

May 9, 2006

Honorable Joe Barton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mssrs. Barton and Dingell:

Having studied telecommunications and Internet policy for many years, we are writing to express our concerns about the impact of “net neutrality” language contained in legislation that passed the Energy and Commerce Committee in last month. The bill would have the effect of codifying the Federal Communications Commission’s “Net Neutrality Principles,” and would give the FCC explicit authority to enforce them.

While we understand concerns about the potential for anti-consumer “discrimination” in the market for next-generation Internet services, we doubt that these concerns will be borne out by actual experience. As the FCC has found in several recent proceedings, the broadband market is extremely competitive, and we do not believe communications carriers or other market participants have the market power required to engage profitably in practices that would harm consumer welfare. Certainly, there is no evidence of such practices occurring to date.

On the other side of the equation, communications technologies and markets are evolving rapidly, and the private sector is actively experimenting with new products and new business models. In order for this experimentation to proceed, companies need to have a reasonable degree of regulatory certainty about what practices are permitted, and prohibited, in this new environment. Otherwise, they will not be willing to make the large investments needed, especially in communications infrastructure, to offer next generation services.

We believe the legislation now before the House would add to the regulatory uncertainty surrounding new Internet services, and that it could lead to a de facto regulatory regime that would prohibit pro-consumer business practices and distort development of the market. Specifically:

- By writing into law the vague and untested language of the FCC's August 2005 policy statement, the legislation would almost by definition increase regulatory uncertainty. Phrases like "operated in a neutral manner" and "entitled to competition among network providers, application and service providers, and content providers," are not well defined in law or regulation today, and are open to broad interpretation.
- The process by which such phrases would be defined would be adversarial and litigious. Private sector actors would have strong incentives to file complaints as provided for in the legislation, and then to lobby and litigate for interpretations that advantage some business models and disadvantage others.
- The resulting cost, delay and uncertainty would inhibit innovation in new Internet services and deter investment in new infrastructure. The process of rapid-fire trial-and-error experimentation that is now underway would be slowed, and products and services that would have benefited consumers might never be offered at all.
- Given the substantive goal of the legislation ("neutrality," somehow defined), the nature of the process and the incentives of the regulatory agency, the end result is that business practices that would have benefited consumers and the economy are likely to be prohibited.
- The concept of "neutrality" is inherently in tension with the realities of the new communications marketplace. Whereas in the past communications services were essentially homogenous, new technologies are creating a diverse and differentiated set of product offerings, and the business models needed to make those offerings possible are equally diverse and differentiated. Efforts to guarantee "neutrality" or create a "level playing field" have a high risk of mistaking welfare-enhancing differentiation for anti-competitive discrimination – especially in the absence of more explicit guidance than what is contained in the legislation and/or the policy statement.
- By deterring product differentiation, net neutrality regulation could easily have the perverse effect of limiting or even destroying competition. Homogeneity imposed by regulation, in other words, could lead us back to monopoly.

We appreciate your efforts to craft legislation that reduces regulation and encourages competition and innovation in the market for communications services. As the House and ultimately the full Congress consider "net neutrality" legislation, we also appreciate your attention to these views.

Respectfully,

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 Honorable John Boehner
 Honorable Roy Blunt
 Honorable Deborah Pryce
 Honorable John Doolittle
 Honorable Mike Pence
 Honorable Adam Putnam
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