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Why America Needs an Updated Communications Act

by

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Congress needs to update the Communications Act of 1934. In 2014, Republican Reps. Fred Upton and Greg Walden started a congressional review process, using the #CommActUpdate handle. Now almost four years later, it's time for Congress to get the job done by overhauling the statute in a way that constrains the Federal Communications Commission's (FCC) authority to substitute burdensome bureaucratic mandates for marketplace freedom.

It's been more than 20 years since Congress made any significant changes to the law. In 1996, the commercial internet was still in its infancy — remember how we marveled then at the World Wide Web — so it is not surprising that the word "internet" appears only a few times in the Communications Act.

The current law was written in an age dominated by narrowband analog communications. Now we live in an era of broadband digital communications. Simply put, in the past two decades, the communications marketplace has undergone dramatic changes characterized by increased competition and consumer choice. Advanced digital technologies are rendering

obsolete the legacy service distinctions — telephone, cable, satellite, broadcasting and so forth — still found in the current law.

Consumers are able to access comparable products and services through different digital communications platforms, whether wireless, fiber, cable, satellite or combinations of these. Indeed, the increased competition and consumer choice brought about by gigabit broadband networks, next-generation 5G wireless technologies, multifaceted Internet-connected smart devices, proliferating digital media services, and cutting-edge software applications are only beginning to be realized.

But continued progress is at risk. The current law, with its antecedents dating back to the Interstate Commerce Act of 1887 and regulation of railroads, and "more recently" to the Communications Act of 1934 and regulation of monopolistic Ma Bell, grants the FCC too much unbridled regulatory discretion. A regime characterized by ubiquitous bureaucratic diktats arguably may have made sense in an era of monopoly, but no longer.

Witness two of the most notorious actions of the Obama administration's FCC. First, the agency proposed to require that TV set-top boxes be standardized according to government-designed "equal access" specifications on the theory this would benefit set-top box providers unaffiliated with cable and satellite pay TV services. Amazingly, this stultifying new mandate was proposed at the very same time that consumers are enjoying an ever-increasing abundance of video programming accessible through a proliferating array of video services, devices and apps. Ajit Pai, the Trump administration's new FCC chairman, has put the brakes on this backward-looking proposal.

And the FCC is now considering repeal of the Obama administration's "net neutrality" regulations that imposed public utility-style regulation on internet service providers, even though the commission never found the existence of a market failure or consumer harm. While the FCC shortly may curtail those rules, the reality is that a future commission could reinstate them, along with the now-jettisoned TV set-top box mandate, and other legacy regulations that might be eliminated by the Pai commission.

The possibility of reimposition of unnecessary regulations attributable to another change in administration is disturbing. Burdensome regulations not necessary to protect consumers from actual harm are costly to the nation's economy. For example, in announcing a proceeding to repeal the 2015 net neutrality rules, Mr. Pai cited Free State Foundation research indicating that those rules already had resulted in more than $5 billion in foregone investment by internet service providers.

We need a #CommActUpdate that will put communications policy on a stable footing that is not subject to bureaucratic whims and pro-regulatory predispositions divorced from marketplace realities.

Here is the essence of what should be done.

At the core of the current law is a "silo" regime that places various services in different regulatory buckets based on techno-functional characteristics. This often results in the

regulation of comparable services in a disparate manner. For example, messaging services are regulated differently depending on whether they are classified as "telecommunications" or "information services," and video services are regulated differently depending on whether they fit into the "broadcast," "cable," or "wireless" silos. Moreover, there are over 100 provisions in the current law delegating authority to the FCC to act in the "public interest." This wholly indeterminate standard confers too much discretion on unelected bureaucrats.

A new Communications Act should eliminate the existing regulatory silos and most of the vague "public interest" delegations except, say, for matters closely related to public safety. The commission's regulatory authority should be circumscribed by tying it explicitly to a competition standard grounded in antitrust-like jurisprudence. This means that before adopting regulations and enforcing sanctions, the agency generally would be required to find convincing evidence of a market failure and consumer harm, rather than relying on allusions to the "public interest."

Furthermore, certain matters involving the practices of internet service providers, such as privacy and data security oversight, should be transferred to the Federal Trade Commission. And state authority to regulate digital broadband networks should be circumscribed. While traditional state regulation may have made sense in the analog age when it was generally possible to distinguish between "long distance" and "local" communications, now neither consumers, service providers, nor regulators can determine easily, if at all, and not without significant costs, the origin and destination of digital traffic. State regulation would detract from the economies of scale associated with national digital networks.

It's time for Congress to update the Communications Act in a technology-neutral way that puts restraints on regulators that all too often haven't been able to resist substituting their predilections concerning the "public interest" for the competitive marketplace's determination of what services interest the public.

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