Telecommunications & Electronic Media

Congress Begins to Consider a New Communications Act

*By Randolph J. May**

Introduction

On December 3, 2013, House of Representative Energy and Commerce Committee Chairman Fred Upton and House Communications and Technology Subcommittee Chairman Greg Walden announced plans for the Commerce Committee to review and update the Communications Act of 1934. This is a welcome and timely development, for as Chairman Walden stated at the time of the announcement:

> When the Communications Act was updated almost 18 years ago, no one could have dreamed of the many innovations and advancements that make the Internet what it is today. Written during the Great Depression and last updated when 56 kilobits per second via dial-up modem was state of the art, the Communications Act is now painfully out of date. We plan to look at the Communications Act and all of the changes that have been made piecemeal [since 1934] and ask the simple question: Is this working for today's communications marketplace?[1]

Initially, the review and update process, which the Committee ubiquitously refers to by its Twitter handle, #CommActUpdate, is expected to be a multiyear project. The process is being conducted primarily through the issuance of a series of White Papers that frame issues and seek responses from interested parties. At the time of this writing, the Commerce Committee has issued four White Papers. In this brief essay, I wish to highlight the issues raised in these White Papers and offer my perspective concerning the questions raised.[2] Of course, updating a regulatory regime that is as comprehensive and outdated as the Communications Act is a project that raises a multitude of significant issues, some of which are quite complicated and technical. These issues can be addressed—and, in fact, are being addressed—in the review process at various levels of detail. Here, given the space constraints, I necessarily must address them at a fairly high level. But an essential point to understand is this: Since the Communications Act was last revised in any meaningful way in 1996, the communications and information services marketplace environment, driven in significant part by rapid technological advances, has changed dramatically. Thus, the review and updating process is not only timely but necessary.

In the first White Paper, "Modernizing the Communications Act,"[3] the Committee wisely sought responses that, as the White Paper put it, "address thematic concepts" for updating the Communications Act. The questions asked in the first White Paper are directed broadly to the structure of a new act, the jurisdiction of the FCC, the need for flexibility, and the role technology should play in classifying services for regulatory purposes. Indeed, the way the Committee framed one question: "What should a modern Communications Act look like?" captured the essence of the response sought by first White Paper.

I. The Guiding Foundational Principles for Updating the Communications Act

The answer to the question "What should a new Communications Act look like?" should be grounded in certain foundational principles that should guide the reform effort. Here are those principles in summary fashion.

• *A clean slate approach is needed rather than an approach that takes the current act as a starting point.*

In other words, a "replacement" regime is needed—a new "Digital Age Communications Act," if you will—because the new act should be very much different in concept and structure than the existing one. There are two primary reasons for this. First, the conceptual changes in communications law and policy that are warranted, indeed required, by the dramatic technological and marketplace changes described in the Committee's White Paper, are major. The governing concepts and philosophical principles embodied in the new act should be very different from the governing concepts and philosophical principles embodied in the current statute. After all, in many important respects, the current statute remains intact as adopted in 1934. And the 1934 Act itself closely resembled, in significant respects, the Interstate Commerce Act of 1887 (ICA). The ICA's very purpose was to tame what were considered to be static common carriers—the railroads—exercising monopolistic power, not to oversee a technologically dynamic, increasingly competitive marketplace. Because the Communications Act is derived directly from the ICA's framework, the "clean slate" approach simply makes more sense. Second, and relatedly, the clean slate approach is more likely to achieve the goal of simplicity because adopting a replacement regime is much more likely to result in a governing statute that is shorter, better organized, more intelligible, with fewer unintended conflicts and consequences, than a statute that takes the current act as its starting point.

• *Generally, the broad delegation of indeterminate authority to the FCC to regulate "in the public interest" should be replaced with a competition-based standard, so that, except in limited circumstances, FCC regulation will be required to be tied to findings of consumer harm resulting from lack of sufficient marketplace competition.*

In the current act, Congress has delegated authority to the FCC to act "in the public interest" nearly a hundred times.[4] These inherently vague delegations of authority confer too much unbridled discretion on the agency. A new act

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should replace most of these "public interest" delegations with a governing competition standard that requires the FCC, in deciding whether and how to regulate, to rely on antitrust-like jurisprudence that focuses on rigorous marketplace analysis.

