congress's statutory pronouncement that Internet regulation is disfavored, the FCC's theory of regulation by "bank shot" under Titles II, III, and VI stretches too far.

The indirect argument the FCC makes is more akin to an ancillary authority argument, even though the FCC's general counsel, at a December 3, 2010, briefing for congressional staff on the network neutrality order, twice insisted that the FCC is making a direct authority argument. At bottom, this is little more than an end-run around the D.C. Circuit's April 2010 ruling in the Comcast case that the FCC failed to show it had ancillary authority to regulate network management.

Opponents of the disapproval resolution argue that it strips the FCC of authority to address Internet-related issues, including issues related to public safety and piracy. That is incorrect. As Senate Majority leader Harry Reid said when the Congressional Review Act was adopted, "[i]f the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule.'' Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. S3683, at S3686 (daily ed. April 18, 1996). Thus, if the agency has broad authority to adopt Internet-related regulations, as the FCC's general counsel contends, it can still adopt such regulations. It simply cannot reimpose these rules or substantially similar ones, whether under its current claims of authority, through a Title II reclassification approach, or under some other existing authority. *See* 5 U.S.C. §§ 801(b)(2). And, of course, if Congress were later to decide that the agency should have authority to adopt the same or substantially similar rules, it can pass a law granting the FCC such authority. *Id.* If, on the other hand, the FCC does not have broad authority to adopt Internet-related regulations, as advocates of the disapproval regulation believe, then the FCC never had the statutory authority to adopt these rules in the first place. Seen in this context, a vote against this disapproval resolution is simply a vote to allow the FCC to try to reimpose these same or substantially similar rules under a Title II reclassification approach should it lose in court under its current claims of authority, as even network neutrality advocates concede is likely.

Some argue that if supporters of the disapproval resolution believe the FCC lacks authority to adopt these rules, they should have supported Mr. Waxman's attempt last Congress to explicitly grant the agency that authority. That draft legislation, however, suffered from some of the same flaws as the FCC's current rules: it required no finding of market failure or market power and selectively targeted broadband providers to the exclusion of web companies. *See* Letter from Rep. Henry Waxman to FCC Chairman Julius Genachowski (Dec. 1, 2010) (attaching copy of draft bill), *available at http://democrats.energycommerce.house.gov/documents/20101201/Genachowski.FCC.2010.12.1.pdf*. It also came so late in the Congress as to prevent any realistic debate or consideration, and the FCC adopted its rules just weeks later.

Opponents of the disapproval resolution suggest puzzlement over supporters' objection to the rules, pointing to the fact that some voted for H.R. 5252 in the 109th Congress, which contained network neutrality provisions. Those provisions, however, would only have codified the FCC's 2005 policy statement, would not have allowed the FCC to adopt these or any other substantive network neutrality rules or regulations, would have applied to web companies as well as broadband providers, and was part of much broader legislation on video franchise reform. Moreover, an amendment to that bill by Mr. Markey that would have authorized regulations akin to the onerous ones at issue here was defeated on the House floor in a bipartisan 269–152 vote, with a number of opponents of this disapproval resolution voting against the amendment. *See* Roll Call 239 (June 8, 2006), *http://clerk.house.gov/evs/2006/roll239.xml*.

Some opponents of the disapproval resolution also try to argue that relying on the expedited process of a resolution of disapproval is somehow something other than ''regular order.'' This ignores the fact that the disapproval process was created through congressional passage of the Congressional Review Act and was described at the time by now-Senate Majority Leader Harry Reid, one of its authors, as a ''reasonable, sensible approach to regulatory reform.'' 141

Cong. Rec. S9644, at S9645 (daily ed. July 10, 1995). It also ignores the fact that some of the critics of this resolution have themselves co-sponsored resolutions of disapproval of other FCC regulations. For example, Mr. Waxman, Ms. Eshoo, Mr. Markey, Ms. Schakowsky, and Mr. Dingell co-sponsored H.J. Res. 72 in 2003 and Mr. Waxman, Ms. Eshoo, Mr. Doyle, Ms. Schakowsky, and Ms. Baldwin co-sponsored H.J. Res. 79 in 2008. Both were resolutions disapproving FCC media ownership rules.

