



THE  
AMERICAN  
CONSERVATIVE  
UNION

DISCOVERY  
INSTITUTE



March 31, 2006

The Honorable Joe Barton  
Chairman, U.S. House Energy and Commerce Committee  
Room: 2125 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Barton:

As members of the free-market community, we, the undersigned organizations, are encouraged that the latest draft of the telecommunications legislation takes positive, market-oriented steps to offer video service providers an alternative to the burdensome labyrinth of local franchise laws while avoiding regulatory pitfalls such as mandated access, rate regulation, and build-out requirements. However, concerns remain, particularly relating to the draft's language with respect to net neutrality. The language is nebulous and potentially detrimental and the draft's arcane choice of words could result in uncertainty, overregulation, litigation, and privacy violations.

In particular, we are troubled by the language in Title II of the draft, which specifies that "The [FCC] shall have the authority to enforce the [FCC]'s broadband policy statement and the principles incorporated therein." The FCC's broadband policy statement requires that:

1. Consumers are entitled to access the lawful Internet content of their choice.
2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement.

3. Consumers are entitled to connect their choice of legal devices that do not harm the network.
4. Consumers are entitled to competition among network providers, application and service providers, and content providers.

To see the potential uncertainty, consider the second principle listed above. It does not elaborate what is meant by the phrase "subject to the needs of law enforcement." Does it give the FCC the authority to regulate everything barred by federal and state law? Or does it give the FCC the authority to regulate the Internet in a way that makes it easier for law enforcement to catch suspects? What constitutes the "needs" of law enforcement, and who defines what those "needs" are? The vague and open phrasing provides opportunities for any activist FCC to easily expand the scope of its regulatory authority.

Alternately, take a look at the fourth principle. Certainly we all want consumers to have access to "competition." But what constitutes "competition"? The phrase is subjective, as it undoubtedly means different things to different people. The FCC could establish any number of regulatory precedents under the pretext of "ensuring competition," including mandated access, rate regulation, and any other definition of "network neutrality." Additionally, the inclusion of "applications providers" suggests that the FCC would have the ability to regulate software makers whose applications run on top of the Internet layer. If true, that would constitute a significant grant of power and discretion to the FCC in a manner that is not enumerated or limited by law.

In reality, we don't know the answers to any of these questions; nobody does. Just as we don't know how the FCC will interpret such expansive language, we also don't know how technology will change. As Dave Farber, one of the pioneers in the creation of the Internet, noted recently:

I am beginning to fear that we are in danger of trying to enact legislation designed around presumptions as to how the Internet will evolve next. ... We don't want to inadvertently stall innovation in these areas by imposing rules or laws the implications of which are far from clear. The technology, operations and management of the Internet's functions are very complex, and we must be aware of the likelihood of unintended consequences with respect to federal regulation or legislation.

While the legislation bars FCC from "rule-making," it also gives this political institution discretion to unpack the nebulous language mentioned above. In doing so, the FCC could circumvent the bar on rule-making, and in the process, exercise complete discretion over the Internet. At the very least, the vague terminology could lead to an explosion of litigation, which would, in turn, deter capital investments in technology and thwart the evolution of the Internet.

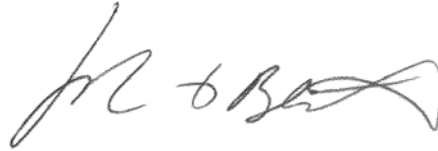
After all, these are questions that directly bear on Internet privacy, regulation, the property rights of Internet Service Providers, and of course, how federal and state laws are enforced. Congress should be wary of granting wide latitude to the FCC on such important issues that fundamentally affect all consumers of technology. Since this is an

important issue that touches all Americans, we urge you clarify the scope and breadth of power granted to the FCC under this latest draft.

Sincerely,



Matt Kibbe  
President & CEO, FreedomWorks



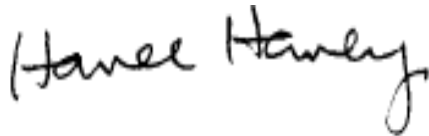
John Berthoud  
President, National Taxpayers Union



William Lauderback  
Executive Vice President, American  
Conservative Union



Thomas A. Schatz  
President, Council for Citizens Against  
Government Waste



Hance Haney  
Senior Fellow & Director of the  
Technology & Democracy Project  
Discovery Institute



Wayne Crews  
Vice President for Policy and Director of  
Technology Studies, Competitive  
Enterprise Institute

CC: Speaker, J. Dennis Hastert  
Majority Leader, John A. Boehner  
House Subcommittee on Telecommunications and the Internet