• *With a competition regulatory standard in place that is generally applicable to all entities providing electronic communications subject to the Commission's jurisdiction, the existing so-called "silo" regime, which results in disparate regulation of entities providing comparable services, should be eliminated in favor of carefully-circumscribed FCC authority over all electronic communications networks.*

Under the current silo regime, regulatory classifications are based on certain techno-functional constructs that are largely now outdated in a digital broadband environment in which "byte is a byte is a byte." In other words, in today's marketplace, in which traditional service distinctions such as "cable" or "wireless" or "telecommunications " or "broadcasting" are disappearing, disparate regulation based on different technological platforms or functional distinctions makes no sense.[5] In today's "converged" broadband marketplace, voice, data, and video services generally are offered in bundles which consumers find attractive. Trying to fit the new digital services, or bundles of services, into legacy service classifications means that products that are comparable from a consumer's perspective are subject to different regulatory burdens and obligations.

• *The FCC's authority to adopt broad anticipatory rules on an* ex ante *basis should be substantially circumscribed, and agency rules should be sunset after a fixed number of years absent a strong showing at the sunset date that they should be continued.*

The Commission should be required to rely more heavily than is presently the case on adjudicating individual complaints alleging specific abuses of market power and consumer harm in a particular market. Presently, much of the agency's regulation takes place through anticipatory *ex ante* rulemakings. Because the Commission conjectures concerning future potential harms, these rulemakings often lead to overly broad regulation. While a new act should not eliminate the agency's authority to adopt generic rules, such authority should be circumscribed. Regulations should be sunset after a fixed number of years absent a strong showing that they should be continued.

• *To a significant extent, the FCC's structure as a matter of form in an institutional sense will be dictated by the structure of the new act and the fundamental decisions made regarding the agency's role.*

The new act should require that the agency adhere to certain process reforms such as those contained in H. R. 3675, the "Federal Communications Commission Process Reform Act of 2013." With respect to jurisdiction, certain matters (for example, privacy and data security regulation) currently under the FCC's jurisdiction should be transferred to the FTC because those matters are closer to the FTC's core institutional expertise and because consolidating such jurisdiction in the FTC makes it less likely that various providers of comparable services in the overall Internet ecosystem will be regulated in a disparate fashion. Finally, the present authority of the states to engage in economic regulation of service providers should be circumscribed in the new act.

So, in drafting a new act, on an overall basis Congress should be guided by the foregoing foundational principles. And the concept of "simplicity" should remain a foremost objective. In the Fourteenth Century, William of Ockham wrote: "What can be explained on fewer principles is explained needlessly by more." This theorem became know as Ockham's Razor. The Razor should be kept close at hand in drafting a new act.

The three succeeding White Papers focused somewhat more narrowly on particular communications policy topics, although, given the technological and marketplace convergence of today's era, each paper necessarily invited responses that contain some overlap with the other papers. Here I will only touch briefly on the questions raised in these three White Papers and my own perspective.

II. Spectrum Policy

The second White Paper, "Modernizing U.S. Spectrum Policy,"[6] invited comment on a number of discrete spectrum policy issues, ranging from fundamental questions concerning the nature and purpose of requiring spectrum licenses at all to different methods of allocating and assigning frequencies to topical questions such as the best way to encourage sharing of government frequencies. At the most fundamental level, a new act should abandon the current administrative fiat approach of allocating and assigning frequencies, which has its roots in the Radio Act of 1912. This cumbersome administrative regime relies on the FCC proceedings to allocate particular frequency bands for particular pre-specified uses in accordance with particular pre-specified technical parameters. This administrative "command-and-control" regulatory regime fails to promote, or even allow, flexible use of spectrum so that, as consumer demand for spectrum-based services shifts and/or technology advances, spectrum can be put to its highest and best use. Thus, in a new act, the existing administrative fiat regime should be replaced with a system that fosters a robust market in which spectrum rights can be initially awarded and then freely traded largely independent of FCC administrative controls.

