Recommendations of the Internet Innovation Alliance to the United States House Energy and Commerce Committee Regarding Communications Law Legislative Reform

January 31, 2014

By the late 1980s, advances in communications technology and accompanying consumer preferences drove the need for the first comprehensive revision of the Communications Act since its adoption in 1934.

Responding to these changing circumstances, Congress embarked on an eight-year exercise to modernize the law culminating in the 1996 Communications Act ("96 Act"). It was groundbreaking because it opened the door for competition across a range of communications industry sectors. Telephone companies were empowered to offer multi-channel television service. Cable companies and CLECs were empowered to enter the local telephone market to compete with incumbent local exchange carriers. The Regional Bell Operating Companies (RBOCs) would be able to enter the nationwide long-distance market upon demonstrating that they had sufficiently opened their networks to local telephone competition, and the RBOCs were granted permission to manufacture telecommunications equipment.

Moreover, emerging technologies in the telephone, cable and wireless industries rapidly set the stage for the convergence of communications services, and the potential for robust and vibrant cross-platform competition.

Since 1996, the way in which consumers receive communications services of all kinds has dramatically transformed. In 1996, telephone companies offered telephone service through signals delivered over circuit switched networks. Cable companies used coaxial cables to deliver multi-channel video service. The wireless industry was in its adolescence, and the Internet was in an early stage of

commercial use. Today, telephone, cable and wireless companies offer the combination of voice, video, and data to their customers in digital format over packet routed networks that employ the Internet protocol; there are more wireless than wireline communications customers, and the use of the internet for the delivery of information of all kinds is becoming ubiquitous.

Consumers have strongly embraced the benefits of cross-platform competition. Given the new marketplace and consumer realities made possible by the successful 96 Act reforms, the inevitability of continued technological innovation, and the reality that today's laws severely lag technological and marketplace advancements, comprehensive statutory telecommunications reform for the 21st Century is vital.

A thoughtful reform should begin by setting a date at the end of this decade to "sunset" the public switched network, and replace it with a highly efficient and scalable network that is resilient and readily capable of handling voice, data or video communications.

The need for this step is underscored by the rapid and well advanced transition from circuit-switched to "routed communications" (i.e., the Internet being the most well-known example of this type of communication). Today, only 5% of American households use the old network as their exclusive communications medium.[1] Another 29% use it in combination with wireless service, and most households use wireless communications only or rely on a combination of wireless and a non-traditional wired alternative to the telephone network, such as cable modem service.[2] We stand at an inflection point where the rules that were sensible in the last century for a heavily regulated telephone monopoly are no longer sensible in today's competitive communications landscape dominated by broadband and a multiplicity of Internet enabled services.

The expectation of current law that telephone companies spend billions annually maintaining an aging network that consumers no longer prefer is impeding the next level of broadband investment. Planning and delivering a rapid transition to

[1] Anna-Maria Kovacs, Internet Innovation Alliance, *Telecommunications competition: the infrastructure-investment race*, October 8, 2013, page 11.
[2] *Id.*

an all – broadband communications environment is today's largest telecommunications policy challenge.

Outdated rules today compel telephone companies to invest nearly $13.5 billion each year to maintain and run the aging phone system as if it were still the nation's core communications medium used by almost all.[3] As the number of telephone company subscribers on POTS (plain old telephone service) sharply falls, the per subscriber cost of maintaining the old network has become unsustainable.[4] According to a recent study, America's telephone companies made more than $154 billion in capital expenditures from 2006 to 2011.[5] Surprisingly, the majority of that investment was dedicated to maintaining the declining telephone network, even though today only about one-third of American households still use it at all, and only 5% use it exclusively.[6] Every dollar that is spent maintaining an inflexible and costly network that consumers are fleeing is a dollar not invested in the modern multifunction broadband networks that consumers prefer. Every dollar telephone companies spend on an ancient, declining, and little used technology is a dollar not spent developing the more capable broadband infrastructures that permit phone companies to efficiently offer voice, video, and data services on a more equal footing with largely unregulated cable companies. That's an important goal because when competition is fair and fierce, consumers ultimately win big with competitive pricing and greater choices to fit their personal needs.

Ancient rules and old ways of thinking are undermining innovation, damaging competition, forcing billions of dollars into misdirected capital investment, and slowing our national progress. Maintaining the status quo for the antiquated telephone network--either by decision or inaction--is a costly anachronism. Requiring phone companies to operate voice-only telephone networks while they

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[3] Fung, Brian. "We spend billions a year maintaining phone lines (almost) nobody depends on. Should we get rid of them?" *Washington Post* 8 October 2013. Web. 30 January 2014. <http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/08/we-spend-billions-a-year-maintaining-phone-lines-almost-nobody-depends-on-should-we-get-rid-of-them/>

[4] Anna-Maria Kovacs, Internet Innovation Alliance, *Telecommunications competition: the infrastructure-investment race*, October 8, 2013, page 9-10.

[5] *Id.* at page 20.

[6] *Id.* at page 11.

are building out new fiber-optic broadband networks makes as much sense as requiring a hitching post in front of every store, forcing bus companies to maintain streetcar tracks, or insisting on backup electric fans in every air-conditioned building.

