

# The Free State Foundation

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### **Sidestepping The Net Neutrality Boondoggle**

By Randolph J. May

[http://news.com.com/Sidestepping+the+Net+neutrality+boondoggle/2010-1028\\_3-6148337.html](http://news.com.com/Sidestepping+the+Net+neutrality+boondoggle/2010-1028_3-6148337.html)

#### **There is a good news-bad news story out of Michigan on the communications policy front.**

First, the good news: Michigan has now become the tenth state in the past two years to enact a statewide video franchise reform law intended to [hasten entry by telephone companies like AT&T and Verizon into the multichannel video market.](#)

The new law requires the Public Service Commission to establish uniform streamlined requirements that municipalities must follow in considering applications by new entrants to provide video service in competition with cable operators. Most significantly, the municipalities must approve completed applications by new entrants within 30 days.

Cable operators already confront competition from satellite operators the Dish Network and DirecTV, with these nationwide providers controlling more than 25 percent of the market. But additional competition from "telephone company" entry into the multichannel video market will benefit consumers. And the Michigan law sensibly allows the incumbent cable providers to opt into the new, less burdensome regime.

In today's competitive environment, "cable" operators should not be subjected to disparate regulatory burdens. The old analog-era appellations--"telephone," "cable," "satellite" and "wireless" companies--are essentially obsolete. What we have are broadband network operators scrambling to package video, voice and Internet services into attractive, consumer-friendly bundles.

#### **Legislative moves**

During 2006, Congress considered, but failed to pass, legislation to reform the local franchising process by establishing a national franchising regime. On December 20, the Federal Communications Commission voted to try and accomplish administratively much of what Congress failed to do, but its legal authority to do so will be challenged in court.

So, in the meantime, Michigan's video franchise reform effort is welcome. With each new state law, the pressure grows for others to follow suit. Laggard states will be leery of losing out, as the telephone companies invest in new facilities--and the jobs that accompany the investment--in states where the opportunities for easier marketplace entry are more promising.

Now for the bad news.

Google tried to use the Michigan bill as a vehicle for adding [Net neutrality mandates](#)--the regulatory rage du jour--to state law. Net neutrality mandates would prohibit all broadband Internet service providers (ISPs) from taking any action to "block, impair or degrade" the ability of subscribers to reach any Web site, or from "discriminating" against any unaffiliated entity's content or applications.

Led by [Google](#), [Net neutrality advocates](#) claim they are concerned that a broadband ISP might charge more for delivering some bits of data faster than other bits--or put another way, might prioritize the traffic of some content and applications providers.

To date, the injurious activity that Net neutrality advocates say they fear has not materialized. More to the point, as the Internet continues to evolve, Net neutrality regulations almost certainly would turn out to be overly broad in application, inhibiting the development of efficient business arrangements that enhance overall consumer welfare. In a competitive marketplace, it is free market forces, after all, that ultimately lead to the development of new efficiently priced services that are responsive to consumer demand.

Now for the even worse news. Although the effort to tack Net neutrality mandates onto the Michigan video bill failed this year, the proregulatory forces likely will try again next year.

In a December 11 "Dear Larry" letter announcing her intention to sign the bill, [Michigan Gov. Jennifer Granholm](#) thanked Larry Page, Google's president, for "all the expertise Google has brought to Michigan on the issue of Net neutrality." Unfortunately, she didn't stop with the thanks: "I believe it may be more desirable to pursue standalone legislation to further extend consumer protections by enacting Net neutrality next year."

Other states may also become battlegrounds, as Google pursues its agenda to force broadband providers to operate as traditional public utilities subject to rate and nondiscrimination. This is too bad, because even if these efforts to impose Internet regulation are repelled, there will be a significant expenditure of time and resources dedicated to fights around the country. These resources could be put to more productive use--like building out new networks and developing innovative new services and applications.

If any state does adopt a [Net neutrality law](#) purporting to regulate the rates or terms on which Internet access is offered, the Federal Communications Commission should be ready with an order preempting such actions. The ruling would follow along the lines of the agency's 2004 Pulver Declaratory Ruling, which preempted state regulation of voice over Internet Protocol (VoIP) services on the basis that they are interstate services subject to exclusive federal jurisdiction.

The new FCC ruling should extend broadly to all Internet Protocol-enabled services. The agency already has compiled a record to support such preemptive action in its long-pending IP-Enabled Services rulemaking proceeding. There is a clearly expressed national policy against regulation of Internet services by the federal government and the states. The 1996 Telecommunications Act states: "It is the policy of the United States...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."

This deregulatory national policy has been embodied in FCC rulings, affirmed by the Supreme Court in the landmark 2005 Brand X case. Imposition of nondiscrimination obligations, and the rate regulation that always accompanies nondiscrimination obligations, are inconsistent with national policy. Without doubt, the FCC possesses authority to preempt state laws imposing net neutrality mandates.

In 2007, more states should join Michigan and the other nine states that already have enacted video franchise reform laws. But it is important they do so without adopting net neutrality mandates that, in effect, regulate the Internet and stifle new broadband investment.

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