

TO: COMMITTEE ON ENERGY & COMMERCE

UNITED STATES HOUSE OF REPRESENTATIVES

FROM: MESCALERO APACHE TELECOM, INC.

RE: MODERNIZING THE COMMUNICATIONS ACT

JANUARY 28, 2014

Mescalero Apache Telecom, Inc. (MATI) was formed in 1995 to provide communications services to the Mescalero Apache Tribe located in rural South Central New Mexico and is one of only eight tribally owned communications providers in the United States. MATI began providing service in 2001. Prior to MATI, the Mescalero Apache people had a telephone penetration rate of less than 50%. Today, 100% of the community has access to some form of broadband service.

MATI serves an average population density of two customers per square mile. A low population density along with extended average loop lengths, combined with mountainous terrain, cause the average costs per loop for MATI to substantially exceed the national average loop costs for service in rural areas. Over 80% of the Mescalero Apache Tribe qualifies for Lifeline Support.

MATI has been successful in changing the communications life of the Mescalero Apache people. It serves as an example of the positive use of Universal Service Fund (USF) support and Rural Utilities Service (RUS) funding by building infrastructure, and providing both basic and advanced services to its community. Without these programs, the Mescalero Apache people would still be largely unserved.

MATI appreciates the commitment of the Committee on Energy and Commerce to examine and update communication law, especially as it relates to service to rural and tribal areas. As the Committee has indicated, technology, and the way consumers use that technology, is moving at a much quicker pace than the laws and regulations that govern them.

There are many aspects of current communications law that the Committee should examine and reform, including the use of Quantile Regression Analysis for the provision of USF support.

While this list is not totally inclusive, MATI suggests three areas that the Committee should examine:

*The contributions methodology of the USF. While many aspects of the support mechanisms of the USF have been examined and reformed since the implementation of the National Broadband Plan, the methods of how the USF is funded have been wholly ignored. The contributions methodology must reflect the realities of today's wired and wireless network, and capture all users of the network, be it traditional voice, data, streaming video or other advanced services. No subset of network users should carry a disproportionate burden of funding the USF while other users get a "free ride." MATI believes that contributions reform can lead to adequate levels of funding for the USF and negate the need for a "budget ceiling" for the USF.

*The requirements of the Tribal Mobility Fund. The Federal Communications Commission (FCC) established the Tribal Mobility Fund in its 2011 USF/ICC Transformation Order to provide one-time support to deploy mobile voice and broadband services to unserved tribal lands. However, many tribal communications providers, which have most of their tribal assets obligated in trust agreements, cannot get access to the Fund because of the irrevocable letter of credit required by the FCC. MATI recognizes the FCC's need to fund economically viable projects. However, MATI and other tribally owned communications providers have not been able to acquire an irrevocable letter of credit from RUS (MATI's current lender) or other lenders in the communications arena. Also, for tribal entities, it's difficult to acquire the spectrum needed to provide wireless services.

*The creation of a Tribal Broadband Fund. A Tribal Broadband Fund dedicated to recognizing and addressing tribal communications challenges would progress the deployment of broadband infrastructure on native lands. Funding is needed to accelerate broadband infrastructure and maintain day-to-day operation of networks in high-cost tribal areas. The Fund, first recommended in the National Broadband Plan, is supported by the National Congress of American Indians, the Native Telecom Coalition for Broadband and the National Tribal Telecommunications Association.

The need for modern communications services on tribal lands is more important than ever. Education, healthcare and other quality-of-life issues are vastly impacted by the lack of up-to-date communications services. Also, maintaining native culture for young tribal community members will rely on adequate communications tools.

MATI looks forward to working with the Committee to move forward on reforms that will provide robust and affordable communications services to tribal communities. Please let us know how we can assist or provide further information. MATI contact: Randy Tyree, GRTyree Consulting, [REDACTED] or [REDACTED].

January 30, 2014

Hon. Fred Upton
Chairman
Energy and Commerce Committee
US House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Hon. Greg Walden
Chairman
Communications and Technology Subcommittee
Energy and Commerce Committee
US House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Re: Comments on Communications Act Modernization

I am a MA Fellow at the Mercatus Center at George Mason University and a full-time graduate student of economics. Though I am only 23 years old, I am an example of someone who has grown up with the internet. I am co-authoring a paper on the state of American broadband.

Through my five years of studying economics, I have learned about different schools of thought. My conclusion is that democracy, though said to be the voice of the people, does not allow for individual's preferences to dictate winners and losers the way free-market capitalism does. While I can vote at 18, it doesn't mean my candidate will win. However, in a market, every individual matters. If I don't like the practices of a broadband provider, I do not have to purchase their services. If the market on broadband becomes heavily regulated, then I will be forced to buy from the companies that politicians support, even if I didn't vote for them.

The United States has a very competitive broadband market. Intermodal competition between DSL, cable, fiber and wireless providers is a checks-and-balances system, ranked #3 in the world by the OECD. However, we don't know how these technologies might combine in the future or what new technologies will emerge. As such, the Communications Act with its regulatory silos must go. It doesn't reflect reality or position America for network innovation in the future.

One of the most important aspects of regulatory policy that I have learned is the benefits of an ex post regime over an ex ante one. In other words, competition is always better than regulation. Regulation has inherent costs, so in competitive industries, of which telecommunications is, it makes more sense to wait for evidence of harm before acting. It brings to mind the old cliché, "If it ain't broke, don't fix it."

Lately, certain Congressional representatives and federal spokespersons have used scare tactics about problems that could potentially occur if a market/industry is not heavily regulated. This is

a form of manipulation of their public position that flies in the face of the evidence of the many capital intensive industries that have transitioned from sector-based regulation to competition regimes, including airlines and trucking. Communications is unquestionably competitive, and can now be governed by competition law, not sector-specific regulation.

In market-based industries, the consumer gets what he/she pays for. Not all cars are the same price, nor should broadband service be. Markets are great because they can correct themselves through competition, whereas regulations can only be corrected with more regulation. Additionally, consumers today are more empowered than ever. With social media tools such as Twitter and Facebook, consumers can bring a company to its knees.

Thank you for your consideration.

Sincerely,

Michael Horney
MA Fellow, Mercatus Center





MICROSOFT'S RESPONSE TO THE WHITE PAPER
OF THE COMMITTEE ON ENERGY AND COMMERCE
ON MODERNIZING THE COMMUNICATIONS ACT

January 31, 2014

Microsoft appreciates the opportunity to provide input to the Committee in response to its first White Paper on the subject of *Modernizing the Communications Act*. This is an important topic, and Microsoft continues to consider the broad thematic questions raised in the White Paper on the overall structure and operation of the Communications Act and the Federal Communications Commission. While Microsoft is not responding to the specific questions raised in the White Paper, it would like to provide input on two themes that it believes should underlie any consideration of modernizing the Communications Act and which are of particular importance to Microsoft as a global provider of cloud communications products and services.

Broadband Deployment

Broadband Internet access is rapidly becoming the lifeblood of the modern American – and global – economy. In 2012, the Boston Consulting Group estimated that the Internet accounted for nearly 5% of all U.S. economic activity, more than the federal government, and more than traditional economic sectors such as agriculture, education, or construction.¹ And the Internet economy is projected to grow substantially over the next several years, outpacing most traditional segments of the economy.² Moreover, the critical role played by broadband Internet access to the economy at large is even more fundamental to devices and services companies such as Microsoft. Without broadband, consumers and businesses lack the ability to gain access to and consume Microsoft's cloud services, and without broadband, consumers and businesses cannot fully take advantage of the devices it sells, which are largely used today to consume cloud services. It cannot be overstated how critical broadband Internet access is to companies like Microsoft, to the consumers to whom it sells its products and services, and to the American economy at large.

¹ Boston Consulting Group, *The Internet Economy in the G-20*, (March 2012)

<http://www.bcg.com/documents/file100409.pdf>.

² *Id.*

It is, therefore, paramount that the U.S. strive to achieve the best system of broadband Internet access in the world. Much work remains to achieve that goal. According to Akamai's most recent *State of the Internet* report for the third quarter of 2013, while the U.S. ranks 9th in the rate of adoption of higher speed broadband (defined as 10 mbps and above), it is not in the top ten in either the overall broadband adoption rate (defined as 4 mbps and above) or in average peak connection speeds.³ A recent Boston Consulting Group study found that the U.S. ranked 6th in a comparison of the ability of national economies to participate in the global Internet economy.⁴ And in a 2013 report, the New America Foundation found that consumers in most major U.S. cities pay higher prices for slower broadband speeds than their international peers.⁵ Finally, Pew Research Center research indicates that nearly 30% of Americans have not adopted broadband Internet access at home, and the lack of home access is particularly acute among lower income households.⁶ We can be proud of our national accomplishments thus far in broadband deployment and adoption, but we can and should do even more, especially if we aspire not only to predominance in the global Internet economy, but also to full participation by all of our citizens.

Deployment of broadband facilities and the provision of broadband Internet access should be the central focus of any modernization of the Communications Act. Congress should use all the tools at its disposal to encourage not only more, but also better, broadband Internet access. In doing so, it should consider "more" and "better" across multiple dimensions. For example, "more" should encompass a greater range of competitive choices in broadband Internet access, as well as attention to unserved and underserved geographies and populations. "Better" should include not merely higher broadband speeds, but should also reflect the fact that broadband Internet access will need to continue improving and evolving long after Congress puts a new framework in place. That framework will need to look forward and avoid directly or indirectly placing barriers to innovation and competition in broadband networks, such as limitations on dynamic and unlicensed use of spectrum for broadband Internet access. In short, promoting not only world-class, but best in class broadband Internet access for all Americans should be the primary focus of any consideration in modernizing the Communications Act.

Over-the-Top Applications and Services

In addition to facilitating more and better broadband Internet Access, Communications Act reforms must also take into consideration the factors that drive investment and innovation in Internet-based applications and services. Policy makers need to bear in mind why people subscribe to broadband Internet access services, how consumer welfare is enhanced through entry by long tail competitors in applications and services, and importantly, the range of new applications and services that are, and will be, an important part of the broadband ecosystem. In considering whether and how to modernize the Communications Act, it is imperative that

³ http://www.akamai.com/dl/akamai/akamai-soti-q313.pdf?WT.mc_id=soti_Q313

⁴ https://www.bcgperspectives.com/content/articles/digital_economy_telecommunications_greasing_wheels_inter_net_economy/#chapter1

⁵ http://newamerica.net/sites/newamerica.net/files/policydocs/Cost_of_Connectivity_2013_Data_Release.pdf.

⁶ <http://pewinternet.org/Reports/2013/Broadband.aspx>

Congress therefore not reflexively bring the existing regulatory paradigm into any new or revised Communications Act. A robust applications and services market drives broadband adoption and increases broadband usage to the benefit of the economy, the consumer, and the entire broadband ecosystem. Moreover, because the ecosystem is global, in modernizing the Communications Act Congress should be mindful not to disadvantage U.S.-based companies vis-à-vis their global competitors. Congress should carefully evaluate whether regulation is actually required to achieve particular policy objectives, and where it is required, work to ensure that global competitors offering Internet services in the United States comply with U.S. law.

Microsoft thanks the Committee for the opportunity to provide this response to the Committee's White Paper, and it looks forward to ongoing discussion concerning the modernization of the Communications Act. For questions or additional information, please contact Paula Boyd, Director, Government and Regulatory Affairs at [REDACTED] or [REDACTED] or John Sampson, Director Government Affairs at [REDACTED] or [REDACTED]



**Minority Media &
Telecom Council**

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February 4, 2014

The Honorable Fred Upton
Chairman
House Energy and Commerce Committee
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
House Energy and Commerce Committee
2182 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton and Chairman Walden:

The Minority Media and Telecommunications Council (MMTC) respectfully submits these initial recommendations on updating communications law to maximize opportunities in the broadband ecosystem for minority consumers, entrepreneurs, and business owners.¹

- Consider ways to structure the Act to prioritize increasing opportunities for MWBE ownership and participation.
- Encourage innovation, experimentation and investment to facilitate first-class digital citizenship for people of color.
- Protect universal service provisions as a means to correct market failures and guarantee access and opportunities for unserved and underserved individuals, schools and libraries, and communities.

¹ MMTC respectfully requests consideration of these recommendations despite the delay in filing.

Hon. Fred Upton and Hon. Greg Walden

February 4, 2014

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- Clarify laws that impact development of broadband infrastructure to ensure economic development and consumer access in underserved communities.

We are encouraged by your leadership in revisiting the Act, and we look forward to working closely with Members of Congress to ensure that our telecommunications laws are designed to address to the technological, cultural, and economic challenges of the 21st Century.

Sincerely,

David Honig

David Honig
President

Attachment



**MODERNIZING THE COMMUNICATIONS ACT TO PROMOTE DIVERSITY,
EQUAL OPPORTUNITY AND MINORITY OWNERSHIP
IN THE MEDIA, TELECOM AND INTERNET INDUSTRIES**

INTRODUCTION

The Minority Media and Telecommunications Council (MMTC) is a non-partisan, non-profit, and market-oriented advocacy organization that seeks to preserve and expand minority ownership and equal opportunity in the media and telecommunications industries, and to close the digital divide. Since 1986, MMTC has advocated before the Federal Communications Commission (FCC) on behalf of the interests of minority business enterprises and communities of color. MMTC works with key stakeholders in public, private, and community sectors, blending public policy reform and social justice advocacy to ensure that communications policy reflects the nuanced 21st century civil rights issues.

MMTC's advocacy spans broadcasting, cable, telecom and Internet, with an emphasis in recent years on bridging the digital divide through telecom reform to encourage first-class digital citizenship for all Americans. In our role as the convener of minority business and social justice stakeholders, MMTC regularly conducts policy briefings and organizes two major annual conferences which, collectively, bring together hundreds of academic and policy experts, government and industry leaders, and entrepreneurs to evaluate how media and broadband technology can advance national civil rights, industry and societal goals, and improve U.S. global competitiveness. Moreover, anticipating the need to modernize the Telecommunications Act of 1996, in January of 2013, MMTC organized the New Telecom and Internet Policy Task Force ("Task Force"),¹ co-chaired by bipartisan former Members of Congress, Edolphus Towns (D-NY) and Clifford Stearns (R-FL). Members of the MMTC Task Force include over 60 distinguished representatives from industry, trade associations, public interest groups, non-governmental organizations, and scholars. The Task Force is currently

¹ See Former Members of Congress Join Forces as Co-Chairs of New Telecom and Internet Policy Task Force, Broadband and Social Justice Blog (Jan. 16, 2013), available at <http://broadbandandsocialjustice.org/2013/01/former-members-of-congress-join-forces-as-co-chairs-of-new-telecom-and-internet-policy-task-force/> (last visited Jan. 30, 2014).

examining how to modernize communications law while advancing diversity and public interest goals, and will separately submit comments throughout this process.

MMTC offers the following four recommendations below in response to congressional inquiry on the modernization of the Telecom Act of 1996.

I. CONSIDER WAYS TO STRUCTURE THE ACT TO PRIORITIZE INCREASING OPPORTUNITIES FOR MWBE OWNERSHIP AND PARTICIPATION.

As Congress frames the next generation of laws governing the communications industries, one theme that should form the nucleus of new legislation is the creation of opportunities for those traditionally excluded from communications ownership - specifically, MWBEs. The increasing importance of our communications sector to our economy, the demographic changes in our society, the vast racial wealth and income disparities, and the historical barriers to MWBE participation demand that Congress take action. Congress should enact legislation that facilitates ownership and participation by MWBEs in both traditional and evolving communications industries.

It is historical fact that our regulated communications industries developed amidst a culture of discrimination and segregation.² Despite later attempts to encourage minority participation, structural discrimination continues to be reflected in media ownership patterns that result from “discrimination in the capital markets, in communities, in the advertising industry, and in the competitive marketplace; by the effects of deregulation and market consolidation precipitated by the 1996 Act; and by various actions and inaction on the part of the FCC, the courts, and Congress.”³ In addition to the challenges in gaining access to capital and overcoming the

² See Federal Communications Commission’s Minority Ownership Task Force, *Minority Ownership Report* (1978), p. 3. “In 1934 when the Communications Act was signed into law, public policy on the assimilation of minorities into the communications industry was nonexistent. Indeed, Blacks, Latin Americans, Asians and American Indians were isolated from the mainstream of American life by generations of racial discrimination and disadvantage. The notion of minority ownership was, therefore, undoubtedly a foreign concept to the communications industry. Yet, even then minority people generally understood the importance of radio to their quest for equality; even though “[t]he radio [was] closed to all speeches for racial equality...”. *Id.* (quoting Dr. Charles Houston, “Don’t Shout Too Soon,” 43 *Crisis* 79 (1936), also quoted by J. Clay Smith, Jr., “For A Strong Howard University Press,” Vol. 121, Part 21, *Cong. Rec.* 27790, 94th Cong. 1st Sess. (Sept. 5, 1975)).

³ *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present*, Ivy Planning Group, LLC (2000), p. 17, available at http://transition.fcc.gov/opportunity/meb_study/historical_study.pdf (last visited Jan. 31, 2014) (“Historical Study”).

Consider this: While the industry took its first steps with the help the Secretary of Commerce

present effects of past discrimination, MWBEs also have to grapple with racial disparities in education and opportunity as well as a growing wealth gap.⁴

and the Federal Radio Commission, the minority community struggled against segregation and second class citizenship. In the **fifty-two year** period between the implementation of the Radio Act of and the Civil Rights Act declaration that racial discrimination is illegal, the minority community fought against segregation, race riots, the Ku Klux Klan, and persecution throughout the legal system. See e.g., The Civil Rights Movement: The civil rights struggle in modern times, CNN Interactive, available at <http://www.cnn.com/EVENTS/1997/mlk/links.html> (last visited Jan. 31, 2014); The Rise and Fall of Jim Crow: A Century of Segregation, PBS, available at <http://www.pbs.org/wnet/jimcrow/segregation.html> (last visited Jan. 31, 2014).

For decades, the FCC's policies favored the awarding of broadcast licenses to the worst exponents of segregation. See, e.g., *Southland Television*, 10 RR 699, *recon denied*, 20 FCC 159 (1955), in which the FCC found that a segregationist theater owner possessed the character required to hold a television license. In its gymnastics, the FCC gave full faith and credit to a Louisiana state law permitting segregation, notwithstanding that law's obvious conflict with the nondiscrimination clause found in the first section of the Communications Act of 1934, 47 U.S.C. §151.

Meanwhile, the 'Golden Age of Radio' passed before the Commission awarded the first minority-owned radio station license. See e.g. Mike Adams, 100 Years of Radio, CaliforniaHistoricalRadio.com, available at <http://www.californiahistoricalradio.com/radio-history/100years/> (last visited Jan. 31, 2014) ("All the big stars and programs and advertisers that made the 1930s and 1940s the "**golden age of radio**" defect to TV. Radio must localize, play records." (emphasis added)); Antoinette Cook Bush and Marc S. Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. 434, 439 (1996). The first minority-owned station was created in 1949 when "J.B. Blayton purchased all the common stock of Radio Atlanta, Inc., owner of radio station WERD." *Id.* at 424 n. 2.

Large corporations, comprised of White men, controlled the early broadcast industry through licenses they received without cost. See Historical Study at p. 7. The opportunities created by early entry set the stage for the modern telecommunications industry. See id. These advantages were not conferred upon minority-owned businesses, which were not awarded a radio license until 1956 or a television license until 1973. See Antoinette Cook Bush and Marc S. Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. at 439. See also The FCC: Seventy-Six Years of Watching TV (2003), available at http://transition.fcc.gov/omd/history/tv/documents/76years_tv.pdf (last visited Jan. 31, 2014) (the first television station was awarded in 1928). By the time that minority owners were able to get a foothold in the industry, the Commission had already licensed its prime broadcast spectrum to nonminority owners. See Antoinette Cook Bush and Marc S. Martin, The FCC's Minority Ownership Policies from Broadcasting to PCS, 48 Fed. Comm. L.J. at 439.

⁴ See id.

As the U.S. is undergoing a fundamental shift to a minority-majority population,⁵ Congress' first order of business regarding any updates to the law should be to ensure that structural discrimination is not repeated, and that MWBEs do not encounter significant barriers to participation in these industries.⁶ MMTC urges Congress to use this opportunity to prioritize diverse participation while modernizing communications law to ensure that the systemic exclusion of significant portions of our population does not persist in these crucial industries.

The following are examples of pro-MWBE initiatives that can be considered by Congress in the modernization of the Act:

- **Restore and Expand the FCC Tax Certificate Policy.**⁷ As MMTC and others have explained, [t]ax incentive policies have been the most effective measures to increase broadcast diversity."⁸ The updated policy could address past concerns while being race neutral, extending it to both media and telecommunications, and including limits on transaction and program size.⁹
- **Amend Section 309(j) to Protect the Designated Entity Program.** Congress should amend section 309(j) to prevent the Commission from interfering with the designated entity (DE) program goals of increasing a diverse array of licensees.¹⁰ The availability of a robust broadband infrastructure is a crucial component to the "access" portion of the first-class digital citizenship equation, and potentially, to economic development within communities of color. The DE program is the primary vehicle upon which the FCC relies to advance statutory requirements in Section

⁵ See e.g., Hope Yen, *Census: White majority in U.S. gone by 2043*, *Associated Press* (Jun 13, 2013), available at <http://usnews.nbcnews.com/news/2013/06/13/18934111-census-white-majority-in-us-gone-by-2043?lite> (last visited Jan. 29, 2014).

⁶ See Reply Comments of the Minority Media and Telecommunications Council, WT Docket No. 13-135 (July 25, 2013), p. 4, available at <http://mmtconline.org/wp-content/uploads/2013/07/MMTC-Reply-Comments-on-Role-MWBEs-in-Wireless-Competition-072513.pdf> (last visited Jan. 31, 2014) ("MMTC MWBE Comments").

⁷ See Initial Comments of the Diversity and Competition Supporters in Response to the NPRM, 2010 Quadrennial Regulatory Review, MB Docket No. 09-182 *et al.* (March 5, 2012), p. 27 ("Initial Comments of DCS").

⁸ *Id.*

⁹ See *id.* at n. 116.