HEARINGS

Reps. Henry Waxman and Rick Boucher, then chairmen of the House Energy and Commerce Committee and its Subcommittee on Communications, Technology and the Internet, respectively, held no hearings on network neutrality in the 111th Congress despite repeated requests, including at least one formal letter. *See* Letter from Reps. Joe Barton and Cliff Stearns to Reps. Henry Waxman and Rick Boucher (June 17, 2010).

Following the change in majority resulting from the 2010 mid-term elections, the renamed Subcommittee on Communications and Technology held two hearings in the 112th Congress on the FCC's network neutrality rules regulating the Internet. The subcommittee held a hearing Feb. 16, 2011, entitled "Network Neutrality and Internet Regulation: Warranted or More Economic Harm than Good?" The subcommittee received testimony from FCC Chairman Julius Genachowski and commissioners Michael J. Copps, Robert M. McDowell, Mignon Clyburn, and Meredith Attwell Baker. At the request of the minority, the subcommittee postponed a markup of the resolution and held a second hearing March 9, 2011, on H.J. Res. 37. The subcommittee received testimony from Robin Chase, CEO, Buzzcar; Tom DeReggi, President, RapidDSL & Wireless; Derek Turner, Research Director, Free Press; Jim Cicconi, Sr. Exec. Vice President, External and Legislative Affairs, AT&T; Prof. Shane Mitchell Greenstein, Kellogg School of Management, Northwestern University; and Dr. Anna-Maria Kovacs, Strategic Choices.

COMMITTEE CONSIDERATION

On Wednesday, March 9, 2011, the Subcommittee on Communications and Technology met in open markup session and approved H.J. Res. 37, disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices, without amendment, by a record vote of 15 yeas and 8 nays. The Full Committee met in open markup session on Monday, March 14, 2011, and Tuesday, March 15, 2011, and ordered H.J. Res. 37 reported, without amendment, by a record vote of 30 yeas and 23 nays.

COMMITTEE VOTES

Clause 3(b) of Rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Upton to order H.J. Res. 37 reported to the House, without amendment, was agreed to by a record vote of 30 yeas and 23 nays.

COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 10

BILL: H.J.Res. 37, Disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices.

AMENDMENT: A motion by Mr. Upton to order H.J.Res. 37 favorably reported to the House, amended. (Final Passage)

DISPOSITION: **AGREED TO**, by a roll call vote of 30 yeas to 23 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Barton	X			Mr. Dingell		X	
Mr. Stearns	X			Mr. Markey		X	
Mr. Whitfield	X			Mr. Towns		X	
Mr. Shimkus	X			Mr. Pallone		X	
Mr. Pitts	X			Mr. Rush		X	
Mrs. Bono Mack	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel		X	
Mr. Terry	X			Mr. Green		X	
Mr. Rogers	X			Ms. DeGette		X	
Mrs. Myrick				Mrs. Capps		X	
Mr. Sullivan	X			Mr. Doyle		X	
Mr. Murphy	X			Ms. Schakowsky		X	
Mr. Burgess	X			Mr. Gonzalez		X	
Mrs. Blackburn	X			Mr. Inslee		X	
Mr. Bilbray	X			Ms. Baldwin		X	
Mr. Bass	X			Mr. Ross		X	
Mr. Gingrey	X			Mr. Weiner		X	
Mr. Scalise	X			Mr. Matheson		X	
Mr. Latta	X			Mr. Butterfield		X	
Mrs. McMorris Rodgers	X			Mr. Barrow		X	
Mr. Harper	X			Ms. Matsui		X	
Mr. Lance	X			Ms. Christensen		X	
Mr. Cassidy	X						
Mr. Guthrie	X						
Mr. Olson	X						
Mr. McKinley	X						
Mr. Gardner	X						
Mr. Pompeo	X						
Mr. Kinzinger	X						
Mr. Griffith	X						

