

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

February 9, 2016

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Markup of H.R. 2666, No Rate Regulation of Broadband Internet Access Act; H.R. ____, Small Business Broadband Deployment Act; and H.R. 1301, Amateur Radio Parity Act of 2015.

On Wednesday, February 10, 2016, at 3:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology will convene a markup for the purpose of delivering opening statements on three bills:

- H.R. 2666, the No Rate Regulation of Broadband Internet Access Act;
- H.R. ____, the Small Business Broadband Deployment Act; and
- H.R. 1301, the Amateur Radio Parity Act of 2015.

The subcommittee will reconvene on Thursday, February 11, 2016, at 10:00 a.m. in 2123 Rayburn House Office Building, to complete consideration of the bills.

I. H.R. 2666, THE NO RATE REGULATION OF BROADBAND INTERNET ACCESS ACT

A. Background

In February 2015, the Federal Communications Commission (FCC) adopted a new set of net neutrality rules to protect consumers, free expression, and innovation.¹ The FCC rooted its decision in multiple sections of the Communications Act. Following a roadmap set out by the

¹ Federal Communications Commission, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)[hereinafter *Protecting and Promoting the Open Internet Order*].

D.C. Court of Appeals in *Verizon v. FCC*,² the Commission classified broadband Internet access service as a telecommunications service under Title II of the Communications Act.³ At the same time, the FCC recognized that many aspects of Title II are not relevant to modern broadband service. Therefore, the FCC chose not to apply over 700 Title II regulations, including rate, tariffing, and last-mile unbundling regulations.⁴

Despite the FCC's clear and unequivocal forbearance from regulating broadband access service rates, some have voiced fears that Title II reclassification makes it easier for the FCC to regulate broadband rates in the future. FCC Chairman Wheeler has consistently responded that his intention is not to regulate rates.

B. Summary

H.R. 2666, the No Rate Regulation of Broadband Internet Access Act, responds to fears that the FCC will seek to regulate rates in the future. As such, the bill statutorily precludes the FCC from ever regulating the rates charged for broadband Internet access services. The bill imports the definition of "broadband Internet access service" from the FCC's most recent net neutrality order. The bill does not define what is meant by "rate regulation."

C. Issues Raised by the Bill

The central issue raised by H.R. 2666 is the bill's failure to define what it is prohibiting—the regulation of rates. Without defining the term "rate regulation," some have asserted that the bill could result in unintended consequences.⁵ Most notably, many have argued that H.R. 2666 could affect FCC's ability to enforce consumer protections.⁶ These consumer protections could include cramming, truth in billing, device rental fees, and fraudulent, inaccurate, or contested charges.

Additionally, some have raised concerns that H.R. 2666 could preclude the FCC from enforcing its rule against paid prioritization rule.⁷ Paid prioritization is a financial arrangement in which a content owner pays a broadband provider to give priority to that content owner or where a broadband provider favors its own content. H.R. 2666 could similarly affect FCC authority to enforce its general conduct rule—the rule within the Protecting and Promoting the

² *Verizon v. FCC*, 740 F.3d 623, 649-650 (2014).

³ *Protecting and Promoting the Open Internet Order*, *supra* note 1, at ¶ 306-435.

⁴ *Id.* at 434-543.

⁵ House Committee on Energy and Commerce, Subcommittee on Communications and Technology, Hearing on Four Communications Bills, 114th Cong. (Jan. 12, 2016) (Testimony of the Honorable Robert McDowell).

⁶ House Committee on Energy and Commerce, Subcommittee on Communications and Technology, Hearing on Four Communications Bills, 114th Cong. (Jan. 12, 2016) (Testimony of Mr. Harold Feld) [hereinafter Testimony of Harold Feld].

⁷ 47 C.F.R. § 8.9. *See also* Testimony of Harold Feld, *supra* note 6.

Open Internet Order aimed at ensuring Internet service providers (ISPs) cannot successfully circumvent the rules in the future.⁸

Other wholly unrelated FCC programs could also be affected. Specifically, the FCC's mandate to ensure that rural consumers have reasonably comparable service provided at reasonably comparable prices when compared to their urban counterparts could be affected as well.⁹ The FCC could also lose its authority to take action related to the \$40 billion special access market.¹⁰

II. H.R. ____, THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT

A. Background

As part of the FCC's Protecting and Promoting the Open Internet order, the FCC enhanced its preexisting broadband transparency rule. In doing so, the Commission noted that "consumers continue to express concern that the speed of their service falls short of advertised speeds, that billed amounts are greater than advertised rates, and that consumers are unable to determine the source of slow or congested service."¹¹

