Response to Questions in the First White Paper

"Modernizing the Communications Act"

by

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and

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I. Introduction

At the outset, we want to commend the Committee for initiating this process to review and update the current Communications Act. In our opinion, the review is timely because the Communications Act does need updating. And we commend the deliberative and open nature of the review process as it begins.

At the time the review process was announced, Chairman Walden stated: "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

[*] While the signatories to this Response are in general agreement, of course, with the views expressed in these comments, their participation as signatories should not necessarily be taken as agreement on every aspect of the submission. And the views expressed are those of the individuals, and they should not be attributed to the institutions with which they are identified.

date."[1] In the first White Paper, "Modernizing the Communications Act,"[2] the Committee explains the initiation of the updating process this way: "Changes in technology and the rate at which they are occurring warrant an examination of whether, and how, communications law can be rationalized to address the 21st century communications landscape." Regardless of precisely how this proposition is framed, and we do not intend to belabor the matter, the essential point 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 technological changes, has changed dramatically. Thus, in our view, the review and updating process not only is timely but necessary.[3]

The Committee has adopted a wise approach by initially seeking responses to questions that, as the White Paper puts it, "address thematic concepts" for updating the Communications Act. It is certainly preferable to begin the review and public comment process by eliciting responses at this higher thematic level, and then, as the process

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[1] "Upton and Walden Announce Plans to Update the Communications Act," News Release, Committee on Energy and Commerce, December 3, 2013.
[2] White Paper No. 1, "Modernizing the Communications Act," January 8, 2014.

[3] While we certainly hope that the review and updating process proceeds apace in light of the dramatic technological and marketplace changes that already have occurred, we understand that it may be several years before the end of the road is reached. In the interim, Congress should not necessarily refrain from adopting certain targeted revisions that may improve communications policy and which are consistent with the overall market-oriented reform direction that communications policy should take. Examples of such targeted measures that might be appropriate include two bills introduced last year by Rep. Bob Latta, Communications and Technology Subcommittee Vice-Chair: H.R. 2649, the "FCC 'ABCs' Act of 2013," which would revise the forbearance provision in Section 10 of the Communications Act to require clear and convincing evidence that the forbearance requirements are not met before denying relief, and H.R. 3196, the Consumer Choice in Video Devices Act, which would revise Section 629 of the Act to require elimination of the cable television set-top box integration ban imposed by the FCC.

progressively moves forward, the Committee will be in a better position to seek responses to questions at less thematic, more specific, levels of detail.

The questions asked in the first White Paper are the proper ones. Given the nature of the current statute, and the direction that changes in the statute likely should take, it is not surprising that, at least from our perspective, the questions would elicit responses with considerable overlap and duplication if each is answered separately and in serial fashion. Therefore, we prefer, in order to avoid undue repetition and duplication, to provide a narrative that, in essence, takes the second question: "What should a modern Communications Act look like?" as the primary focal point of our response. In answering this broad framing question posed by the White Paper, we necessarily will address the other questions relating to the structure of the Act, the need for flexibility and technological neutrality, the distinction between information and telecommunications services, and so forth.

II. The Major Guiding Principles for Reforming the Communications Act

In this section, before providing a more expansive narrative statement responsive to the Committee's questions, we want to set forth in summary fashion what we believe should be the guiding foundational principles of the reform effort. These principles will guide the narrative statement that follows this Section II.

A. In updating the Communications Act, a clean slate approach is needed to adopt a "replacement" regime – a new Digital Age Communications Act, if you will[4] – because the new act should be much different in concept and structure than the existing one.

[4] In 2005, at the Progress & Freedom Foundation, Randolph May and James Speta, working with a group of scholars with diverse views and political leanings, led an effort to develop a regulatory framework for what was called a "Digital Age Communications Act" or "DACA." The framework ideas presented here certainly owe much to the ideas developed then, because we think that they remain proper guiding principles at this time. Indeed, we still favor "Digital Age

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

C. 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 "silo" regime, which results in the regulation of entities providing comparable services in a disparate manner, should be eliminated in favor of FCC authority over all electronic communications networks.