Current as of 03/14/2011

COMMITTEE OVERSIGHT FINDINGS

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

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goals of H.J. Res. 37 are to nullify the "network neutrality" rules regulating the Internet that the FCC adopted Dec. 21, 2010. *See In re* Broadband Industry Practices, WC Docket No. 07–52, *Report and Order*, FCC 10–201 (rel. Dec. 23, 2010). The Committee also intends the resolution to prevent the FCC from reimposing the same or substantially similar rules through reclassification of broadband under Title II of the Communications Act or any other claimed source of direct or ancillary authority. The purpose of the resolution is to prevent the harm the rules would cause to broadband deployment, innovation, competition, and jobs, as well as to stop the FCC from asserting authority over the Internet that Congress has not granted it.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.J. Res. 37 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARKS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.J. Res 37 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

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

CONGRESSIONAL BUDGET OFFICE ESTIMATE

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

MARCH 30, 2011.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 37, a joint resolution disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices.

If you wish further details on this estimate, we will be pleased to provide them. the CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.J. Res. 37—A joint resolution disapproving the rule submitted by the Federal Communications Commission with respect to regulating the Internet and broadband industry practices

H.J. Res. 37 would disapprove the rule adopted by the Federal Communications Commission (FCC) on December 21, 2010, that is intended to preserve the Internet as an open network. *Report and Order FCC 10–201* establishes rules that would bar broadband providers from blocking lawful content and discriminating in transmitting lawful traffic on the network. The rule also would require broadband providers to disclose to the public information about network management practices, performance, and terms of service.

H.J. Res. 37 would invoke a legislative process established by the Congressional Review Act (Public Law 104–121) to disapprove the open Internet rule. If H.J. Res is enacted, the published rule would have no force or effect. Based on information from the FCC, CBO estimates that voiding this rule would have no effect on the budget. Enacting H.J. Res. 37 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.J. Res. 37 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would improve no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

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

ADVISORY COMMITTEE STATEMENT

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

APPLICABILITY TO LEGISLATIVE BRANCH

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

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

The resolution states "[t]hat Congress disapproves the rule submitted by the Federal Communications Commission relating to the matter of preserving the open Internet and broadband industry practices (Report and Order FCC 10–201, adopted by the Commission on December 21, 2010), and such rule shall have no force or effect."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.

DISSENTING VIEWS

We oppose H.J. Res. 37, a resolution disapproving the rules submitted by the Federal Communications Commission (FCC) relating to the matter of preserving the open Internet and broadband industry practices, as reported. We oppose this misguided legislation because it will limit access and innovation, undermine job creation, and ultimately harm the Internet ecosystem.

The FCC's Light Regulatory Touch to Preserve and Promote an Open Internet

The FCC has always played a critical role in our nation's development and deployment of broadband Internet services. When incumbent phone companies began to offer broadband digital subscriber line (DSL) services in the late 1990s, it was regulated as a "telecommunications service" under the Telecommunications Act of 1996 (the 1996 Act) subject to Title II of the Communications Act of 1934 (the Act), including provisions to ensure that those that offer such services do so on reasonable and nondiscriminatory terms.

Proponents of H.J. Res. 37 point to a 1998 FCC report to Congress widely known as the "Stevens Report" to justify their claim that retail availability of Internet access service was never regulated. But while the Report stated that Internet access service as it was then being offered was an "information service," this distinction was premised on the fact that at the time, 98 percent of all households with Internet connections used traditional telephone service to "dial-up" their Internet access service provider. The Report thus treated Internet access service as "information service" because these providers owned no telecommunications facilities. When telecommunications companies began to offer their own DSL services, the transmission component of their Internet access service remained under Title II regulation.

When the FCC elected to treat cable modem service as an "information service" under Title I of the Act in 2002, then-FCC Chairman Michael Powell stated that the FCC is "not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results." [1]

On December 21, 2010, the FCC issued its *Open Internet Order* incorporating open Internet principles and building upon the existing record at the Commission to identify "the best means to achieve

[1] Statement of Chairman Michael Powell, *Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities,* FCC 02–77 (March 15, 2002).

our goal of preserving and promoting the open Internet."[2] It also represented the first attempt by the Commission to address the legal authority issues raised by the D.C. Circuit in *Comcast*.

