S. 2360

To ensure and promote a free and open Internet for all Americans.

IN THE SENATE OF THE UNITED STATES

March 2, 2006

Mr. WYDEN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To ensure and promote a free and open Internet for all Americans.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Internet Non-Discrimination Act of 2006'.

SEC. 2. FINDINGS.

Congress finds the following:
(1) Since passage of the Telecommunications Act of 1996, the Internet has grown robustly. Today, Americans are changing how they access the Internet, moving from dial-up to broadband for their home connections. According to the Pew Internet and American Life Project, 72 percent of Americans use the Internet and 59 percent of Americans with home Internet have a high-speed Internet connection. (2) Americans use the Internet for many daily activities. Over 17 percent of Americans have sold something over the Internet. Everyday, approximately 60,000,000 Americans use search engines to get access to information. 80 percent of Americans have looked online for health care information. In growing numbers, Americans are using the
Internet to place phone calls, watch their favorite television shows or movies, and play games.

(3) The growth of the Internet and its success are due in large part to the freedom that has always existed on the content and applications layer of the Internet. Innovation has thrived on this layer, as anyone with a good idea has the ability to access consumers. The continuation of this freedom is essential for future innovation.

(4) Freedom on the content and applications layer has also led to robust competition for retail goods for consumers. Consumers can shop at thousands upon thousands of retailers from their home computers, including small businesses located miles away in other towns, States, and even countries.

(5) Such freedom is leading to the development of important new entertainment offerings, on-demand video and movie purchases, Internet Protocol television, and enhanced gaming options. The entertainment options available in the future will only be limited by the bandwidth that can be used and the innovation of people all over the world.

(6) Despite the growth of the Internet and increased access to the Internet for Americans, there is very little choice in who provides them high-speed Internet access. According to an April 2005 White Paper by Harold Feld and Gregory Rose, et. al., entitled, `Connecting the Public: The Truth About Municipal Broadband' only 2 percent of Americans get high-speed Internet access from someone other than their local phone company or cable provider. According to the Federal Communications Commission, approximately 20 percent of Americans do not have a high-speed Internet access provider that offers them service.

(7) As more and more Americans get high-speed access to the Internet without having much choice of who their provider will be, it is important that Congress protect the freedom on the Internet to ensure its continued success.

**SEC. 3. DEFINITIONS.**

In this Act, the following definitions shall apply:

(1) APPLICATION OR SERVICE- The term `application or service' means any information or service--
(A) by which an end-user through software or a device engages in an exchange of data or information; and
(B) conveyed over communications.
(2) BITS- The term `bits' or `binary digits' means the smallest unit of information in which form data is transported on the Internet as a single digit number in base-2.
(3) COMMISSION- The term `Commission' means the Federal Communications Commission.
(4) COMMUNICATIONS- The term `communications'--
(A) means any voice, video, or data application or service, regardless of the facilities or technology used, that--
(i) is a transmission to subscribers by use of--
(I) the public rights-of-way;
(II) spectrum;
(III) numbering or addressing resources; or
(IV) other inputs licensed or managed by a unit of local government, or a private entity working in concert with such unit of local government, for the benefit of the public;
(ii) is offered to the public, or as to such classes of subscribers as to be effectively available directly to the public, with or without a fee; and
(iii) enables an end user, as part of such service, to transmit content of their own design or choosing between or among points specified by such user;
(B) includes interactive on-demand services, as such term is defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)); and
(C) does not include cable service, as such term is defined in section 602(6) of the Communications Act of 1934 (47 U.S.C. 522(6)).
(5) CONTENT- The term `content' means information--
(A) in the form of writing, signs, signals, pictures, and sounds of all kinds, including stored information requested by an end user; and
(B) that is generated based on the input or request of such user.

(6) PERSON- The term 'person' means any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.

(7) NETWORK OPERATOR-
(A) IN GENERAL- The term 'network operator' means any person who owns, operates, controls, or resells and controls any facility that provides communications directly to a subscriber.
(B) OBLIGATIONS- Any obligation imposed on a network operator by the provisions of this Act shall apply only to the extent that such network operator is engaged in providing communications.

(8) SUBSCRIBER- The term 'subscriber' means any person who--
(A) is an end user of an application or service provided through communications; and
(B) consumes or provides goods provided through such application or service.

(9) TRANSMISSION COMPONENT- The term 'transmission component' means the portion of communications which enables an end user to transmit content of their own design and choosing between or among points specified by such user.

SEC. 4. OBLIGATIONS OF NETWORK OPERATORS.

(a) In General- A network operator shall--
(1) not interfere with, block, degrade, alter, modify, impair, or change any bits, content, application or service transmitted over the network of such operator;
(2) not discriminate in favor of itself or any other person, including any affiliate or company with which such operator has a business relationship in--
(A) allocating bandwidth; and
(B) transmitting content or applications or services to or from a subscriber in the provision of a communications;
(3) not assess a charge to any application or service provider not on the network of such operator for the delivery of traffic to any subscriber to the network of such operator;
(4) offer communications such that a subscriber can access, and a content provider can offer, unaffiliated content or applications or services in the same manner that content of the network operator is accessed and offered, without interference or surcharges;
(5) allow the attachment of any device, if such device is in compliance with part 68 of title 47, Code of Federal Regulations, without restricting any application or service that may be offered or provided using such a device;
(6) treat all data traveling over or on communications in a non-discriminatory way;
(7) offer just, reasonable, and non-discriminatory rates, terms, and conditions on the offering or provision of any service by another person using the transmission component of communications;
(8) provide non-discriminatory access and service to each subscriber; and
(9) post and make available for public inspection, in electronic form and in a manner that is transparent and easily understandable, all rates, terms, and conditions for the provision of any communications.

