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We Need a Communications Act That Befits the Digital Age

by

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Now that Congress has passed, and President Trump has signed into law, the One Big Beautiful Bill, here's a less momentous, but nevertheless important task for Congress to undertake. The outdated Communications Act of 1934, most recently amended by the Telecommunications Act of 1996, should be substantially revised to "Make Communications Law Relevant Again."

Even though the Supreme Court recently rejected a challenge to the constitutionality of the Federal Communications Commission's program involving $9 billion in annual subsidies to provide "universal service," there is widespread agreement it needs to be substantially revamped for it to be sustainable. Congress needs to modernize the subsidy regime so it's more targeted, economically efficient, transparent, and politically accountable.

But while tackling this job, Congress should go further and meaningfully update other key parts of the Communications Act. Call the reformed statute the Digital Age Communications Act.

Not surprisingly, the Communications Act of 1934 was premised on the notion that a principal job of the newly created FCC would be to regulate telephone companies, mainly AT&T and its local subsidiaries, as common carriers, given their dominant market power. And another was to

regulate the operations, including in some instances even overseeing the programming content, of radio and television broadcasters, which because of limitations in the available frequency assignments and the lack of other available non-broadcast media outlets at the time, also exercised market power.

So, with the aim of directing the FCC to control what was viewed as the monopolistic power of the telephone companies and broadcasters, the 1934 law contained hundreds of specific regulatory diktats. Significantly, it also contained dozens of delegations of authority sprinkled throughout the statute authorizing the FCC, in various circumstances, to act in the "public interest." This amorphous delegation was consistent with the entrenched Progressive-era belief that new "alphabet" agencies, filled with bureaucrats claimed to possess specialized "expertise," would always know what was best.

Of course, the delegation of so much unbridled authority is highly problematic. The public interest standard's indeterminateness provides a ready means for agency officials – when they are so inclined, and they often are – to achieve the inherent bureaucratic imperative to expand the agency's power.

Thus, even when competition began to take root in some telecom and media market segments in the 1970s and 1980s because of technological advancements and marketplace developments, the FCC proved reluctant to loosen its long-standing regulatory grip. This was so despite the increased consumer choice that new competitive entrants made available. Think, for example, MCI and Sprint emerging to challenge AT&T's dominance in long-distance service and cable and satellite TV operators challenging broadcasters in media markets.

By the time Congress passed the Telecommunications Act of 1996, this trend towards increasing competition in the various communications market segments was undeniable. In a nod to this reality, the Senate Report accompanying the 1996 Act declared the new law was intended to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications services to all Americans by opening all telecommunications to competition."

Despite this deregulatory rhetoric, implementation of the 1996 Act by the FCC has been anything but consistently deregulatory. There are several reasons for this – again, don't ignore the dogged bureaucratic imperative for agency officials to maintain their power. But it's true too, as Justice Antonin Scalia put in the first case under the 1996 statute to reach the Supreme Court, that the law was "a model of ambiguity or indeed even self-contradiction."

Now, with the 30th anniversary of the 1996 law approaching, it's time for Congress to consider adopting a new deregulatory communications law, this time one that is a model of clarity and without self-contradiction. Even though current FCC Chairman Brendan Carr, with a Republican majority, plans to eliminate many costly legacy regulations, a new chairman, with a pro-regulatory majority, could reimpose many of them.

Moreover, recall that in 1996, high-speed broadband networks had not yet been widely deployed, and thus the Internet, still in its "infancy" stage, was accessed primarily through slow dial-up connections. Indeed, the "Internet" was barely mentioned in the 1996 law. This is not the place to describe how, and the extent to which, the Internet's ongoing development has dramatically changed the communications marketplace environment in the direction of still more competition and consumer choice. Multiple bookshelves already are filled with volumes doing just that.

So, what are the most fundamental points, aside from reforming the universal service regime, that should inform remaking the current law into a new Digital Age Communications Act worthy of its name? Here are two major ones.

First, the current woefully outdated "stovepipe" regulatory framework is an impediment to the development of market-oriented communications policies. The existing statute contains distinct service definitions – such as "telecommunications," "information services," "cable service," "mobile service," and "broadcasting" – each of which so-called "stovepipes" has its own different regulatory requirements. These regulatory stovepipes don't make sense in today's digital environment characterized by relentless technological innovation and marketplace convergence driven by cross-platform facilities-based competition. The "stovepipes" serve to keep in place legacy regulations that are no longer necessary to protect consumers and which impede efforts to allow comparable services to compete with each other without unfair advantages conferred by outdated regulatory distinctions.

Second, the ubiquitous public interest standard should be replaced by a market-oriented competition-based standard. In fact, the statute should create an overall rebuttable presumption that, absent convincing evidence of harm to consumers or competition due to a demonstrable market failure, the FCC may not impose regulations restricting private market operations.

Of course, any meaningful revision of current communications law will involve many nuances, even complexities and trade-offs. But the major points described above – replacing the existing "stovepipe" regulatory regime and the public interest standard with an overarching presumption against regulation absent market failure – will go a long way towards securing a new communications law fit for the Digital Age.

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