The FCC's Open Internet Order included a two-page rule that imposes limited obligations on broadband Internet service providers. The Commission based its authority to promulgate the rule on Section 706(a) and (b) of the 1996 Act as well as its Title I authority ancillary to explicit authorities granted under Titles II, III and VI of the Communications Act.

First, it imposes a transparency obligation requiring both fixed and mobile broadband Internet access service providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services" and for content, application, service, and device providers to "develop, market, and maintain Internet offerings."[3] Second, it prohibits fixed broadband providers from blocking lawful content, applications, services and devices to ensure consumers and innovators continue to have the right to send and receive lawful Internet traffic, with mobile broadband service providers subjected to a more limited set of prohibitions.[4] Third, the rules ensure the Internet remains a level playing field by prohibiting fixed broadband providers from unreasonably discriminating in transmitting lawful network traffic.[5] Finally, the framework recognizes the right of broadband providers to meaningfully and legitimately manage their network and provides flexibility to network providers to address congestion or traffic that's harmful to the network.[6]

The majority claims that the FCC conducted no market analysis and failed to consider the cost-benefit of the rules. But the record shows that the FCC reviewed the broadband retail market and found that as of December 2009, nearly 70 percent of households lived in areas where only one or two wireline or fixed wireless firms provided broadband and that about 20 percent of households are in areas with only one broadband provider, making the ability to switch broadband providers difficult.[7] The FCC also pointed to the Department of Justice observations that: (1) the wireline broadband market is highly concentrated; (2) the prospects for additional wireline competition are dim; and (3) extent to which mobile wireless offerings will compete with wireline offerings is unknown.[8] Finally, the FCC based its analysis on the existence of a "terminating access monopoly," finding that a broadband provider could force other content or "edge" providers to "pay inefficiently high fees because that broadband provider is typically an edge pro-

[2] *See* Federal Communications Commission, *Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking p. 4 (Oct. 22, 2009) (online at *http://hraunfoss.fcc.gov/edocs1public/attachmatch/FCC-09-93A1.pdf*).
[3] *Id.*, at 65.
[4] *Id.*, at 65.
[5] *Id.*,
[6] *Id.*,
[7] *Id.*, at 19.
[8] *Id.*, at 27.

vider's only option for reaching a particular end user,"[9] thereby acting as a gatekeeper.

In considering the cost-benefit of the rules, the FCC found that "we expect the cost of compliance with our prophylactic rules to be small, as they incorporate longstanding openness principles that are generally in line with current practices and with norms endorsed by many broadband providers. Conversely, the harm of open Internet violations may be substantial, costly, and in some cases potentially irreversible."[10] Furthermore, the FCC concluded that "the benefits of ensuring Internet openness through enforceable, high-level, prophylactic rules outweigh the costs" because the rules are "carefully calibrated to preserve the benefits of the open Internet and increase certainty for all Internet stakeholders, with minimum burden on broadband providers."[11]

Consistent with the FCC's "hands-off' approach to the regulation of broadband, the *Open Internet Order* did not rest the Commission's authority on Title II of the Communications Act as traditionally applied to common carriers. The majority notes that 275 members of Congress weighed in with the FCC in opposition to the open Internet rules. In fact, congressional concern was largely focused on a proposal to reclassify broadband Internet access services under Title II of the Communications Act. By electing to proceed under Section 706 and under Title I of the Act, the FCC did not adopt what turned out to be the most controversial aspect of the open Internet proceeding. Indeed, the rules adopted by the FCC reflected broad consensus amongst stakeholders to codify many of the existing practices by broadband providers.