D. 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.

E. 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 regulated in a disparate fashion. Finally, the authority of the states to engage in economic regulation of service providers should be circumscribed in the new act.

F. In drafting a new act, one guided by these foundational principles, the concept of "simplicity" should remain an important goal. In the

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Communications Act" as the name for the new act. Once again, we acknowledge the debt owed to the DACA Working Group. See Randolph J. May and James B. Speta, "Digital Age Communications Act," Proposal of the Regulatory framework Working Group, Progress & Freedom Foundation, June 2005. See also, 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, "what one might call a new Digital Age Communications Act.")

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. In drafting a new act, the Razor should be kept close at hand.

III. "What Should a Modern Communications Act Look Like?"

As stated above, within the context of answering this broad framing question we believe we will answer below all of the questions posed by the Committee. But because we understand that this is just the beginning of the process, a process that certainly will focus more narrowly on specific subject matters and issues as it continues, our response, by design, is broadly thematic in keeping with the nature of the initial set of questions.

A. A Clean Slate for Adopting a Replacement Regime

Perhaps the most fundamental question the Committee will face is whether Congress should approach the updating process by, for the most part, starting with a "clean slate" to devise a replacement regime, or whether, on the other hand, it could achieve what needs to be accomplished in an update by employing more targeted revisions to the current statute. There may well be some who suggest that rather replacing the current act with a new one embodying a very different model, a principal drafting objective should be to amend the statute as little as possible. We do not discount the possibility that the existing Communications Act could be improved, perhaps even substantially, by amendments to the current statute.[5] But the option of "tinkering around the edges" in order in an effort to minimize the changes to the current statute should be rejected in favor of adopting a replacement statue.

[5] And as stated earlier in footnote 3, we do not suggest that, in the interim, pending adoption of a comprehensive rewrite, the current act should not be revised in limited targeted ways that are consistent with the market-oriented, less regulatory direction the new act ultimately should take.

There are two primary reasons for this. First, as explained below, 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 that we envision are very different from the governing concepts and philosophical principles embodied in the current statute. After all, in many important respects, in a foundational sense, 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. The ICA's very purpose was to tame what were considered to be static carriers exercising monopolistic power, not to oversee a technologically dynamic marketplace. This being so, the "clean slate" approach simply makes more sense.

Second, and relatedly, the clean slate approach is more susceptible to achieving the goal of simplicity. A clean slate approach 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, than one that takes the current act as its starting point.[6]

B. The Silos Should Be Eliminated

As the Committee's first question states: "The current Communications Act is structured around particular services." No one really disputes this assertion, and there is fairly widespread agreement that the current act's structure, with its various regulatory

[6] It is worth noting here that we understand that there will need to be attention paid to transitional periods and transitional mechanisms to get from the existing statute to a new one. These transitional issues, which may involve phase-outs of certain obligations and duties over a period of time, will present some difficult and important questions. Nevertheless, at bottom, they are still transitional issues. It would be a mistake to sacrifice the benefits of long-term improvements in the law because of a fear of short-term disruption.

"silos" or "stovepipes" is increasingly problematic in the digital age. Under the existing statute, disparate regulations often apply to services that, from the consumer's perspective, compete against each other in the marketplace. Thus, for example, "telecommunications" providers are regulated differently from "information services" providers. "Cable " television operators are regulated differently from broadcasters and "satellite" television operators. Wireless service providers are subject to their own set of regulatory requirements, even though the services they offer increasingly compete with all of the others.

Without belaboring the point, whatever the merits of the "silo" structure in an earlier age, it no longer makes sense. The various silos, in essence, primarily are based on "techno-functional" constructs[7] that do not comport with the realities of digital age technologies and services. Even a casual examination of the definitions of "telecommunications," "information services," "cable service," "mobile service," and so forth shows that these definitions, with the attendant regulatory classification impacts, mostly are tied to descriptions of certain technological capabilities or functional characteristics of the services.