¹⁰ See MMTC Legislative Recommendations to Advance Diversity in the Media and Telecom Industries (Jan. 21, 2009), available at http://mmtconline.org/lp-pdf/MMTC_Legis_Recommendatns_012109.pdf (last visited Jan. 31, 2014) ("MMTC 2009 Legislative Recommendations"). See also MMTC MWBE Comments at p. 9-14.

309(j), which directs the Commission to avert an “excessive concentration of licenses,” and to “disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and business owned by minority groups and women.” The goals of the DE program were circumvented by the Commission’s 2006 rule changes, which have since been successfully challenged in court.¹¹ MWBE bidders must be included in the upcoming incentive spectrum auctions, especially as people of color are increasingly using wireless as a substitute for landline services, and because of the expansive use of smartphones and devices by minorities. Strengthening the DE program positions minority businesses to create wealth and assets that, in turn, create jobs and economic value for communities of color.

- **Continue to Advance Broadcast Diversity Goals.** As Congress examines how to modernize the Communications Act, it must also examine ways to improve opportunities for MWBE ownership and participation in the broadcast industry. MMTC has previously suggested proposals for Congress to consider, including:
 - Update and clarify Section 307(b) to provide that rules adopted to promote localism are presumed to be invalid if they significantly inhibit diversity;¹²
 - Update Section 614 to improve opportunities for MWBEs to secure access to capital;¹³
 - Revise Section 257 to ensure meaningful tracking and oversight on barriers to entry and participation;¹⁴
 - Strengthen EEO enforcement by requiring the FCC to collect and examine data on diverse participation throughout the regulated industries to ensure meaningful regulation and enforcement of equal employment opportunities (EEO) rules across all platforms;¹⁵

¹¹ See Council Tree Communications, Inc. et al. v. FCC, 619 F.3d 235, 259 (3rd Cir 2010) (vacating the 2006 rule changes with respect to the 10-year holding period and the 50% material relationship rule and upholding the 25% attribution rule that was found to have been implemented after sufficient notice and opportunity to comment).

¹² See Initial Comments of DCS at 36.

¹³ See id. at 35-36.

¹⁴ See id.

¹⁵ See e.g. MMTC 2009 Legislative Recommendations.

- Adopt a Flexible License Application Fee Schedule. Congress should also consider developing a fee schedule that reduces arbitrariness and increases flexibility for economically disadvantaged applicants.
- Collect Data to Incorporate Diversity in all FCC Policies. Congress should specifically direct the Commission to incorporate diversity and diverse participation in its data driven policies and to use this data to provide incentives and promote opportunities for MWBE inclusion.

II. ENCOURAGE INNOVATION, EXPERIMENTATION AND INVESTMENT TO FACILITATE FIRST-CLASS DIGITAL CITIZENSHIP FOR PEOPLE OF COLOR.

First class digital citizenship, achieved through affordable broadband access, adoption, and informed use, is the greatest civil rights challenge of the 21st century. Having access to broadband and the skills to take advantage of opportunities made available through broadband are crucial to being able to participate fully in our society and our economy.

In MMTC's recent white paper on broadband policy, we reported that despite slight gains in minority broadband adoption since 2005, African Americans and Hispanics are still under-adopting when compared to Whites.¹⁶ Demand for broadband continues to be stifled by lack of perceived relevance and digital literacy, which remain primary barriers to broadband adoption for African American and Hispanic non-adopters.¹⁷

To ensure that digital inclusion remains a policy priority, Congress should work towards creating a flexible legal and regulatory framework of oversight for broadband that maintains the goals of preserving an "open Internet" and increasing broadband adoption.¹⁸ Broadband growth and technology innovation have been the key drivers for greater digital engagement by all citizens, particularly people of color and other marginalized populations. Over the last decade, the market for broadband services has blossomed due to the long-standing, minimalist

¹⁶ See David Honig and Dr. Nicol Turner-Lee, *Refocusing Broadband Policy: The New Opportunity Agenda for People of Color*, MMTC White Paper (Nov. 20, 2013), p. 7 ("MMTC White Paper on Broadband Policy"). According to Pew's research, 24 percent of Hispanics are non-Internet users as compared to 15% of African Americans and 14% of Whites are not getting online. See *id.*

¹⁷ See *id.* at 8 ("Among non-Internet users, recent Pew research found that 15% of American adults over the age of 18 were not online. According to this data, 34% of non-Internet users reported that the Internet was just not that relevant to them, pointing to the lack of interest, desire and need for it as the main reasons for lack of a connection. Digital illiteracy was cited by 32% of survey respondents as to the reason for their lack of a connection, while 19% cited the expense of service and/or computer as another reason for not getting online.")

¹⁸ See *id.* at 13.

regulatory approach to broadband policy.¹⁹ Championed by former FCC Chairman William Kennard, the light touch approach to Internet regulation has led to both continued investment in infrastructure and rapid deployment of next-generation wireline and wireless networks to nearly every part of the country.²⁰ Today, the vast majority of households in the U.S. are served by broadband ISPs, with most having multiple wireline and wireless options.²¹ Equally as important, the quality of broadband service – measured in terms of speed, the range of offerings and other factors – has greatly increased,²² and prices have fallen.²³

It is essential that the nation continues to deploy and drive the demand for broadband services, and it is equally essential that Universal service and equal access to communications technology and media remain at the core of communications policy initiatives.²⁴ For people of color, first-class *digital citizenship* means full access to the opportunities powered by broadband and the Internet, especially those applications and Internet-enabled devices that drive physical wellness, wealth creation, educational readiness and civic engagement.²⁵ The experimentation and implementation of broadband-enabled platforms that modernize educational systems, facilitate telemedicine innovation, and expand employment and entrepreneurship opportunities should be supported, especially as more populations seek social and economic supports online, rather than in line.

¹⁹ See *id.* at 9.

²⁰ See *id.* at 12.

²¹ For an overview, see National Broadband Map, Summarize: Nationwide, available at <http://www.broadbandmap.gov/summarize/nationwide> (last visited Feb. 2, 2014).

²² See MMTC White Paper on Broadband Policy at p. 9 (referencing recent data from *Measuring Broadband America*, FCC (Feb. 2013), available at <http://www.fcc.gov/measuring-broadband-america/2013/february> (“*Measuring Broadband America - Feb. 2013*”); *Measuring Broadband America*, FCC (July 2012), available at <http://www.fcc.gov/measuring-broadband-america/2012/july> (“*Measuring Broadband America - July 2012*”); *Measuring Broadband America*, FCC (Aug. 2011), available at <http://www.fcc.gov/measuring-broadband-america/2011/august>. For data from the mid- to late-2000s, see *generally Internet Access Services: Status as of June 30, 2010*, FCC (March 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305296A1.pdf.

²³ See MMTC White Paper on Broadband Policy at p. 9 (referencing Shane Greenstein & Ryan C. McDevitt, *Evidence of a Modest Price Decline in US Broadband Services*, National Bureau of Economic Research NBER Working Paper 16166 (July 2010), available at http://www.nber.org/papers/w16166.pdf?new_window=1 (last visited Feb. 2, 2014).

²⁴ See MMTC White Paper on Broadband Policy at p. 9.

²⁵ See *id.* at 5.

III. PROTECT UNIVERSAL SERVICE PROVISIONS AS A MEANS TO CORRECT MARKET FAILURES AND GUARANTEE ACCESS AND OPPORTUNITY FOR UNSERVED AND UNDERSERVED INDIVIDUALS, SCHOOLS AND LIBRARIES, AND COMMUNITIES.

The Commission was created to regulate commerce in the communications industry “so as to make available, so far as possible, to all people of the United States, without discrimination [...] a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges....”²⁶ For this reason, the concept of universal service was written into the legislation that established the Federal Communications Commission and later codified in the Telecommunications Act of 1996.²⁷

Congress should continue to protect Universal Service Fund (USF) programs that ensure access to rural healthcare and advanced telecommunications capabilities for low-income consumers and rural communities, and schools, libraries and community centers. Despite recent attempts to incentivize investment and innovation to *all* Americans, there will likely be communities – including low-income and rural communities – where the business case for broadband service fails.

Over the past few years the Commission has been diligently working to successfully modernize its universal service programs under the statutory framework set forth in the current Act.²⁸ MMTC has firmly advocated for the inclusion of broadband capabilities in the Commission’s low-income Rural Health Care Program²⁹, Lifeline/Link Up³⁰, and E-rate programs³¹ as strategies for narrowing the digital divide.³²

²⁶ See 47 U.S.C. §151.

²⁷ White Paper on Modernizing the Communications Act, Energy and Commerce Committee (Jan. 8, 2014), available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf> (last visited Jan. 31, 2014).

²⁸ See 47 U.S.C. §254.

²⁹ The Rural Health Care Program, another critical universal service provision, is still in need of funding to facilitate telemedicine and telehealth applications. Enabling a reciprocal, remote relationship between patients and doctors, the Rural Health Care Program is an asset for vulnerable populations whose distance from medical facilities often limits their access to quality care. Telemedicine and telehealth services are cost-effective solutions that potentially foster improved life choices and outcomes in rural, remote and even densely poor urban communities. A modernized communications act should parallel advancements in health care and medical provision and ensure benefit to more individuals and states.

³⁰ MMTC Continues to support the modernization of Lifeline/Link Up to support broadband capabilities as a way to narrow the digital divide. See e.g., Comments of the Minority Media and Telecommunications Council, Lifeline and Link Up Reform and Modernization, WC Docket

We urge Congress to continue to support these programs that provide all Americans with a crucial on-ramp to our networks and the ability to participate as first-class digital citizens. Taken together, these USF programs will help to accelerate ubiquitous broadband access for individuals and communities, while enhancing consumer welfare.

IV. CLARIFY LAWS THAT IMPACT DEVELOPMENT OF BROADBAND INFRASTRUCTURE TO ENSURE ECONOMIC DEVELOPMENT AND CONSUMER ACCESS IN UNDERSERVED COMMUNITIES.

In creating a new Act, Congress should do a comprehensive review of the statutory and common laws that impact development of our networks.

The broadband ecosystem consists of interrelated parts that act holistically to energize high-speed broadband networks, deliver content over those networks and ensure that process is repeated without negative consumer impacts. Broadband infrastructure – the backbone of this new digital economy – lays the foundation for the ecosystem.

No. 11-42 *et al.* (Aug. 26, 2011), available at <http://mmtconline.org/lp-pdf/MMTC%20LL%20Comments%20082611.pdf> (last visited Jan. 31, 2014).

³¹ E-Rate reform presents another vital tool to engender first class citizenship among school-age children. Specifically, MMTC urges Congress to continue to support the Commission’s efforts to fund deployment of high-speed, high-capacity broadband schools, classrooms, libraries, and computer labs while ensuring equitable access to funds for low-income and rural schools. *See* MMTC E-Rate Comments. Increased capacity gained through modernization of this program will address the technology needs that are not being met under the current regulatory structure. *See id.* at 2 (“... nearly eighty percent of E-rate school and library participants surveyed reported that their broadband speeds did not fully meet their technology needs. This disparity becomes even greater when community income is taken into account.”). The government should also be careful to ensure that E-rate funds do not increase service costs to the detriment of broadband adoption or infringe upon other USF programs, especially Lifeline/Link Up, as they evolve to provide broadband support for low-income consumers. *See id.* at 10.

³² Given the vital role of networks to the national and global economy, Congress should use the modernization of the Communications Act to ensure that the architecture for future network expansion: 1) provides opportunities for participation in the spectrum allocation process and does not concentrate spectrum licenses in the hands of a few carriers; 2) encourages diverse participation in network infrastructure build out, and promotes or encourages economic development in communities that are most in need of the jobs and business opportunities that accompany network infrastructure build out; 3) prohibits discrimination in broadband deployment by building networks only in wealthy portions of local communities; and 4) promotes network management policies that improve efficiency and spur innovation.

While past network innovation spurred access to increased opportunity, the current network transformation is driving our economy. As FCC Chairman Tom Wheeler recently summarized, our network revolution is inherently distinct from past network revolutions:

Whereas earlier networks *enabled* the economic activities of their eras, our network revolution *defines* virtually all aspects of our current economy. In the process, it places even greater importance on the role Congress has given the FCC to protect, ‘the public interest, convenience, and necessity’ of the nation’s networks.³³

It has been reported that, over the last few years, wireline and wireless providers have invested an average of \$60+ billion annually in maintaining and improving their network infrastructure.³⁴ In order for this trend to continue, Congress should do a comprehensive review of the statutory and common laws that impact broadband infrastructure and spectrum policy to clarify authority and resolve barriers to infrastructure build out.³⁵ Broadband should be geared to promote investment and buildout of networks to ensure access in underserved communities.

In addition to looking at laws that prompt broadband investment and build out, Congress should also be aware of the dangers of digital redlining, whereby infrastructure placement and capacity upgrades do not occur in low-income and minority-neighborhoods.³⁶ As revisions to the Telecom Act are debated, Congress must ensure that digital redlining that intentionally passes over or avoids infrastructure build out in certain zip codes will not be tolerated.

³³ See Tom Wheeler, *Net Effects: The Past, Present, and Future Impact of our Networks* (2013).

³⁴ See MMTTC White Paper on Broadband Policy at p. 9.

³⁵ One example that has been brought to our attention is Section 332, which preserves state and local authority over wireless infrastructure siting, the interpretation of which has caused some obstacles to wireless buildout. See 47 U.S.C. §332(c)(7). “Except as provided... nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities.” 47 U.S.C. §332(c)(7)(A).

³⁶ See e.g., MMTTC President David Honig Delivers Annual Remarks on the State of Social Justice in Media, Telecom, and Broadband and BBSJ Summit (Jan. 15, 2014), available at <http://broadbandandsocialjustice.org/2014/01/mmttc-president-david-honig-delivers-annual-remarks-on-the-state-of-social-justice-in-media-telecom-and-broadband-at-bbsj-summit/> (last visited Feb. 2, 2014).

CONCLUSION

Going forward, MMTC desires to work with Congress as it begins this journey to revisit the 1996 Telecommunications Act. As suggested in our comments, developing a culture where diversity and minority ownership are critical to the final product ensures that the burgeoning opportunities of the 21st century become realities for all citizens of our nation. As our daily practices and creative imaginations become more enriched because of these robust networks, diversity inclusivity must undergird all parts of the Act to enable participation and ownership among people of color.

Respectfully submitted,

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February 4, 2014



January 31, 2014

Via Electronic mail (CommActUpdate@mail.house.gov)

Committee on Energy and Commerce
House of Representatives
United States Congress
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Washington, D.C. 20515-6115

Re: Mobile Future Comments on Modernizing the Communications Act

Dear Members of the Committee on Energy and Commerce:

America's wireless consumers benefit from one of the most vibrantly competitive sectors in our nation's economy. In response to a long-standing, bipartisan, and restrained regulatory approach, communications providers have made historic capital investments in U.S. broadband infrastructure, leading to spectacular growth, dynamic innovation, and new economic opportunities. The burgeoning wireless sector in particular has transformed entire industries, given birth to a thriving "app economy," and equipped consumers with new tools to meet an expanding variety of social, educational, health and other challenges facing their communities and families.

Intense competition drives this dynamic marketplace, amplifying consumer benefits. Mobile innovators compete vigorously across price points, devices, applications, and services, increasing consumer satisfaction and expanding wireless broadband demand. Evidence of this sector's dynamism abounds. Mobile app usage more than doubled in the past year alone.¹ In 2013, tablets outsold desktops and laptops.² Wireless data prices continue to drop.³ Twenty-one

¹ Zoe Fox, Mobile-App Use Increased 115% In 2013, Mashable (Jan. 14, 2014), http://mashable.com/2014/01/14/mobile-app-use-2013/?utm_cid=mash-com-fb-main-link.

² Matt Hamblen, Tablet Shipments Will Surpass Desktops and Laptops in Q4, ComputerWorld (Sept. 11, 2013), http://www.computerworld.com/s/article/9242344/Tablet_shipments_will_surpass_desktops_and_laptops_in_Q4.

³ Analysys Mason, Bring Down the Cost of Mobile Data Traffic: Investing in New Technologies and More Spectrum (Nov. 6, 2013), <http://www.analysismason.com/About-Us/News/Newsletter/Mobile-data-cost-Nov2013/>.

companies across the country now offer 4G/LTE service,⁴ and last year, U.S. mobile subscribers nearly doubled their wireless data usage, consuming an average 1.2 GBs/month.⁵

However, the U.S. must not take its national leadership in mobile innovation for granted. Spectrum is and will be the essential element that powers innovation and investment in response to consumer demand. The Communications Act must facilitate access to additional spectrum to all market participants so that those resources can be brought to bear to serve consumers and to support all of the innovations ahead in the mobile future. Further, the nature of the communications sector has changed radically, and our laws must keep pace. The Communications Act's silo-based structure and permission-based approach to regulation – originally designed for monopolistic and rotary-style telephone systems – harms today's consumers, impedes investment, and chills innovation. Today's Internet marketplace reflects competition among and between platforms (*e.g.*, cable, wireless, telco, and satellite) and services (*e.g.*, VoIP, over-the-top applications, and content providers), all of which vie for users' attention. Although consumers may view these offerings as similar or identical, our laws too frequently subject them to disparate regulatory regimes. When archaic regulations – rather than the marketplace – drive competitive outcomes, competitors will often seek advantages in regulatory disparities rather than fully engaging on a level-playing field. Such outcomes diminish consumer welfare and distort competition.

Mobile Future therefore supports the Committee's efforts to modernize the laws governing our communications and technology sector. The transition now underway, from analog narrowband communications to an all-IP environment, renders the existing legal framework unsuited for the modern marketplace. The white paper penned by the Committee properly recognizes the "regulatory uncertainty" created by a law that contemplates neither "the convergence of technologies in the modern digital era" nor the "intermodal competition" of today.⁶ Congress should reassess the current legal framework to account for a diverse and expanding broadband/Internet ecosystem marked by constant competition and expansive consumer choice. Congress should model its policy on the deregulatory and federalized framework that has generally applied to wireless and broadband services, which have been the most successful segments of the communications sector. In particular, the new market-orientated paradigm should:

- Rely on dynamic competitive forces, rather than *ex ante* regulations that prevent experimentation and innovation;
- Promote access to spectrum resources, particularly from the Federal Government, needed to fuel innovation and investment and meet consumer demand;
- Adopt a federal framework that eliminates the current patchwork quilt of state and local regulations that inhibit innovation and sow confusion; and

⁴ News Release, Mobile Future, New FCC Chair Meets Transformed Wireless Market (Nov. 3, 2013), <http://mobilefuture.org/newsroom/infographic-the-revolution-of-mobile/>.

⁵ Brian X. Chen, U.S. Mobile Internet Traffic Nearly Doubled This Year, N.Y. Times (Dec. 23, 2013), http://bits.blogs.nytimes.com/2013/12/23/u-s-mobile-internet-traffic-nearly-doubled-this-year/?_r=0.

⁶ House Energy and Commerce Committee White Paper, Modernizing the Communications Act (Jan. 8, 2014), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf>. ("Committee White Paper")

- Provide for public safety, consumer protection, and other social-policy priorities (e.g., accessibility) in a technology-neutral way across the Internet ecosystem as a whole via targeted provisions in areas that competition alone may not address.

To assist the Committee as it contemplates the future of communications and technology law, Mobile Future respectfully submits the following resources related to the competitive wireless landscape, the need for non-discriminatory access to spectrum, and the exploration of potential spectrum sharing techniques in conjunction with the continued reallocation of spectrum resources:

- Comments of Mobile Future providing input and data for the FCC’s Seventeenth Annual Report on the State of Competition in Mobile Wireless.⁷
- Comments of Mobile Future responding to the FCC’s mobile spectrum holdings Notice of Proposed Rulemaking.⁸
- Comments of Mobile Future responding to the FCC’s Public Notice seeking comments on the ongoing transition to an all-IP network.⁹
- Mobile Future’s paper, “FCC Spectrum Auctions and Secondary Market Policies: An Assessment of the Distribution of Spectrum Resources Under the Spectrum Screen.”¹⁰

Mobile Future applauds the Committee’s effort to begin a conversation on how “communications law can be rationalized to address the 21st century communications landscape.”¹¹ Data and market trends consistently and clearly indicate that potent competitive forces in America’s mobile marketplace are driving greater wireless use, stimulating economic growth, sparking historic levels of capital investment, and providing more consumer choice than ever before. However, it is the re-envisioning of the existing regulatory framework that will enable our country’s *continued* wireless leadership and the *continued* deployment and adoption of innovative new communications services and technologies.

Respectfully submitted,

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⁷ Comments of Mobile Future, WT Docket No. 13-135 (June 17, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7520919883>.

⁸ Comments of Mobile Future, WT Docket No. 12-269 (Nov. 28, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022068040>.

⁹ Comments of Mobile Future, GN Docket No. 12-353 (Jan. 28, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022113614>.

¹⁰ Mobile Future *ex parte* notice, GN Docket No. 12-268 (Nov. 13, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7520957585>.

¹¹ Committee White Paper.

Comments of the Motion Picture Association of America
In Response to the #CommActUpdate White Paper on
Modernizing the Communications Act

January 31, 2014

Overview

Few would disagree that the video marketplace has seen rapid technological change and competition growth in the last twenty years. Tremendous innovation is occurring in the creation, distribution, and consumption of video content, with audiences increasingly able to watch what they want, when they want, where they want, on the device they want. Consumers can now download or stream movies and shows from more than 90 legitimate online services and counting. Last year, the MPAA created wheretowatch.org, offering a one-stop shop to connect consumers to the growing list of legal Internet video services. And of course consumers in almost every market can still gain access to video programming from at least four broadcasters, two satellite providers, one cable provider, and increasingly a phone company. Against this backdrop, there is little basis for expanding government intervention in consumer access to video content.

As the advocate for the American film, television, and home video industries, the Motion Picture Association of America is pleased to respond to the House Energy and Commerce Committee's Jan. 8, 2014, solicitation for comment in its first #CommActUpdate White Paper on "Modernizing the Communications Act." Our six members—Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios, and Warner Bros. Entertainment—are committed to providing video fans with as many options as possible for experiencing great entertainment.