The FCC's Open Internet Order Is a Product of Consensus and Compromise

Despite efforts to portray the FCC's Open Internet Rules as an example of government overreach, the Order has received broad support from consumer and public interest groups, broadband Internet service providers, labor unions, as well as high-tech and edge companies:

- *Broadband Providers.* Jim Cicconi, AT&T's Senior Executive Vice President of External and Legislative Affairs, testified that the FCC's rules "landed at a place where [AT&T has] line of sight . . . [AT&T] can commit to these 10-year and 15-year horizon investments."[12] Similarly, Time Warner Cable stated at the time of the Order's release that the rules adopted "appear to reflect a workable balance between protecting consumers" interests and preserving incentives for investment and innovation by broadband Internet service providers,"[13] That view was echoed by Kyle McSlarrow of the National Cable & Telecommunications Association (NCTA), who stated in a letter to Republican leaders of the Committee that NCTA supports the FCC order because "1) it large-

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[9] *Id.*, at 15.
[10] *Id.*, at 3.
[11] *Id.*, at 5.
[12] House Committee on Energy and Commerce, Testimony of Sr. Exec. Vice President, External and Legislative Affairs, AT&T Jim Cicconi, *Hearing on H.J. Res. 37 Disapproving FCC Rules Regulating the Internet*, 112th Cong. (March 9, 2011).
[13] Jeff Simmermon, *FCC Votes on "Net Neutrality"—Here's Our Position*, (Dec. 21, 2010) (online at *http://www.twcableuntangled.com/2010/12/fcc-votes-on-net-neutrality-heres-our-position/).*

ly codifies the status quo practices to which the industry has voluntarily committed; 2) it contains helpful clarifying language around such issues as what constitutes "reasonable network management;" 3) it provides greater certainty about our ability to manage and invest in our broadband services today and those we may deploy in the future; and 4) the alternative of Title II regulation . . . presented a stark and much worse risk to continued investment and job creation." [14]

High-Tech Sector. The Open Internet Coalition, which includes companies such as Amazon, Netflix, Facebook, eBay, and Google, stated that the Order "would provide a degree of certainty to all participants in the broadband marketplace and help foster an open wireline Internet online ecosystem." [15] Similarly, the Computer & Communications Industry Association (CCIA) and TechNet stated in a letter opposing H.J. Res. 37 that the FCC rule "allows flexible network management and does nothing to inhibit broadband network deployment, while it affirmatively facilitates innovation and investment in new online services, content, applications, and access devices by providing some minimal assurance they will not be blocked arbitararily." [16]

Public Interest Organizations and Unions. In a joint statement, Consumers Union (CU) and Consumer Federation of America (CFA) praised the Order for helping to "resolve the current uncertainty in the Internet marketplace" and that while "unanimity on net neutrality may be impossible . . . inaction is unacceptable." Mark Cooper, Research Director for CFA, further stated that "[t]he only way to preserve the open Internet is for the FCC to immediately put in place a pragmatic set of rules that gives teeth to the principles that have governed the open Internet since its inception. We need to establish facts on the ground and gain practical experience with network management in the broadband era . . . the FCC appears headed toward the right goal." [17] In addition, the Communications Workers of America (CWA) supported the Order because it "resolves the issue in a way that protects an Open Internet yet provides for incentives for investment, economic development and the creation of quality jobs and sustainable communities." [18]

Overall, the Subcommittee received letters from more than 130 organization, including the AFL-CIO, NAACP, United States Conference of Catholic Bishops, American Library Association, American Association of Independent Music, Leadership Conference on Civil and Human Rights, League of United Latin American Citizens, National Organization for Women, Free Press, Sierra Club,

[14] Letter from Kyle McSlarrow President and CEO National Cable and Telecommunications Association to Reps. Fred Upton, Greg Waldon, and Lee Terry (March 7, 2011).

[15] Open Internet Coalition, *Statement on FCC Open Internet Vote* (Dec. 21, 2010) (online at *http://www.openinternetcoalition.com/index.cfm?objectid=6C430AD4-0D2C-1EOB78C000C296BA163.)*

[16] Computer & Communications Industry Association, *Letter re: Open Internet* (Feb. 14, 2011) (online at *http://democrats.energycommerce.house.gov/sites/default/files/documents/CCIA%20-%20open%20internet%20letter.pdf).*

[17] Consumers Union and Consumer Federation of America, *Consumers Groups Welcome FCC Action on Network Neutrality* (Dec. 1, 2010) (online at *http://www.consumerfed.org/pdfs/Network%20Neutrality%20News%20Release.pdf).*