The old saw that a "byte is a byte is a byte" is now a digital world truism, at least in the sense that is relevant here. And it is this technological reality that has rendered the

[7] Randolph J. May, *Calling for a Regulatory Overhaul, Bit by Bit*, CNET NEWS, Oct. 19, 2004, http://news.com./Calling+for+a+regulatory+overhaul%2C+bit+by+bit/ 2010-1028_3-5415778.html. ("The policy framework embodied in our existing communications laws is often called 'stovepipe' regulation. This is because there are distinct technology-based and functionally driven regulations that apply in a disparate fashion, depending on whether different services are classified as telecommunications, information services, cable, satellite or broadcast. Imagine each distinct service classification as a vertical stovepipe…. [O]n the regulation of VoIP services, I called the distinctions underpinning stovepipe regulation metaphysical in the sense that the existing definitions rest upon transcendent and highly abstruse techno-functional constructs.")

current silo regime obsolete as a policy paradigm as the transition to IP networks has rapidly accelerated. As Christopher Yoo put the matter as early as 2003: “Gone are the days in which each communications technology could be regarded as occupying a separate regulatory silo. The impending shift of all networks to packet-switched technologies promises to complete the collapse of any remaining attempt to base regulation on differences in the means of transmission.”[8] Shortly thereafter, in 2004, the FCC itself recognized the impact and implications of the IP transition. In opening its (yet to be completed) *IP-Enabled Services* proceeding, the Commission explained that the greater bandwidth of digital broadband services encourages the introduction of services "which may integrate voice, video, and data capabilities while maintaining high quality of services."[9] Then, in a prediction that certainly has proven to be true, the FCC added: “[I]t may become increasingly difficult, if not impossible, to distinguish ‘voice’ service from ‘data’ service, and users may increasingly rely on integrated services using broadband facilities delivered using IP rather than the traditional PSTN (Public Switched Telephone Network).”[10]

The Commission's 2004 statement predicting the increasing difficulty in distinguishing "voice" from "data" services, not at all surprisingly, has been proven true, and this surely is a contributing reason as to why the Commission, some nine years later, has yet to take further action in the *IP-Enabled Services* proceeding definitively to classify interconnected VoIP services as "telecommunications services" or "information services." We are entirely sympathetic to the difficulty faced by the Commission and

[8] Christopher S. Yoo, *New Models of Regulation and Interagency Governance*, 2003 MICH. ST. L. REV. 701, 714 (citation omitted).
[9] IP-Enabled Services, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863, para. 16 (2004).
[10] Id.

understand its reluctance to conclude that these IP-based voice services are "telecommunications" with all the attendant regulatory consequences that may flow from such a determination. Nevertheless, it is the consequences of this non-action – at best, continued regulatory uncertainty, or, at worst, the application of disparate regulations to services that, from the consumer's perspective, compete against each other in the marketplace – that demonstrate the need to dismantle the silo regime, including the distinction between "telecommunications service" on the one hand and "information services" on the other.[11]

The transition from narrowband to broadband and from analog to digital has rendered the silo regime statutory structure obsolete. In the current environment, the communications marketplace has become increasingly competitive – but the competition primarily takes place across multiple digital broadband platforms employing various technologies, and sometimes a mix of technologies. These various communications platforms should not be subject to disparate regulations simply because they are consigned to one silo or another. Instead, a new act should be technologically neutral. The current approach creates incentives for companies to invest capital in efforts to gain advantages through regulatory arbitrage, rather than investing in ways to deliver better services to consumers more efficiently.

[11] This is not to say that the distinction between "telecommunications services" and "information services," which dates back to the *Computer II* regime adopted by the FCC in 1980, did not, for a number of years, play a valuable role in allowing the newly emerging information services to continue to develop free from Title II common carrier regulation. The point is that now, in a new act, the Title II silo itself should be eliminated.

