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A New Digital Age Communications Act: Regulations Should Reflect Marketplace Changes

by

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Amid all the news coverage of the ill-begotten Healthcare.gov website and other Obamacare problems, it would have been easy to overlook a recent announcement from two leaders of the House Energy and Commerce Committee. The announcement is too important to go unnoticed.

On Dec. 3, the committee's chairman, Rep. Fred Upton, and Rep. Greg Walden, chairman of its communications and technology subcommittee, announced plans to use 2014 to begin a process leading to an update of the Communications Act.

As Mr. Walden explained in a news release, the committee plans "to look at the Communications Act and all of the changes that have been made piecemeal over the last 89 years and ask the simple question: 'Is this working for today's communications marketplace?'"

The answer to that simple question is "no." Here's why.

The reference to "89 years" harkens back to 1934, the year the Communications Act was adopted. The lengthy statute created the Federal Communications Commission and then delegated to the agency expansive, vaguely defined powers to regulate most all communications and media companies. What's more, key parts of the Communications Act of 1934 were lifted almost verbatim from the Interstate Commerce Act of 1887, the landmark legislation Congress passed to regulate railroad rates.

The railroads have been mostly deregulated for a quarter-century now since Congress recognized the competitive nature of the interstate transportation market — with railroads, trucks, planes, barges, buses and other modes of transport all competing. Even though the communications marketplace is now mostly competitive, regulation of communications companies, in important respects, remains stuck in regulatory paradigms of the distant past.

It is true that in 1996 Congress did make revisions to the 1934 act, partly in response to competition that already was emerging in various previously monopolistic communications market segments. Indeed, in the preamble of the Telecommunications Act of 1996, Congress declared its intent "to promote competition and reduce regulation." Given the structure of the statute and many of its specific provisions, the reality is that the 1996 act is not suited to achieving its dual objectives.

Perhaps the best that can be said about the 1996 act is that it has served as a transitional bridge from the old 1934 law to the new law that, ultimately, should emerge from the legislative process the House Commerce Committee has commenced.

It is indisputable that the changes in the communications environment since 1996 have been dramatic. During this period, we have witnessed a transition from analog to digital services and from narrowband to broadband networks, and spurred by these technological advances, a transition from a mostly monopolistic to a mostly competitive communications marketplace.

In the 1996 telecommunications act, the Internet was barely mentioned. This is not surprising when you recall that the Netscape Navigator, the first popular Web browser, was not introduced until the mid-1990s. In 1996, there were around 100,000 websites. By the end of 2012, the figure was around 634 million and growing exponentially.

In 2000, there were a little more than 7 million broadband lines in the U.S. Now there are more than 245 million. There were fewer than 200,000 VoIP (Internet voice telephony) connections in 2000, compared with 39 million today.

In light of the remarkable marketplace changes since the Communications Act was last revised, the updating process that Mr. Upton and Mr. Walden have announced is certainly welcome.

As the process begins, here are a few basic guideposts that, to my mind, are key to fashioning what I've called a new Digital Age Communications Act.

First, the new law should get rid of the so-called "silo" regime in which differential regulatory requirements are tied to various service classifications, such as "cable" or "telephone" service. These legacy service classifications are grounded in outdated techno-functional constructs, and they often favor one marketplace competitor over another without good reason. In today's digital environment, the saying "a bit is a bit is a bit" is now a reality. This means that telephone companies, cable operators, wireless providers, satellite operators, and fiber firms all compete against each other, utilizing their own different broadband platforms, to provide consumers with various mixes of voice, video and data services.

Second, the "public interest" standard, ubiquitous throughout the current statute, grants the agency too much unconstrained discretion that enables too much regulatory micromanagement. A new law should replace this indeterminate, and, therefore, elastic delegation of authority with a competition standard grounded in antitrust-like jurisprudential principles. This competition-based standard would force the FCC to focus, before deciding to regulate, on whether a market failure exists that is actually harming consumers.

Third, under a new law, the FCC should be required to favor narrowly tailored remedial orders over broad proscriptions developed in anticipatory rule-making proceedings. The agency would be required to determine whether service providers subject to individual complaints possess demonstrable market power that should be constrained in some targeted way. This would help avoid the burdensome overregulation that frequently results now when, in generic rule-making proceedings, the agency attempts to anticipate potential harms that may well never materialize.

Surely there are other approaches that should be considered as well. For now, it is just important the legislative reform process get started.

Of course, the review needs to be deliberative, and Mr. Upton, Michigan Republican, and Mr. Walden, Oregon Republican, apparently envision a multiyear effort. But given the competitive changes that already have occurred in the communications marketplace — and that continue to occur at a rapid pace — deliberative should not be allowed to turn into never-ending.

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