

111TH CONGRESS  
2ND SESSION

# S. 3624

To encourage continued investment and innovation in communications networks by establishing a new, competition analysis-based regulatory framework for the Federal Communications Commission.

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## IN THE SENATE OF THE UNITED STATES

JULY 21, 2010

Mr. DEMINT (for himself, Mr. HATCH, Mr. ENSIGN, Mr. THUNE, Mr. COBURN, Mr. CORNYN, and Mr. SESSIONS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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## A BILL

To encourage continued investment and innovation in communications networks by establishing a new, competition analysis-based regulatory framework for the Federal Communications Commission.

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 “Freedom For Con-  
5 sumer Choice Act”.

1 **SEC. 2. DEFINITIONS.**

2 (a) IN GENERAL.—In this Act, the following defini-  
3 tions shall apply:

4 (1) ANTITRUST LAWS.—The term “antitrust  
5 laws” includes—

6 (A) the Act entitled “An Act to protect  
7 trade and commerce against unlawful restraints  
8 and monopolies”, approved July 2, 1890;

9 (B) sections 73 through 76 of an Act enti-  
10 tled “An Act to reduce taxation, to provide rev-  
11 enue for the Government, and for other pur-  
12 poses”, approved August 27, 1894;

13 (C) the Act entitled “An Act to amend sec-  
14 tions 73 and 76 of the Act of August 27, 1894,  
15 entitled An Act to reduce taxation, to provide  
16 revenue for the Government, and for other pur-  
17 poses”, approved February 12, 1913; and

18 (D) the Act entitled “An Act to supple-  
19 ment existing laws against unlawful restraints  
20 and monopolies, and for other purposes”, ap-  
21 proved October 15, 1914.

22 (2) COMMISSION.—The term “Commission”  
23 means the Federal Communications Commission.

24 (3) ELECTRONIC COMMUNICATIONS NET-  
25 WORK.—The term “electronic communications net-  
26 work” means—

1 (A) a transmission system; and

2 (B) where applicable, switching or routing  
3 equipment and other facilities which permit the  
4 conveyance of signals by wire, radio, optical, or  
5 other electromagnetic means, over satellite,  
6 cable, or other facilities, whether fixed or mo-  
7 bile, to the extent that such facilities are used  
8 for the purpose of transmitting signals, irre-  
9 spectively of the type of information conveyed.

10 (4) ELECTRONIC COMMUNICATIONS SERVICE.—

11 The term “electronic communications service”  
12 means a service normally provided for remuneration  
13 which consists wholly or mainly in the conveyance of  
14 signals on electronic communications networks.

15 (5) UNFAIR METHODS OF COMPETITION.—

16 (A) IN GENERAL.—The term “unfair  
17 methods of competition” means—

18 (i) practices that present a threat of  
19 abuse of significant and nontransitory  
20 market power as determined by the Com-  
21 mission consistent with the application of  
22 jurisprudential principles grounded in mar-  
23 ket-oriented competition analysis such as  
24 those commonly employed by the Federal  
25 Trade Commission and the United States

1 Department of Justice in enforcing the  
2 Federal Trade Commission Act (15 U.S.C.  
3 41 et seq.) and the antitrust laws of the  
4 United States; and

5 (ii) with respect to interconnection,  
6 practices that pose a substantial and non-  
7 transitory risk to consumer welfare by ma-  
8 terially and substantially impeding the  
9 interconnection of public communications  
10 facilities and services in circumstances in  
11 which the Commission determines that  
12 marketplace competition is not sufficient to  
13 adequately protect consumer welfare.

14 (B) INTERCONNECTION DETERMINA-  
15 TION.—In making any determination under  
16 subparagraph (A)(ii), the Commission shall con-  
17 sider whether requiring interconnection will ad-  
18 versely affect investment in facilities and inno-  
19 vation in services.

20 (b) COMMON TERMINOLOGY.—Except as otherwise  
21 provided in subsection (a), terms used in this Act shall  
22 have the same meaning given to such terms under sections  
23 3, 254, and 602 of the Communications Act of 1934 (47  
24 U.S.C. 153, 254, and 522).

