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Rep. Markey's Internet Bill: Curiously Off the Mark

by
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Representative Ed Markey, chairman of the House Telecom Subcommittee, has proposed yet another net neutrality bill (H.R. 5353). It should not become law.

Here are some problems with the bill:

- Section 1 says the bill "may be cited" as the "Internet Freedom Preservation Act of 2008." It may, but shouldn't be, because the name is misleading. If enacted, the bill would constitute a step in the direction of government control of the Internet, not in the direction of preserving freedom. Curiously enough, in the "Findings" section of the bill, there is no recitation of any factual predicate that would support the notion that the Internet is not currently free or that consumers are currently being harmed by any broadband operators' practices. You might expect to see in the "Findings" some elaboration, however modest, of some threat to consumers that calls forth the need for legislative action. There is none.

- The "Findings" do state that the importance of the broadband marketplace "warrants a thorough inquiry to obtain input and ideas for a variety of broadband policies that will promote openness, competition, innovation, and affordable, ubiquitous broadband service for all individuals in the United States." How curious that after proposing a *thorough inquiry* to obtain input and ideas, the very next section of the bill, Section 3, without awaiting any further input and ideas, proceeds to declare a departure from U.S. policy — that broadband networks must be operated "without unreasonable interference from or discrimination by network operators." Make no mistake. This policy declaration would

reverse the Supreme Court's *Brand X* decision affirming the FCC's 2002 determination not to regulate broadband operators as common carriers. By embracing the no-discrimination mandate, a core common carriage requirement, the Markey bill would declare it now to be the policy of the U.S. that broadband operators be regulated like public utility common carriers. More about this policy departure below.

- And how curious that we need legislation requiring, as Section 4 does, that the FCC do an "assessment" of the broadband marketplace, and that it conduct no less than eight broadband summits around the U.S. within one year. The FCC is right in the midst of several such assessments already and undertakes several more on an annual basis. Does Congressman Markey think there is a lack of ongoing dockets at the agency? Not to mention that the FTC only recently conducted its own comprehensive inquiry. After reams of comments and a three day public hearing, in June 2007 the FTC produced a 150+ page report that concluded: "[W]e are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects on such welfare of potential conduct by broadband providers and the law enforcement structures that already exist." The Commission added: "Further reason for policy makers to proceed with caution in the area of broadband Internet access is the existence of several open questions that likely will be answered by either the operation of the current marketplace or the evolution of complicated technologies." More conferences and summits than can be catalogued, sponsored by private and public organizations, continually examine, discuss and debate the issues that Congressman Markey directs in his legislation should be examined. For example, for many years the National Association of Regulatory Utility Commissioners has co-sponsored an annual "Broadband Summit" that examines, from all perspectives, the same issues that are the subject of Rep. Markey's legislatively-mandated broadband assessment. There is not a compelling case for Congress to be legislating assessments and summits that are already occurring.

- It is also a bit curious that in ordering up a new broadband assessment, Rep. Markey's bill essentially incorporates the first three consumer entitlement principles from the FCC's Broadband Policy Statement – entitlement to access lawful content, to run applications and services of their choosing, and to connect devices of their choosing to the network. But it omits the FCC's fourth principle, which states that consumers are entitled to competition, from among others, content providers. Many have suggested that this means Google, with its 65% and growing share in the Internet search market needs to be reined in, if this consumer entitlement is to mean anything. For example, James B. Stewart, writing

recently in the Wall Street Journal [subscription required], once again suggested Google may be a "natural monopoly." I don't necessarily agree, but Google's current dominance does make one wonder why Mr. Markey omitted the FCC's broadband principle relating to competition among content providers. His professed concern about concentration does not appear to extend to the market segment that Google dominates.

- Finally, it bears emphasis that the most serious harm from Mr. Markey's bill, were it to be enacted, is the policy reversal it would write into law. In the 1996 Telecom Act, in the "Findings" in Section 230, Congress stated: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." Congress then declared it to be U.S. policy "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*." Relying on what it determined to be a rapidly evolving competitive broadband marketplace, and these congressional declarations, in 2002 the FCC concluded that, as a matter of national policy, broadband services should exist in a "minimal regulatory environment." The agency found innovation and new investment would be stifled if broadband operators were regulated as common carriers. Mr. Markey's bill would constitute a marked shift in current policy by imposing common carrier regulation on broadband providers. There is no way around this conclusion.

A non-discrimination obligation, and the rate regulation that inevitably accompanies such requirement, is the core common carrier obligation. By mandating "non-discrimination" by broadband providers as U.S. policy, Congress, in effect, would be declaring broadband providers must be regulated as common carriers. As I have written many times before, the FCC's deregulatory broadband policy, which it generally if not always consistently has followed, has been successful. The U.S. broadband marketplace continues to evolve on a competitive basis. Over 80% of U.S. residents live in areas with four or more broadband providers. And the number of broadband subscribers, now numbering over 85 million, continues to grow rapidly.

To be sure, "discrimination" can be made to sound unappealing. And in many contexts, such as with respect to race, ethnicity, and gender, it most certainly is. But in the context of the economics of network industries, and the real-world operation of networks in dynamic technological and marketplace environments, the principal effect of a "non-discrimination" mandate is to straight-jacket broadband providers, preventing them from adapting to market environments that are constantly evolving.

Removing the flexibility that will allow broadband providers to experiment with various pricing, quality, quantity, and other models that may differentiate their services in ways that make economic sense, while also responding to consumer

demand, will be to the detriment of consumers. For many publications explaining why this is so, see the Free State Foundation's publications page. And because net neutrality non-discrimination rules, by design, are intended to severely constrain the flexibility of broadband operators, such legislative mandates also likely will threaten the ability of broadband providers to take reasonable actions to manage their own networks for the benefit of all subscribers, rather than for the benefit of certain subscriber segments, and to prevent ever-evolving malicious network harms. To understand how this threat might materialize – indeed, already has materialized -- once steps are taken down the slippery net neutrality slope, see the Free State Foundation comments recently submitted to the FCC in its Broadband Practices proceeding.

In sum, Rep. Markey's bill is off the mark, and curiously so in a number of important respects. It should not be adopted.

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