

January 31, 2014

Honorable Fred Upton, Chair  
Honorable Greg Walden  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Information Technology and Innovation Foundation (ITIF)<sup>1</sup> applauds the House Committee on Energy and Commerce for undertaking the arduous task of modernizing the Communications Act and appreciates this opportunity to comment on the Committee's white paper.<sup>2</sup> ITIF looks forward to future hearings and white papers as the Committee moves forward with this important project. The Communications Act of 1934 (the Act) is a complex patchwork of laws, and the time is ripe for a comprehensive update.

The Committee's white paper traces the major legislative changes made to the Act since 1934, some of which represent wholesale shifts in competition policy. We urge the Committee to craft a law that respects dynamic innovation in communications technologies and markets. As the white paper acknowledges, these technologies are unpredictable, and the speed at which communications markets change direction can be hard to judge. Any update of the Act should proceed with humility, refraining from specific predictions as to how future Americans will communicate. A light-touch federal framework that relies primarily on the market to define the contours of our communications markets will best allow innovation to flourish.

That said, there is undoubtedly a continued role for the Federal Communications Commission (FCC or Commission). The FCC should be able to intervene where market participants engage in anti-competitive behavior or consumers are being harmed. The

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<sup>1</sup> The Information Technology and Innovation Foundation (ITIF) is a non-partisan research and educational institute – a think tank – whose mission is to formulate and promote public policies to advance technological innovation and productivity internationally, in Washington, and in the states. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues.

<sup>2</sup> The Committee on Energy and Commerce, "Modernizing the Communications Act" (white paper, 2014) *available at* <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf>.

Commission can also play a key role in convening stakeholders to encourage cooperation. Furthermore, the federal government should be empowered, and funded, to facilitate more widespread broadband adoption and deployment.

The core of the Act, its general organization and basic principles, was put into place 89 years ago. The Communications Act of 1934 was premised on regulating communications in a similar way to then monopoly railroads. We have since recognized that a competitive market in interstate transportation make railroad regulation obsolete. Any Communications Act update should similarly recognize that communications markets are mostly competitive – the vast majority of Americans have access to multiple digital video platforms, mobile wireless carriers, and broadband services, and increasingly telephony is a simple app that runs on broadband networks. We have already moved away from the assumption that these networks are natural monopolies in practice; it is time to formalize this fact into law.

Even just in the 18 years since the last major update to the Act the communications market has changed significantly. We are all well familiar with the recent explosion of services riding over our networks, but a simple thought experiment illustrates just how dramatic the changes of the last twenty years have been. Imagine if Congress had enacted the Telecommunications Act of 1999 instead of the Telecommunications Act of 1996. Would encouraging facilities-based competition in an attempt to build a duplicative phone network have seemed wise when by then it was clear broadband networks were key? Would the rise of the Web and early IP voice communications have given us pause? The changes we have witnessed since the '96 Act represent a break in our ability to understand and predict this complex sector. It is time to update the Act, but not in a way that assumes to know what direction our communications and media markets are heading or what would be best for them.

In 1996 voice, video, and data were carried over separate “wires” and constituted separate services. Soon after the '96 Act, communications began to converge on the IP platform. With this ongoing convergence comes improved competition and dynamism in communications markets. Many laws, especially those designed for regulating legacy services in a monopoly era, no longer make sense where competition is established. A general shift towards policing competitive markets will work better than up-front regulation, though there are some areas that will continue to need prospective rules.

Universal service for broadband access, for example, will require continued government support. Similarly, public safety, accessibility, and spectrum management will also need clear rules. Any rewrite of the Act should also ensure that there is clarity on what is and what is not VoIP and ensure that just because a service simply transmits voice over an IP network, does not mean that it gets swept up in a regulatory voice framework. Simply clarifying the regulator’s jurisdiction, those areas that require affirmative, up-front regulation, would be an important first step in providing much needed certainty.

The relationship between competition and innovation, and more specifically the role of competition in telecommunications markets, has been hotly debated for years. These days some claim that a lack of competition in broadband access leaves consumers with high prices and slow speeds. Not only does ITIF believe these claims are not empirically true,<sup>3</sup> but, furthermore, such views generally represent short-sighted, old-fashioned economic thinking. It is all too easy to romanticize innovation, to think innovation happens only in garages. While such innovation is no doubt important, a Communications Act update should avoid hampering innovation and investment in existing networks: incumbents should be allowed to innovate as well.

Indeed, the law’s inability to keep pace with rapid changes in technology is a common concern. The white paper rightly identifies some steps to overcome this problem. The law should certainly move away from the siloed structure of the old Act and attempt to treat similar services alike instead of picking out specific technologies for regulation. That said, the notion of “technology neutrality” is a difficult one, and in some circumstances different architectures may require different approaches. For example, in the context of the recently vacated net neutrality rules, the Commission’s decision to exempt wireless services from the anti-discrimination rule was entirely reasonable, as the capacity constraints on these networks are significant. Even here, the goal should be less about different rules for different technologies and more about reasonable rules based on the performance of the underlying network architecture.

ITIF believes the best way to regulate in this space is to encourage a multi-stakeholder model of governance that allows for flexible, subtle application of clearly

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<sup>3</sup> See Richard Bennett, Luke A. Stewart, & Robert D. Atkinson, “The Whole Picture: Where America’s Broadband Networks Really Stand” (Information Technology and Innovation Foundation, Feb. 2013) <http://www.itif.org/publications/whole-picture-where-america-s-broadband-networks-really-stand>.



articulated principles. Such an approach can encourage continued cooperation in increasingly complex markets and recognize where it makes sense to treat different technologies differently.<sup>4</sup> Targeted reforms to the Federal Advisory Committee Act could help facilitate government leadership in multi-stakeholder institutions that can best address rapidly changing markets.

ITIF congratulates and supports this initial investigation to updating the Communications Act. We applaud the Committee's recognition that this is a complex environment not well suited to monopoly style regulation. We urge the Committee to move forward with this important work and stand ready to assist in any way we can.

My best regards,

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<sup>4</sup> See Philip J. Weiser, "The Future of Internet Regulation" *U. of Calif., Davis Law Review* Vol. 43 (2009) 529, [http://lawreview.law.ucdavis.edu/issues/43/2/articles/43-2\\_Weiser.pdf](http://lawreview.law.ucdavis.edu/issues/43/2/articles/43-2_Weiser.pdf).