Markets are the original distributed computing network. Even with the best of intentions, government is no match for thousands of actors creating and experimenting in the face of competition. In the current climate, regulatory humility will pay dividends; premature action will stunt healthy experimentation, choice, and growth. As many have said, the first goal should be to do no harm. To that end, we propose three guiding principles for Congress to consider in addressing the video marketplace:

1. *Government should not act absent evidence of market failure.*
2. *Before taking action, government should determine whether the costs will outweigh the benefits.*
3. *Creators, distributors, and consumers can themselves enter into relationships in the competitive video marketplace that capitalize on technology to make content accessible in innovative ways so long as a framework exists for the effective enforcement of intellectual property rights.*

Our industry has been the beneficiary of giant leaps in technology, and we are both media and technology companies ourselves. We have produced programming that

has inspired, thrilled, and educated audiences around the world for more than a century. And we have been an engine for economic growth in the process. Arts and culture including movie and television production is responsible for more than \$500 billion of our nation's gross domestic product—or 3.2 percent—according to a new report by the Bureau of Economic Analysis and the National Endowment for the Arts. And recent changes by the BEA to more accurately reflect the economic contributions generated by movies, television, and other creative works show that GDP had actually been 3 percent higher than previously reported going all the way back to 1929. The movie and television industry supports directly or indirectly nearly 2 million jobs in the United States with backgrounds including trade skills, college educations, and professional degrees. It is responsible for more than 100,000 businesses across all 50 states, 85 percent of which employ fewer than 10 people. The industry accounts for \$104 billion in total wages; \$16.7 billion in sales tax, state income tax, and federal taxes; and a \$12.2 billion trade surplus. Direct industry jobs generate \$43 billion in wages. The 284,000 people employed in the core business of producing, marketing, and manufacturing movies and TV shows earn on average \$84,000 a year, 75 percent higher than the national average. We drive the newest innovations and work to exceed consumer expectations. As the marketplace continues to evolve in the digital age, we will continue pushing these innovations and the plethora of legitimate services for delivering content to consumers.

The Robust and Innovative Video Marketplace

An explosion of change propelled by Moore's Law has produced better, faster, and cheaper electronics, computing power, storage, and communications. Those developments are revolutionizing everything from "glass to glass," that is, every element between the camera lens and the screen where consumers experience movies and video programming.

When it comes to content creation, our industry is regularly rolling out innovative and often experimental offerings in response to consumer demand for more interactive, more immersive, and more portable entertainment. Whether in state-of-the-art cinemas, on high-definition TVs, or on the latest mobile devices, content creators are working every day on their own and in partnership with other technology companies to create new ways for audiences to easily access content. All MPAA member companies stream their content online through their own sites, as well as through partner services. This includes advertisement-supported applications, such as the NBC app, as well as applications powered by the TV Everywhere authentication model, such as the FOX Now app, TNT app, Watch ABC, Showtime Anytime and others. With licensing agreements under which consumers can rent films through sites such as YouTube, content creators are demonstrating a commitment to offer their high-quality content through the most popular platforms. And others are joining the fray. This is reflected in companies like Netflix and Amazon, whose online streaming services began as distribution outlets for content created by others, but who now also drive development of new original programming.

Transformation is also characterizing video consumption. This is a time of unprecedented change in consumer behavior. Before televisions became commonplace in the 1950s American home, the only way audiences could experience the spectacles and

remarkable storytelling of filmmakers was by sitting in a theater. More than half a century later, consumers have more options than ever for viewing their favorite content, and those options continue to grow almost daily.

When watching on the silver screen, moviegoers can experience the latest cutting-edge visual and special effects in high-resolution digital 3-D and IMAX, surrounded by breathtaking digital sound.

When at home, they can watch films and television shows as they air or at the time of their choosing using a DVR, video-on-demand service, Blu-ray disc, or over the Internet. Indeed, nearly 42 million homes in the United States now have any number of Internet-connected media devices, including game consoles, smart-TVs, and online set-top boxes. And because of partnerships with innovative consumer electronics companies, consumers have many new options for enjoying our members' content in their living room, enabled by affordable and easy to use devices like Roku, Chromecast, AppleTV, Xbox, and Playstation. Last year alone, U.S. audiences legally consumed nearly 3.5 billion hours of movies online.

When outside the home, the revolution continues. There are now more mobile devices than people in the United States, and smartphones and tablets have outpaced sales of desktop and laptop computers combined. Audiences are increasingly using those devices to watch video content. They spent many of those hours using a smartphone, tablet, or other mobile device on services like TV Everywhere, Netflix, Hulu, HBO GO, Amazon, Target Ticket, and EpixHD, to name just a few.

Our member companies have embraced this movement of portability, flexibility, and ease of access for viewers. One way they have done so is through cloud-based services such as "UltraViolet," a free digital storage locker that allows a consumer, after purchasing UltraViolet media—such as a Blu-ray, DVD, or electronic purchase over the Internet—to then access that content on any UltraViolet-compatible device registered to them. Consumers have the option to either seamlessly stream the content or download it for later viewing without a broadband connection. Consumers can choose from a number of UltraViolet-enabled services, such as Flixster, Wal-Mart's Vudu, Best Buy's Cinema Now, Technicolor's M-Go and Barnes & Noble. Our member companies—along with others in the Digital Entertainment Content Ecosystem consortium of more than 60 studios, retail stores, and technology firms—created UltraViolet to further enable consumers to watch what they want, when they want, where they want. And because UltraViolet is powered by such a diverse consortium of innovative companies, consumers are not locked in to one portal and can shift from one service to another as each continues to innovate. UltraViolet also enables sharing of content among up to five connected accounts and twelve devices. More than 9,500 titles are available through UltraViolet, with the list growing every day. Consumers have registered more than 15 million accounts for UltraViolet to date.

One thing is certain: today's market is a television fan's market.

Guiding Principles

The Energy and Commerce Committee’s Jan. 8, 2014, white paper seeks comment on the appropriate communications regime for the modern era. It asks how to preserve flexibility in the face of rapid change. In that spirit, we offer three principles that we believe should guide policy in the robust and innovative video marketplace:

Government should not act absent evidence of market failure. Policy leaders and economists have oft stated this principle. Some express it as “do no harm.” Others as “if it ain’t broke, don’t break it.” A well-functioning market will be more efficient and nimble than government, especially in industries such as ours that are characterized by swift technological change, shifting business models, and increasing competition. Government’s ability to prognosticate accurately and act quickly is limited. Good policy and transparency call for market power analyses and showings of market failure before action. How can government know whether action is necessary if it does not first examine the marketplace with rigor? Ours is an evolving marketplace. Content creators, distributors, and audiences are only starting to confront the world of possibilities that the digital, Internet-enabled era brings. Some technological solutions and business models in the video marketplace will strike the right chord from the start. Others will miss the mark. Still others are yet to be conceived, and will evolve in a serendipitous process of trial and error. Policymakers should not short-circuit that process, substituting their judgment for the choices consumers are actively making *for themselves* in the evolving marketplace. The opportunity cost of anticipatory action in this space is large, and government should give the marketplace room to run. Developments in Internet distribution of video, for example, have occurred in fits and starts, marked by events such as the rollout of iTunes. Indeed, it is often the challenge of the moment that motivates the next entrepreneur to invent the better mousetrap. The risk is high that regulatory intervention will inadvertently interrupt healthy experimentation. The government should not act unless it has solid reason to believe that a given issue will persist over the long run, especially when the marketplace offers consumers a variety of options to choose from.

Before taking action, government should determine whether the costs will outweigh the benefits. Cognizant that steps intended to help can themselves harm businesses large and small and serve as a drag on the economy, President Obama issued an order January 2011 requiring executive agencies to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify).”¹ While that order only binds executive agencies, President Obama stated in a subsequent order that the same regulatory principles should apply to independent agencies.² His Jobs Council has similarly recommended that Congress require independent agencies “to conduct cost-benefit analysis for economically significant regulations.”³ This makes good policy sense. Not only will it help ensure that government does not inadvertently do more harm than good,

¹ Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

² Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 11, 2011).

³ President’s Council on Jobs and Competitiveness, Road Map to Renewal: 2011 Year-End Report at 45, available at <http://files.jobs-council.com/files/2012/01/ JobsCouncil2011YearEndReport1.pdf>.

the added care will help ensure that the government only acts when necessary and appropriately tailors its proposals.

Creators, distributors, and consumers can themselves enter into relationships in the competitive video marketplace that capitalize on technology to make content accessible in innovative ways so long as a framework exists for the effective enforcement of intellectual property rights. The video marketplace is enjoying tremendous success in no small part because policymakers have chosen to give clear effect to the rights of creators and disseminators of content. This allows the free market to continue facilitating tremendous innovation in the production, dissemination, and consumption of content, including through the use of Internet-enabled services, applications, and devices. Regulating this market is inherently difficult to get right, and government efforts run the risk of being both under and over-inclusive, hampering innovation. Absent proof of market failure, government should allow evolving business models based on existing intellectual property rights and negotiation through contract to grow and thrive. Because communications policy and copyright policy are intimately intertwined, and because ensuring the right environment for the creation and distribution of content is no small task in the digital environment, we encourage the Energy and Commerce Committee as it continues its examination of the video provisions of the Communications Act to coordinate closely with the Judiciary Committee.

Conclusion

This is a transformative time for content creators and distributors of all types, but especially for those working in the American film and television industry. We have told remarkable stories and been responsible for our share of countless technological innovations thanks to the creative talent and skilled workers who call this industry home. We have made the transition from silent films to talkies; from projector reels to television; from black and white to color; from analog to digital. Today, consumers enjoy our content on every distribution platform, be it broadcast, cable, satellite, or the Internet. Tales once told exclusively on cinema screens are now told on screens of all shapes and sizes. We look forward to working with you to ensure incentives remain in place to encourage creators to continue innovating and exceeding audience expectations.

Respectfully submitted:



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January 31, 2014

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Honorable Greg Walden
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The National Association of Broadcasters welcomes the opportunity to share its views on the current state of our media and communications industry, the laws and regulations that govern those industries, and questions the Committee should consider as it undertakes the important and deliberate process of assessing how our laws and regulations serve the public interest and advance the goals and objectives that best serve the American people.

Broadcasters provide high quality locally-focused news, entertainment, emergency services and sports programming to hundreds of millions of Americans. Despite the rise in high-profile cable programming, broadcasters still remain the most-watched source for nearly all of the top 100 programs watched on television. More than 22.4 million American households (representing 59.7 million consumers) receive television exclusively through free broadcast signals – not a pay service such as cable or satellite. Moreover, over 243 million Americans listen to broadcast radio every week. We urge the Committee to ensure that any rewrite of our communications laws enables broadcasters to have a meaningful opportunity to provide their vital service to the American people.

I. What Values Should Be Embodied in an “Updated” Communications Act?

Respectfully, the first question that should be posed in this Communications Act Update should be: What values should Congress embody in the “new” updated Act? The current Act has the four pillars of **localism, diversity, universal service, and public interest**. Congress has adopted many laws since 1934, and the FCC has imposed numerous regulations over the decades, but all of these laws and regulations have been justified as serving or advancing these four pillars.

The broadcast industry both embodies and reflects all of those core principles – and does so more so than any other industry. Because the broadcast industry has been so

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extensively regulated for so long, it is not surprising that the industry has evolved in that direction, but it is remarkable how different the other industries look through that prism. One cannot find any evidence of localism or diversity in the operations of wireless carriers. The cable and satellite industries also offer few examples of localism, and in its view universal service depends upon universal payment. And neither industry has a history or a requirement of serving in the public interest.

So the television and radio broadcast industries come to this debate by asking the threshold question of whether we should maintain those values that have guided communications policy for several decades, or scrap them in lieu of new principles. Do the four principles of localism, diversity, universal service and public interest still speak to core American values as we move well into the 21st century, or do they need a major revision? And if they do, how can the law ensure that the broadcast industry remains viable and able to embody these values for years to come. The precise nature of the broadcast industry may change, but broadcasters' commitment to these principles will not.

The discussion about what principles should be embodied in the Act is an important debate for your Committee, Congress and the American people to have so that we reach a consensus. The outcome of this debate matters greatly, since the answer will shape the specific legislative provisions that are included in any "update." The answers also will shape the next generation of laws that inevitably will be passed, and also will shape important decisions that lie ahead for the FCC. For that reason, NAB respectfully suggests that forming a view as to what values should be embodied in any new Act should be a first priority.

II. Before undertaking a major revision to our communications laws, the Committee must first understand the current status of affected industries, and give careful consideration to how the legislative and regulatory regimes under which they have developed impacts their position today.

The Communications Act touches a number of different industries, and in different ways. It is important that we examine the different regulatory regimes that apply currently to each of the major industries affected by the Communications Act, and explore the impact those regimes have had on their development over time.

- The wireless industry is relatively young. Launched in 1983, the wireless industry began as an analog duopoly for the first decade of its existence. Ten years later, Congress adopted legislation making spectrum available for the industry to transition to digital, authorized spectrum auctions, and largely deregulated the industry at the federal level while at the same time preempting state and local regulation. Before long, the industry thrived under the deregulatory regime as numerous multi-billion

- companies were built. The lack of regulation has enabled the industry to get to scale quickly, and thus innovate to provide consumers with new products and services, including the roll-out of digital services. To understand how regulation – or lack thereof – helped shape the wireless industry, one need look no further than the industry’s transition to digital. The decision to go digital was made by the wireless industry, for the wireless industry, and with no government involvement in the selection of the standard or timing of the transition. In fact, the transition was quite uneven, with some areas going digital in the 1990s and some not going digital until the 2010s. The wireless carriers were able to structure a technology change at their own pace, as the regulations under which they live foster only one bottom-line purpose: profit maximization. And despite receiving some of their spectrum for free in the 1980s, Congress and the FCC have not imposed public interest or other significant obligations on the wireless industry.
- The cable industry has been around longer than the wireless industry, but interestingly its tremendous growth and expansion occurred during almost the same time frame as the wireless industry. When Congress adopted the 1984 Cable Act, cable systems passed only 71 percent of Americans, but only 37 million Americans subscribed to a cable network, and the average cable system had just ten channels. The 1984 Cable Act acted to prevent State and local governments from using the franchise process to regulate rates and impose many other conditions. That bill was adopted after Congress gave the cable industry another huge advantage: the compulsory copyright of television broadcast signals. The result of those two boosts was that the 1980s and early 1990s saw cable systems grow in geographic scope and channel capacity while the rates of consumers’ cable bills grew even faster. Congress used the 1992 Cable Act to impose rate regulation on some cable systems, but since Congress passed the 1996 Telecommunications Act the cable industry has been lightly regulated. Likewise, the modern direct-broadcast satellite industry emerged in the 1990s, was given the benefit of a compulsory copyright license in the late 1990s, and also received some of their initial licenses for free, yet satellite faces even fewer regulations than the cable industry. Despite delivering television service like the broadcast television industry, the regulatory scrutiny applied to cable and satellite with regard to content, ownership structure and public interest obligations is far less than that applied to broadcasting.
 - The radio and television broadcast industries are more mature; radio even predates the Federal Communications Commission itself. Not long after the dawn of both industries, the government began regulating them quite substantially. The reason so often given for this heavy regulation is that broadcasters received their initial licenses for no charge. While accurate 50 years ago, that rationale does not carry the

weight it once did. A recent Navigant study¹ found that 92% of all full-power television stations as of August 2013 have been bought and sold since receiving their initial licenses from the FCC. The report estimated the cumulative value of transactions involving full-power stations to be over \$50 billion, which includes the market value paid for the stations' spectrum licenses.

But Congress, and in turn the FCC, have always seen the broadcast industries as the primary way in which they could meet the goals and values embodied in the Communications Act. Both radio and television broadcasters uniquely provide universal service to all Americans, offer local and diverse programming, and serve the public interest. These core principles flow directly from the Communications Act of 1934 and since the very beginning have been embedded by rule and regulation into the fabric of the broadcast industry.

III. How the Broadcast Industry Is Regulated.

The brief overview above demonstrates the significant differences in the regulatory regimes under which the wireless, cable and broadcast industries are regulated. To understand where the broadcast industry is today in the media and telecommunications landscape, it is worth taking a deeper dive into exactly to what regulations it is subject, and how those regulations have impacted its development and ultimately where it stands today.

Broadcasters face a broad array of regulations that are designed to meet the goals of the Communications Act. These extensive rules govern nearly every aspect of the broadcasting business, from the location of our antennas and stations, who can own our stations, the programming we choose to broadcast, the amount of that programming that is geared toward children, the personnel we choose to hire, the advertising inventory we choose to sell, the amount of advertising we can broadcast, the price we can charge for that inventory to major buyers, emergency alerts we must run, closed captions we must offer, the information about our operations that we make public, and even the volume changes in our advertising and programs.

This extensive regulation has led to an industry that is far different from its wireless and cable counterparts. First, as a result of ownership limits, the broadcast industries are far more diverse and localized than the others. No radio or television station is allowed to reach the entire country, let alone even half of the nation. This limitation is designed to foster local content and ensure that broadcasters are tied to their communities. One challenge it presents,

¹ *The Equities and the Economics of Property Interests in TV Spectrum Licenses*, Jeffrey A. Eisenach, Navigant Group, January 2014.

however, is that it prevents scale, and thus innovations and other efforts that often require scale are far more difficult.

Second, there are a myriad of public interest obligations that Congress and the FCC have prescribed that dictate how broadcasters connect to the public. Broadcasters embrace this connection with programming that is accessible to all, has political accountability and that touches critical pieces of our society, in particular children. But, federally prescribed obligations, ostensibly designed to meet the goals of the Communications Act, also place significant burdens on broadcasters in a world where its competitors do not have the same obligations to meet a number of the goals of the Communications Act.

Third, decency regulations, while controversial for a number of reasons, have been imposed only on the broadcast industry which has led to a different standard on free, over-the-air radio and television than the lower or non-existent one for cable stations and pay radio services. These regulations have had a major impact on the kind of television and radio programming that is available to consumers free and over-the-air. It allows for less experimentation and creativity to ensure that the airwaves are appropriate for all members of the family.

IV. A Portrait of the Broadcast Industry Today.

The hallmark of the American broadcast system is that we do not have a national broadcast system but instead a locally based, diverse and fragmented broadcast industry. As a result, the broadcast industry is far less concentrated than the other industries. Consider that:

- The four largest wireless carriers provide service to 93 percent of wireless phone users;
- The four largest cable companies provide service to 76 percent of cable-subscribing households;
- The four largest cable channels, on average, are in 102 million homes and each reach an average of 32 percent of the American population;
- The two direct broadcast satellite providers reach virtually 100% of homes and have a virtual duopoly over home satellite subscriptions; and
- Yet the four largest TV broadcasting companies reach 45.16% of the nation and the four largest radio broadcasting companies can be heard by 10.2% of the population.

As every economist and business person will tell you, this fragmentation leads to higher overhead costs and certain inefficiencies in mundane but important back-office areas such as equipment purchasing, system operations, sales, and maintenance. Of course,

Congress and the FCC are very familiar with arguments for why combinations improve efficiencies, since nearly every major transaction of the past two decades has featured efficiencies as an argument on why transaction should be approved.²

The broadcast industry also stands apart from other industries because of the deep ties that local broadcasters have to their local communities. Whether in Manhattan, New York or Manhattan, Kansas, the staff of a local broadcaster are not only known persons in the community, but they also are the source for news on school closings, local sports teams, government and political activity and a host of activity that tie a community together. As the FCC recognized in its groundbreaking 2011 report on local journalism, hundreds of local newspapers have shuttered or scaled back their publication in recent years, often leaving television and radio stations as the only sources of independent, local news in small and mid-sized communities.³ In addition, local broadcasters support annual appeals for toys during the holiday season, blood drives during the summer, and a range of local civic causes year long. The general manager and station personnel often serve on the board of the local YMCA and hospital, speak at graduation ceremonies at local colleges and high schools and lend their voice to a range of local events.

There is another way that broadcast stations are unique. Broadcasters are always on, and always free. In terms of being always on, of course cable systems and wireless carriers strive to deliver service twenty-four hours a day, 365 days a year. Recent history, however, has shown that only broadcasters can deliver on this promise. When floods or hurricanes or tornadoes hit a community, as so many areas of our country have experienced in recent years, only the broadcast towers have stood tall to provide vital, and sometimes life-saving, information without disruption.

Broadcasting remains the primary source of high quality news and entertainment for all 300 million Americans. But for the nearly 60 million Americans who do not watch television from a cable or satellite provider and depend on free, over-the-air television, or one of the millions of who listen to broadcast radio every week, the contrast with the other industries could not be sharper. Consider that:

² See, e.g., Application to Transfer Control of BellSouth Corporation to AT&T Inc., SC Docket No. 06-74 (Mar. 31, 2006) (“The Applicants estimate that this merger will produce total efficiencies of \$18 billion, after accounting for the costs of integration and other implementation costs. Those cost savings will allow a stronger network, enable more research and development, enhance service quality and lower costs for consumers.”); AT&T/Leap Wireless Description of Transaction, Public Interest Showing and Related Demonstrations, WT Docket No. 13-193 (“the transaction will . . . benefit the public interest, by putting Leap’s spectrum, much of which is currently unused, to more efficient use in AT&T’s 4G LTE network, supplying AT&T with additional network capacity, and providing customers of both companies with an improved network experience.”).

³ See Federal Communications Commission, *The Information Needs of Communities*, July 2011 at 82 (“Local television news has broken numerous important, high-impact stories in the last decade.”).

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- The average wireless customer pays \$73 per month or \$876 per year for service;
- The average cable and satellite customer pays approximately \$100 per month or \$1,200 per year for video services; and
- Yet the average broadcast television viewer among those 60 million American pays zero.

Similarly,

- The average XM Sirius customer pays \$124 per year for service;
- Yet the average broadcast radio listener, who include 243 million American listeners every week, listen for free.

As the Committee considers policies that affect the various industries, we urge the Committee to consider what each industry brings to the American people, the nature of the service each provides, and the value that each industry delivers.