C. The Public Interest Standard Should Be Largely Eliminated

Aside from the silo structure, there is another paradigm in the Communications Act that, for the most part,[12] should be jettisoned in a new Digital Age Communications Act. This is the ubiquitous "public interest" standard, which "still pervades the current regulatory regime."[13] There are nearly 100 different provisions in the Communications Act which delegate authority to the FCC to regulate in the "public interest, convenience, and necessity" (or some very close variant thereof).[14] There is an argument that the public interest standard, which originated in Progressive/New Deal era theories of public administration based on notions of an agency's presumed impartial, nonpolitical expertise, is so indeterminate in meaning that it constitutes an unconstitutional delegation of legislative authority.[15] Among long-time FCC-watchers, there is an old saw that the "public interest" is whatever three of the five commissioners say it is on any given day. While the Supreme Court has rejected the constitutional challenge to the public interest

[12] We say "for the most part" because there may be a few limited instances in which retention of the public interest standard might be appropriate. It is not the proper place here, at the beginning of the review process, to attempt to delineate those places, if any. The main point now is the public interest standard is ubiquitous throughout the Communications Act, and this certainly should not be the case in the replacement regime.

[13] See Randolph J. May, A Modest Plea for FCC Modesty, 60 ADMIN. LAW REV. 895, 897 (2008) ("The public interest standard that was the keystone of the Radio Act of 1927 and its successor, the Communications Act of 1934, still pervades the regulatory regime.")

[14] 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). In 1999, constitutional law scholar Gary Lawson called the public interest standard "[e]asy kill number 1" on nondelegation doctrine grounds because the licensing provisions of the Communications Act grant "nearly absolute discretion…." Gary Lawson, *Delegation and the Constitution*, REG., Spring 1999, at 23, 29, *available at* http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf.

[15] For a full discussion of this argument with citation to many authorities, see Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?* 53 FED. COMM. L.J. 427 (2001).

standard on nondelegation doctrine grounds,[16] this does not mean that this Progressive/New Deal era standard should remain the FCC's governing lodestar for regulation in today's radically changed environment. It should not. Simply put, the public interest standard is so vague that it necessarily confers too much unbridled discretion on the agency without sufficient direction from Congress.

D. A Marketplace Competition Standard Should Replace the Silos and Public Interest Standard

If the silo regime should be disassembled and the public interest standard largely jettisoned, then what should be at the core of the replacement regime as the governing lodestar? The answer is a competition-based standard that directs the FCC generally to undertake an antitrust-like economic analysis when it engages in regulatory activity that is subject to its jurisdiction.[17] We are not suggesting that a new statute direct the FCC, in an overtly strict sense, to incorporate and apply current antitrust jurisprudence or precedents. But given the development of competition in most communications market segments, and the technological dynamism that characterizes these markets, the

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[16] See FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940); National Broadcasting Co. v. United States, 319 U.S. 190, 219-226 (1943).

[17] In our view, the Commission generally should retain jurisdiction over electronic communications networks and services that, to a significant extent, mirrors the extent of the agency's jurisdiction under the current Communications Act. Thus, while the language would be updated to reflect modern usage, we envision that the scope of the Commission's *jurisdiction* would not be materially narrowed from the scope of the agency's *jurisdiction* in present Section 2(a) of the Act. We hasten to add, though, as explained in the text, that the *exercise* of whatever jurisdiction the Commisison is granted should be substantially constrained by the new competition-based standard that ties the *exercise* of the Commission's authoritiy to findings of market failure and consumer harm. In other words, it is important to distinguish between the conferral of jurisdiction and the real constraints placed on the exercise of such jurisdiction. Finally, there are delegations of authority in the curent act, such as the enforcement of privacy (CPNI) rules for telephone and cable companies, that probably should be transferred to the Federal Trade Commission so that various entities providing comparable services in the Internet ecosystem would be subject to the same type of regulations. And enforcing a uniform set of privacy rules, and other consumer protection-like rules, for example, is closer to the core competency of the FTC than the FCC.