1 **SEC. 3. FINDINGS AND POLICY.**

2 (a) FINDINGS.—Congress finds that—

3 (1) in 1996, Congress enacted and the Presi-  
4 dent signed into law the Telecommunications Act of  
5 1996, which was intended to provide a procom-  
6 petitive, deregulatory framework designed to facili-  
7 tate the continuing transition to a more competitive  
8 communications market;

9 (2) since the enactment and implementation of  
10 the Telecommunications Act of 1996, rapid advances  
11 in technology and marketplace developments have  
12 further increased the existence of competition in all  
13 communications markets and the likelihood of the  
14 continuing existence and increasing intensity of com-  
15 petition;

16 (3) competition in a dynamic communications  
17 marketplace is the most effective and efficient means  
18 for protecting consumers and enhancing the con-  
19 sumer welfare of all the people of the United States  
20 in terms of achieving the optimum mix of price,  
21 quality, and consumer choice; and

22 (4) unnecessary regulation regarding protection  
23 of consumers and enhancement of consumer welfare  
24 deters—

25 (A) investment in new and advanced com-  
26 munications facilities; and

1 (B) the development of new services and  
2 applications.

3 (b) POLICY.—It shall be the policy of the United  
4 States Government—

5 (1) to promote the widespread availability of  
6 communications services for all Americans in order  
7 to assure that the American people have access to a  
8 diversity of information sources necessary for demo-  
9 cratic government;

10 (2) to promote the integrity, reliability, and ef-  
11 ficiency of communications facilities in a manner  
12 consistent with—

13 (A) the encouragement of investment in  
14 advanced communications networks; and

15 (B) innovation in communications services  
16 and applications;

17 (3) that economic regulation of communications  
18 markets should be presumed unnecessary absent cir-  
19 cumstances that demonstrate the existence of a sig-  
20 nificant threat of abuse of market power that poses  
21 a substantial and nontransitory risk to consumer  
22 welfare; and

23 (4) that in order to ensure that the actions of  
24 the Federal Communications Commission are con-  
25 sistent with the findings in subsection (a), and to ef-

1       fectuate the deregulatory policy declared in this sub-  
2       section, the decisions of the Commission should be  
3       based on jurisprudential principles grounded in mar-  
4       ket-oriented competition analysis such as those com-  
5       monly employed by the Federal Trade Commission  
6       and the Department of Justice in enforcing the Fed-  
7       eral Trade Commission Act (15 U.S.C. 41 et seq.)  
8       and the antitrust laws of the United States.

9   **SEC. 4. PROHIBITION OF UNFAIR METHODS OF COMPETI-**  
10                   **TION.**

11       (a) IN GENERAL.—It shall be unlawful for any pro-  
12       vider of electronic communications service, including any  
13       State, or any general purpose political subdivision of a  
14       State, to engage or participate, or to attempt to engage  
15       or participate, in—

16           (1) unfair methods of competition in or affect-  
17       ing electronic communications networks and elec-  
18       tronic communications services; or

19           (2) unfair or deceptive practices in or affecting  
20       electronic communications networks and electronic  
21       communications services.

22       (b) RULEMAKING AUTHORITY.—

23           (1) IN GENERAL.—The Commission may, by  
24       rule, define with specificity, the acts or practices  
25       that shall constitute unfair methods of competition

1 or unfair or deceptive acts or practices as described  
 2 in subsection (a).

3 (2) CONTENT OF RULES.—Rules promulgated  
 4 under paragraph (1) may include such requirements  
 5 as the Commission determines necessary to prevent  
 6 any methods, acts, or practices prohibited by this  
 7 section.

8 (3) LIMITATION.—

9 (A) IN GENERAL.—Notwithstanding para-  
 10 graph (1) and except as provided in subpara-  
 11 graph (B), the Commission shall have no au-  
 12 thority to issue rules that declare unlawful an  
 13 act or practice on the grounds that such act or  
 14 practice is an unfair method of competition or  
 15 unfair or deceptive act or practice.

16 (B) EXCEPTION.—The Commission may  
 17 declare an act or practice unlawful if the Com-  
 18 mission determines, based on a showing of clear  
 19 and convincing evidence presented in a rule-  
 20 making proceeding, that—

21 (i) marketplace competition is not suf-  
 22 ficient to adequately protect consumer wel-  
 23 fare; and

24 (ii) such act or practice—



1 (I) causes or is likely to cause  
 2 substantial injury to consumers; and

3 (II) is not—

4 (aa) avoidable by consumers  
 5 themselves; and

6 (bb) outweighed by counter-  
 7 vailing benefits to consumers or  
 8 to competition.