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Thank you for the opportunity to provide our views at the outset of this critical process to review our current communications laws and to assess whether changes are needed. NAB stands ready to work with you and all the Members of the Committee on this important endeavor.

cc: Hon. Henry A. Waxman, Ranking Member
Hon. Anna Eshoo, Ranking Member



N A R U C
National Association of Regulatory Utility Commissioners

January 31, 2014

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
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Washington, D.C. 20515

The Honorable Henry Waxman
Ranking Member
Committee on Energy and Commerce
2322A Rayburn HOB
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The Honorable Greg Walden
Chairman
Subcommittee on Communications,
Technology & the Internet
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The Honorable Anna Eshoo
Ranking Member
Subcommittee on Communications,
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**Re: Comments to House Energy & Commerce White Paper #1
“Modernizing the Communications Network”**

Dear Chairmen Upton, Walden and Ranking Members Waxman, Eshoo:

Thank you for seeking public comment on white papers designed to help the Committee launch an update of the 1996 Telecommunications Act. The National Association of Regulatory Utility Commissioners (NARUC) is uniquely positioned to provide input. NARUC members are the government experts from each of your jurisdictions (including all States, U.S. Territories, and the District of Columbia) on communications and energy utilities and services. The NARUC members from your jurisdiction know and understand local demographics, market strengths and deficits, and can gauge the impact of, and implement policies complementary to, federal laws impacting facilities siting, emergency restoration of service, competition, call completion, and deployment of universally available and affordable communications services (through, *inter alia*, complementary State universal service programs and related policies). The Commissioners from each of your jurisdictions have a precise identity of interest with you, as, like each of you, they are narrowly focused on assuring each one of your constituents benefits from high-quality, reliable, and ubiquitous communications services at reasonable prices.

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?

In evaluating any oversight regime, it is crucial for Congress to focus on the right issues. The reason for regulatory oversight *never changes* regardless of changes in technology used to provide a service. Regulation is needed where competition is not vigorous enough to adequately protect consumers. And policy makers intervene to impose public interest obligations. Regardless of the level of competition, some oversight is always necessary to provide things the market will not. This includes, among other things, a certain level of consumer protection, local number portability, interconnection, prioritization of restoration of services after disasters, 911 service, disabled access, and universal service.¹

¹ See, *Testimony of Commissioner John Burke on the Evolution of the Wired Communications Network before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives*, at 1 (Oct. 22, 2013) (*Burke Testimony*) at: <http://www.naruc.org/Testimony/13%201022%20Burke%20Testimony2.pdf>.

NARUC has consistently urged a technology neutral approach to regulation that recognizes the core competencies of State regulators.²

From that perspective, the basic structure Congress provided in the 1996 legislation actually is quite good.

- With a few exceptions, the basic definitions focus on function not technology.³
- Significantly, the design of the statute also compels federal and State cooperative action.⁴ The statute recognizes the crucial need for a State-mediated mechanism to assure that competitors interconnect, at 47 U.S.C. §§251-2 and, even in the most preemptive grant of authority to the agency – a section that gives the FCC explicit authority, in a specific proceeding, to preempt any State statute or rule that “*may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service*” – Congress still specifically preserved State authority:

*to impose on a competitively neutral basis...requirements necessary to preserve and advanced universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.*⁵

- Along with this broad grant of preemptive authority, the FCC was also given broad authority to forbear from applying provisions of Title II on the basis of specific findings that forbearance will “promote competitive market conditions.”⁶

² See, e.g., the November 2013 “NARUC Federalism Task Force Report: Cooperative Federalism and Telecom in the 21st Century” at 5 (NARUC 2013 Report), noting that even as far back as 2005, NARUC urged “that any rewrite of TA 96 focus on dividing the responsibility for “overseeing” communications functionally, assigning the primary responsibility to the States in areas where they have specific knowledge and expertise (for example individual consumer protection issues), and giving the FCC the lead on issues that address the needs of the nation as a whole (e.g., spectrum allocation, and the federal USF).” Text available at: <http://www.naruc.org/Publications/Federalism-task-force-report-November-20131.pdf>.

³ *Id.* at 4 and 6 (“TA96 is technology agnostic and thus can serve as the basis for communications oversight going forward, regardless of changes to the underlying configuration of the network(s) or the protocols used to transmit information...The 2013 Task force concurs.”)

⁴ *Id.* at 7-8. As Professor Philip Weiser (and the NARUC 2013 Report) points out, this partnership creates a cooperative federalism that represents the balance between complete federal preemption and “uncoordinated federal and state action in distinct regulatory spheres.” According to Professor Weiser:

Cooperative federalism programs set forth some uniform federal standards — as embodied in the statute, federal agency regulations, or both — but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1696 (2001).

⁵ 47 U.S.C. §§253(b).

⁶ 47 U.S.C. §160.

- The Act also includes several mechanisms, e.g., joint boards/conferences, to assure the FCC can take advantage of unquestioned State expertise on the likely impact of any regulations on, e.g., State universal service policies, State disaster recovery provisions, State consumer protection requirements, and other issues.⁷ Unfortunately, the agency has never fully utilized these opportunities to inform its decision-making.

The problem in many instances is not the Act, but the broad, and some might argue, unwarranted discretion the judiciary has given the FCC to implement it.

As former FCC Chairman Richard Wiley said in his recent testimony before your committee “functionally equivalent services should be treated in the same manner, regardless of who provides them or how they are delivered to consumers.”⁸

As noted earlier, NARUC has been on record for years urging the FCC to do just that: *apply the statute in a technology-neutral manner*.⁹

An example best illustrates the point.

⁷ See, e.g., July 2013 *Resolution Concerning Numbering and Technology Transition Trials for Voice over Internet Protocol and other IP-Enabled Services*, noting the “FCC should refer any proposed or future technology transition trials to an adequately funded Federal-State Joint Board . . . for collaborative review with the State commissions and advice.” See also, *NARUC 2013 Report* at 6 stating:

To encourage this collaboration, Sections 410 and 254 of the Act created a partnership between the States and the FCC—the Joint Boards—for collectively seeking, developing, and implementing communications policy recommendations. By referring items to the Joint Boards established by these sections of the Act, the FCC is able to gain direct insight into the potential effects of proposed communications rules and policies on individual States and their citizens. In the past, the Joint Boards have provided effective input into numerous FCC rulemakings and policies, including revisions to the Lifeline program, certification of eligible telecommunications carriers (ETCs), cost allocations, and wholesale service requirements. The Commission's recent actions in dealing with key issues like the reform of the federal USF program, however, appear to have reduced the effectiveness of the Joint Boards and caused the States to seek improvement to the FCC's rulemaking procedures.

⁸ See, *Testimony of Richard E. Wiley before the Subcommittee on Communications and Technology Committee on Energy and Commerce, U.S. House of Representatives*, at 4 (January 15, 2014) available online at: <http://docs.house.gov/meetings/IF/IF16/20140115/101648/HHRG-113-IF16-Wstate-WileyR-20140115.pdf>.

⁹ See, e.g., the Nov. 2013 *Resolution on Federalism*, “[C]hanges to the underlying structure of the network or the technology used to carry information do not change the need for reliable, robust, affordable, and ubiquitous communications services,” available online at: (<http://www.naruc.org/Resolutions/Resolution%20on%20Federalism.pdf>) and the *NARUC 2013 Report* pointing out, at 12, that “rules for interconnection do not and should not depend on the technology used by the interconnecting providers;” see also, the February 2010 *Resolution on Open Access to the Internet*, encouraging “the FCC and/or Congress, when crafting rules and regulations in this area...[to] strive to be as technologically neutral as possible,” at: <http://www.naruc.org/Resolutions/Resolution%20on%20Net%20Neutrality.pdf>; the July 2008 *Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks*, “The Act, in its imposition of interconnection requirements is technologically neutral and does not distinguish between circuit switched facilities and other network facilities that may be used to exchange voice telecommunications traffic...NARUC recognizes that in emerging and competitive markets, incumbent and competitive telecommunications carriers each benefit from appropriate technologically neutral policies...NARUC supports technical standards that allow all telecommunications carriers to interconnect with each other as the “network of networks” develops and that do not mandate the use of a particular technology or a specific network configuration...NARUC recognizes that it is in the public interest for telecommunications carriers to interconnect their networks to exchange traffic in a technologically neutral manner, as provided for under Sections 251 and 252,” at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>.

The definition of “telecommunications services” is a *functional* definition that is focused narrowly on the characteristics of the service provided-NOT the technology used to provide the service.

Indeed, there is no reference to technology in these key definitions.¹⁰

In so doing, the definitions in the statute take a technology-neutral approach to defining services.

The FCC, in implementing those definitions, has not.

It is hard to argue that any business that provides real time point-to-point voice services, for a fee, to the public is NOT a “telecommunications service” carrier.

The 1996 Act defines the term “telecommunications service” as “the offering of *telecommunications* for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,” and defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”

Currently, real-time voice service, provided for a fee “directly to the public,” is a “telecommunications service” because it is “the transmission, between or among points specified by the user, of information” . . . in this case – the user’s voice . . . “of the user's choosing, without change in the form or content of the information as sent and received.” The 1996 Act makes no distinction based on whether the provider was previously in another related business regulated under another “silo” (e.g., cable)¹¹ or using a different packet-based technology/ communications protocol, i.e., I.P. vs. time division multiplexing (or TDM), to deliver the voice service. And yet for almost 10 years, the FCC has been unable, under different administrations, to provide needed certainty by classifying voice services, provided using Voice over Internet Protocol (VoIP), as either a “telecommunications service” or an “information service.” The result has been regulatory arbitrage that undermined the intercarrier compensation system and is the *raison d'être* for the call completion problems that continue to plague rural constituents in each of your States. NARUC, the States, and industry stakeholders continue to waste significant resources, all at the ultimate expense of the taxpayer and ratepayers, on proceedings that would be unnecessary if the FCC acted.¹²

¹⁰ The white paper contains a few misstatements. It is important to understand that the Act does not treat “information services” as a distinct category. Rather, Congress explicitly made it a residual catchall for things that are not “telecommunications services.” Specifically, the Act says that term means: “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. §153(20) (emphasis added).

¹¹ Remember, the statute specifies that a provider of a *telecommunications service* “...shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. §153(51).

¹² *Burke Testimony at 8.*

There is no question that 47 U.S.C. §214 specifically requires that a carrier provide a “telecommunications service” (and thus actually qualify as a “common carrier” as defined in the Act) before it can qualify for federal universal service funding. And yet, in a recent order, the FCC, in three explicit statements, specifies it has no intention of complying with the classification scheme established by Congress.¹³

NARUC has not taken a specific position on elements of the Act that should be retained. Many argue the agency needs additional flexibility under any future reform. However, if properly utilized, arguably, the forbearance authority in Section 160, the preemption authority in Section 253 (with the crucial reservations of State authority re: non-economic oversight), and the requirement to engage in a biennial review of federal rules to eliminate those that are no longer needed in Section 161 already provide all the implementation flexibility any agency needs.¹⁴ It is hard to construct a scenario where these existing authorities cannot provide the requisite flexibility.

But there are certainly places where the Act needs adjustment. However, NARUC has not had adequate time to collect and approve official positions on potential adjustments. The provisions to designate multiple carriers to qualify for a subsidy to provide service where there are not enough customers to sustain one provider could be one target for reform.¹⁵ And there are certainly others. But much of the legal uncertainty and problems surrounding the FCC’s implementation of the 1996 legislation are directly related to the agency’s penchant for interpreting the statute in ways that even the agency itself has effectively acknowledged Congress in 1996 never anticipated,¹⁶ instead of relying on the explicit deregulatory tools Congress provided.

¹³ See, e.g., *Connect America Fund*, Report and Order, 26 FCC Rcd 17663 (2011) (“2011 Transformation Order”), online at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0206/FCC-11-161A1.pdf, at ¶63, noting “Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.” Actually, Congress required an identified “telecommunications service” for a provider to be classified as a “common carrier” and qualify for federal funds; at ¶69, noting “Under our approach, [as opposed to Congress’ approach in the Act] federal support will not turn on whether interconnected VoIP services or the underlying broadband service falls within traditional regulatory classifications under the Communications Act.” (Un-italicized text added); at ¶72, contending “[L]imiting federal support based on the regulatory classification of the services offered over broadband networks as telecommunications services would exclude [some] from [participating as] the universal service program providers.” This is an interesting statement – because it implies the FCC has in fact classified VoIP services as something else – when it continues to claim it has not. Nonetheless, it is an accurate statement of exactly what Congress, and the Act, requires. And if these explicit statements are not enough to demonstrate the agency’s determination to ignore Congressional instructions, it also clearly indicates it will ignore the definition of “telecommunications services” in the same order by creating a brand new functional “voice telephony” classification, which carriers are required to provide to get federal funds – a classification that – like services provided using VoIP, cannot possibly be distinguished from the definition of a “telecommunications service” in the Act.

¹⁴ 47 U.S.C. §161.

¹⁵ 47 U.S.C. §214(2) says “A State Commission shall...designate more than one common carrier as an eligible telecommunications carrier” to receive federal universal service subsidies. In the *2011 Transformation Order*, the FCC stretched this provision in two directions. First, it specified that Congress wanted multiple carrier designations in §214 - most that will never provide service or receive a subsidy - to facilitate an auction procedure. Many agree that auction procedure has merit but the FCC’s approach finds little support in the statute. Second it undermines the multiple designations with a series of conditions. Many of those issues are pending before the 10th Circuit.

¹⁶ See, e.g., the *2011 Transformation Order*, at ¶71:

“Information services are not excluded from section 254 because of any policy judgment made by Congress. To the contrary, Congress contemplated that the federal universal service program would promote consumer access to both advanced telecommunications and advanced information services “in all regions of the Nation.” When Congress enacted the 1996 Act...broadband capabilities were provided over tariffed common carrier facilities...It was not until 2002 that the Commission first determined that one form

In terms of principles, NARUC has recently developed a white paper with core principles that should apply to any re-write of TA 96.¹⁷ Taken almost verbatim from the white paper, the principles are listed in no specific order; each is equally important to ensure a robust and reliable communications ecosystem available to all consumers:

Consumer protection: Ensure that consumers are protected from unfair or illegal practices (including cyber threats) and that individual consumer privacy is maintained, regardless of technology used to provide the service. States, the FCC, and industry should work collaboratively to ensure that consumers are protected from unfair practices regardless of the technology used to provide those services. This includes protecting against slamming, cramming, unfair billing practices, and cyber attack, as well as ensuring that consumers' personal information remains private and secure. FCC consumer protections should be a floor—not a ceiling. Individual States and service providers should work together to determine whether additional protections are necessary based on their own needs.

Network reliability and public safety: Reliable, ubiquitously available communications are critical to protecting the public safety (911, E911, NG911), responding to disasters, and ensuring the public good, such as resolving ongoing call completion problems. Communications policy must ensure that communications networks are reliable and available, regardless of technology utilized, and the FCC should make relevant data available in real time to States.

Competition: Competition is critical to discipline the market and to ensure that consumers have multiple options for selecting the service that best meets their needs. The States are well-positioned to work with all stakeholders to ensure that there is robust competition and customer choice across their specific jurisdictions.

Interconnection: Communications networks must remain interconnected on a non-discriminatory basis regardless of technology. All consumers must be able to call each other regardless of carrier or technology, calls must complete, and no area of the country should become an isolated communications island, simply because some providers choose not to interconnect to others in those locations. The requirement to interconnect should not be limited to a subset of providers, but should apply to all suppliers, regardless of the technology they use. The States are well-positioned to continue to oversee the interconnection process as provided in Sections 251 and 252 of the Telecommunications Act of 1996, which are technology neutral.

Universal Service: Universal service remains a key policy goal of the nation as a whole. The States and the FCC should work together to ensure that service is affordable, ubiquitous, and reliable for all consumers. The States retain an important role in working with the FCC to ensure that service providers continue to meet social policy goals, including the universal availability of communications services, providing reasonably comparable and affordable service between urban and rural areas, and providing access to services such as Lifeline, Telecommunications Relay Service, and carrier of last resort (COLR) obligations as permitted by State law,

of broadband–cable modem service – was a single offering of an information service rather than separate offerings of telecommunications and information services, and only in 2005 did the Commission conclude that wireline broadband service should be governed by the same regulatory classification."

Classifications that this section quite obviously concedes-Congress *never* contemplated because it “thought” broadband, even when used to provide internet access, was a “telecommunications service.” Hence the final agency statement: "Thus...the Commission’s determinations that broadband services may be offered as information services have had the effect of removing such services from the scope of the explicit reference to “universal service” in section 254(c)." {Emphasis Added} Determinations that, according to this section, are apparently inconsistent with Congressional intent. Note, the omitted qualifiers in the last quote sentence are not consistent with the facts and are somewhat illogical.

¹⁷ NARUC 2013 Report, at Section IV, pages 10-15.

regardless of technology. The need for Universal Service Fund (USF) support will continue regardless of changes in technology. The States should retain a prominent role in all decisions related to USF.

Regulatory diversity: Regulation should be functional rather than based on the specific technology used to initiate a communication and carry information. Regulation should be technology neutral and developed after reviewing and evaluating constitutional and statutory State and federal roles and exploring multiple points of view. The States remain important laboratories for exploring solutions to complex problems. Federal and State regulators should seek multiple points of view on issues, including utilizing the Joint Boards to ensure that State and end user needs are heard and understood.

Evidence-based decision making: Open and transparent evidence-based decision making should be the primary tool in reforming regulatory policies. The best policies are developed by gathering information, evaluating all points of view, and exploring multiple options. The States are ideally suited to conduct evidence-based proceedings.

Broadband access, affordability, and adoption: The universal availability of broadband service is important to ensure job growth and the availability of quality medical care and education across the nation. The States have a key role in ensuring broadband deployment and adoption for their constituents, as well as in protecting the consumers of those services. The States are well-positioned to work with the FCC, industry, and others to determine where broadband is needed and to assess the availability of competitive choices as well as aid the FCC and industry in defining consumer protections for broadband service, including exploring privacy issues, ensuring accurate billing, and working with industry to review and resolve customer complaints.

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?*

As noted in the response to question one, NARUC has not taken specific positions that allow it to respond fully to the question presented. NARUC hopes to be able to amplify this response before the Committee completes its white paper series. That said, the preceding discussion makes clear that, *at a minimum*, the following provisions/reservations of State authority, should be retained, including:

- **47 U.S.C. §§251-2 Interconnection Arbitration¹⁸**

In all critical infrastructure industries, interconnection among competing utilities has usually been a source of concern. The 1996 Act, in Sections 251 and 252, provides a back-up alternative – regulatory arbitration - for competing providers with widely divergent market power, but only when voluntary negotiations fail. Interconnection between competing carriers, while crucial for competition, is not always in the interests of both carriers. Some claim the market already has resolved all problems. But it is clear that many competing carriers that want to interconnect via IP, because it is unquestionably more efficient and necessarily a lot less expensive, cannot. Large carriers have no difficulty shifting between TDM and IP technologies on their own networks, yet it appears competing carriers heretofore have been unable to even get large carriers to the negotiation table. This provision is another victim of the FCC's intransigence in classifying services. If VoIP were classified as a "telecommunications service" it would be clear that Sections 251-2 apply to IP interconnections and the arbitration option would be available to smaller carriers that cannot get large carriers to the table to discuss interconnection. Because the January 15, 2014 D.C. Circuit decision in *Verizon et al v.*

¹⁸ See, e.g., the July 2008 NARUC Resolution Regarding the Interconnection of New Voice Telecommunications Services Networks, online at: <http://www.naruc.org/Resolutions/TC%20Interconnection.pdf>.

*FCC*¹⁹, suggests at least that Court would find any FCC effort to use “ancillary authority” to force interconnection illegal,²⁰ it seems unlikely the agency, if it acts at all, would classify VoIP as an information service. But it is crucial for Congress to maintain some avenue to assure competitors do interconnect if voluntary negotiations fail. Providers with market power should not have the capability to disadvantage competitors by limiting interconnection to older and more expensive technologies.

- **47 U.S.C. §253(b) and other Reservations of State authority**²¹ **to continue to address universal service, public health and welfare, and service quality.**

This section gives the FCC a powerful tool to assure no State is inhibiting competitive entry or competition. Significantly, it also, in tandem with other crucial reservations of State authority in the Act, reserves State authority to maintain existing State universal service programs, protect the public welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

These are all critical values that should be preserved in any re-write of TA 96.

Congress should not limit State authority to manage service restoration and prioritization in the wake of any disasters.

Nor should Congress limit or inhibit the ability of existing State-level universal service and broadband deployment programs to achieve their designated goals.²²

And certainly, there is no conceivable rationale for Congress to limit its constituents’ access to State remedies or penalties for federally defined inappropriate or abusive conduct (or specify what entity a State must use to provide relief).

The 1996 legislation recognized the lessons of history. States are almost always the first to provide relief and the bulk of enforcement when new abuses emerge, e.g., slamming, cramming or mislabeling of simple business expenses as “regulatory charges.” Often State efforts beat federal counterparts by one to three years. Sometimes the gap is longer.²³ States authorities are closer to your constituents and our commissions (and

¹⁹ This decision vacates key aspects of the FCC’s so-called “net neutrality” order and is available online at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/\\$file/11-1355-1474943.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf)

²⁰ The only evidence available strongly suggests that the biggest obstacle to establishing VoIP interconnection agreements is incumbent LECs’ unwillingness to do so—not any technical issues related to VoIP interconnection. See July 8, 2013 *Comments of Comptel*, filed in the FCC’s GN Docket No. 13-5, at 9, available online at: <http://apps.fcc.gov/ecfs/document/view?id=7520928883> (“The RBOCs, such as AT&T and Verizon, nevertheless, continue to refuse to enter into VoIP interconnection agreements that would comply with the simple competitive protections of those statutory provisions, such as public disclosure, opt-in rights and arbitration (should negotiations fail).”).

²¹ See, e.g., 47 U.S.C. §§152(b), 261(a) & (b), 706, and 601.

²² Lichtenberg, Sherry, Akyea, Kafui, Bernt, Phyllis, “Survey of State Universal Service Funds 2012” (Report 12-10, NRRI, Silver Springs, MD, July 2012)), online at: <https://prodnet.www.neca.org/publicationsdocs/wwpdf/72012nrriusf.pdf>.

²³ For example, by the time the Federal government got around to establishing a national “do-not-call” register, on June 27, 2003, at least nine States had already established State do-not-call registries. On the public policy front similar gaps between State and federal action to address issues exist. For example, in 1976, South Dakota became the first State to offer a Statewide Deaf Relay program with State appropriated funds. Other States started programs. In 1987, California began the first round-the-clock relay program. That same year NARUC petitioned the FCC to conduct a further notice of inquiry on federal relay services. It was 1990 before a national relay service was sanctioned by Congressional action. Compare, July 2007 *Testimony of North Dakota Commissioner Clark before the House Subcommittee on*

Attorneys General) feel a stronger urgency to act quickly (and are more likely to suffer consequences if they do not act). Moreover, our proceedings and rulemakings generally are finished more quickly than those at the FCC.