Commission generally should be required to find a threat of an abuse of market power and a concomitant threat of consumer harm before imposing regulations on entities subject to its jurisdiction.[18] In line with the recommendation of the Digital Age Communications Act Regulatory Framework Working Group, and the technological dynamism that characterizes the communications marketplace, it may be advisable for the new statute to specify that any market failure found by the Commission must be determined to be "non-transitory."[19]

By virtue of adoption of a competition standard grounded in antitrust-like jurisprudential principles, before regulating the FCC would be required, much more than it is today under the existing act, to engage in a rigorous economic analysis that focuses on actual and potential marketplace competition. As part of such analysis, the agency necessarily would need to take into account the impact of the dynamism that characterizes the digital marketplace.

Recognizing the importance of the interconnection of communications networks that serve the public, the FCC should have authority to maintain interconnection by addressing interconnection practices that might pose significant consumer harm, where it finds that marketplace competition is not adequately protecting consumers. This standard also recognizes the importance of competition analysis, but also empowers the FCC to maintain the most central aspect of the modern Internet – its interconnected nature.

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[18] There may be some limited areas of regulatory activity subject to the Commission's jurisdiction that should not be tied to the market failure standard, but the purpose here is to suggest the proper general framework, not to identify any specific exceptions. These may be addressed as the updating process continues.

[19] See Randolph J. May and James B. Speta, "Digital Age Communications Act," Proposal of the Regulatory framework Working Group, Progress & Freedom Foundation, June 2005, and note 4 supra.

E. Curtailing *Ex Ante* Rulemakings and Relying More Heavily on *Ex Post* Adjudication of Complaints

In a new act, the FCC should be required to favor narrowly-tailored *ex post* remedial orders in addressing practices that are alleged to be anticompetitive or abusive rather than undertaking broad *ex ante* proscriptions developed in generic rulemakings. The agency generally should be required to determine whether service providers subject to individualized complaints have adopted practices that present the threat of abuse of significant and non-transitory market power that should be constrained in some appropriately targeted way. Regulatory prohibitions and sanctions under the new statute generally would be accomplished through the conduct of focused adjudicatory proceedings following the filing of individual complaints containing specific allegations of abuse of market power.

Application of a marketplace competition standard would make it easier for broadband companies to engage in permission-less innovation. Commentators have long acknowledged that competition improves if entrepreneurs can develop ideas and bring new products to market without first needing to seek government approval. Unfortunately, an *ex ante* regulatory regime that operates mainly through rulemaking often inhibits permission-less innovation by suggesting that new products be submitted to the Commission for review or face the threat of litigation and sanctions over their lawfulness. An *ex post*, competition-based standard would clarify that entrepreneurs are free to introduce new ideas and products to the marketplace without prior regulatory approval, provided that the offering doesn't abuse market power in a way that causes consumer harm.

While the Commission should not necessarily be precluded from adopting rules that define, in advance, certain specific acts or practices that constitute threats of abuse of market power because they cause consumer harm, this rulemaking authority should be carefully circumscribed. And any such rules the Commission issues regarding competition should automatically sunset after an appropriate period of time, say, for example, in five years, unless the Commission affirmatively finds, again based on a showing of clear and convincing evidence, that there is a market failure necessitating continuation of the regulation in order to prevent consumer harm.

IV. The Structure and Jurisdiction of the FCC

The Committee asks, quite appropriately, about the structure and jurisdiction of the FCC, and how they should be tailored to address the systematic change in communications. To a significant extent, of course, the structure of the agency, in an institutional sense, should be strongly influenced by – or "follow" as in the saying, "form follows function" – the jurisdiction of the agency and the structure of the new act that defines the agency's exercise of its regulatory authority. In other words, in a new Digital Age Communications Act without silos, there likely should not be an FCC, institutionally, with separate Mass Media, Wireline, Wireless bureaus, as opposed to say, a Broadband Bureau. And in an FCC in which a marketplace competition standard replaces the public interest standard as the agency's regulatory lodestar, then from an internal agency organization perspective, the role of economic analysis – and the economists responsible for performing such analysis – should be institutionalized in an appropriate organizational manner that furthers the usefulness and effectiveness of such analysis.