At that time, the FCC chose to exempt smaller broadband providers temporarily from the transparency rule enhancements, citing an abundance of caution regarding concerns that the requirements might be particularly burdensome for small providers.¹² Indeed, the FCC adopted the proposal of the American Cable Association to define smaller Internet service providers as those with 100,000 or fewer subscribers.¹³

The FCC further directed its Consumer & Governmental Affairs Bureau to adopt an order by December 15, 2015, regarding whether to make the exemption permanent and whether to modify the Commission's definition of a smaller broadband provider. The Bureau issued an order on December 15, 2015, extending the smaller broadband provider exemption for another year. In that December order, the Bureau noted that it was extending the exemption for one year so it could complete the process of estimating the burden the enhancements will place on

⁸ 47 C.F.R. § 8.11.

⁹ 47 U.S.C. § 254 (b)(3). *See also* Testimony of Harold Feld, *supra* note 6.

¹⁰ Testimony of Harold Feld, *supra* note 6.

¹¹ *Protecting and Promoting the Open Internet Order*, *supra* note 1, at ¶ 164.

¹² *Id.* at ¶ 172-175.

¹³ *Id.* at ¶ 174 ("One metric to which ACA points is the approach that the Commission used in its 2013 Rural Call Completion Order, which excepted providers with 100,000 or fewer subscriber lines, aggregated across all affiliates, from certain recordkeeping, retention, and reporting rules. We adopt this definition for purposes of the temporary exemption that we adopt today.").

providers of all sizes, and to obtain approval from the Office of Management and Budget, as is required under the Paperwork Reduction Act of 1995.¹⁴

B. Summary

The Small Business Broadband Deployment Act discussion draft would alter the application of the enhanced transparency rule in two ways. First, the discussion draft would make the small broadband provider exemption permanent. Second, the draft would expand the definition of a smaller broadband Internet access provider to those providers with 500,000 subscribers or less, or providers with 1,500 employees or fewer.

C. Issues Raised by the Discussion Draft

The discussion draft could unnecessarily lead to tens of millions of consumers being denied critical information about their Internet service. As written, the discussion draft would nearly double the number of consumers without the full protection of the FCC's transparency rule. A more narrowly-tailored definition of small business would better balance the needs of consumers with the needs of truly small businesses.

III. H.R. 1301, THE AMATEUR RADIO PARITY ACT OF 2015

A. Background

The FCC preempted state and local regulations over amateur radio station facilities in 1985, determining at the time that there was a “strong Federal interest in promoting amateur service communications,” and that state and local regulations that preclude such communications are in “direct conflict with Federal objectives.”¹⁵ The FCC declined to extend the preemption to cover covenants, conditions, and restrictions in deeds and by-laws due to the fact they are privately negotiated agreements.¹⁶ The FCC declined to amend its policy against preemption of such private land use restrictions in 1999, with a Wireless Bureau denial of a petition for rulemaking filed by the American Radio Relay League.¹⁷ The Bureau denied a petition for reconsideration of the issue in 2000,¹⁸ and the full Commission upheld the Bureau's decision in 2001.¹⁹

¹⁴ *Protection and Promoting the Open Internet*, Report and Order, GN Docket No. 14-28 (Feb. 26, 2015) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1215/DA-15-1425A1.pdf).

¹⁵ Federal Communications Commission, *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service*, Order, RM-8763, DA 99-2569 at ¶ 3 (Nov. 19, 1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Federal Communications Commission, *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support*

In the 2001 decision, the FCC recognized the important role that amateur radio operators play in providing emergency communications, but declined to expand its policy to preempt because petitioners “submitted no specific evidence” that private agreements seriously disrupt the federal regulatory scheme.²⁰ The FCC did note, nevertheless, that it would act expeditiously to fulfill any congressional directive that mandates an expansion of its existing policies.²¹

B. Summary

H.R. 1301 would direct the FCC to amend its amateur radio rules to prohibit any private land use restrictions that (1) preclude amateur radio communications, (2) fail to reasonably accommodate such communications, or (3) are not the minimum practicable restriction. The bill has the bipartisan support of 116 members, but stakeholders representing homeowner associations have raised concerns with the existing language.

Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service, Order on Reconsideration, RM-8763, DA 00-2468 (Rel. Nov. 15, 2000).

¹⁹ Federal Communications Commission, *Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission’s Rules Governing the Amateur Radio Service*, Memorandum Opinion and Order, RM-8763, FCC 01-372, (Rel. Dec. 26, 2001).

²⁰ *Id.* at ¶ 8.

²¹ *Id.*