Whenever abuses arise, the law of unintended consequences should NOT be construed to work against consumers. To assure needed State flexibility, as the *NARUC 2013 Report* suggests, in a discussion of privacy protections, that generally speaking any federal consumer protection rules (and fines and penalties in particular) should be a floor, not a ceiling. Moreover, consumers should NOT have to wait for federal rulemaking every time a new issue arises. In any case, the federal government will always lack the manpower to help all consumers in every State. In many cases, whatever assistance it may provide will be complicated by distance and time zones. As the FCC has acknowledged in some contexts, this means that even where federal minimum standards may be appropriate, State/local governments must be allowed to enforce the federal standards and adopt more specific standards where needed.²⁴

Telecommunications and the Internet, arguing NARUC believes, in some cases, federal standards for consumer protection “may be one way to address carrier concerns over potentially conflicting State regulations. After all, States also want to ensure that compliance costs are minimized so that investment dollars can be focused on providing new service to consumers. However, we also want to be sure that federal standards are accompanied by State enforcement. Experience has taught us that relying solely on the federal government in these mass markets is folly. Take for example, the (earlier referenced) Do-Not-Call List experience. While both States and the federal government have enacted these laws, in practice, enforcement has fallen overwhelmingly to States, in fact, almost exclusively. For illustrative purposes, consider this somewhat dated – but still relevant history lesson: North Dakota is a State of only about 640,000 people. In the first 2 ½ years of its strict State Do-Not-Call law, the State Attorney General has enforced 53 settlements, totaling over \$64,000, and issued 7 cease and desist orders just in his State alone. In approximately the same time frame, the entire federal government, despite receiving over one million complaints, [had] only issued 6 fines and filed 14 lawsuits. Even more importantly from the consumer’s viewpoint, telemarketers were quick to exploit a patchwork of loopholes and “workarounds” to the federal rules and the calls kept coming. It fell to a handful of States to say that “no means no.” It is not that federal officials don’t care, it is just that there is simply no way they can effectively respond to individual complaints across a nation this large unless States are full partners in enforcement.”

²⁴ The FCC has frequently recognized States’ core competency with respect to consumer protection. A May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement:

Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . . We agree with NARUC that the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. . . establishing the State commissions as the primary administrators of slamming liability issues will ensure that “consumers have realistic access to the full panoply of relief options available under both State and federal law.” . . . Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming . . . We conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum for the resolution of slamming disputes.

In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, 15 FCC Rcd 8158 (rel. April 13, 2000). In this *First Order on Reconsideration*, the FCC recognized States should have the ability, if they choose, to mediate slamming complaints received from consumers within that State. It also acknowledged individual States have unique processes, procedures and rules regarding slamming complaints. Initially 37 States “opted-in” to the FCC’s approach. This coordinated approach to slamming enforcement continues today.

- **47 U.S.C. §§410, 254 and other provisions that leverage State expertise and facilitate cooperation in consumer protection and universal service policies.**²⁵

The NARUC 2013 Report specifies that Congress should increase the collaboration between the FCC and the States to examine and provide solutions to communications issues. In the past, the Joint Boards have provided effective input into numerous FCC rulemakings and policies, including revisions to the Lifeline program, certification of eligible telecommunications carriers (ETCs), cost allocations, and wholesale service requirements. There is no question that this type of collaboration is a pre-requisite to good decision making. States are much better positioned to gauge the practical impact of federal policies on some programs, like State disaster recovery measures, State universal service programs, State broadband deployment initiatives, electric and telecommunications industry interdependency issues, and others. Sections 410 and 254 of the Act create a partnership between the States and the FCC—the Joint Boards—for collectively seeking, developing, and implementing communications policy recommendations. By referring items to the Joint Boards established by these sections of the Act, the FCC is able to gain direct and crucial insights into the potential effects of proposed communications rules and policies on your individual States and your constituents.

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

NARUC has in the past provided significant critiques of FCC process and procedures rather than the agency’s actual structure. We also have sent lengthy letters to the Administration²⁶ and testified before this Committee twice on a host of needed procedural reforms that will improve the operation, efficiency and fairness of agency operations.²⁷ For example, we support legislation to provide FCC Commissioners with more technical expertise²⁸ based on a 2009 NARUC resolution. That resolution notes that recent FCC orders demonstrate that the Commission needs access to more technical expertise and “encourages the Commission to consider enhancing its capabilities and analysis in finance and engineering.”²⁹ Indeed, the recently passed *NARUC 2013 Report*, at 7-8, raises particular concerns of the impact on decision-making of the FCC’s *ex parte* procedures. In practice, that process frequently results in numerous complex pleading filed near the end of comment periods. This can prevent other parties from providing a proper critique and often clear rebuttal of facts and allegations

²⁵ See, e.g., Bernt, Phyllis, *Universal Service in the National Broadband Plan: A Case for Federal-State Cooperation*, *Journal of Information Policy* 1(2011): 125-144.

²⁶ See *Dec. 12, 2008 Letter from NARUC President Butler to the Obama-Biden Transition Team*, App. A, online at: <http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf>. This letter contains a list of proposed procedural reforms.

²⁷ *Testimony of James Bradford Ramsay before the House of Representatives Energy and Commerce Committee’s Subcommittee on Communications and Technology on Reforming the FCC Process*, (July 11, 2013), available online at: <http://www.naruc.org/Testimony/13%200711%20Ramsay%20FINAL%20NARUC%20testimony%20FCC%20reform%20.pdf>, and also Mr. Ramsay June 22, 2011 testimony on the same topic before the same committee, available online at: <http://www.naruc.org/Testimony/11%200622%20Ramsay%20NARUC%20testimony%20FCC%20reform.FINAL.PDF>

²⁸ *NARUC Letter to the House Energy Commerce Committee Chairman Rockefeller and Ranking Member Hutchison, supporting The FCC Technical Expertise Capacity Heightening (TECH) Act*, (March 29, 2011) online at: <http://www.naruc.org/policy/Testimony/11%200329%20NARUC%20FCC%20tech%20enhancement%20act%20support.pdf>.

²⁹ See, e.g., *NARUC’s February 2009 Resolution on Reform of FCC Management and Process*, available online at: <http://www.naruc.org/Resolutions/TC%20Resolution%20on%20Reform%20of%20FCC%20Management%20and%20Process.pdf>.

contained in such late-filed pleadings. This, in turn, can lead to FCC decisions based on inaccurate or flawed data or reasoning. As the Republican leaders of this Committee recognized only yesterday, the FCC's use of Joint Board mechanism, is crucial "to ensure any changes . . . achieve the statutory goals in an effective and appropriately tailored way." Any revisions to the Act should include mechanisms to ensure the FCC returns to its earlier policy of actively seeking Joint Board recommendations. To do this, the *NARUC 2013 Report* recommends that the FCC refer matters to the Joint Boards more regularly; follow the APA rules in its formal and informal rulemakings; and seek diverse regulatory input from a variety of sources.

Some of our proposed process reforms were adopted in the bipartisan Federal Communications Process Reform Act.³⁰ Whatever happens to that legislation in the Senate in this Congress, this Committee should use this initiative as an opportunity to reconsider some of the proposals that were not.

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?*

As noted earlier, the Act already provides the FCC with a range of options that provide it with significant flexibility. Congress can enhance the likelihood for effective oversight by building on the basic functional definitions in the Act. The basic definitions in the Act are technology agnostic and thus can serve as the basis for communications oversight going forward, regardless of changes to the underlying configuration of the network(s) or the protocols used to transmit information. Perhaps Congress could consider ways to constrain the FCC's "creative" approach to effectively re-writing substantive provisions of the statute, which would, in turn, require them to instead rely on the tools Congress has already provided.

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

The distinction was created to distinguish services that all policy makers are likely to agree must be subject to at least some overriding public interest standards, from services that should not have to comply with such requirements. This would include things like one or more of the following: emergency communications requirements including the provision of 911 service, restoration priorities during natural disasters, technical access for law enforcement acting pursuant to court order, disabled access provisions, assuring dialed calls are completed, universal service, required interconnection, etc. But the distinction is only useful if the FCC applies the classification logically and consistently based on the core functionality provided. See the discussion under question 1 at pp 1-7.

If you have questions about any of NARUC's positions or would like to discuss it further, please contact the undersigned, or NARUC Legislative Director Brian O'Hara at (202)898-2205, bohara@naruc.org, or NARUC General Counsel Brad Ramsay at (202)898-2207, jramsay@naruc.org. We look forward to providing additional input as your process continues.

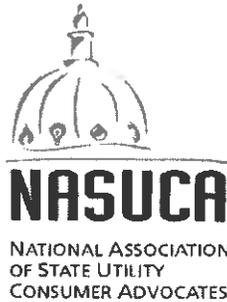
Sincerely,

Colette D. Honorable
NARUC President

Chris Nelson
Chair, NARUC Committee on Telecommunications

cc: Members of the Committee on Energy and Commerce

³⁰ *Walden Announces Bipartisan Agreements on FCC Process Reform and Legislation to Improve Federal Spectrum Use* (December 9, 2013) online at: <http://energycommerce.house.gov/press-release/walden-announces-bipartisan-agreements-fcc-process-reform-and-legislation-improve>.



THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADOVCATES
("NASUCA")
RESPONSE TO HOUSE COMMITTEE ON ENERGY AND COMMERCE
"MODERNIZING THE COMMUNICATIONS ACT" WHITE PAPER

NASUCA¹ submits these comments to the House Committee on Energy and Commerce ("Committee") in response to the Committee's request.² NASUCA comments on each of the five "Questions for Stakeholder Comment." NASUCA also comments on certain aspects of the White Paper's otherwise-accurate "History of Communications Laws," and the description of the "Current State of the Law and Criticisms." NASUCA very much appreciate the opportunity to comment at this first phase of dialog.³

The five questions:

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?

¹ NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

²<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf> (issued January 8, 2014) ("White Paper").

³ NASUCA was deeply involved in the 1996 Act - e.g., 47 U.S.C. § 254(a)(1) makes a NASUCA member part of the Federal-State Joint Board on Universal Service - and has presented numerous comments to the FCC in the intervening years.

Perhaps not. The goals of the CA that currently apply to Title II services should be extended to more services, those on which consumers increasingly depend. Those goals⁴ include:

- **Affordability:** Broadband and wireless services are increasingly viewed as necessities. Policy makers should consider whether steps are necessary to mitigate affordability concerns.
- **Limited Competition:** Duopoly wireline broadband markets, and consolidating wireless markets, should be monitored to determine whether markets are delivering economically efficient outcomes.
- **Reliability and Service Quality:** Legacy wireline voice networks have delivered reliable and high quality service, providing value to consumers and contributing to the fulfillment of critical public safety objectives. As broadband and wireless are now viewed as necessities, reliability and service quality standards for new technologies must be addressed.
- **Access to Emergency Services:** The transition to an alternative technology platform does not reduce the importance of robust access to emergency service providers. Policy makers should monitor the oversight of the transition to IP-based broadband, and ensure that the benefits associated with high-quality systems continue. The issue of backup power also requires careful attention.
- **Carrier of Last Resort and Universal Service:** Carrier of last resort obligations (“COLR”), the requirement that local telephone companies make service available to all households in their service area, have ensured that affordable and reliable telephone service is available on reasonable request to all households. While voice services have been subject to COLR obligations, broadband services have not. Access to affordable, high-quality broadband services will be as important in the future as access to affordable high-quality legacy voice services has been in the past. Determining how COLR costs will be recovered, and the criteria required to ensure broadband availability will be critical.
- **Informed Consumers and Consumer Education:** During the transition to IP/broadband, policy makers should ensure that educational efforts are ongoing, so as to inform consumers of changes and the potential impact of changes, and to promote an open dialog regarding consumer needs during the transition.
- Finally, the states have a role in addressing the seven areas described above under state laws and the dual jurisdiction of the FCC and States should be preserved..

Any rewrite of the Communications Act must confirm these protections for the services on which consumers depend. That includes, at minimum, voice communications service, whether provided over a traditional platform or the newer Internet Protocol (“IP”) platform. The protections should also apply to the broadband services that consumers use, which the FCC declassified out of protection in its early-21st century rulings.⁵

⁴ See FCC Docket No. WC-12-353, NASUCA ex parte (January 12, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7521065326>, attaching paper by Dr. Trevor Roycroft <http://apps.fcc.gov/ecfs/document/view?id=7521065327>.

⁵ See *Verizon v. FCC* (D.C. Cir., January 14, 2014), slip op. at 45-62.

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?

See previous answer. In today's communications environment, when preserving the core principles just discussed, the distinctions between telecommunications services and information services (similarly, between basic and enhanced services) can largely be disposed of. But the requirement of just and reasonable rates and the promise of affordable voice and broadband service must be maintained.

There is one provision that should be eliminated. That is the "deemed granted" in the forbearance statute, 47 U.S.C. § 160(c), which grants any forbearance request from Congressional language, no matter how broad, no matter how complex, if the FCC has not granted it within one year and ninety days.⁶ Indeed, forbearance requests themselves are becoming rarer, so perhaps the entirety of § 160(c) could 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?

The jurisdiction of the FCC needs to extend at least to those services and capabilities set forth in response to #1. The structure of the FCC should be flexible enough to "address systemic change in communications" while preserving stakeholders' rights to effective participation in public processes. In his recent remarks at the Computer History Museum, Chairman Wheeler stated, "[I]t is essential in the public interest of our country that the government, and by government I mean the FCC, have the power to oversee the broadband networks and to intervene to forestall their exploitation by unacceptable acts."⁷ Chairman Wheeler reemphasized the importance of competition generally and the need to protect consumers from market power. Chairman Wheeler has addressed protecting the Network Compact, which has three key elements: universal accessibility; reliable interconnection, and consumer protection and public safety and security.⁸

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?

Laws could track equivalent services, rather than the technology over which a service is supplied to consumers. As one example, voice telephony would be a continuing focus,

⁶ 47 U.S.C. § 160 sets a one-year limit for FCC action; the FCC can extend the limit by 90 days.

⁷ Prepared Remarks of Tom Wheeler Chairman given on January 9, 2014 in Mountain View, California at the Computer History Museum, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0117/DOC-325054A1.pdf.

⁸ See <http://benton.org/node/169354>.

regardless of whether supplied by wireline carriers, cable companies, wireless carriers or other entities, and regardless of platform (Time Division Multiplexing (“TDM”), IP or other).

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

See answer to #2.

Comments on “History of Communications Laws”

As noted above, the History is for its greatest part both accurate and non-partisan (especially where “non-partisan” means not tied to a deregulatory philosophy), but there are a few points that NASUCA, on behalf of consumers, should make:

- The distinction between “telecommunications” services and “information” services is not a result of the Telecommunications Act Of 1996 (“1996 Act”).⁹ The FCC had established a distinction between “basic” service and “enhanced” services,¹⁰ which was both continued and muddled by the 1996 Act.
- The 1996 Act did not “distinguish that ‘information’ services would be largely unregulated while ‘telecommunications’ services would remain highly regulated....”¹¹ Certainly the regulation of telecommunications services has substantially diminished since 1996. More importantly, it was not the differential in regulation that caused information services to grow “at a rapid pace.”¹² The technological revolution was far more important than a deregulatory revolution.
- The 1996 Act did direct the FCC to address the Internet in a forward-looking manner.¹³ Unfortunately, The FCC has addressed the Internet in a fashion that limits to the detriment of consumers some of the key public interest goals addressed above.

Comments on “Current State of the Law and Criticisms”

- The White Paper notes that “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.”¹⁴ NASUCA basically agrees, but would argue that these equivalencies mean that consumer protections should be extended to such services, not that all services should be stripped of protection due to “competition” among them.

⁹ White Paper, p.[2].

¹⁰ See *Verizon*, fn.5, *supra*, slip op. at 7-9.

¹¹ White Paper, p.[2].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, p.[3].

- It may be that “broad prescriptive rules can have unintended consequences for innovation and investment.”¹⁵ But the **lack of** prescriptive rules can also reduce investment and innovation, by allowing those with market power to harm competition and consumers.
- The “regulatory uncertainty with respect to FCC authority to regulate aspects of the Internet within U.S. Borders...” is pretty much the result of the FCC’s unfortunate decade-old decision to classify broadband Internet access service as an information service, rather than the dual service that includes both telecommunications and information services.¹⁶ It remains to be seen whether the FCC will act on this in the wake of *Verizon*. The “service” structure discussed above, if adopted by Congress, should alleviate such regulatory uncertainty.
- “It is vital that any changes to the law account for the impact on consumers and industry alike.”¹⁷ NASUCA applauds this recognition of consumer rights in the Committee White Paper.

Conclusion

NASUCA again appreciates the opportunity to provide these comments to the Committee. As NASUCA has stated in many previous contexts, the **public** interest is best served when regulators (and legislators) are not swayed by the business plans and pecuniary interests of particular companies - or indeed, particular industries. A balanced approach that considers the interests of consumers is best.

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¹⁵ *Id.*

¹⁶ See *Verizon*, slip op. at 45-46; *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 975-977 (“*Brand X*”).

¹⁷ White Paper, p.[3].



NATIONAL GRANGE OF THE ORDER OF PATRONS OF HUSBANDRY

1616 H ST. NW, WASHINGTON, DC 20006 | PHONE (202) 628-3507 | FAX (202) 347-1091

American Values. Hometown Roots.

January 30, 2014

Congressmen Fred Upton and Henry Waxman
House Energy and Commerce Committee
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton and Ranking Member Waxman:

Since 1867, the National Grange has advocated for policies and legislation that advance the lives, culture, and prosperity of rural America. Advancements in technology have become the great equalizer for rural America. Our organization is committed to ensuring that rural Americans have equal access to modern technologies and an understanding of how advancements in broadband Internet enabled technologies and services can better their lives and communities by enhancing social and economic welfare. The National Grange applauds you and your colleagues on the Energy and Commerce Committee for your leadership as you begin your work to modernize our nation's communications laws for the digital age.

High-speed, affordable Internet connectivity is no longer a luxury. The near daily advances in online applications like telemedicine, online education, and telework are leveling the playing field for urban America by helping to attract new investment, businesses, and more diverse industries. This new economy is slowing the talent drain to big cities by stimulating new job creation and professional opportunities throughout rural communities. In addition to the economic benefits, broadband Internet enhances the quality of life in these communities, providing access to services and information that were unheard of as little as 10 years ago. Further, given the higher rates of poverty and unemployment in rural counties, we as a nation stand to benefit greatly as our farming, tribal, and rural communities experience the benefits of the burgeoning digital economy.

But there's a lot of work still to do. Numerous studies from the FCC, Pew Charitable Trust, and others have detailed how rural America still lags behind urban and suburban counterparts in adopting or accessing broadband. Next generation 4G wireless broadband is helping to bridge that gap and bring fast, reliable connections to the nearly 19 million Americans who lack wireline home service in remote, hard to reach, and sparsely populated areas of the country. Clearly, the economics of deploying wired broadband to certain parts of rural America are difficult; however, good regulatory and legislative policies can help change this. The current statute and regulatory framework, which is designed for the monopoly era telephone days of the 20th century, are slowing advancements in technology. Fortunately, this modernization effort has the potential to unleash new investments and innovations that will disproportionately benefit rural America.

Burdensome and obsolete regulations have hindered the deployment of new services to rural populations as capital has been tied up servicing outdated infrastructure instead of being fully devoted to deploying modern cable, wireless, and wired broadband networks.

A new, modern telecommunications framework can change this dynamic. As an organization that has always believed in the power of the market, we believe a 21st century Communications Act must allow innovators and entrepreneurs the ability and flexibility to compete to serve all Americans, including those in rural America. Only through policies that promote private sector investment and innovation will our rural communities fully

reap the benefits of high quality broadband and other communication services. No one can predict the next chapter of the Internet's evolution, but we know that it requires tens of billions of dollars a year in investment by service providers to maintain and deploy new networks. A flexible policy framework that avoids prophylactic regulations will allow innovation and investment to flourish by allowing private industry to do what it does best: deliver options and choice at a competitive cost to all consumers.

Getting this policy right is important because Internet connectivity is benefiting rural Americans tremendously, for example:

- A recent study by University of California Davis Children's Hospital found telemedicine consultations with pediatric critical care specialists significantly improved the quality of care for seriously ill and injured children in remote, rural emergency rooms. After an interactive videoconference with a specialist, rural emergency room physicians were more likely to adjust their course of treatment, and parents' perceptions of their child's care improved significantly.
- Field technology has drastically altered farming methods. With GPS enabled tractors, farmers are able to navigate fields and track crop yields with incredible precision, adjusting nutrients, irrigation, and pesticides accordingly for subsequent harvests. Smart phone apps for crop scouting can alert farmers to specific problem-areas in a field early, reducing the need to spray entire fields. These Internet enabled diagnostic tools not only increase productivity but also reduce costs and environmental hazards as farmers are better able to manage, coordinate, and track their crops and equipment.
- Delivery services like Good Eggs and Fresh Direct are connecting farmers and food makers to consumers like never before. With mobile apps and websites, consumers can order fresh produce from dozens of farms in their area and have it delivered to their doorstep.
- Broadband has enabled distance learning to be a very real reality for students in remote areas. Through video conferencing and websites, classrooms and tutors from around the U.S. and throughout the world can be brought right to them – regardless of the student's physical location.

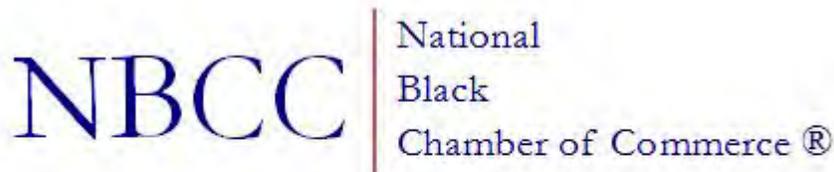
As a non-partisan organization, we applaud the bi-partisan effort being put forth in the Committee to bring our nation's communications policy in sync with the times. Telecommunications policy has never been a single party issue in the past and should continue to be debated, legislated, and regulated in a bi-partisan manner across all branches of government. The next generation of broadband networks hold the promise of reliable access to opportunities for economic growth, education, healthcare, and more. These advanced networks will provide seamless communication regardless of your device or location, strengthening the economies and lives of our rural communities. This should be a worthy goal all policy makers can embrace when considering new telecommunications policy.

