

111TH CONGRESS
2D SESSION

H. R. 5257

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

MAY 11, 2010

Mr. STEARNS (for himself, Mrs. BLACKBURN, Mrs. BONO MACK, Mr. BLUNT, Mr. RADANOVICH, Mr. LATTA, and Mr. UPTON) 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 Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

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

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

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

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

8 “(a) MARKET AND COST-BENEFIT ANALYSIS RE-
9 QUIRED.—

10 “(1) IN GENERAL.—To the extent that the
11 Commission has the authority to regulate the rates,
12 terms, conditions, provisioning, or use of an infor-
13 mation service or an Internet access service, the
14 Commission shall not regulate such rates, terms,
15 conditions, provisioning, or use unless—

16 “(A) the Commission first transmits a re-
17 port to Congress concluding that—

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

21 “(ii) there is substantial evidence that
22 the market failure is causing specific, iden-
23 tified harm to consumers by preventing a
24 substantial number of consumers nation-
25 wide from accessing a substantial amount
26 of lawful Internet content, applications,

1 and services of their choice on a continuing
2 basis; and

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

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

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

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

16 “(iii) explains how imposing such reg-
17 ulation would not hinder ubiquitous
18 broadband availability consistent with the
19 national broadband plan that section
20 6001(k) of the American Recovery and Re-
21 investment Act of 2009 (Public Law 111–
22 5) requires the Commission to issue;

23 “(C) in an order issued after such notice
24 of proposed rulemaking, the Commission pub-

1 lishes in the Federal Register the specific lan-
2 guage of a rule codifying such regulation; and

3 “(D) the Commission complies with the
4 transparency requirements under subsection
5 (d).

6 “(2) CONSIDERATION.—In conducting the cost-
7 benefit analysis under paragraph (1)(B)(ii), the
8 Commission shall consider the impacts of the regula-
9 tion, including—

10 “(A) any cost of enforcement;

11 “(B) any disincentive to investment;

12 “(C) any detriment to innovation;

13 “(D) any harm to competition, such as to
14 the ability of providers of content, services, or
15 applications to differentiate their content, serv-
16 ices, or applications based on quality, offerings,
17 or other factors; and

18 “(E) any harm to efficiency, such as re-
19 stricting the ability of broadband network pro-
20 viders, service providers, application providers,
21 or content providers to optimize their offering.

22 “(3) REQUIRED FINDINGS.—The Commission,
23 in making the determination under paragraph (1)(A)
24 and in conducting the cost-benefit analysis under
25 paragraph (1)(B)(ii), shall—

1 “(A) define the relevant product market;

2 “(B) determine whether any entity has
3 market power in the relevant product market,
4 taking into account competition among and be-
5 tween broadband network providers (including
6 such providers using wireline, cable, wireless,
7 satellite, and broadband over power line tech-
8 nologies), service providers, application pro-
9 viders, and content providers;

10 “(C) conduct an economic analysis of
11 whether any such entity has the incentive and
12 ability to exercise such market power in a way
13 that harms consumers and that such entity
14 could continue to profitably exercise that mar-
15 ket power; and

16 “(D) consider—

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

24 “(ii) the impact of the broadband
25 stimulus loans and grants issued pursuant

1 to the American Recovery and Reinvest-
2 ment Act of 2009;

3 “(iii) the availability of access to the
4 information service or Internet access serv-
5 ice from 1 or more sources; and

6 “(iv) the ease of entry into the rel-
7 evant product market.

8 “(b) LEAST RESTRICTIVE REGULATION REQUIRED;
9 NETWORK MANAGEMENT PERMITTED.—If the Commis-
10 sion decides to regulate the rates, terms, conditions, provi-
11 sioning, or use of an information service or Internet access
12 service after meeting its obligation under subsection (a),
13 the Commission shall adopt a regulation that—

14 “(1) shall be the least restrictive necessary to
15 address the market failure and specific harm to con-
16 sumers identified under such subsection; and

17 “(2) shall not prohibit managed services, net-
18 work management to address congestion and quality
19 of service, or measures designed to prevent or deter
20 unauthorized or illegal activity, including copyright
21 infringement.

22 “(c) PERIODIC RE-EVALUATION REQUIRED.—

23 “(1) IN GENERAL.—If the Commission regu-
24 lates the rates, terms, conditions, provisioning, or
25 use of an information service or Internet access serv-

1 ice, the Commission shall complete a proceeding in
2 which the Commission shall reexamine the regula-
3 tion and shall determine whether—

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

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

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

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

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

19 “(3) SUNSET.—Any regulation adopted pursu-
20 ant to this section shall be deemed to be repealed if
21 the Commission fails to determine that all of the
22 conditions in subparagraphs (A) through (D) of
23 paragraph (1) still exist within the proceeding dead-
24 line under paragraph (2).

1 “(d) TRANSPARENCY REQUIRED.—The Commission
2 shall not regulate the rates, terms, conditions, provi-
3 sioning, or use of an information service or Internet access
4 service unless the Commission complies with the following:

5 “(1) Before transmitting a final report to Con-
6 gress under subsection (a)(1)(A), the Commission
7 shall commence a notice of inquiry to examine the
8 issues required to be addressed in such report and
9 provide—

10 “(A) notice and an opportunity for com-
11 ment on such notice of inquiry to the public for
12 a period of at least 30 days;

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

17 “(C) to all Commissioners not less than 30
18 days after the receipt of such replies under sub-
19 paragraph (B) to consider the record before the
20 Commission provides a draft of the report re-
21 quired under subsection (a)(1)(A) to all Com-
22 missioners; and

23 “(D) at least 30 days to all Commissioners
24 to consider such draft report before the dead-
25 line for a vote.

1 “(2) Before issuing an order under subsection
2 (a)(1)(C), the Commission shall provide—

3 “(A) notice and an opportunity for com-
4 ment to the public for a period of at least 30
5 days on the notice of proposed rulemaking re-
6 quired under subsection (a)(1)(B);

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

11 “(C) to all Commissioners, not less than
12 30 days after the receipt of such replies under
13 subparagraph (B), a draft of the order to be
14 issued pursuant to the notice of proposed rule-
15 making; and

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

19 “(3) Before completing the proceeding required
20 under subsection (c), the Commission shall pro-
21 vide—

22 “(A) notice and an opportunity for com-
23 ment to the public for a period of at least 30
24 days on the determinations made under the
25 proceeding required by such subsection;

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

5 “(C) to all Commissioners, not less than
6 30 days after the receipt of such replies under
7 subparagraph (B), a draft of such determina-
8 tions; and

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

12 “(e) NEUTRAL NETWORK NEUTRALITY.—The Com-
13 mission shall apply and enforce any regulation governing
14 the rates, terms, conditions, provisioning, or use of an in-
15 formation service (including any transmission component
16 of an information service whether or not the transmission
17 component is offered for a fee directly to the public or
18 to such class of users as to be effectively available directly
19 to the public regardless of the facilities used) or an Inter-
20 net access service on a nondiscriminatory basis between
21 and among broadband network providers, service pro-
22 viders, application providers, and content providers.

23 “(f) ENFORCEMENT.—If the Commission regulates
24 the rates, terms, conditions, provisioning, or use of an in-
25 formation service or an Internet access service, such regu-

1 lation may only be enforced against an entity if the Com-
2 mission determines, pursuant to a complaint filed by a
3 consumer, that the entity has engaged in conduct in viola-
4 tion of that regulation and such conduct caused a specific
5 and substantial harm to that consumer.

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

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

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

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

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

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