

# **The Free State Foundation**

**A Free Market Think Tank For Maryland...Because Ideas Matter**

**Testimony of**

**Randolph J. May**

**President**

**The Free State Foundation**

**before the**

**Economic Matters Committee**

**Maryland House of Delegates**

**On**

**HB 1069**

**Public Service Commission—Broadband Internet Service**

**February 27, 2007**

***The Free State Foundation***

*10701 Stapleford Hall Dr., Potomac, MD 20854*

*Tel. 301-299-3182 Fax: 301-299-5007*

*E-Mail: [info@freestatefoundation.org](mailto:info@freestatefoundation.org)*

**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

Mr. Chairman and distinguished Members of the Committee:

Good afternoon. My name is Randolph May, and I am President of The Free State Foundation, an independent, non-profit research and educational institution located in Potomac, Maryland. The Free State Foundation is a think tank that promotes free market, limited government, and rule of law principles in Maryland and throughout the United States. I appreciate the opportunity to present this testimony on HB 1069.

I have over thirty years of experience working in communications law and policy. I am the co-editor of two academic books on communications policy and the author of over a hundred scholarly law review articles, essays, and commentaries on communications law and policy topics, including dozens on the specific subject of net neutrality. A brief biographical sketch may be found at:

[http://www.freestatefoundation.org/images/Randolph\\_May.Web\\_Version.doc](http://www.freestatefoundation.org/images/Randolph_May.Web_Version.doc)

And a partial list of my publications may be found at:

<http://www.freestatefoundation.org/images/PublishedWorksofRandyMay.doc>

Especially pertinent to today's hearing, I am the co-editor of a book published in 2006 by Springer titled, *Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated*.

I can appreciate the sentiment behind HB 1069 to the extent that its introduction is motivated by a concern that broadband Internet access should be widely available to Maryland's citizens and that broadband providers should not unreasonably prevent their subscribers from accessing any lawful Internet content. But enactment of the bill, which for the first time would regulate Internet access on a public utility-like basis, would be counterproductive and is unnecessary to protect Maryland consumers. Indeed, its passage ultimately would be quite harmful to consumers. In the process of attempting to mandate that the Net be neutral, the bill would, in fact, move in the direction of neutering the Net.

In a commentary published in the *Washington Times* on February 24, I explained in detail why passage of the bill would be counterproductive and harmful as a policy matter. As a legal matter, the bill also likely would be preempted by federal law. Here I just want to summarize in bullet point form the main points that are discussed more fully in the commentary that immediately follows:

- While the bill seems to be motivated on its face by a concern that broadband service providers not discriminate against Internet content and applications providers, such as Google or Amazon, by "prioritizing" Internet traffic in any way, there is no evidence that any such discrimination has occurred. Thus, at least at present, there is no problem that requires any regulatory solution.

- The broadband Internet marketplace is already workably competitive, and this competition protects consumers more effectively than a costly and burdensome regulatory regime would. The fact that the marketplace is competitive is demonstrated on the face of the bill by the listing of the various types of broadband providers—telephone, cable, wireless, and power companies—that are subject to the bill’s regulatory requirements. The FCC’s most recent data show that 92% of Maryland’s zip codes have present three or more broadband providers.
- 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.
- 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.

**[Illogical net neutrality idea](#)**

**By Randolph J. May**

Published February 24, 2007

---

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.

*Randolph J. May is president of the Free State Foundation, a free market policy institute in Potomac, Md.*

**The Free State Foundation**  
10701 Stapleford Hall Dr., Potomac, MD 20854  
Tel. 301-299-3182 Fax: 301-299-5007  
E-Mail: [info@freestatefoundation.org](mailto:info@freestatefoundation.org)  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**