If the National Grange could be of assistance on this issue, please do not hesitate to contact our National Grange Legislative Director, Grace Boatright, at [REDACTED]. Thank you for the opportunity to comment on this important issue.

Sincerely,



Edward L. Luttrell
National Grange President



4400 Jenifer St NW Suite 331 Washington, DC 20015
202-466-6888 Fax 202-466-4918
www.nationalbcc.org info@nationalbcc.org

January 31, 2014

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo,

We are writing to applaud you for undertaking the bipartisan process of updating the laws and regulations that govern our country's communications marketplace.

For too long, these laws have been overtaken by technological and marketplace change and for too long they have not fostered the best environment for our consumers, small businesses and most importantly, people of color.

The constituents of the NBCC – small businesses in African American communities – benefit greatly from our communications landscape. Government policies that encouraged the availability of broadband and its adoption have had a profound effect on the economic health and availability of jobs within minority communities throughout the United States.

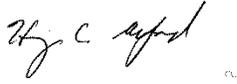
Broadband enables countless opportunities that benefit African-American small businesses which, according to the U.S. census, are growing at the rate of 45% - one of the highest and fastest growing segments of the U.S. economy. To continue that progress, we need Congress to move forward with updating our communications laws.

As you look to update our laws, it is important to remember that simpler is usually better and that overly-complex new laws tend to hurt small businesses the most. That is why the NBCC supports simple principles for the future law, that:

- Provides the same opportunities for innovation and growth in the Internet economy regardless of technology or platform
- make sure there is a clear and documented harm to customers that cannot be fixed by the market before the government intervenes; and
- preempt state and local municipalities from imposing barriers or patchwork laws and regulations that place heavy burdens on minority owned small businesses

With these simple principles, we can move our communications laws forward and help speed the innovation and certainty needed for minority small business owners to bring their products and

services to market. Establishing a clear bipartisan approach to move this legislation is paramount and NBCC will help build consensus across any political and ideological divisions. Updating our country's communications laws are too important to our small businesses to get stuck in a Washington morass and we urge all of you to move forward with this update in a timely manner. Sincerely,

A handwritten signature in black ink, appearing to read "Harry C. Alford". The signature is written in a cursive style with a large initial "H".

Harry C. Alford
President/CEO
National Black Chamber of Commerce®



January 30, 2014

Chairman Fred Upton
Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Chairman Greg Walden
Communications and Technology Subcommittee, Energy and Commerce Committee
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

VIA EMAIL

Dear Chairman Upton and Chairman Walden:

Facilitating growth, sustainability, and opportunity within the new technology economy is a federal priority of the National Black Caucus of State Legislators (NBCSL). NBCSL recognizes the great impact of the technology on our communities and urges you and your fellow colleagues to implement a 21st century policy framework that encourages growth and innovation while addressing pressing technology issues such as privacy, cybersecurity, and spectrum policy. State sovereignty must be maintained as well.

The current federal regulatory approach to the Internet and broadband is based on particular services and policies intended to address previous challenges. We must develop a new framework that recognizes old challenges, anticipates new ones, and fully supports everyone involved in technological proliferation.

NBCSL applauds the House Energy and Commerce Committee's review of the Communications Act and further lauds your appeal for public input. Telecommunication laws do not exist in a vacuum: they are a part of an Internet ecosystem of which everyone, including communities of color and the underserved, plays an integral role.

This past December, our membership ratified Resolution TST-14-08, "Calling for An Update on Federal Telecommunications Laws." Attached is a copy for your review and consideration. Please refer to this as you debate this timely policy issue. NBCSL stands ready to work in collaboration to fully update this nation's telecommunications laws and to implement a regulatory plan that recognizes rapidly evolving broadband innovations and investments and protects our nation's most vulnerable. If you need any additional information, please contact LaKimba B. DeSadier, NBCSL's Executive Director at [REDACTED] or [REDACTED]

Respectfully,

Representative Joe Armstrong (TN)
President, National Black Caucus of State Legislators

EXECUTIVE OFFICERS

Rep. Joe Armstrong (TN)
President

Sen. Catherine Pugh (MD)
President-Elect

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Vice-President

Rep. Alan Williams (FL)
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Rep. Laura V. Hall (AL)
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Rep. Barbara W. Ballard (KS)
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Rep. Lois DeBerry (TN)
Ex-Officio Member

LaKimba B. DeSadier
NBCSL Executive Director

TELECOMMUNICATIONS, SCIENCE, AND TECHNOLOGY

Resolution TST-14-08

CALLING FOR AN UPDATE ON FEDERAL TELECOMMUNICATION LAWS

WHEREAS, the Internet has flourished into a vibrant marketplace with positive effects for all Americans;

WHEREAS, the United States leads the world with Internet infrastructure investment with \$1.2 trillion invested from 1996 to 2011 and this investment is enabling and growing the American economy by creating thousands of jobs and driving innovation;

WHEREAS, the Federal Communications Commission (FCC) acknowledged in its 16th Mobile Competition Report that 91.6 percent of U.S. citizens have a choice of three or more wireless broadband providers, and 97.8 percent have access to at least two;

WHEREAS, the FCC reports that annual investment in U.S. wireless networks grew more than 40 percent between 2009 and 2012, from \$21 billion to \$30 billion;

WHEREAS, 94 percent of the U.S. population has access to a wired broadband provider;

WHEREAS, the National Black Caucus of State Legislators (NBCSL) stated in our collaborative policy report with the Joint Center for Political and Economic Studies and other key legislative organizations in 2009, *Broadband Imperatives for African Americans: Policy Recommendations to Increase Digital Adoption for Minorities and their Communities*, that “access to broadband is essential to economic and social progress in every community, and that broadband itself can be an essential tool for bringing jobs, economic development, and a better quality of life in economically challenged communities across the country”;

WHEREAS, continued investment and innovation in broadband will provide additional competitive choices and affordable options for advanced home-based and mobile broadband allowing communities to further capitalize on this technology;

WHEREAS, the current federal regulatory approach applied to broadband networks is based on policies intended to address previous challenges and is not commensurate with current advances in technology;

WHEREAS, a new policy framework should allow for a fair, competitive, and equitable market for all consumers as well as businesses in the Internet ecosystem, including network providers, software makers, applications developers, and device manufacturers; and

WHEREAS, the nation’s telecommunications laws and regulations should keep pace with today’s highly innovative marketplace.

THEREFORE BE IT RESOLVED, that the National Black Caucus of State Legislators (NBCSL) acknowledges that broadband innovations and investments are rapidly evolving and the government, must implement the most appropriate regulatory policies to protect citizens and communities;

TELECOMMUNICATIONS, SCIENCE, AND TECHNOLOGY

Resolution TST-14-08

BE IT FURTHER RESOLVED, that NBCSL believes state policy and rule makers are most adept at understanding the needs of their communities, and their ability to tax and implement necessary regulations for their respective jurisdictions should be maintained;

BE IT FURTHER RESOLVED, that NBCSL urges federal policymakers to implement a 21st century policy framework that encourages continued investment and innovation while addressing advanced technology issues, such as privacy, cybersecurity, and spectrum policy;

BE IT FURTHER RESOLVED, that NBCSL urges its members to introduce policies that use a national, 21st century framework and encourages participation by people of color and other underserved communities; and

BE IT FINALLY RESOLVED, that a copy of this resolution be transmitted to the President of the United States, the Vice-President of the United States, members of the United States House of Representatives and the United States Senate, and other federal and state government officials as appropriate including the Federal Communications Commission and the Federal Trade Commission.

SPONSOR: Representative Mia Jones (FL)

Committee of Jurisdiction: Telecommunications, Science, and Technology Policy Committee

Certified by Committee Chair: Delegate Michael Vaughn (MD)

Ratified in Plenary Session: Ratification Date is December 13, 2013

Ratification is certified by: Representative Joe Armstrong (TN), President



National Cable & Telecommunications Association
25 Massachusetts Avenue, NW, Suite 100
Washington, DC 20001-1431
(202) 222-2300

Michael K. Powell
President & Chief Executive Officer

(202) 222-2500
(202) 222-2514 Fax

January 31, 2012

The Honorable Fred Upton
Chairman
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman
Ranking Member
House Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Chairman, Subcommittee on
Communications and Technology
House Committee on Energy and Commerce
2182 Rayburn House Office Building

The Honorable Anna Eshoo
Ranking Member, Subcommittee on
Communications and Technology
House Committee on Energy and Commerce
205 Cannon House Office Building
Washington, DC 20515

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo:

On behalf of NCTA and our member companies, I am submitting the attached comments on the questions you posed in your first White Paper on the CommAct Update. As I mentioned at the Subcommittee hearing on January 15th, I commend the thoughtful and deliberative process the Committee has established and I look forward to our continued dialogue on issues that arise as you consider possible reforms to the Communications Act.

Please feel free to contact me if you or your staff has follow-up questions, or if you require additional details regarding any of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Powell", written in a cursive style.

Michael K. Powell

Modernizing the Communications Act: Questions for Stakeholder Comment

Responses of the National Cable & Telecommunications Association

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?

The existing Communications Act was organized to reflect increasingly obsolete distinctions, and its structure is ill-equipped to deal with the fluidity of today's marketplace. The communications industry has been evolving at a blinding pace, largely driven by robust high-speed broadband networks that now connect nearly all American homes. Among other things, the widespread deployment of IP technology has made intermodal competition possible: networks once constructed and optimized to provide a single service – voice or video, for instance – are now capable of providing voice, video, and data.

Any new Communications Act must be structured in a manner that allows it to address the present and future challenges presented in this ever-evolving marketplace. A fragmented regulatory regime for each type of provider and service may have made sense years ago when each provider generally offered only one service. A new Communications Act should eliminate regulatory silos to reflect how companies compete and innovate, and how consumers use and enjoy services.

A new Communications Act should revolve around a few simple principles. First, do no harm. The communications infrastructure and marketplace in this country have thrived, in stark contrast to the challenges with the power grid, or the transportation system. There has been exceptionally strong private sector investment. Innovations have flourished at a remarkable rate. Broadband networks have reached over 90 percent of Americans faster than any technology in history. Widespread deployment and adoption of broadband Internet access services have created an entirely new ecosystem for developing innovative products and services. Cable's platform has given storytellers the flexibility to take risks and craft imaginative and groundbreaking programming, making cable home to some of the best television ever created. And the sector has provided jobs and spurred economic growth, even during the darkest recession since the Great Depression. Rather than attempt to create advance solutions to hypothetical problems, a new Act should simply refrain from trying to fix what is not broken.

Second, keep it simple. This marketplace requires a greater degree of business flexibility than ever before. Participants need assurance that any government involvement will be applied on a technology-neutral basis and in a manner that preserves an environment that continues to incent strong private investment. Thoughtful reduction of the Act's prescriptive rules will lead to greater simplicity and a better product for consumers.

A new Act should focus on nurturing the conditions for innovation and investment. Keep the marketplace as deregulated as possible, to allow providers to innovate in creative ways that respond to marketplace demand. Allow and reward risk-taking, which is key to achieving innovative breakthroughs. And create a climate of stability through regulatory certainty, which allows for the constant flow of risk capital that communications markets demand.

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?

A modern Communications Act would need to acknowledge that today's marketplace reinvents itself constantly and rapidly. It should accept and account for uncertainty, unpredictability and constant change. As described above, it should be as streamlined as possible, and focus on promoting the conditions for innovation and investment.

At the same time, NCTA recognizes the important role the law plays in preserving important societal values and protecting consumers. Even a simpler, streamlined Act could contain the core obligations that promote and preserve important societal values. Providing emergency services like 911 and E-911, cooperating with law enforcement, supporting universal service, and ensuring access for persons with disabilities are important. Providers should ensure that their service reaches and serves every segment of society. However, these provisions of the Act would need to be modified to ensure that regulation is no greater than what is necessary to ensure the fulfillment of those responsibilities, and that obligations are consistent across providers who are offering comparable services.

Consumer protection is equally important. The law must protect against fraud and abuse, prevent physical harm, and ensure transparency so consumers can make informed choices. But any reform must also ensure that regulators do not use the guise of "consumer protection" to stray into what is really economic regulation, such as regulating rates or terms of service.

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

A modern Communications Act should give regulators the ability and the obligation to address constantly changing marketplace dynamics. In 1992, cable operators served 98 percent of all multichannel video homes, the top ten multichannel video distributors were all cable operators, the typical cable system offered 30-40 analog video channels, and cable broadband and voice services did not exist. Today, cable operators serve 54 percent of multichannel video homes, and the second, third, fifth and sixth largest multichannel video distributors are not traditional cable companies, but DBS or telco service providers. The typical cable system offers hundreds of digital and HD channels as well as VOD and DVR capabilities, broadband Internet speeds from 10-30 Mbps are standard and many networks offer up to 100+ Mbps, and cable operators provide voice service to one in three homes that use wireline voice service. Yet the old law still governs, and the FCC's ability to reexamine policy in order to reflect the changed environment is constricted. Going forward, the law should give the FCC the ability – and the duty – to modify legal requirements as marketplace realities demand.

A modern Act also should prioritize timeliness of agency action. Open-ended proceedings and lack of definitive answers on questions that drive product and service development hinder pro-consumer innovations and create a strong reluctance to further engage in the regulatory process. The law should require the FCC to focus on timeframes for agency action, disclosures, and measures of progress.

Finally, a new Communications Act should strive to ensure that the FCC monitors and safeguards markets, rather than try to create them. The FCC should be limited in its authority to affirmatively create economic conditions for markets and set terms, conditions, and prices. There should be minimal economic regulation, to allow competition to rely on market forces wherever possible. Where there is a demonstrated market failure or anticompetitive harm, the FCC should look to principles of antitrust enforcement and competition policy rather than seek to institute economic regulations *a priori*. And it should require that there be demonstrable evidence of harm to justify any FCC intervention in economic decisions.

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?

To ensure that the law remains flexible enough to deal with the challenges of rapidly changing marketplace conditions, the prime directive should be to keep the law simple. Standards should be easy for affected parties to understand and implement. While the current Act is complex and lengthy, attempting to prescriptively address thousands of topics, a new law should be as streamlined as possible, maintaining a simple, deregulatory environment. Rather than try to regulate markets based on hypothetical harm, it should focus on giving regulators the ability to address problems if and when they arise.

To create a law that is more technology-neutral, the new law should treat all like services alike. Technological neutrality and competitive parity are essential components in any new communications law that seeks to promote innovation. While historically, determining which law governs a communications business depended on three elements – the technology used, the particular service being offered, and particular company doing the offering – modern data networks and service providers are capable of virtually any kind of communications product or service. These similarly situated companies should not be regulated differently. Rather than concentrating on the technology used to provide a service, providers of the same service should play by the same rules.

For example, under existing law, cable operators remain subject to a number of statutory requirements that DBS providers are not, even though – from the consumer’s perspective – they provide the same type of service and the DBS providers are much larger than all but one or two cable companies. Only cable operators are subject to rate regulation and “must-buy” requirements; DBS providers essentially avoid PEG and leased access obligations; and DBS providers have no obligations to make their affiliated networks available to competing multichannel video programming distributors. The competitiveness of the multichannel marketplace is undeniable and continuing to impose these requirements on cable operators is no longer necessary and cannot be justified.

Competitive parity requires not giving special advantages to use of any particular technology, or conditioning deregulatory status on a particular technological offering. A law that confers a regulatory advantage on a particular technology, or that deregulates not when marketplace forces warrant, but when a favored technology is used, is a serious threat to innovation and competition. Companies facing fierce competition will respond to what consumers want, as providers continuously seek to differentiate themselves and their products and services. Requiring providers to arrange and offer service in a particular way hinders their

ability to create and respond to market demand. The constant invention and adaptation in this marketplace has been good for consumers and for our economy. Experimentation in new services and new business models should be encouraged. Decisions about what technology to use should not be driven, or even affected, by a need to fit a service into a particular regulatory box. A regulatory scheme that successfully encourages innovation will not require providers to spend time debating which side of the line a service feature puts them on.

Moreover, there is a serious danger with having the government pick technology winners and losers, particularly in a field as dynamic as communications. The initial technology choice may be wrong, and the government cannot predict what technology is coming next. A technology-based approach creates a perverse incentive for providers to select the technologies they use based on a particular regulatory result even if they do not necessarily respond to consumer demand most effectively and efficiently, and to hold onto that technological approach, even long after it has outlived its usefulness.

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

The distinction between “information services” and “telecommunications services” continues to serve a purpose to the extent it ensures that broadband Internet access service remains free of burdensome common carrier-style regulatory treatment. The imposition of common carriage obligations under the existing legal framework arose from a monopoly era when the availability of service to all was assured only through heavy government oversight and control of service offerings and business models. In contrast, Internet services, including cable broadband service, arose from a more competitive, unregulated environment and have thrived due to the FCC’s longstanding policy of treating them as information services. While the FCC has relaxed its common carrier regime as the telecommunications marketplace has become more competitive, imposing even this more relaxed form of regulation on broadband providers and other information service providers would substantially increase the role of government in the marketplace and significantly disrupt the competitive, multi-platform broadband ecosystem that has developed in the absence of regulation. Given the historical role that ILEC networks have played, there may still be an on-going need to protect consumers and competitors from any disruptions, as ILECs transition to modern IP-based networks.



January 30, 2014

Congressman Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Congressman Henry Waxman
Ranking Member
Committee on Energy and Commerce
2322A Rayburn House Office Building
Washington, D.C. 20515

Congressman Greg Walden
Chairman, Subcommittee on Communications and
Technology
2125 Rayburn House Office Building
Washington, D.C. 20515

Congresswoman Anna Eshoo
Ranking Member, , Subcommittee on Communications
and Technology
2322A Rayburn House Office Building
Washington, D.C. 20515

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo,

The Newborn Coalition appreciates the opportunity to submit comments on the Committees initiative to rewrite the 1996 Telecommunications Act. We applaud your effort and commitment to modernizing our nation's communications laws.

Formed in 2010, the Coalition is an advocate for the perspectives of parents, families, providers, and other child advocates, committed to the promotion of early detection and prevention of adverse health events in newborns through the innovative use of health information technology.

Over the past two decades we have witnessed a dramatic technological revolution. Before the infusion of technology into the healthcare system, patients had to travel to see their doctor or the doctor made house calls to see patients. Now, with the convergence of ubiquitous broadband and the delivery of healthcare, patients and providers have access to each other at a moment's notice. Newborns represent the highest transfer population in our healthcare system, so these technology innovations are already improving the quality of their care.

Broadband and wireless technology is helping doctors in underserved areas save newborn and infant lives. In recent years, a variety of devices have come to market that attach to smartphones and tablets to turn them into mobile diagnostic devices. There are tools that connect smartphones to pulse oximeters to measure blood oxygen levels and even technology that allows 4G phones to monitor ECGs. This technology has been used by doctors in rural and underserved areas to treat newborns that suffer from prenatal asphyxia and Critical Congenital Heart Disease – among the nation's top causes of infant mortality.

There is little doubt that technology has transformed our healthcare system. In 1996, when the Communications Act was put into law, smartphone, tablets, and broadband were virtually non-existent. So much has changed so quickly because of modern high-speed and capacity networks. The information and communication technologies sector and the healthcare sector clearly don't operate in independent silos anymore. The two sectors are forever entwined and dependent upon each other; and as such it is imperative that our nation's communications laws adequately reflect the current dynamic technological landscape and not try to anticipate future innovations with any preemptive rules or regulations.

For the next life saving device or technology to come to market, there needs to be a modern, flexible, and responsive legal framework that fosters consumer confidence and incentivizes innovation without favoring or leaving out key players in the market. Any new communications law should be technology agnostic and encompass all the players in the Internet ecosystem whether it's an app developer, Internet service provider or technology vendor.

Modernizing our communications laws will allow new innovative solutions to come to market that will help solve some of our nation's biggest healthcare challenges. The Newborn Coalition applauds your efforts in this endeavor and stands ready to work with the Committee to modernize our communications law.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Bialick". The signature is fluid and cursive, with the first name "Jim" and last name "Bialick" clearly legible.

Jim Bialick
Executive Director
Newborn Coalition

Dear Representatives Upton and Walden,



Frederiksberg
January 26th 2014

With regard to your effort to reform the Communication Act, here are some thoughts from competition law and anti-trust.

I have served in Danish Competition Authority in Denmark for 35 years, rising to the head of that office. During my tenure I was responsible for telecommunication, transportation and post, and I worked to develop the framework for telecommunication regulation in the Faroe Islands and Greenland, to areas with particular challenges because of their remote and rural characteristics. There are parts of the USA that have some of these challenges. Now I have consultancy advising companies and governments on competition issues.

The telecom industry is global. Consumers can obtain services across borders, and firms can compete across borders. Differences in national laws create arbitrage for global players. There is a challenge to create laws that can be harmonized internationally.

When new products and services enter the market, there is a natural fear of the unknown and concerns about consumer protection and abuse of market position. Sometimes lawmakers respond by imposing strict ex-ante, proactive regimes to preclude bad behavior. However the problem with this approach is that it imposes costs and risks of regulatory failures, distort competition and reduce economic welfare. Proactive rules can be so severe that they become obstacles to innovation and growth.

Given these challenges and the global nature of telecommunications, lawmakers should look to competition law and antitrust to play a greater role. Competition and antitrust law can strike the appropriate balance. It is important to allow market participants to innovate and experiment, but when abuse occurs, competition law should be invoked with full force.

Director Niels Rytter
Konkurrenceraadgivning.dk
Solsortvej 7
DK 2000 Frederiksberg
Denmark



www.konkurrenceraadgivning.dk

During the latest 20 years competition law and antitrust have converged around the globe and administrative practices are pretty efficient today.

At the same time the dynamic telecom sector has been liberalized around the globe and this process has left the telecom sector with different sector specific competition regulation. The rollback of sector specific competition regulation has begun in many countries, but there is also a need for an international harmonization of the remaining sector specific competition regulation.

