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Illogical net neutrality idea

By Randolph J. May

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Maryland's legislature frequently is the birthplace of bad ideas spawned by a penchant for costly over-regulation. Remember last year's ill-fated Wal-Mart law, which dictated the exact percentage of Wal-Mart's payroll to be devoted to paying employee health care costs?

Now some Maryland legislators have introduced a bill to regulate the Internet under the guise of so-called "Net neutrality." Regulations purporting to ensure strict neutrality regarding Internet traffic almost certainly will have the effect of neutering the Net. So let's call a spade a spade: The Maryland bill -- and similar ones cropping up elsewhere -- are really Net neutering measures.

The Maryland bill states that broadband Internet service providers should not sell to Internet content or applications providers any service that prioritizes any Internet traffic "based on its source, ownership, or destination." In addition to this non-discrimination obligation, broadband providers would have to file quarterly reports detailing where they provide service, the number of customers served, and the speed and price of the various service offered. The required information is not limited to service in Maryland. The bill specifically identifies broadband providers using DSL, cable modems, wireless, and power-line technologies as subject to its mandates.

Like the Wal-Mart law struck down by a federal court because it was inconsistent with federal policy governing employee benefits, Maryland's Net neutering bill likely would be held unlawful because it, too, is inconsistent with federal policy. Congress declared in

the Telecommunications Act of 1996 that U.S. policy is "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."

Pursuant to this declaration, the Federal Communications Commission has determined that broadband Internet services are interstate information services that should be largely unregulated, not telecommunications services subject to traditional public utility nondiscrimination obligations and rate regulation. In 2005, the Supreme Court approved the FCC's classification determination. The FCC has since indicated it will consider complaints alleging Net neutrality-like discrimination case-by-case.

Classifying broadband Internet service as an interstate service not subject to state regulation should not come as a surprise. The Internet is essentially "borderless," with data packets not following any predetermined path. Unlike the old circuit-switched networks, it is impossible, as a practical matter, to distinguish between intrastate and interstate traffic. Indeed, much of Internet traffic originates or terminates overseas. It is rare for an online user to access Web sites hosted only in-state. Moreover, broadband Internet providers generally have multistate or national footprints designed to accommodate cross-state business practices and advertising.

Apart from likely federal pre-emption, there are sound policy reasons why the bill should be rejected. Internet subscribership is growing nicely without regulation. The FCC's most recently released data show that for the year ending June 2006, the number of high-speed lines in Maryland increased 66 percent, an even more robust figure than the healthy nationwide 52 percent increase.

The rapid growth in broadband lines in service has been accompanied by increasing competition. The Maryland bill's identification of telephone, cable, wireless and power companies demonstrates this trend. Broadband companies compete ever more vigorously to sell consumers Internet, video and voice service. The FCC's latest data show 95 percent of Maryland zip codes have at least two providers of broadband service, while 92 percent have three or more. While the power companies, for now, remain largely on the sidelines, their potential market entry already exerts competitive pressure because of their ubiquitous presence and resources.

It is not surprising that nationwide there have been only a few isolated "discrimination" complaints of the type Net neutrality regulation is intended to address. I know of none in Maryland. In a competitive marketplace, broadband providers will not adopt business practices that alienate their subscribers. If they do, subscribers will switch providers.

Finally, as the Internet continues to evolve, there may be legitimate economic reasons for broadband providers to offer to prioritize traffic in some price-related way to most efficiently meet consumer demand for various types of services. Absent such flexibility, all consumers ultimately will be required to pay more for Internet service than they otherwise would to cover the increased capacity costs caused by certain especially

intensive bandwidth uses, such as videogaming or sites requiring higher speed, reliability and security, such as online telemedicine applications.

If broadband providers are not allowed to differentiate their services because of regulatory straitjackets, they will lack incentives to invest in new network facilities and innovative applications. This will have the perverse effect of dampening competition among existing and potential broadband operators, an effect the Net neutrality proponents claim not to want.

Net neutrality bills also have been introduced recently in California and Maine. All these state measures are unsound as a matter of law and policy. "Net neutrality" has a pleasing ring. But legislators should be smart enough to look beyond sound bite labels. They should understand that those who want to regulate Internet providers like public utilities will instead neuter the Net.

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