Modernizing the Communications Act

The Committee on Energy and Commerce is issuing a series of white papers as the first step toward modernizing the laws governing the communications and technology sector. The primary body of law regulating these industries was passed in 1934 and while updated periodically, it has not been modernized in 17 years. Changes in technology and the rate at which they are occurring warrant an examination of whether, and how, communications law can be rationalized to address the 21st century communications landscape. For this reason, the committee initiated an examination of the regulation of the communications industry, and offers this opportunity for comment from all interested parties on the future of the law.

History of Communications Laws

The Communications Act of 1934 ("the Act") consolidated the regulation of telephone, telegraph, and radio communications into a single statute. Title I of the Act created the Federal Communications Commission, replacing the Federal Radio Commission as the body tasked with implementation and regulation of the law. Title II addressed common carrier regulation of telephone and telegraph, modeled on the assumption of a utility-like natural monopoly, and title III addressed radio communications, expanded in 1967 to include television broadcasting. The three other original titles addressed administrative and procedural matters, penalties and fines, and miscellaneous matters. An additional title was added in 1984 covering cable television.

One of the major changes to the Act was the Cable Television Consumer Protection and Competition Act of 1992 ("the Cable Act"), which aimed to foster competition, diversity, and localism in the cable television industry. Among other things, the Cable Act prescribed federal rate regulation for cable services, established the must-carry and retransmission consent rules for cable providers, and set consumer protection standards. Congress also required the FCC to report annually on the progress of competition in the video marketplace.

In 1993, the Omnibus Budget Reconciliation Act amended the Communications Act with the creation of the statutory classification of Commercial Mobile Radio Services (CMRS) – what many commonly call cellular or wireless services – and authorized the FCC to conduct auctions for spectrum licenses. The telecommunications provisions of OBRA were intended to promote competition in the mobile service sector. To measure the progress toward this goal, Congress required an annual report from the Commission analyzing the competitive conditions in the industry.

The most comprehensive overhaul of the Act was the Telecommunications Act of 1996 ("the 1996 Act"), 62 years after the passage of the Communications Act. Enacted 12 years after the break-up of AT&T, the legislation was intended to increase competition and reduce regulatory barriers to entry in the telecommunications marketplace, in order to promote lower prices and better services. The 1996 Act represented a fundamental shift away from the assumption of a natural monopoly for the delivery of telecommunications services to a model that contemplated competition for local phone service. The 1996 Act set forth requirements for interconnection between carriers and wholesale access to incumbent networks, aiming to open both the local and long-distance markets to new entrants and lower barriers to entry for new

competitors. In addition, it codified the long-standing national policy of universal service and required that telecommunications carriers contribute to a subsidy fund to preserve and advance universal service. The 1996 Act also required the FCC to forbear from regulating carriers or services if the regulation is not necessary to ensure reasonable rates, protect customers, or otherwise promote the public interest.

One key result of the 1996 Act is the distinction created between "telecommunications" services and "information" services. This distinction came as the Commission was struggling with how the Communications Act could address telephone carriers' entry into data services. Under the 1996 Act provisions, "telecommunications" services were subject to common carrier regulation under Title II, while "information" services were not. Once the law distinguished that "information" services would be largely unregulated while "telecommunications" services would remain highly regulated, information services grew at a rapid pace. Data services and the commercial Internet, which are also largely exempt from state regulation, grew out of services that were categorized as "information" services. While the 1996 Act directed the FCC to initiate an inquiry into the deployment of advanced services, it did not address the Internet in a forward-looking manner.

In 2005, the Deficit Reduction Act included the Digital Television Transition, which shifted broadcast television from analog transmission to digital. The transition to a more efficient technology allowed for higher quality broadcasts and also freed up valuable spectrum for commercial wireless services and public safety communications. The cutoff deadline for full-power broadcasters to turn off their analog signal was ultimately set as June 12, 2009, after multiple delays. The transition resulted in 108 MHz of reclaimed spectrum, 24 MHz of which was allocated to public safety use. The remainder was auctioned for commercial purposes, bringing a total of $19.5 billion in proceeds.

In 2012, the Middle Class Tax Relief and Job Creation Act expanded the Commission's spectrum auction authority, authorizing the Commission to conduct two types of voluntary incentive auctions designed to provide an economic incentive for licensees to relinquish spectrum licenses for compensation. Under the legislation, the FCC has general authority to hold incentive auctions in which a licensee may relinquish spectrum for the Commission to auction. The law also grants authority for a one-time, specialized incentive auction in which broadcast television stations may relinquish spectrum for Commission auction. The grant of authority for both the general auctions and the broadcast incentive auction expires in 2022.

As technology evolved and the communications market changed, the Commission's authority has evolved as well through both judicial decisions and congressional action. The FCC's jurisdiction includes wireline and wireless communications, television and radio broadcast, satellite operators, and cable television. The Commission is also able to regulate by exercising ancillary jurisdiction over an issue when their general grant of authority covers the regulated subject, and the regulation contemplated is reasonably ancillary to the performance of the Commission's statutorily mandated responsibilities.

Current State of the Law and Criticisms

Currently, the Communications Act consists of seven titles: general provisions, common carriers, provisions related to radio, procedural and administrative provisions, penal provisions and forfeitures, cable communications, and miscellaneous provisions. Rules adopted by the FCC to implement the provisions of the Act are in Title 47 of the Code of Federal Regulations.

One of the most common criticisms of the Communications Act is the so-called "siloed," sector-based nature of the law and resulting regulation. Each of the titles governs a specific sector of the communications economy with inconsistent approaches to definition and regulation. By dividing the overall regulatory scheme into separate titles based on specific network technologies and services, the law does not contemplate the convergence of technologies in the modern digital era. While there were historic reasons for separating the Act into service-based titles, the Act and subsequent changes to it did not envision the intermodal competition that exists today. As a result, there are different regulatory obligations based on the mode of technology, even though many of the technologies are functionally equivalent either technologically or from the consumer perspective. Because the Commission is structured in much the same way as the Act, the assorted bureaus and divisions within the agency may duplicate certain functions and fail to cover other functions, resulting in a lack of clear regulatory authority.

Changes to the Communications Act have become problematic due to the rapid pace of innovation in technology. Narrow statutory provisions tailored to address specific circumstances can quickly become outdated by the pace of innovation. Conversely, broad prescriptive rules can have unintended consequences for innovation and investment.

A consequence of the technology-focused approach of the Act has been regulatory uncertainty with respect to FCC authority to regulate aspects of the Internet within U.S. borders. Because the regulatory approach varies depending on the classification of a service, data-based services such as the Internet and VoIP have presented classification challenges for the Commission. At the same time, absent clearly delineated classification for certain services, the Commission has nonetheless sought to impose regulations that stem from its Title II authority. At best, this approach creates uncertainty for innovators and opens the Commission to legal challenges. It is vital that any changes to the law account for the impact on consumers and industry alike.

Questions for Stakeholder Comment

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

2. What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?

3. Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?

4. As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology-neutral?

5. Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

These questions address thematic concepts for updating the Communications Act; and the committee intends to issue subsequent white papers on discrete issues. In addition to these, the committee will accept comments on any aspect of updating communications law. Please respond by January 31, 2014 to CommActUpdate@mail.house.gov. For additional information, please contact David Redl at (202) 225-2927.