There is an impressive record of the application of competition and antitrust law in Europe. This shows that competition rules can be effective and preferable to prophylactic rules. Here are just a few of the cases within ICT where competition law prevailed

- Market Access (Microsoft)
- Bundling and tying (Microsoft and Viasat)
- Predatory pricing (Wanadoo)
- Margin squeeze (Deutsche Telekom)
- Discount Discrimination (Intel)
- Refusal to supply (Microsoft and Kommunedata)

Competition law and antitrust cannot fully substitute telecom regulation. But it is crucial for future economic welfare to reduce sector specific competition regulation as much as possible and find the optimal balance between these two regimes.

I hope this is helpful in your effort to reform the Act.

Yours sincerely

Niels Rytter

<http://www.konkurrenceraadgivning.dk>



January 29, 2014

The Honorable Fred Upton (MI-6)
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Henry Waxman (CA-33)
Ranking Member
Committee on Energy and Commerce
2322-A Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden (OR-2)
Chairman
Subcommittee, Communications
& Technology
Committee on Energy and Commerce
2128 Rayburn House Office Building
Washington, DC 20515

The Honorable Anna G. Eshoo (CA-18)
Ranking Member
Subcommittee, Communications &
Technology
Committee on Energy and Commerce
2322-A Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Upton and Walden and Ranking Members Waxman and Eshoo:

On behalf of the National Organization of Black Elected Legislative Women (NOBEL-Women), I would like to applaud the Committee on Energy and Commerce for your initiatives to update the Communications Act.

During our 2013 Annual Legislative Conference in Atlanta, Georgia in June our members passed a resolution calling for an update to our nation's telecommunications laws. We believe this is an important initiative because the current Communications Act is built upon old technologies of the rotary phone era and doesn't adequately reflect the current Internet ecosystem we live in today.

In order to keep investment flowing in our advanced communications networks we need a policy framework that recognizes the new dynamic Internet marketplace and opens the doors for better educational opportunities, access to healthcare and job creation for minority communities.

We appreciate the opportunity to submit our resolution and look forward to working with the committee on this important process.

Sincerely,

Waikinya Clanton
Executive Director



Resolution Urging an Update on Telecommunications Laws

WHEREAS, the Internet has flourished into a vibrant marketplace with positive effects for women and minorities; and

WHEREAS, the United States leads the world with Internet infrastructure investment with \$1.2 trillion invested from 1996 to 2011 and this investment is enabling and growing the American economy by creating thousands of jobs and driving innovation; and

WHEREAS, the Federal Communications Commission (FCC) acknowledged in its 16th Mobile Competition Report that 91.6% of U.S. citizens have a choice of 3 or more wireless broadband providers, and 97.8% have access to at least two; and

WHEREAS, the FCC reports that annual investment in U.S. wireless networks grew more than 40% between 2009 and 2012, from \$21 billion to \$30 billion; and

WHEREAS, 94% of the U.S. population has access to a wired broadband provider; and

WHEREAS, the National Organization of Black Elected Legislation (NOBEL) Women reported in our Joint Policy Paper with the National Foundation of Women Legislators in 2009, "Empowering Women in the 21st Century: Paving the Way with Broadband and Mobility", that economic opportunity and jobs, better health care, education for the twenty-first century, sustainability and energy independence, investment and innovation that improve lives, public safety, and civic empowerment can all be advanced by harnessing the power of broadband; and

WHEREAS, continued investment and innovation in broadband will provide additional competitive choices and affordable options for advanced home-based and mobile broadband allowing communities to further capitalize on this technology; and

WHEREAS, the current regulatory approach applied to broadband networks remains rooted in the restrictive approach applied to old technologies of the telephone era and creates uncertainty and the constant potential for the imposition or expansion of rules that undermine incentives to invest, innovate and create new networks that benefit our society and economy; and

WHEREAS, a new policy framework should be created that applies to all companies in the Internet ecosystem including network providers, software makers, applications developers, and device manufacturers and relies on government intervention only when consumers or competition is harmed by the actions of any player; and

WHEREAS, to keep investment flowing, the nation's telecommunications laws and regulations need to keep up with today's highly innovative marketplace; and

NOW, THEREFORE, BE IT RESOLVED, that NOBEL Women acknowledge that broadband innovations and investments are rapidly evolving and the government must implement the most appropriate regulatory policies to protect consumers; and

THEREFORE BE IT FURTHER RESOLVED, that by the 2013 Legislative Summit of the NOBEL Women, assembled in Atlanta, GA, June 21, 2013 that NOBEL Women urge national policymakers to implement a 21st century policy framework that encourages continued investment and innovation while addressing advanced technology issues such as privacy, cyber-security, and spectrum policy; and

BE IT FINALLY RESOLVED, that NOBEL Women send a copy of this resolution to the President of the United States, members of Congress, and State Legislatures and Regulatory agencies.

Submitted by:

Rep. Angela Williams (CO)

Adopted: 6/22/13



**NTCA–The Rural Broadband Association
Comments in Response to U. S. House of
Representatives Energy & Commerce
Committee White Paper 1: Modernizing the
Communications Act
(Released January 8, 2014)**

January 31, 2014

INTRODUCTION

NTCA–The Rural Broadband Association (“NTCA”) represents nearly 900 small, rate-of-return rural telecommunications providers (commonly called “RLECs”). RLECs serve about 5% of the US population and roughly 40% of its landmass. These companies operate in rural and tribal areas long ago left behind by larger service providers because the markets were too high-cost – too sparsely populated, too far from larger towns and cities, and/or just too challenging to serve in terms of topography or terrain. As anchors in the communities they serve, these small businesses create jobs, drive economic activity, and connect rural Americans to the world. Moreover, these rural network operators have been at the forefront of the broadband and Internet Protocol (“IP”) evolution for years, making every innovative effort to deploy advanced networks that respond to consumer and business demands for cutting-edge services.

Success in any update of the Communications Act (the “Act”) must begin with a comprehensive review of the law, building surgically upon the best of what has worked to date and pausing at each turn to ensure that potential changes advance what should be considered “Core Principles” codified within the existing law – universal service, consumer protection, and competition. Although “market-based” frameworks in many cases may ensure consumers realize the full benefits of innovation at the lowest possible prices, in rural areas there are often no such “markets” to speak of. Therefore, a reasonable statutory and regulatory construct that ensures fulfillment of the Core Principles will be very much needed regardless of how quickly technology advances.

For rural areas, key among these Core Principles is the current statutory pledge that specific, predictable, and sufficient support will be provided to help promote reasonably comparable services at reasonably comparable rates in rural, high-cost areas. This explicit mandate, which builds upon decades of national policy, has been – and remains – essential in

enabling small rural providers to deploy and upgrade cutting-edge networks over time in those so-called “markets” where no other carrier or entity could find a business case. Indeed, this mandate has already helped these small, community-based businesses deliver at least DSL-speed broadband to over 90% of rural America (even as there is more to be done and sustained). Furthermore, not only does this long-standing national policy promise rural Americans an opportunity to participate in the economic, educational, and public safety benefits of the broadband economy, but it allows the entire country to benefit from the ideas and ingenuity of rural residents and the resources and business opportunities that exist in rural and remote areas. Studies examining the impact of rural communications activity – including purchasing, employment figures, and projected tax revenues – confirm rural communications to be a powerful generator of urban economic growth and federal and state tax revenue.¹ In short, universal service is an investment with real benefit and returns for the nation as a whole, and this policy must be sustained and enhanced in any potential “re-write” of the Act.

¹ Kuttner, Hanns, *The Economic Impact of Rural Telecommunications: The Greater Gains*, HUDSON INSTITUTE, at 6, 8 (2011) (The rural telecommunications industry supported \$14.4 billion of economic impact in 2009, with \$9.5 billion occurring in urban areas, and more than 70,000 jobs, 45% of which were placed in urban areas.); Shields, Martin, Cutler, Harvey, and Marturana, Michael, *The Impacts of Colorado Telecommunications Association Members on the Colorado Economy*, REGIONAL ECONOMICS INSTITUTE, COLORADO STATE UNIVERSITY, at 9 (Oct. 26, 2011) (In Colorado, 428 jobs added over \$21.0 million to state payrolls.); McKee, Gregory, *The Effect of Changes in Universal Service Funding on the Economic Contribution of Rural Local Exchange Carriers to the North Dakota State Economy*, DEPARTMENT OF AGRIBUSINESS AND APPLIED ECONOMICS, AGRICULTURAL EXPERIMENT STATION, NORTH DAKOTA STATE UNIVERSITY, at 16-19 (Dec. 2011) (North Dakota saw an additional \$18 million in Federal tax revenue and \$31 million in state tax revenue arising out 1,100 direct jobs and 800 secondary jobs generated by rural telecommunications activity. “Like other RLECs, North Dakota RLECs buy many specialized products and services not available in state economies. National and international markets typically provide these products and services”); *Kansas Rural Local Exchange Carriers: Assessing the Impact of the National Broadband Plan*, W. FRANK BARTON SCHOOL OF BUSINESS, CENTER FOR ECONOMIC DEVELOPMENT AND BUSINESS RESEARCH, WICHITA STATE UNIVERSITY, at 11, 12 (2011) (Projecting \$1.4 million in personal income tax and \$1.3 million in retail sales tax losses in Kansas from potential cuts in Federal rural telecom programs.); Peach, James, Popp, Anthony V., and Delgado, Leo, *The Potential Economic Impact of the National Broadband Plan on the New Mexico Exchange Carriers Group*, OFFICE OF POLICY ANALYSIS, ARROWHEAD CENTER, NEW MEXICO STATE UNIVERSITY, at 18 (2011) (Projecting a personal income loss of \$14.1 million in New Mexico due to potential cuts in Federal rural telecom programs.).

To implement and fulfill this Core Principle of universal service, deployment and ongoing operation of communications networks in high-cost rural areas has to date relied on a combination of fees paid by subscribers, privately-sourced capital, and revenues derived from several programs. The latter includes an effective partnership of: (1) loan and grant opportunities administered by the U.S. Department of Agriculture's Rural Utilities Service and other agencies that help to finance in the first instance the deployment of networks to the benefit of the whole community; and (2) user-funded explicit support programs, including the Federal Universal Service Fund (USF), that help keep those networks sustainable once built and the services offered over them affordable. In addition, while regulated compensation arrangements among telecommunications carriers (intercarrier compensation, or ICC) have been portrayed by some as an inefficient or ineffective scheme, such arguments hold little water when one peels back the layers – at least in rural areas. To the contrary, ICC has long played (and despite recent regulatory reforms, continues to play for now) an important role in enabling rural network deployment and operation by helping to average out costs in rural and urban areas. ICC mechanisms also have the efficiency of ensuring that those who make use of the network actually pay for such use. Assuming, however, that ICC mechanisms will wind down pursuant to recent regulatory reforms and the self-help of certain market participants, determining how truly to fill the gaps in cost recovery as ICC withers away must still be seen as a critical piece of future universal service policy in any Act update.

Even if in need of review and update, this statutory regime and the ensuing regulatory frameworks (matched in many instances by comparable state-level policies) must be seen as a collective success story by and large. These constructs have helped and continue to help connect consumers and business across the nation with broadband and other advanced services. A faithful and disciplined approach to the Core Principle of universal service must ensure that, even in the event of any statutory or regulatory update, those areas served through support from

federal and state USF mechanisms not only “become” served in the first instance but that they “remain” served, and that consumers and businesses everywhere can make full use of a suite of advanced communications services at affordable rates. In other words, especially in these “markets” where there is no real economic “market” to speak of, a strong and well-tailored statutory and regulatory backdrop that captures the Core Principles is essential – even in an IP-enabled, broadband-capable world – if we are to keep America connected. Accordingly, these Core Principles must serve as the touchstones of any review and update to the statute, and the commitment to such principles must be expressly renewed and reaffirmed in any such update.

With this backdrop, NTCA submits the following response to the specific questions posed by the committee:

- 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?***

The Committee’s first question highlights a critical component of technological evolution that should be captured in considering any possible update – specifically, the fundamental break between communications networks and the services that ride atop them. In the past, services and networks were largely indistinguishable, if not inseparable. Telephone calls rode atop telephone networks; video services rode atop over-the-air broadcast spectrum or cable or satellite networks. It therefore made sense that past regulation primarily focused on services, and that services were in turn regulated in effective silos because their lines did not blur.

Of course, circumstances differ dramatically today. With advanced networks that enable innovative service offerings, the otherwise inextricable tether between networks and services has been all but severed (although it is clear that advanced networks remain a prerequisite to cutting-edge services). One can today offer voice, video, and other data atop almost any kind of network, and underlying networks need not distinguish between types of data in performing their

core functions of processing and transmission.² For this reason, subject always to the touchstones of the Core Principles noted above, any legislative review and update should evaluate possible departure from “vertical silos” of service regulation, and instead consider reasonable, carefully tailored regulation of services and networks based instead upon “horizontal layers.”

The rationale (and need) for such a layered approach to regulation in the communications space was perhaps best anticipated by Justice Antonin Scalia nearly 10 years ago in his dissent in the *NCTA v. Brand X* decision.³ In that case, Justice Scalia honed in on the distinction between network transmission and finished service, noting that the former retained “ample independent entity” even when included as a component of the latter. His analysis turned upon what he recognized as a clear difference between “the physical transmission pathway to the Internet” and the other advanced “applications and functions” that comprise the Internet. Indeed, Justice Scalia captured almost a decade ago the foundational difference between the “computer-processing facilities” that process data from distant servers and websites and the downstream physical network transmission that “merely serves as a conduit for the information services that have already been ‘assembled’ by the [ISP].” Congress should now proceed forward from the analytical construct outlined by Justice Scalia in considering whether and to what degree to update and revise the statutory and regulatory backdrop.

² To be clear, however, even if networks need not distinguish between services and types of data in undertaking transmission, networks *can and should* do so from time to time as a matter of both good business and good public policy. For example, network management is critical to make sure that voice communications, including but not limited to calls to public safety entities, are effectively prioritized and that high latency or other substandard integrity in such communications does not defeat the purpose of the users. One does not want the nation’s critical voice communications flowing over unmanaged networks co-mingled with web traffic and other data that are less time-sensitive and less quality-sensitive.

³ *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, 545 U.S. 967 (2005).

In the context of any future regulation of services as distinct from network technology used to provide them, the goal should be to put service providers on relatively equal footing in the regulation of functionally equivalent services, with the precise level of regulation determined based upon market conditions and, of course, the Core Principles. As just one example, any party holding itself out as offering voice service by means of any underlying “technology” or network should be subject to the same type and level of regulation. A voice provider should, for example, be expected to meet reasonable standards for quality of service (or clear and conspicuous disclosures as to how its service falls short of such standards), should be prohibited from blocking its customers’ communications,⁴ and should of course be required to provide reliable access to public safety under any and all circumstances. The same requirements, by contrast, would not be necessary in the context of broadband Internet access services, although perhaps some basic consumer protection requirements (such as disclosures) would be fitting there instead. In sum, in a world where the service and underlying network technology are no longer inextricably linked, distinctions in underlying network technology should no longer allow for (or drive) variance among rules that apply to functionally equivalent services or, even worse, give any entity an incentive to “self-classify” its offering to evade rules that apply to its effective competitors. And, of course, disciplined application of the Core Principles and a thoughtful, careful approach to the proper level of regulation at the service layer must be assured at each turn.

Similarly, rather than treat different kinds of networks differently and adopt special carve-outs based upon what services ride atop them or whether one happens to use fiber, coaxial wires, terrestrial wireless, or satellite technology in an underlying network, any legislative update should aim for the regulation of networks on common footing to the extent possible, subject

⁴ This is more than a hypothetical concern. *See In the Matter of Rural Call Completion, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 13-39, FCC 13-135, at para. 1-12 (2013).

again to ensuring fulfillment of the Core Principles. The same holds true of protocol – it should matter not if the transmittal of data occurs in IP, TDM, ATM, or Frame Relay or the nature of the service(s) that may happen to ride atop the network. Instead, if the function performed is the transmission of data from point A to point Z, then the technological means by which those data make that journey (or what someone does with the data atop that network) should be irrelevant to regulation of the network.

Because of the paramount importance of networks to all of the services that ride atop them, there is some need for scrutiny of how those networks differentiate among the data they transmit. Innovation in services and realization of the economic and civic benefits that can flow from them will be frustrated to the extent that networks do not work seamlessly. That is to say, if networks of competing or complementary providers do not interconnect on fair and reliable terms, or if access to them can be denied arbitrarily, unjustly, or unreasonably, then fulfillment of the Core Principles will be imperiled at both the service *and* the network layer. In this regard, while common carrier regulation may be deemed “outdated” in some corners, a framework like common carriage may offer the best fit for regulation of network transmission. To be clear again, such regulation should not and cannot bleed over to distinct services offered atop the network; service-based regulations should instead be developed and applied to functionally equivalent services pursuant to the Core Principles and consistent with the more flexible approach described above. But NTCA submits that the Core Principles cannot be served at the network level – and, worse still, may only be frustrated at the service level – unless clear-cut, time-tested rules of the road, such as common carriage or something comparable, are applied to the networks that carry our nation’s data.

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?***

In keeping with the Core Principles described above, it is particularly important that fundamental universal service and interconnection requirements be retained and adapted for a new communications environment. Applying these Core Principles specifically to the transmission layer through a clear and robust framework will provide regulatory certainty, while pairing such regulation with more common-sense, equitable treatment of comparable services and clear but reasonably applied consumer protection requirements will encourage innovators and entrepreneurs to invest time and resources and expect returns if their ideas win over consumers.

An update to the Act ultimately presents an opportunity to capture shifts in the ways in which service providers use networks, as well as changes in the ways in which network operators interact and interconnect with one another. An update also offers the chance to transform the USF into a program that provides specific, predictable, and sufficient support for reliable, quality, advanced networks and essential services that ride atop them at reasonably comparable rates. A careful examination and surgical revisions will ensure that the Act continues to promote many desirable goals in addition to universal service – including 911 and other essential public safety services.

To achieve these ends, there are several specific key measures that Congress should consider as part of any possible update to the Act in addition to renewing and reaffirming in all respects the Core Principles themselves.

Require Contributions to USF Based Upon Network Use, Rather than Arbitrary Service Distinctions That Can be Exploited and Avoided. The sustainability and very success of our nation's universal service policy will be called into question if USF continues to be funded only through assessments on telecommunications services. Because of artificial and outdated

distinctions and incentives for gamesmanship through “creative” use of current statutory service definitions, the pool of assessable telecommunications services revenues is shrinking even as telecommunications and other communications-related revenues grow. Moreover, shoring up the USF contribution base by imposing assessments on certain services on a “one-off” basis through permissive authority under the Act offers little promise in the long-run – not unlike putting fingers in a leaky regulatory dike, it is at once inefficient as an administrative matter, and it ultimately cannot hope to keep up with and capture all the ways in which those making use of underlying networks might do so now or in the future.

As a result, the USF program effectively has an artificial funding ceiling that lowers a bit each day due to the failure to broaden the contribution base and the incentives (and abilities) in place today for entities to avoid contribution.⁵ This *de facto* cap on the USF program will handicap severely our nation’s ability to fulfill the Core Principles unless changes are made. While the statute today may provide flexibility to assess such services, nothing would help more in breaking a decade-long logjam than a clear Congressional mandate that all those who use our nation’s networks – by whatever technology or service – are responsible to contribute to its universal well-being and availability on an equitable and nondiscriminatory basis. Indeed,

⁵ Consider for example, an entity’s purchase of “private line” or special access services as compared to dedicated Internet access (DIA). Both offer capacity to connect to the provider’s network and ultimately to other networks, albeit through different protocols or technologies. And while one may be perceived as more advanced than the other, the fact is that one might obtain a private line with capacity far in excess of the Internet port and link obtained via DIA. Yet the arbitrary and artificial classification of these functional equivalents skews regulatory outcomes and marketplace behavior in ways that should be deemed unacceptable in an efficient and effective market. Specifically, the customer buying a private line pays contributions in excess of 10 percent to USF simply because the capacity being procured has been classified as a “telecommunications service,” while another customer buying precisely the same amount of capacity as DIA pays no contribution to USF or the wider health and well-being of our nation’s networks because the latter is deemed an “information service.” Fixing such market-skewing disparities and eliminating such arbitrary distinctions while making sure always to serve the Core Principles should be seen as a priority of any legislative review and update.

broadening the contribution base to include the information services that USF already supports has recently received bipartisan backing in the US House.⁶

To this end, for much the same reasons noted above with respect to the need to move away from “vertical service silos” that allow entities to pick and choose their mode of regulatory arbitrage, any legislative update should avoid tying contributions to artificial and likely-to-be-soon-outdated service classifications and should instead “future-proof” the USF system by simply providing that any end user’s procurement of a connection to a network – whether in TDM, IP, ATM, Frame Relay, or whatever technology may be the fancy of the moment – must contribute to the health of American networks and services as a whole and thus will be assessable for USF purposes.

Support Broadband-Capable Networks Without Arbitrary Distinction as to What any Given Consumer Chooses to Use as a Service Upon that Network. In rural areas served by RLECs, current FCC rules require consumers to take voice service for the network to be supported, even if all a given consumer wants is broadband. Just as with contributions, arbitrary tether to individual kinds of services for purposes of determining what networks high-cost USF can support undermines the technological neutrality and sustainability of the program. To be clear, there certainly should – and indeed, must – be certain baseline services that every network operator *offers* to consumers to ensure reasonably comparable services are indeed available throughout the country. But a USF system that *compels* a consumer to take any given service on a network in order for that network and its services to be supported holds too fast to the old inextricable link between service and network. Such a system will be unsustainable as technology and consumer preferences evolve – we are already seeing this come to pass as some consumers served by NTCA members experience “sticker shock” as those consumers seek to

⁶ See H.R. 5828 § 102(a), 111th Cong., 2d Sess. (2010).

drop voice service only to find that in doing so their broadband service rates on the same network skyrocket as a result.