III. Competition Policy

The third White Paper, "Competition Policy and the Role of the Federal Communications Commission," explained:

> The evolution of technology from analog to digital and narrowband to broadband has brought about the integration of voice, video, and data services across multiple platforms employing various technologies. The ongoing shift away from single-purpose technologies toward Internet Protocol packet-switching has rapidly called into question the adequacy of the current Communications Act and the monopolistic assumptions on which it is based.[7]

This statement really goes to the heart of the matter regarding formulation of proper competition policy. While new technologies continue to emerge and older technologies evolve in unpredictable ways, presently the communications market-

place is impacted positively by competition among cable firms, telephone companies, satellite operators, fiber providers, and various sorts of wireless companies, each employing their own facilities. In order to encourage the continued development of this intermodal platform competition on a long-run sustainable basis, the Commission must avoid adopting policies that, in effect, seek to "manage" competition through resale, sharing, and access regulatory mandates. Instead, a principled competition policy framework must be premised on facilitating free entry and exit as the basic rule, which should then be qualified by targeted *ex post* remedies in the event market failure and consumer harm are proven by clear and convincing evidence. Prescriptive *ex ante* regulation should be carefully circumscribed as discussed above.

IV. Network Interconnection Policy

The Committee's Fourth White Paper, "Network Interconnection," begins by stating that, "[t]he interconnection of telecommunications networks has been at the heart of communications policy since the Kingsbury Commitment of 1913 when AT&T guaranteed interconnection with independent companies . . . ."[8] I agree that interconnection policy will be an important aspect of the Communications Act update.

As twentieth-century analog narrowband communications networks give way to the all-IP-based broadband networks of the future, there is still a role for the FCC to play in overseeing the interconnection of the various privately-operated networks that comprise the nation's communications infrastructure. But going forward, consistent with the transition to more competitive communications and information services markets, this oversight role should be presumptively less interventionist in scope than it is under the current act. Rather than overseeing enforcement of a general duty to interconnect, as the current statute requires, the new law should presume that interconnection agreements between IP-based networks will be negotiated on a voluntary basis, as they have been throughout the Internet's history with minimal disruption. The Commission should intervene only upon a finding that denial of interconnection poses a substantial, non-transitory risk to consumer welfare, and that marketplace competition is inadequate to correct the problem. And in those rare instances when intervention is determined to be necessary, the Commission should solve the impasse without undue delay by employing some means of dispute resolution mechanism, such as mediation or some form of arbitration, rather than by resorting to current rate case-like adjudicatory procedures that result in drawn out administrative proceedings.

V. Conclusion

The House Commerce Committee should be commended for initiating the process to review and update the current Communications Act. Given the widely-acknowledged marketplace and technological changes that have occurred in the past two decades since the last significant changes in the act, there definitely is a need for a new act. And as discussed, the new act should be much more than one that tinkers around the edges of the existing act. Tinkering around the edges of the existing act will not produce a statutory framework that works in today's competitive digital broadband environment. What's needed is a replacement regime grounded in the principles and perspectives set forth here— in other words, what is needed is a new "Digital Age Communications Act."

Endnotes

1 News Release, House Committee on Energy and Commerce, Upton and Walden Announce Plans to Update the Communications Act (Dec. 3, 2013), http://energycommerce.house.gov/press-release/upton-and-walden-announce-plans-update-communications-act.

2 At the outset, I want to acknowledge that much of what I say here is adapted from the Free State Foundation's responses to the four White Papers, and these papers, in turn, benefitted greatly from the participation and input on the various responses of the following scholars who are members of the Foundation's Board of Academic Advisors: Michelle Connolly, Richard Epstein, Justin (Gus) Hurwitz, Daniel Lyons, Bruce Owen, Richard Pierce, James Speta, and Chrsitopher Yoo, along with Free State Foundation Senior Fellow Seth Cooper. I am grateful to all for their contributions to this important FSF work responding to the Committee's White Papers. But the views expressed herein should be attributed to me alone.

3 House Committee on Energy & Commerce, Modernizing the Communications Act [First White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf.

4 See Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L.J. 427, at 456–67 (2001) (listing provisions in the Communications Act that pertain to the public interest standard).

5 See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 Fed. Comm. L. J. 103, 106 (2006)(referring to the need for a new regulatory framework that reflects today's digital age competitive marketplace realities).

6 House Committee on Energy & Commerce, Modernizing U.S. Spectrum Policy [Second White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140401WhitePaper-Spectrum.pdf.

7 House Committee on Energy & Commerce, Competition Policy and the Role of the Federal Communications Commission [Third White Paper] 1 (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140519WhitePaper-Competition.pdf.

8 House Committee on Energy & Commerce, Network Interconnection 1 [Fourth White Paper] (2014), http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140715WhitePaper-Interconnection.pdf.