Any new act should contain within it some of what, for present purposes, might be called "process reforms." As Free State Foundation President Randolph May has testified before this Committee twice in the last three years, these reforms should include a range of process improvements, ranging from additional analytical requirements for agency rulemakings to transaction process reforms, to the institution of "shot clocks" for completing agency proceedings and requirements for more input by all commissioners in controlling the Commission's docket.[20] These institutional process reforms are important to making the FCC the "model agency for the digital age" that then-FCC Chairman William Kennard envisioned in 1999, when the agency, under his direction, released a report entitled, "A Strategic Plan: A New FCC for the 21 Century." The plan's first four sentences read:

> In five years, we expect U.S communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator. The FCC as we know it today will be very different in both structure and mission.[21]

Unfortunately, since 1999, there have been few meaningful changes regarding the structure and mission at the agency. The proposals contained in Chairman Walden's "Federal Communications Commission Process Reform Act of 2013" (H.R. 3675) and in Mr. May's testimony before the Committee certainly should be considered in conjunction with a new act.

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[20] See Testimony of Randolph J. May, Hearing on "Improving FCC Process," Subcommittee on Communications and Technology, July 11, 2013; Testimony of Randolph J. May, Hearing on "Reforming FCC Process," Subcommittee on Communications and Technology, June 22, 2011.
[21] FCC, "A Strategic Plan: A Model Agency for the 21st Century," August 1999.

With respect to the FCC's jurisdiction, as lines continue to blur across the Internet ecosystem among various providers of services that, from the consumer's perspective, are comparable – regardless whether they are facilities-based network service providers, "over-the-top" providers of VoIP services, or content and applications "edge" providers, or whatever – it will be important in drafting a new act to consider treating such services in a holistic way, at least for some purposes that relate more closely to consumer protection than to traditional economic regulation. For example, with regard to any regulatory oversight relative to the protection of privacy or data security, even though the FCC presently has some jurisdiction in these areas, for the most part, it would be preferable to consolidate such jurisdiction in the FTC. The types of consumer protection issues most likely to arise with regard to privacy and data security are at the core of the FTC's institutional expertise. If jurisdiction over these type of matters – matters outside of the purview of traditional economic regulation of service providers – is transferred to the FTC, it is much less likely that telecom and cable services providers, on the one hand, and, say, Facebook or Twitter, on the other, will end up subject to disparate regulations in these areas.

Finally, a new act must also address the role of state regulators in the 21st century telecommunications marketplace. The Communications Act of 1934 divided regulatory authority over telecommunications services between the federal government and the states. This distinction was appropriate when regulating twentieth-century telephone networks, which were primarily regional monopolies that distinguished between local and long-distance calls. But today's information service networks generally are national in scope. Neither providers nor consumers can distinguish easily, if at all, and certainly

not without incurring significant costs, between interstate and intrastate communications. The law should not require them to do so. State regulation of economic activity such as rates or conditions of market entry jeopardizes the economics of scale that flow from national networks. Many states recognize this and have reduced their telephone regulations while foreswearing any interest in regulating IP networks. The new act should similarly vest most regulatory authority in the federal government rather than the states.

But this does not mean states should play no role under a new act. States have a significant advantage over their federal counterparts regarding issues where local knowledge may be brought to bear, and sound policymaking should continue to leverage that advantage. For example, state and local authorities should retain primary jurisdiction over siting decisions, because they know best how specific projects will affect a local community. Similarly, state regulators are in a better position to understand the individualized needs of local communities and thus should retain a prominent voice regarding consumer protection issues, though subject to federal oversight to assure that parochial issues do not needlessly jeopardize broader national objectives.