[18] *See* Communications Workers of America, *FCC Vote Moves U.S. Forward on Broadband* (Dec. 21, 2010) (online at *http://www.cwa-union.org/news/entry/cwa*lfcclvotelmoveslu.s.lforwardlonlbroadband).

and United Auto Workers all expressing their opposition to H.J. Res. 37.[19]

Overturning the Open Internet Order Will Inject New Uncertainty into the Broadband Marketplace, Threatening Investment and Job Creation

According to Hamilton Consultants, the open Internet ecosystem has led to the creation of more than 3 million jobs ov e past 15 years. In 2010, the U.S. tech sector grew about twice as fast as the U.S. economy.[20] Since 1995, venture capital funds have invested approximately $250 billion in industries reliant on the Open Internet, including software, IT services, computers and peripherals, media and entertainment, as well as networking and equipment.

Supporters of the *Open Internet Order* have widely praised the FCC action for removing regulatory uncertainty over broadband network providers and allowing investment to flow for both network operators and edge companies. That view is echoed by major Wall Street analysts such as Bank of America/Merrill Lynch, which found the rules to be eliminated "the net neutrality regulatory overhang" from telecom and cable stock [21] as well as analysts from Standard & Poor's, Citi, Credit Suisse, Goldman Sachs, Raymond James, and Wells Fargo.[22]

The majority can only point to a single investment analyst to support its opposition to the *Order*—an outlier whose perspective contrasts sharply with most investment analysts.

Contrary to the assertions of the majority, we believe H.J. Res. 37, if enacted, would generate new uncertainty into the broadband market, hampering investment and job creation.

First, H.J. Res. 37 would undermine the Internet economy by allowing broadband operators to pick and choose winners and losers. It would allow broadband network operators to block applications, content, and services traveling on their networks absent any disclosure to consumers and without legitimate network management reasons. The Internet as it exists today would never have flourished if network operators were allowed to extend their control at the core of the network to the edge of the network in a manner that would restrict consumer choice. Indeed, economists such as Prof. Shane Greenstein of Northwestern University have raised the concern that the lack of open Internet rules will increase transaction costs for edge providers seeking access online thereby raising

[19] All the letters could be found at *http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-network-neutrality-and-internet-regulation-warranted-or-more-economic-harm-than-g*

[20] Hamilton Consultants, Inc. *Economic Value of the Advertising-Supported Internet Ecosystem* (June 10, 2009).

[21] Bank of America Merrill Lynch, *Turning the page on net neutrality* (Dec. 21, 2010).

[22] *See* Wells Fargo Securities, *Telecom Services & Cable Comments: FCC Outlines Plan for Open Internet (Net Neutraility)*, by Jennifer M. Fritzsche and Marci L. Ryvicker (12/1/10); Citigroup Global Markets, *Alert: FCC Likely to Push Forward on a Compromise Solution for Net Neutrality Under Title I Instead of Title II*, by Michael Rollins and Jason B. Bazinet (12/1/10); Credit Suisse, *Genachowski's New Net Neutrality Framework; Generally Positive for MSOs*, by Stefan Anninger and Ashton Ngwena (12/1/10); Raymond James, *Redefining Success on Net Neutrality*, by Frank G. Louthan IV, Jason Fraser, and Mike Ciaccia (12/1/10); Bank of America Merrill Lynch, *The OTT Silver Bullet*, by Jessica Reif Cohen, Ethan Lacy, and Peter Henderson (12/2/10); Goldman Sachs, *FCC Net Neutrality Rules: A Framework, with a Lot of Wiggle Room*, by Jason Armstrong, Derek R. Bingham, Ingrid Chung, and Scott Goldman (12/21/10).

costs of introducing new products and chilling innovation and competition.[23]

Second, broadband providers will continue to experience the regulatory uncertainty that the *Order* sought to minimize. In addition to taking away the "line of sight" for broadband companies to start making investment decisions, it is unclear what role, if any, the FCC will assert in this matter. Without a clear role for the FCC, broadband providers will have difficulty determining the scope of agency action or how the agency will address complaints about certain practices. Without clear rules of the road and a defined process, uncertainty will result.