To be clear, there must be some accountability in the use of USF, and recipients must be committed to offering (and must be obligated to offer) a full suite of high-quality services to consumers. Such mandatory services atop USF-supported networks should include high-quality, reliable (“carrier-grade”) voice services, robust broadband services, and other services that the FCC might in the future designate based upon changes in technology and consumer preference. A network operator that wants to or can only provide either voice or broadband should not be deemed to be serving the true mission of universal service, nor should an entity that *only* provides services but does not deploy the network that enables such services be eligible for USF support. But, at the same time, a forward-looking universal service policy should focus the mandate on the provider/network operator – it should not force consumers to take any one service on a supported network simply to keep affordable all other services that the consumers actually want.

Recognize that Networks Today are Different Than They Were in the Past and that the Current USF (and ICC) Mechanisms No Longer Fully Support Such Networks. Current cost recovery mechanisms, although in need of updating, have helped to support deployment both of the local connections to consumer premises (in the case of USF) and the transport connections that connect small rural towns and outlying areas to distant urban areas (in the case of ICC). With ICC revenues trending downward due to a mix of consumer preferences, self-help by individual actors, and regulatory reforms aimed at gutting the mechanism over time, the recovery of the high costs of the long-haul transport networks that connect rural America and the rest of the world is very much at risk. Given that these networks today not only carry voice telephony calls but also serve as “middle mile” connections for the carriage of data to and from urban Internet gateways, it is important that declining ICC revenues can be replaced with some other

form of cost recovery for transport – otherwise, the Core Principle of universal service is at serious risk as rural consumers bear an increasingly disproportionate share of the costs of such transport. Indeed, even if IP networks might offer efficiencies, they do not make costs magically disappear – there are still real and substantial network costs associated with the underlying transport of data from point A to point Z, particularly over hundreds of sparsely populated rural miles. Congress should therefore consider as part of any universal service update the need for sufficient support not only of services and the local networks that connect rural consumers to one another, but also sufficient “middle-mile” support to enable robust, affordable connections between rural and urban areas. In addition, or as an alternative, Congress should consider how to ensure that rural consumers do not bear such transport costs. Transport providers must bear the obligation of interconnecting in rural areas and/or pay rural carriers of last resort for interconnection in high-cost markets.

Ensure Seamless Interconnection and Exchange of Data to Satisfy the Core Principles.

The scourge of rural call completion failure encompasses many of the fears of what consumers can expect in the absence of a clearly defined, time-tested regulatory backstop that requires network operators to interconnect with one another on reasonable terms and precludes service providers and network operators of all kinds from blocking data. Despite the problem having been brought to its attention three years ago, the FCC has been unable to stem the tide of dropped and/or misidentified calls, with their efforts bearing only one enforcement settlement and a recording and reporting mandate that has yet to be implemented and is currently being challenged by some. Clear “rules of the road” for interconnection of networks and the exchange of data will be essential to avoiding such problems going forward and ensuring the seamless transmission of data in accordance with customer expectations. Any new provisions should at the same time, however, maintain the Act’s current carefully struck balance in recognizing that,

in areas served by smaller providers, interconnection and competition requirements must be measured against their possible effects on universal service objectives.⁷

Tailor and Balance Reporting Burdens for Smaller Providers. While the Committee asks about possibly eliminating provisions of the current Act, a number of the requirements that should be considered for elimination are in fact regulatory, rather than statutory, obligations – specifically, the numerous, costly, and sometimes redundant reporting requirements that providers must wade through on a regular basis. Although NTCA and its RLEC members recognize the importance of accountability in the use of USF resources and the delivery of quality, affordable services to consumers, there is a need to strike a clear balance and take meaningful account of the costs associated with such reports. To the extent that small businesses are compelled to devote substantial employee or consulting resources to preparation of plans and reports, this necessarily detracts from the deployment of those resources for service delivery, network operation, and customer service. The Energy & Commerce Committee is off to a good start on this front by moving the Federal Communications Commission Consolidated Reporting Act of 2013⁸ through the House last year, but Congress should continue to keep in mind how to ensure a better balance of the need for accountability in network deployment and service delivery with the very real effect of reporting burdens on small businesses.

⁷ See 47 U.S.C. § 251(f). Section 251(f) clearly highlights the need for a careful balance in seeking to promote competition while ensuring universal service in certain “markets.” Specifically, Congress rightly found that, in areas served by RLECs, applying certain obligations such as interconnection at locations beyond the RLEC’s local serving area or network unbundling would likely imperil universal service rather than serve consumer needs. This careful balance surrounding the terms and conditions of interconnection and other provisions must be maintained in any legislative update.

⁸ H.R. 2844, 113th Cong., 1st Sess. (2013).

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

The FCC's structure and jurisdiction may require some updating, but NTCA submits that it would be best first to focus on the structure and application of the Act itself. Then, to the extent that can be defined and established, Congress can assess whether the FCC has the tools and authority needed to carry out the mission of a revised and updated statute. NTCA also notes that local-jurisdiction regulators possess extensive knowledge of local conditions and should continue to play an important role even as networks evolve to "IP" and consumer preferences shift to "interstate" service offerings. Giving state and local regulators a clearly defined complementary role in matters such as consumer protection and the need for universal service in individual "markets" would seem well-advised and help to fulfill the Core Principles most effectively.

The House Energy & Commerce Committee took a good step toward improving FCC transparency and predictability when it passed the Federal Communications Commission Process Reform Act of 2013 last year.⁹ The bill would implement a number of common sense process reforms such as publishing rules before adoption and soon after adoption. Stricter guidelines for action on waiver requests would also be welcomed. Currently, the FCC can sit on waiver requests indefinitely, leaving providers and investment waiting for years at a time.

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?*

Forbearance already enables the FCC to rapidly tailor regulatory processes to meet fast-evolving market characteristics – a potentially key tool for maintaining a nimble and flexible regulatory framework that can achieve precise results that otherwise would require legislative action. Action must be measured against the Core Principles, however, and forbearance should

⁹ H.R.3675, 113th Cong, 1st Sess. (2013).

not be employed lightly when implicating matters of consumer protection, competition, or universal service.

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

No. Confusion over classifying VoIP and the epidemic of rural call incompleteness represent only a harbinger of what is to come if the distinction between telecommunications and information services is perpetuated in any legislative review and update. As discussed above, any review and update should seek to minimize vertical silos of service or differentiation between functionally equivalent services simply based upon the underlying network or technology used to deliver them. In the absence of such an approach, we are likely to see only the perpetuation of self-classification, regulatory gamesmanship, and other arbitrage that has contributed, among other things, to the decline of the ICC system, the crisis in USF contributions, and the uneven playing field that imposes restrictive rules on some services while functionally equivalent services can drop or block calls, for example, with effective impunity. The Core Principles can be served best if a simple, straightforward statutory and regulatory framework governs the provision of *all* like services and applies separately to the distinct and severable underlying networks.

At the same time, a lighter regulatory touch for *all* applications and services (but not networks) may be warranted to the extent it is assured that the Core Principles can still be fulfilled. But it is essential that the Core Principles will indeed be fulfilled in connection with any review and update of the Act, to avoid recreating problems like rural call completion or lack of access to 9-1-1 in a supposedly “evolved” service environment. Put another way, lighter-touch regulation should not come at the expense of the Core Principles, at the expense of the effective working of our interconnected communications networks, or in defiance of consumers’ expectations for the services they procure.

CONCLUSION

Small, community-based rural telecom providers are eager to continue deploying advanced networks and delivering the advanced services that rural areas need to participate in a broadband economy, but the Core Principles of universal service, consumer protection, and competition are critical to the success of this mission. Universal service and interconnection have worked to enable deployment of advanced, affordable communications services. These principles are as valid today as they were in 1996. Accordingly, even as it considers rewriting the Act in whole or in part, Congress should ensure that these principles are not abandoned; to the contrary, they must be renewed and reaffirmed expressly as part of any legislative update.

Congress should consider departing from service silos that have allowed entities to self-select the degree to which laws and rules relating to these Core Principles apply to their operations, while at the same time Congress should ensure that the networks upon which all services and applications ride are universally available, seamlessly interconnected, and singularly focused on the successful transmittal of all data between points of consumers' choosing.



OREGON
TELECOMMUNICATIONS
ASSOCIATION

January 31, 2014

Mr. David Redl
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Modernization of the Communications Act

Mr. Redl:

The Oregon Telecommunications Association (OTA) is a statewide trade association representing both Incumbent and Competitive Local Exchange Carriers operating in Oregon. The OTA appreciates the opportunity to offer comments on the effort to modernize the Communications Act.

The OTA offers these comments on behalf of the companies listed on appendix A accompanying this document. The OTA is a diverse association and consequently not all our members are listed on appendix A.

Those members listed provide state of the art telecommunications services in rural Oregon. In some cases these areas are quite remote and are difficult to serve. All members of the OTA firmly believe that Oregonians, regardless of their geographic location, should have the same access to telecommunications services as Oregonians living in more urban areas.

Large parts of Oregon are rural and many thousands of Oregonians live, work and pay taxes in those areas. Many thousands more visit rural Oregon for recreational purposes. It is essential that these individuals are able to connect to the outside world reliably and at an affordable cost. The need for quality, state of the art telecommunications services will only increase in future years.

Please do not hesitate to contact me if you need any further information. I also offer to you the real world experience of any of our rural ILEC members if you would like to visit them in Oregon or have a conversation about any aspect of their operations.

Best Regards,


Brant Wolf

**Selected members of the Oregon Telecommunications Association (OTA) comments
to HOUSE ENERGY AND COMMERCE COMMITTEE**

**Modernizing the Communications Act
FIVE 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?

Since its creation in 1934, review and oversight of specific service provision has been how the FCC has worked to protect the public interest. When a carrier offers a service for a fee to the public, this event triggers a considerable amount of regulatory oversight and compliance reporting. We will discuss the need to streamline some of this reporting in the answer to Q5.

Regulation of services has been the method used to regulate entire classes of carriers in a consistent but at times inequitable manner. The first staff white paper describes federal telecommunications regulation as consisting of “silos.” Silos, or distinctions based on the specific network technologies used and services provided, have been created by using different titles of the Act to oversee separate classes of carriers. Inconsistency has arisen as the convergence of technology has evolved our modern digital arena. Intermodal competition creates the need to reexamine such an arrangement. With what appears to the customer as equivalent services being treated differently based on which Title applies to their provider, the timing of the start of this lengthy legislative review is appropriate.

If a public policy decision is made to modify to some degree this current silo-based regulation, there are a variety of options. We offer two for the Committee’s consideration: **silos reduction and single silo**. First, we share the foundational public

policy principles of the Oregon Telecommunications Association Group that guide our responses in this filing:

- 1 – Affordable broadband should be available to all Americans**
- 2 – Federal universal service support should be sufficient and predictable**
- 3 – Policies should promote competition while protecting consumers**
- 4 – Public safety and national security should continue to be a priority**
- 5 – More regulatory authority should be shifted to the states**

A first option of “**silos reduction**” would establish stratification by two sizes of carrier, using either revenue levels, number of states served or number of customers. Such a distinction could facilitate different time frames for certain future actions being applied to each of the two groups of carriers. It is easy to see that the timing of certain sunset provisions could differ for large carriers when compared to small carriers on issues such as market power, transport issues and reporting requirements. We discuss the need for streamlined reporting at page 6.

A second option, known as “**single silo,**” is to develop one set of regulation that applies to all carriers under regulation. The transition to this approach would be initially difficult and impractical over the long-run due to the dizzying array of circumstances that would be placed into a single class of carrier.

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?

A many year process culminated with the Telecommunications Act of 1996 (“the 1996 Act”). This comprehensive overhaul of the Act was intended to achieve dual

objectives: to move away from the assumption of a natural monopoly and promote competition for local phone service while at the same time codifying the vital national public policy of universal service. **Federal USF programs are critically important and should be specific, sufficient and predictable.**

A key issue in any Act rewrite is how to adapt the current “silo” basis of regulation that focuses on individual sectors of the communications economy into the current world of intermodal competition. The rewrite will need to address whether to continue to maintain different regulatory obligations based on the mode of technology employed, or whether different regulatory obligations will be as a result of a different metric (e.g., size of company).

What should be **RETAINED**?

The modernization of the Act should include provisions that require the Federal Communications Commission to regulate carriers if such regulation is necessary to incent wider availability of broadband access, ensure reasonable rates, protect customers, or otherwise promote the public interest. A key section that should be retained is the universal service provisions.

What current provisions should be **ADAPTED**?

The modernization of the Act should include provisions that require the Federal Communications Commission to adapt certain existing regulations that have become outdated by technological change if such regulatory oversight of carriers is still necessary

to incent wider availability of broadband access, ensure reasonable rates, protect customers, or otherwise promote the public interest.

Universal service provisions belong in this category as well, as the legacy voice mechanisms must be transitioned to reflect the need for support for broadband in certain portions of the United States.

What would be prudent to **ELIMINATE**?

In its *Petition for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution* filed with the FCC in November, 2012, the National Telecommunications Cooperative Association suggested the important concept of “smart regulation” review. The Committee should analyze this type of an approach in its current deliberations. The theory of the smart regulation review is that regulations are not automatically assumed to be unnecessary, but rather evaluated against the core objectives of protecting consumers, promoting competition, and ensuring universal service. We believe that the smart regulation review approach could be adapted to become a smart legislative review approach that should be applied to the analysis of what provisions should be eliminated in this rewrite of federal telecommunications law.

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

The Federal Communications Commission is organized in large part in a manner that mirrors the structure of the Act and the 1996 Act. Changes to FCC structure would logically follow with decisions made to the platform used to regulate carriers. For example, if the decision is made to shift to regulation by size of entity, then the Bureau

designations at the FCC might well change to Large Company Oversight Bureau (LCOB) and Small Company Oversight Bureau (SCOB).

The members of OTA that join in this set of comments respectfully submit to the Committee that this portion of the debate address the proper role of the state Public Utility Commission (PUC) in the future. The OTA members included in this filing believe the states should have a reasonable amount of regulatory oversight. State PUCs possess an understanding of the companies they regulate not possessed by the FCC due to the distance away from Washington, D.C., and in Oregon have a strong working knowledge of the challenges that are faced by carriers in providing quality and affordable communications services to consumers.

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?

The simple answer on how to create a set of laws flexible enough to have staying power is to develop a platform that is immune from changes in technology and the related service offerings. For 80 years, the FCC has found it necessary to use some form of “silos” in order to not have to regulate companies on an individual case basis. The pivotal question is: “What should the FCC rename its silos?” Our recommended approach is to gear the regulatory silos to focus regulation by size of carrier, the silo reduction option we describe at page 2 of this document.

The challenge is to create a sustainable platform that is relevant long into the future in order to realize any benefits from a modernization effort.

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

The Federal Communications Commission first began to study the convergence of computers and communications in 1966. With this origin developed during the Computer Inquiry series of dockets, the distinction between information and telecommunications services was debated for three decades. In the 1996 Act, provisions were enacted so that “telecommunications” services were subject to Title II common carrier regulation. Separate and distinct was the designation for “information” services that would not be covered by Title II common carrier regulation.

The goal for many carriers became to have their service offerings be considered as information services and thus outside the regulatory burden that Title II regulation brings to bear. The problem for the FCC was where to draw the line.

What is missing from these five questions is the issue of whether there is an opportunity to streamline reporting and paperwork for carriers that have a long track record of providing quality, affordable communications service to their customer base. With the many restrictions placed on carriers due to the universal service fund cap that the FCC has implemented, it is important for Congress to encourage the FCC to find ways to streamline reporting for carriers that must devote more resources to meeting the broadband mandate. An excellent example of a problem area is the FCC requirement for companies to submit a five-year plan. In simplest terms, in our rapidly changing marketplace, companies are being asked to forecast what products they will be buying that have not yet been invented from companies that have yet to be formed. We respectfully suggest that the five year time frame is unreasonable.

Appendix A
Oregon Telecommunications Association Members

Asotin Telephone Company d/b/a/ TDS Telecom
Beavercreek Cooperative Telephone Company
Canby Telephone Association d/b/a Canby Telcom
Cascade Utilities, Inc. d/b/a Reliance Connects
Clear Creek Telephone & Television
Colton Telephone Company d/b/a ColtonTel
Eagle Telephone System, Inc.
Gervais Telephone Company
Helix Telephone Company
Home Telephone Company d/b/a TDS Telecom
Molalla Communications, Inc. d/b/a Molalla Communications
Monitor Cooperative Telephone Company
Monroe Telephone Company
Mt. Angel Telephone Company
Nehalem Telecommunications, Inc. d/b/a RTI Nehalem Telecom
North-State Telephone Co.
Oregon-Idaho Utilities, Inc.
Oregon Telephone Corporation/Midvale Telephone
People's Telephone Co.
Pine Telephone System, Inc.
Pioneer Telephone Cooperative
Roome Telecommunications Inc.
St. Paul Cooperative Telephone Association
Scio Mutual Telephone Association
Stayton Cooperative Telephone Company
Trans-Cascade Telephone Company d/b/a Reliance Connects

Context is Key in Communications Act Update

By: Kristal High, Esq., Editor in Chief, Politic365.com

A lot can change in eighteen years, especially when it comes to technology.

The last time the Telecommunications Act was updated, the commercial Internet was in its infancy, Google and Amazon were just starting and their popularity was limited to those “in the know,” Nintendo 64 was the hot gaming console, LCD TV’s were things of the future belonging to the filthy rich or [The Jetsons](#), the average cost of a cell phone was \$1,000, text messaging didn’t exist, and social media hadn’t yet been imagined, in fact, Mark Zuckerberg was just twelve years old at the time.

Fast-forward and today we have near ubiquitous broadband access in this country, though home adoption is still woefully lacking among one-third of the nation’s residents, particularly for members of rural, tribal, low-income and underserved minority communities. Innovation abounds at a dizzying pace with new gadgets, applications, video, music, and social media sharing tools coming on the market each day. The name of the game is convergence, consumer choice rules the day, and in this landscape the regulatory structures of the past no longer apply.

In considering ways to update the Communications Act, then, Congress must be mindful of context.

In 1996 the people involved in creating that iteration of the Telecom Act could not predict that in less than 20 years America would have begun the transition to a full-scale digital economy. Likewise legislators today cannot predict what the next 20 years will hold in store. We’re in the midst of the third major economic revolution of our times, and the rate at which we moved between the agricultural and industrial eras proceeded at a snail’s pace compared to what has happened to our society in the Internet Age.

A modern Communications Act, therefore, in order to be successful, must focus on the reality that as technologies evolve the market will continue to converge and the line between infrastructure and content providers, search and operating systems, and device manufactures and app developers will continue to blur. As such, any rules of the road for the technology and telecommunications sectors must be flexible enough to allow for changes. Further, we should no longer treat players in the Internet ecosystem differently because of what we know them for today, because the technology and services they ride upon and provide in 2014 may be very different from what they offer and how they reach consumers in 2034. An effective Communications Act will likely be one that applies technology neutral broad rules of the road that serve as guiding principles for appropriate conduct, all the while bearing in mind the critical need to promote investment, innovation, and consumer protection.

While the future of the Internet ecosystem is entirely too important to gamble on which regulations today will promote growth and economic opportunity tomorrow, any revised Communications Act must speak to the important role the Federal Communications

Commission plays in overseeing the Internet. To be clear, the FCC ought not be tasked with creating the market conditions under which the Internet is expected to flourish. Thus far light touch regulations have enabled an explosion of progress and prosperity that few would have deemed possible in 1996. That trend should be allowed to continue. The most important role the FCC can play going forward is to promote the public interest, and it can do that by both policing markets, rather than trying to create them, and by ensuring that broadband is not just deployed but that it is adopted and used on a wide scale.

Even today, the boundless benefits of high-speed Internet access are not leveraged by millions of Americans, and scores of people who are online are focused solely on entertainment and miss the array of opportunities to enhance their educational, economic, and wellness pursuits. While studies show that the costs of connectivity and computing equipment are factors in the lack of broadband adoption, we have come to understand that digital illiteracy and the perceived lack of relevance of broadband to people's lives are the chief reasons why people do not use this technology to maximize their lives in profound and meaningful ways. If America hopes to remain globally competitive and if we ever intend to decrease economic inequality and social disparity in this country we must make broadband adoption and use non-negotiable. This is the highest purpose to which the FCC can invest its time, energy, and focus, and it is imperative that this scope of engagement be outlined in a new Telecom Act.

We no longer exist in an era where the interests of corporations or consumers are served by classifying the implements of Internet engagement as telecommunications *or* information services. These days we live in an "and" rather than an "or" regime. The Internet, the great network of networks, would not be possible but for the synergistic interplay between telecommunications *and* information services. Our legislative and regulatory structures, therefore, should acknowledge this symbiotic relationship between all of the players in the Internet ecosystem – be they Internet service providers, edge players, content providers, or consumers. Superficial labels and demarcations classifying services in a narrow silo serve no one and should be eradicated from any future rewrites of the Telecom Act.

The only thing certain about the future of tech and telecom in this country is that change is inevitable. To foster continued growth, our laws should not try to play catch up with technology – that's a losing battle. The Internet Age is upon us, and we must invite frameworks that allow investment, innovation and economic opportunity for all to emerge in previously undreamed of ways.



To: Senate Committee on Energy and Commerce

Re: Comments on the Modernization of the Telecommunications Act of 1996

Progressive Policy Institute

January 31, 2014

Thank you for the opportunity to comment on this very important topic. The Progressive Policy Institute (PPI) believes any modernization of the Telecommunications Act of 1996 should make continued innovation, investment and growth a guiding principle.

It's worth noting that in December 2013, the Progressive Policy Institute hosted an event titled "Enabling the Internet: A Conversation with America's Digital Policy Pioneers." The event honored a bipartisan group of people who helped create the legal and regulatory framework that has enabled the exponential growth of the Internet. The honorees included former Senior Advisor to President Clinton Ira Magaziner, former U.S. Ambassador to the OECD Karen Kornbluh, former FCC Chairman Bill Kennard, former Administrator of National Telecommunications and Information Administration Larry Irving, and former FCC Chairman Michael Powell.

The event showed how the Internet's growth, under both Democratic and Republican Administrations, depended critically on avoiding heavy-handed top-down regulation. Instead, the legal and regulatory framework was consciously designed to allow Internet innovation to thrive with relatively little interference, except in a few critical areas.

This example of successful bipartisan digital policy may turn out to be useful as Congress considers modernization of the Telecommunications Act of 1996. The complete video of the event can be seen [here](#).