9 (4) SUNSET OF RULES.—Any rule promulgated  
 10 under paragraph (1) shall terminate on the day that  
 11 is 5 years after the date on which such rule became  
 12 effective unless the Commission, in a proceeding in  
 13 which the public is afforded notice and an oppor-  
 14 tunity to comment, makes an affirmative determina-  
 15 tion, based on a showing of clear and convincing evi-  
 16 dence presented in such proceeding, that the rule  
 17 continues to be necessary because marketplace com-  
 18 petition is not sufficient to adequately protect con-  
 19 sumers from substantial injury which is not—

20 (A) avoidable by consumers themselves;  
 21 and

22 (B) outweighed by countervailing benefits  
 23 to consumers or to competition.

24 **SEC. 5. ACTIONS FOR COMPLAINTS.**

25 The Commission shall have authority—

1           (1) to hear complaints from any party injured  
2       by a violation of the prohibitions established under  
3       section 4; and

4           (2) to award damages to such injured party if  
5       the Commission determines that a violation of that  
6       section has occurred.

7   **SEC. 6. TIME LIMITS ON COMMISSION ACTION.**

8       (a) 120-DAY LIMIT FOR APPLICATIONS WITH SUP-  
9   PORTING TESTIMONY.—If an application is filed with the  
10   Commission under this or any other Act, and such applica-  
11   tion is accompanied by supporting testimony from the ap-  
12   plicant or a detailed summary of that testimony, together  
13   with exhibits, if any, the Commission shall issue a decision  
14   on such application not later than 120 days after the ap-  
15   plication is deemed complete (as the Commission shall, by  
16   rule, determine).

17       (b) 210-DAY LIMIT FOR APPLICATIONS WITHOUT  
18   SUPPORTING TESTIMONY.—If an application is filed with  
19   the Commission under this or any other Act, and such  
20   application is not accompanied by supporting testimony  
21   and exhibits, the Commission shall issue a decision on  
22   such application not later than 210 days after the applica-  
23   tion is deemed complete (as the Commission shall, by rule,  
24   determine).

1 (c) WAIVER.—The time limits specified in subsections  
2 (a) and (b)—

3 (1) may be waived by an applicant; and

4 (2) if so waived, shall not be binding on the  
5 Commission.

6 (d) EXTENSION OF TIME.—The Commission, in par-  
7 ticular cases, under extraordinary conditions, and after  
8 notice and a hearing at which the existence of such condi-  
9 tions are established, may extend the time limits specified  
10 in subsections (a) and (b) for a period not to exceed an  
11 additional 90 days.

12 **SEC. 7. ADDITIONAL POWERS OF THE COMMISSION.**

13 The Commission shall have authority—

14 (1) to research and investigate, from time to  
15 time, the organization, business, conduct, or prac-  
16 tices of—

17 (A) any person or entity engaged in, or  
18 whose business affects, the operation of elec-  
19 tronic communications networks; and

20 (B) any provider of electronic communica-  
21 tions service;

22 (2) to require any person or entity that owns or  
23 operates an electronic communications networks, or  
24 any class of such persons or entities, to file, in such  
25 form, in such manner, and at such time as the Com-

1 mission may determine, reports or answers to spe-  
2 cific questions regarding the organization, business,  
3 conduct, or practices of such person or entity, such  
4 reports or answers shall be in writing and made  
5 under penalty of perjury;

6 (3) to make public, from time to time, in such  
7 form, and in such manner as the Commission deter-  
8 mines—

9 (A) such portions of the information ob-  
10 tained under paragraph (1) as are in the public  
11 interest; and

12 (B) the reports and answers described  
13 under paragraph (2), except that the Commis-  
14 sion—

15 (i) may not make public any trade se-  
16 cret or any privileged or confidential com-  
17 mercial or financial information obtained  
18 from such reports or answers; and

19 (ii) may disclose such trade secrets or  
20 information to officers and employees of an  
21 appropriate Federal or State law enforce-  
22 ment agency upon prior certification by an  
23 officer of that Federal or State law en-  
24 forcement agency that such trade secrets  
25 or information shall—

1 (I) be maintained in confidence;  
2 and  
3 (II) be used only for official law  
4 enforcement purposes; and  
5 (4) to make annual and special reports to Con-  
6 gress and to submit with such reports recommenda-  
7 tions for additional legislation.

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