Finally, a Resolution of Disapproval under the Congressional Review Act (CRA) not only strikes the agency rule, it prohibits the agency from going forward with another rule that is "substantially the same" as the disapproved rule without additional congressional authorization. Therefore, H.J. Res. 37, if enacted, could prevent the FCC from going forward with rules that are substantially similar to the transparency, no-blocking, and nondiscrimination provisions approved by the agency in December 2010. How the term "substantially the same" would be interpreted might be subject to a reviewing court, and no court has so far opined on the term under the CRA. Passage of H.J. Res. 37 could therefore generate additional uncertainty for broadband providers, high-tech companies and investors, as well as the FCC.

A Resolution of Disapproval Under the CRA Is a Blunt Instrument That Should Be Utilized Rarely

Successful adoption of a Resolution of Disapproval under the CRA would strike down any disapproved rule in its entirety.[24] Therefore, if H.J. Res. 37 is enacted, it would overturn all of the provisions included in the *Open Internet Order*. Despite areas of broad agreement on certain aspects of the FCC's rules, such as the need for transparency, the prohibition on blocking of lawful content, and the right to exercise reasonable network management, the CRA would bluntly remove even these consensus measures.

In order to address this problem, Democratic committee members attempted to amend H.J. Res. 37 to retain these consensus provisions, but these amendments were ruled out of order.

By way of example, during subcommittee and full committee markup of H.J. Res. 37, Rep. Doyle attempted to introduce an amendment that would preserve the FCC's so-called "no blocking rule"—which simply states that fixed broadband providers may not block lawful content, applications, services or non-harmful devices and that mobile broadband may not block lawful websites or block applications that compete with their voice or video telephony services. No blocking of lawful content has been a common practice of broadband providers for years. Indeed, as early as 2004, then-FCC Chairman Michael Powell gave a speech in which he outlined four 'Net freedoms. The first freedom was that consumers should have

[23] *See* House Committee on Energy and Commerce, Testimony of Shane Greenstein, Elinor and Wendell Hobbs Professor, Kellogg School of Management, Northwestern University, *Hearing on H.J. Res. 37 Disapproving FCC Rules Regulating the Internet,* 112th Cong. (March 9, 2011).

[24] *See* CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade,* by Morton Rosenberg.

access to their choice of legal content. Chairman Powell stated at the time that "consumers have come to expect to be able to go where they want on high-speed connections, and those who have migrated from dial-up would presumably object to paying a premium for broadband if certain content were blocked.[25] The principle was reaffirmed by FCC's 2005 Internet Policy Statement and incorporated into the Communications Opportunity, Promotion, and Enhancement Act of 2006 introduced by then-Chairman Joe Barton.[26]

Another provision of the Open Internet Order that has enjoyed broad support from stakeholders is the rule pertaining to transparency. During Committee markup, Rep. Matsui attempted to offer an amendment that would preserve the portion of the Open Internet rule imposing a transparency requirement on broadband providers so that consumers and developers can make informed choices. The transparency rule requires broadband providers to disclose their network management practices, performance characteristics and terms and conditions of their broadband service to consumers.

This rule is critical to promoting our Internet economy because in order to maximize Internet usage, consumers must have the information necessary to make informed choices regarding the types and use of broadband service they purchase. Transparency also generates trust, which in turn increases consumer confidence in broadband provider practices, thereby encouraging adoption. Thus a transparency requirement creates a so-called "virtuous cycle" as increased adoption leads to greater investment in broadband infrastructure. A transparency rule will also help third parties like edge providers, high-tech companies, and venture capitalists make informed decisions on when and how to embark on innovative projects and investments. Through disclosure of necessary technical requirements, new and improved online content, applications, services, and devices will be created.

During the Subcommittee's legislative hearing on H.J. Res. 37, all six witnesses testifying before the subcommittee—including two witnesses that support the Resolution expressed support for the transparency rule adopted by the FCC. Yet Rep. Matsui's amendment was ruled out of order. As a result, H.J. Res. 37 would eliminate these common sense provisions.