Against this backdrop, the leaders of the House Energy and Commerce Committee have announced the launch of a process for legislative reform. This submission is in response to the committee's invitation for legislative recommendations. We make the following suggestions:

- Reform legislation should recognize the pervasive and rapidly developing role of broadband networks in the delivery of modern communications and the urgent need for deregulatory parity among similarly situated broadband service providers.

  The 96 Act was about telephone service delivery. The only provision which addressed Internet protocol delivery was known as the "Communications Decency Act", and it was declared unconstitutional by a unanimous vote of the Supreme Court. The division established in the Act between information services and communications services was not specific to the Internet but was designed to address the provision by telephone companies and potentially other entities of data services and applied to any platform over which the communication is delivered. Given the advanced nature of the transition to broadband delivered services and the accelerating cost of maintaining the little used circuit-switched telephone network, reform legislation should proceed from the assumption that the old network will sunset by the end of this decade. In addition, Congress should level-the-playing field and encourage greater innovation by ensuring that artificial legal and regulatory distinctions between broadband service providers are eliminated.

- Reform should also be premised on the understanding that our current light touch regulatory approach to broadband broadly stimulates investment in networks and promotes both job creation and innovation. A comparison of the state of broadband in the United States and Europe is instructive. Europe heavily regulates broadband through leased access

requirements. Consequently, according to the National Telecommunications and Information Administration ("NTIA"), the US, despite its vast geography and dispersed cities, has higher average broadband speeds and lower prices than Europe generally. In fact, entry-level broadband pricing in the US is the second lowest globally, behind only Israel, according to the International Telecommunications Union ("ITU"). Our light-touch regulatory approach toward broadband networks works and must be retained.

- Any reform should realign the Federal Communications Commission's ("FCC") regulatory structure to match current marketplace and technological realities. Today's structure is a holdover from a distant past in which telephone companies, both wired and wireless, delivered voice services, cable and satellite companies delivered one-way multi-channel television service, and the Internet was barely in existence. A streamlined functional regulatory structure is needed which recognizes today's cross-platform competition in which telephone, cable and wireless carriers are in head to head competition one with the other offering the combination of voice, video and data to customers who care only about the quality and the price of services not about the historical identity of the companies that offer them. A realigned structure will ensure that similar services will have similar regulations.

- Reforming the FCC's regulatory structure should include elimination of existing duplicative or unnecessary functions at the agency. In particular, the Committee should consider trimming back the FCC's duplicatation of the Department of Justice ("DOJ") and Federal Trade Commission's ("FTC") role in reviewing communications merger transactions. Today, the FCC essentially replicates the DOJ and FTC's merger review process, by using the Act's ambiguous public interest standard to require that proposed transactions "enhance competition." Even though some mergers might generate effects that do not trigger anti-trust harm, the FCC has used its authority in the past to impose unrelated behavioral requirements on merging parties to promote the public interest. Given the DOJ's and/or FTC's current role and expertise in determining whether transactions would "substantially lessen competition," the Committee should promote

government efficiency and on a going-forward basis limit the FCC's merger review authority.

- Congress can help address the existing spectrum deficit facing commercial wireless carriers by enabling the near-term reallocation of significant swaths of government held spectrum for commercial auction. Government spectrum holders have proven resistant to past reallocation efforts, and even when reallocation has been mandated have been very slow to vacate the reallocated spectrum. To address these concerns, the Committee is urged to consider the provision of incentives of various kinds to government spectrum holders which will encourage greater cooperation in the reallocation process and in the taking of steps necessary to make the reallocated spectrum available for commercial auction.

- The Committee should also consider facilitating secondary market transactions among spectrum holders and encourage streamlined processes to facilitate spectrum use as additional mechanisms to address the nation's spectrum crisis.

  Today, companies that purchase spectrum in federal auctions receive a license to use the spectrum for specified purposes. Due to legitimate interference (co-channel and adjacent channel) concerns, if the spectrum is bought for the provision of terrestrial wireless services, it may not be used for over the air broadcasts or for the delivery of satellite-based services. In many instances, the dynamically changing marketplace, and the technology to support that marketplace, will suggest appropriate and profitable spectrum uses not apparent at the time of the original spectrum allocation, but under restrictions imposed on license holders, the spectrum may not be used for those new and appropriate purposes without regulatory approval following a costly and lengthy proceeding. Spectrum scarcity is challenging the ability of wireless carriers to meet the exploding demand for service. Reform legislation should enhance the efficiency of spectrum use through the provision of flexible licenses, allowing for direct negotiations between co-channel and adjacent channel licensees on operating rules to minimize interference while facilitating the expansion of the secondary market for spectrum.

The Internet Innovation Alliance appreciates the opportunity afforded by the Committee to submit these recommendations and commends the Committee for its leadership in undertaking a thoughtful process to address modern communications policy needs. We stand ready to assist the Committee through the provision of additional information upon request and in supplying oral testimony for Committee informational hearings.

Rick Boucher
Former Member of Congress
Honorary Chairman, Internet Innovation Alliance