

# THE FREE STATE FOUNDATION

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## **MEDIA ADVISORY**

**March 5, 2018**

**Contact: Randolph May at 301-285-9926**

## **FSF SUBMITS TESTIMONY OPPOSING MARYLAND NET NEUTRALITY BILL**

**Free State Foundation President Randolph May and Research Fellow Michael Horney submitted prepared testimony and Mr. Horney testified at a March 2, 2018, Hearing on SB 287, “State Funds - Procurement of Services From Internet Service Providers – Restriction,” before the Committee on Education, Health, and Environmental Affairs, Maryland General Assembly. The testimony opposes SB 287 on legal and policy grounds.**

Below is the testimony delivered on March 2.

A PDF of the Free State Foundation testimony is [here](#).

Madam Chairwoman and Distinguished Members of the Committee,

Good afternoon. My name is Michael Horney, and I am a Research Fellow at The Free State Foundation, an independent, nonpartisan research and educational institution located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank focusing heavily on communications and Internet law and policy. Thank you for the opportunity to present this testimony on SB 287, which was prepared by me and Free State Foundation President Randolph May. We oppose adoption of SB 287.

SB 287 purports to prevent state funds from being used to procure services from an Internet service provider (ISP) that blocks, impairs, or degrades certain Internet traffic or that engages in certain forms commercial traffic preferencing. SB 287 is legally problematic because it conflicts with federal policy that broadband Internet access services are largely unregulated “information services” and should not be regulated in a public utility-like fashion. And SB 287 is unwise as a matter of policy.

The Federal Communications Commission’s *Restoring Internet Freedom Order*, adopted in December 2017, expressly preempts any state measure that, in effect, would impose prohibitions and restrictions on Internet service providers (“ISPs”) that are inconsistent with the prohibitions and restrictions the federal agency has repealed. SB 287’s provisions regarding blocking, impairing or degrading, and traffic preferencing essentially mirror the rules that were repealed by the FCC. Thus, SB 287, if adopted, would be contrary to what the FCC’s order called the “preemptive federal policy of nonregulation for information services.”

The FCC’s order declares that state or local laws inconsistent with the federal policy of not

regulating Internet traffic would “requir[e] each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.” If adopted, SB 287 would run afoul of the federal policy by contributing to the patchwork regulatory problem.

Due to the dynamic nature of today’s digital broadband networks in terms of operation and routing, it is difficult, if not impossible, to distinguish between intrastate and interstate Internet traffic in the way that, in an analog world, telephone companies readily could distinguish between intrastate and interstate voice traffic. Therefore, SB 287 necessarily would impose a burden on interstate commerce. As the FCC’s *Restoring Internet Freedom Order* explains:

"It is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications. Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission’s treatment of interstate traffic, the first condition for conflict preemption is satisfied."

SB 287 purports to be limited by its terms to Internet providers who receive state funds. While the resulting impacts conceivably may be less than for a state law purporting to extend its reach beyond services procured with state funds, they nevertheless are sufficient to render the law inconsistent with federal policy. This inconsistency and the adverse effects on interstate commerce would put this Maryland law at risk of preemption.

Legal questions aside, the FCC’s order explains why state laws like SB 287 would be harmful to all broadband consumers. The difficulties of distinguishing between intrastate and interstate Internet traffic – and the resulting costs from attempting to separate such traffic – may well have an adverse impact on investment, innovation, and the overall quality and price of broadband services in Maryland.

Assuming it is even possible for ISPs to distinguish the between intrastate and interstate communications, as a practical matter ISPs likely would need to install additional data processing capabilities to monitor data flows across the country. Any online activity can result in Internet traffic transmitted all across the country – and, for that matter, the world. This means ISPs would need to implement different practices in efforts to accommodate Maryland’s and other state’s laws. These additional costs imposed on Internet providers offering services in Maryland likely would crowd out resources that otherwise would be used for additional investment and innovation, which all broadband consumers enjoy.

SB 287 would not benefit Maryland’s state and local agencies either. For example, under SB 287, any Internet provider that provides services for a state agency cannot engage in traffic prioritization. This restriction, and even though cast in terms of “commercial” traffic, nevertheless may impede the delivery of emergency, public safety, and health services that state and local agencies provide because the line between what is “commercial” or not is unclear and likely to remain so. Or there may be government services clearly offered on a “commercial” basis that fall in those public safety and health-related categories that would be required by law to be treated just like the popular Internet cat videos.