A Resolution of Disapproval Under the CRA Is Not an Appropriate Tool In This Instance

In the 15 years since the Congessional Review Act has been in place, Congress has used it just once to invalidate an agency rule.[27] Although there may be situations in which the CRA is appropriate, Committee Democrats objected to the use of the CRA in this instance because it is an extraordinary step that runs contrary to the Committee's tradition of open debate. Democrats urged con-

[25] Federal Communications Commission, Remarks as Prepared for Delivery by Chairman Michael K. Powell at the Silicon Flatirons Symposium (Feb. 8, 2004).
[26] H.R. 5252, 109th Cong. (2006)
[27] In March 2001, President Bush signed into law a repeal of Clinton Administration regulations that set new workplace ergonomics rules to combat repetitive stress injuries.

sideration of this issue under the standard process that includes debate and votes on amendments.[28]

On March 7, 2010, Subcommittee Democrats wrote to Chairman Upton and Subcommittee Chairman Walden objecting to the process for consideration of H.J. Res. 37. The letter, which was signed by every Democratic member of the Subcommittee, stated that by not allowing votes on any amendments, the majority would be departing from the Commitee's tradition of transparency and depriving members of their right to offer amendments. [29]

During Committee markup of H.J. Res. 37, every amendment offered was ruled out of order on germaneness grounds. The Energy and Commerce Committee has traditionally managed germaneness objections differently. Typically, such objections have been raised because either (1) an amendment is not relevant to the subject of the measure; or (2) the amendment is outside the scope of the Committee's jurisdiction.

Neither of those circumstances applied to the amendments members sought to offer at the Subcommittee and full Committee markups. It is within the Committee's jurisdiction to review and develop communications policy. And the amendments proposed by members focused squarely on the subject of the FCC's Open Internet rule. Accordingly, the only basis for Chairman Walden's and Chairman Upton's rulings to uphold the point of order was that the amendments did not conform to the CRA. Although the CRA provides the basis for denying debate and votes on amendments, having this power does not make using it right. Instead, the majority should have brought before the Committee a regular H.R. bill that overrules the Commission's Order. Taking such an approach would not have precluded members from offering and debating amendments.[30]

The Majority's Focus on the FCC's Open Internet Rules Has Prevented the Committee From Focusing on Critical Issues

At this critical juncture in our economic recovery, Congress should be focused on the many pressing issues in the communications and technology arena.

Even if this Resolution of Disapproval passes the House of Representatives, it still must get through the Senate. After that, it will be met with a Presidential veto. The majority knows this, but is still willing to waste precious legislative time on something that has virtually no chance of success.

Furthermore, this issue is squarely before the courts. Verizon has already filed an appeal in the D.C. Circuit challenging the *Open*

[28] The majority originally planned to proceed directly to a subcommittee markup of H.J. Res. 37. In response to a request from Ranking Members Waxman and Eshoo, however, the majority agreed to hold a legislative hearing to examine the implications of H.J. Res 37 and to hear from other stakeholders about this topic.

[29] Letter from Ranking Member Waxman et al., to Chairman Upton and Walden (Mar. 7, 2011) (online at *http://democrats.energycommerce.house.gov/sites/default/files/documents/Upton.Walden,HJRes.37.2011.3.pdf*).

[30] Some proponents of H.J. Res. 37 suggest that it is inconsistent for several Committee Democrats that have cosponsored CRA resolutions in the past to complain about the process being utilized in this instance. This is a superficial analysis. Although use of the CRA allows for expedited procedures in the Senate, using the CRA does not affect timing of such a measure in the House. Moreover, cosponsoring a Resolution of Disapproval in a past Congress does not in any way suggest that members cannot object to the use of the CRA in different circumstances.

Internet Order. The courts will review the legal questions raised in the appeal and will decide this matter.

If Republicans want Congress to determine the proper role for the FCC, we believe we should work on a legislative alternative to the FCC's approach *before* we simply eliminate FCC's ability to adopt basic, common sense rules to protect consumers in the broadband market.

The Committee should instead be focused on efforts to boost our economy by making more spectrum available for next-generation wireless broadband services, ensuring the construction of a nationwide broadband network for public safety, and updating the Universal Service Fund to provide targeted support to communities without broadband. Unfortunately, H.J. Res. 37 is a demonstration of misplaced priorities and ideological agenda.

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