(b) Preserved Authority of Network Operators—Notwithstanding the requirements described in subsection (a), a network operator--

(1) may--

(A) take reasonable and non-discriminatory measures to protect subscribers from adware, spyware, malware, viruses, spam, pornography, content deemed inappropriate for minors, or any other similarly nefarious application or service that harms the Internet experience of subscribers, if such subscribers--

(i) are informed of the application or service; and

(ii) are given the opportunity to refuse or disable any such preventative application or service;

(B) support an application or service intended to prevent adware, spyware, malware, viruses, spam, pornography, content deemed inappropriate for minors, or any other similarly nefarious application or service that harms the Internet experience of subscribers, if such subscribers--
(i) are informed of the application or service; and
(ii) are given the opportunity to refuse or disable any such preventative application or service; and
(C) take reasonable and non-discriminatory measures to protect the security of the network of such operator, if such operator faces serious and irreparable harm; and
(2) shall--
(A) give priority to an emergency communication;
(B) comply with any court-ordered law enforcement directive; and
(C) prevent any activity that is unlawful or illegal under any Federal, State, or local law.

SEC. 5. COMPLAINTS REGARDING VIOLATIONS.

(a) Complaint- Any aggrieved party may submit a written complaint to the Commission seeking a ruling that a network operator has violated a requirement described in section 4(a).
(b) Content of Complaint- In any complaint submitted under subsection (a) an aggrieved party shall make a prima facie case that--
(1) a network operator violated a requirement of section 4(a);
(2) such violation was not a preserved authority described in subparagraph (A) or (B) of section 4(b)(1); and
(3) such violation is harmful to such party.
(c) 7-DAY ACCEPTANCE PERIOD- Not later than 7 days after the date of the submission of a complaint under subsection (a), the Commission shall issue a decision regarding its acceptance or denial of the prima facie case made by an aggrieved party.
(d) Cease and Desist--
(1) IN GENERAL- If the Commission accepts the prima facie case of an aggrieved party under subsection (c), a network operator shall be required to cease and desist the action that is the underlying basis of the complaint for the duration of the proceeding on such complaint, until such time as the Commission may rule that a violation of a requirement of section 4(a) has not occurred.
(2) AUTHORITY TO EXTEND CEASE AND DESIST ORDER- The Commission shall have the authority to extend any
cease and desist order to any similarly situated person as the Commission determines necessary and appropriate.

(e) Burden of Proof- If the Commission accepts the prima facie case of an aggrieved party under subsection (c), a network operator shall bear the burden of proving that--
(1) no violation of section 4(a) occurred; or
(2) such violation was a preserved authority described in section 4(b).

(f) Final Decision-
(1) 90-DAY PERIOD- Not later than 90 days after the date of the submission of a complaint under subsection (a), the Commission shall issue a final decision regarding the request for a ruling contained in such complaint.
(2) FAILURE TO ISSUE DECISION- If the Commission fails to issue a decision at the expiration of the 90-day period described in paragraph (1), a violation of a requirement of section 4(a) shall be deemed to have occurred.

(g) Rules of Construction-
(1) DELEGATION-
(A) IN GENERAL- Nothing in this section shall be construed--
(i) to prevent the Commission from delegating any authority granted to it under this section to a relevant office or bureau pursuant to the authority granted the Commission under section 5(c) of the Communications Act of 1934 (47 U.S.C. 155(c)); or
(ii) to limit the Commission from adopting any appropriate procedures pursuant to any other provision of law.
(B) LIMITATION- The rule established under subparagraph (A) shall only apply if at the expiration of the 90-day period described in subsection (f)(1)--
(i) the Commission issues a final decision that is ripe for judicial review; or
(ii) a violation of a requirement of section 4(a) shall be deemed to have occurred under subsection (f)(2).
(2) PETITION FOR RECONSIDERATION-
(A) IN GENERAL- Nothing in this section shall be construed to affect the ability of any eligible party to file a petition for reconsideration under section 405 of the Communications Act of 1934 (47 U.S.C. 405).
(B) TIMING-
(i) 90-DAY PERIOD- Not later than 90 days after the date of the submission of a petition for reconsideration under section 405 of the Communications Act of 1934 (47 U.S.C. 405), the Commission shall issue an order granting or denying such petition.

(ii) FAILURE TO ISSUE AN ORDER- If the Commission fails to issue a decision at the expiration of the 90-day period described in clause (i), the previous decision of the Commission shall be considered affirmed and final for purposes of judicial review.

(3) JUDICIAL REVIEW- Notwithstanding section 402(b) of the Communications Act of 1934 (47 U.S.C. 402(b)) and any other provision of law, any appeal of a decision of the Commission under this section shall be made to United States district court for the district in which the principle place of business of the aggrieved party is located.

(4) INTERVENTION BY THIRD PARTIES- Nothing in this section shall be construed to prevent any interested person from intervening in any appeal of a decision of the Commission in accordance with section 402(e) of the Communications Act of 1934 (47 U.S.C. 402(e)).

SEC. 6. PENALTIES.

(a) In General- If the Commission issues a ruling under section 5 that a network operator is in violation of a requirement of section 4(a), such network operator shall be subject to the penalties prescribed under section 501 of the Communications Act of 1934 (47 U.S.C. 501).

(b) Separate Violations- Each violation of a requirement of section 4(a) shall be treated as a separate incident for purposes of imposing penalties under subsection (a).