The impracticality of implementing different practices for provision of services procured with state funds and those offered to the public at large is problematic as well. An Internet provider would incur additional costs if it wanted to deviate from the state mandates applicable to state procurements while operating in accordance with federal law in its offerings to the public at large. As a practical matter, this might well mean that all Maryland residents may be deprived of services that, in order to serve effectively their intended purpose, depend on some form of traffic preferencing. For example, certain services like remote surgeries or physician consultations, various medical monitoring services, and emergency-type communications, may be adversely impacted because they cannot be prioritized over streaming of movies or other entertainment applications. Beyond identifiable health and safety-related services, SB 287’s restrictions against any form of “commercial traffic” differentiation likely may well discourage Internet providers from offering other innovative services, including those which are still evolving in the fast-changing Internet environment.

In the two years following implementation of the FCC’s *Open Internet Order*, which SB 287’s restrictions mirror, Free State Foundation scholars estimated that broadband investment declined

by \$5.6 billion on a nationwide basis. This corresponds to roughly \$116 million in foregone broadband investment in Maryland. Adoption of restrictions like those that would be imposed by SB 287 likely would have a Maryland-specific negative impact on investment and innovation. Adoption of SB 287 may incentivize broadband providers to invest in other states that do not adopt laws that conflict with the federal policy disfavoring prohibitions like those in the bill.

Governor Larry Hogan has made eliminating or reducing unnecessary and costly regulatory mandates a hallmark of his administration. In his February 4, 2015, "State of the State" address, Governor Hogan stated: "Maryland's anti-business attitude, combined with our onerous tax and regulatory policies have rendered our state unable to compete with any of the states in our region. It's the reason that businesses, jobs and taxpayers have been fleeing our state at an alarming rate." Significantly, after the FCC's December 2017 action, Maryland's consumers will remain protected from any allegedly abusive "net neutrality-type" practices by Internet service providers by, among other things, oversight by the Federal Trade Commission and the Department of Justice, along with state consumer protection laws of general application.

In sum, SB 287 is problematical from a legal and policy perspective and should not be adopted.

Thank you for considering this testimony.

**A PDF of the FSF testimony is [here](#).**

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**Randolph J. May**, President of the Free State Foundation, is a former FCC Associate General Counsel and a former Chairman of the American Bar Association's Section of Administrative Law and Regulatory Practice. Mr. May is a past Public Member and current Senior Fellow of the Administrative Conference of the United States, and a Fellow at the National Academy of Public Administration.

Mr. May is a nationally recognized expert in communications law, Internet law and policy, and administrative law and regulatory practice. He is the author of more than 200 scholarly articles and essays on communications law and policy, administrative law, and constitutional law. Most recently, Mr. May is the co-author, with FSF Senior Fellow Seth Cooper, of the recently released, [#CommActUpdate - A Communications Law Fit for the Digital Age](#) as well as [The Constitutional Foundations of Intellectual Property](#), and is the editor of the book, [Communications Law and Policy in the Digital Age: The Next Five Years](#). He is the author of *A Call for a Radical New Communications Policy: Proposals for Free Market Reform*. And he is the editor of the book, *New Directions in Communications Policy* and co-editor of other two books on communications law and policy: *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated And Communications Deregulation and FCC Reform*.

**Michael J. Horney** is Research Fellow.

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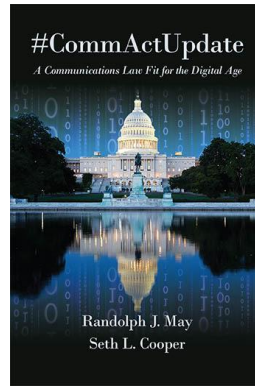
**Register to attend the Free State Foundation's Tenth Annual Telecom Policy Conference on March 27 at the National Press Club. Information about the conference, the speaker lineup, and a registration link is [here](#). Space is limited and you must register to attend!**

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**The new Free State Foundation book, [#CommActUpdate - A Communications Law Fit for the Digital Age](#), by **Randolph May and Seth Cooper**, is now available on **Amazon in paperback for \$9.95 and on Kindle for \$2.99!** And it is available as an ebook for \$2.99 from seven**

different bookstores [here](#). Read more about the book [here](#).



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