January 31, 2014

Hon. Fred Upton
Chairman
Energy and Commerce Committee
US House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Hon. Greg Walden
Chairman
Communications and Technology Subcommittee
Energy and Commerce Committee
US House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Re: Comments on Communications Act Modernization

We, the undersigned scholars at the American Enterprise Institute's Center for Internet, Communications, and Technology Policy, respond below to your request for comments on your white paper on "Modernizing the Communications Act."[1]

Our comments are based upon two foundational points. First, the historical silo-based approach to communications regulation is inapposite to the modern communications ecosystem. Second, the Federal Communications Commission's ("FCC," or "Commission") functions are largely duplicative of those of other agencies. It is therefore our view that Congress should revise the approach taken by the Communications Act, eliminate the silo-based structure and replace it with a technology-neutral, competition-oriented approach. Concurrent with this process, Congress should rationalize the Commission, apportioning the majority of its functions and resources to its sister agencies. In particular, Congress should consider merging the FCC's competition and consumer protection functions with those of the Federal Trade Commission ("FTC"), thus combining the FCC's industry expertise and capabilities with the generic statutory authority of the FTC. More broadly, it is our view that many of the important functions and resources currently housed in the Commission can be redeployed – not eliminated – to yield a more coherent and streamlined regulatory edifice that would more effectively serve the goals of consumers, competitors, and Congress.

As currently structured, the Communications Act ("Act") divides the communications market into a number of regulatory silos, each applying a unique set of rules to a separate communications

[1] We write in our individual capacities, and the views expressed here do not necessarily represent those of the American Enterprise Institute or any of its affiliates, nor of any of the other institutions with which we are individually affiliated. The views expressed herein result from a consensus process. While we are collectively in agreement with the general ideas expressed, none of us necessarily agrees with them in their entirety and we each may change our views as dictated by the facts.

technology. Some technologies – most importantly, the Internet and Internet-based communications – are not covered by any specific silo and are therefore subject to uncertain regulatory treatment. While there are historical reasons for the Act to have been structured in this way, the silo approach is a poor fit for the modern, converged, communications marketplace. In the case of the Internet, it raises questions and creates uncertainty as to what rules apply to the various technologies and sectors that make up the Internet ecosystem. Such a structure does not facilitate the continued development of converging technologies and distorts or disrupts competition between otherwise competitive technologies.

Simultaneously, the Commission's jurisdiction and duties are in some respects duplicative of, or overlapping with, the jurisdiction and duties of other agencies. The most obvious example relates to competition regulation and consumer protection, where the Commission's authority overlaps with that of the FTC and the Department of Justice. The Commission's spectrum management duties are complementary to those of NTIA – resulting in the Commission and NTIA developing many duplicative competencies. In international communications matters, the Commission's role is limited to that of advising the Department of State.

These concerns are brought into sharp relief by the DC Circuit's recent decision in Verizon's challenge to the FCC's Open Internet Order.[2] This decision vacated the non-discrimination and non-blocking portions of the FCC's Open Internet Order; at the same time, it found that Section 706 of the Communications Act provides the Commission with broad authority to regulate the Internet. The ultimate boundaries of this authority are unclear – but it is conceivable that Section 706 gives the FCC authority to regulate areas such as online privacy, data security, and the so-called "Internet of Things," where the FTC is already actively engaged.

The remainder of this response develops the arguments that communications regulation needs to transition from a silo-based to a technology-neutral, competition-oriented approach; that the Commission's functions (today, and in a post-silo world) are duplicative of functions performed by other agencies; and, that the Commission's functions and resources can be effectively rationalized and redeployed across its sister agencies.

Transitioning from Silos to Competition

The silo-based approach of the Communications Act evolved alongside the development of the various technologies it regulates, in response to each of these technologies' unique uses and technological and economic characteristics. As is well understood today, as these technologies have developed, they have largely converged. Where each technology was once clearly distinct from the others, today they are increasingly substitutes for, complements to, and interoperable with one another. More important, different technologies are increasingly employed to support the same uses – and it is their uses that are the ultimate concern of consumers (and therefore of the law).

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[2] *Verizon v. Federal Communications Commission*. United States Court of Appeals District of Columbia Circuit. 14 Jan. 2014. http://www.cadc.uscourts.gov/internet/opinions.nsf/3AF8B4D938CDEEA685257C6000532062/$file/11-1355-1474943.pdf.

The silo-based approach clearly no longer fits the modern, converged world. For example, the telecommunications and cable silos, each once viewed as containing a natural monopoly, now house firms facing inter- and intra-silo competition.

As FCC chairman Tom Wheeler has observed, "the role of the FCC has evolved from acting in the absence of competition to dictate the market, to promoting and protecting competition with appropriate oversight." The economic evidence here is clear: in all but a few areas, communications networks no longer have the characteristics of natural monopolies, and should no longer be regulated as public utilities. Indeed, the convergence of the communications sector and the dynamic, intensely competitive, Internet ecosystem is now virtually complete.

Convergence has not only eliminated the need for technology-specific regulation of communications services, but also removed the justification for *sector*-specific regulation: it is past time that the communications industry follow the path of the airline and railroad industries and transition to a competition-oriented regulatory regime. The appropriate standard for competition oversight is consumer welfare and competition protection. That standard, by and large, is embodied in current antitrust laws. Industry-specific competition oversight is not only unnecessary, but leads to regulatory discrimination and market distortions.

In a competition-oriented regime, the market – not regulators – is the primary regulator of firms' conduct. Where, for some reason, the market fails to constrain harmful conduct, regulatory intervention is appropriate. Such intervention should occur on a case-by-case basis, allowing the market to develop as competition and consumer preferences dictate. There may be some need for the *ex ante* development of regulation – but only where there exists clear and convincing evidence that such regulation is needed to address actual, industry-wide, consumer harm. These are the principles that have governed antitrust and consumer protection regulation as embodied in modern jurisprudence and as practiced by the FTC and the Department of Justice.

The Existence and Dangers of Duplication

Eliminating the silo-based approach of the Communications Act and transitioning instead to a competition-oriented approach to regulating the communications industry raises questions about the relationship between regulation and antitrust – between the FCC on the one hand and the FTC and Department of Justice on the other. These questions are not new: antitrust issues have always loomed large in the communications industry. The silo-based approach of the Communications Act, however, has long required that the FCC be engaged in something more than antitrust law and consumer protection. A transition from silos to a competition-oriented approach to communications law would make long-standing concerns over FCC authorities that are concurrent with those of other agencies more pressing than they have been in the past.

The clearest example is that the powers of the FCC and FTC as dual sovereign entities are largely, and increasingly, duplicative of each other. Both agencies have exceptionally broad statutory mandates (e.g., the "unfairness" and "public interest" standards), which have substantial overlap. The public interest standard, for instance, has long been held to include antitrust concerns; and the standard

governing unfair methods of competition has long been defined as encompassing the antitrust laws. Both agencies also support important consumer protection missions.

Moreover, in recent years the FTC has increasingly focused on issues relating to data security, online privacy, and the Internet of Things. Following the DC Circuit's broad construction of Section 706 in its Open Internet decision, the FCC arguably has jurisdiction over these issues – and many others – as well. It is conceivable that these two agencies could assert conflicting authority over these areas. They could adopt substantive rules or approaches that create conflicts between the agencies or increase uncertainty for consumers and regulated parties. Even absent such conflicts, both agencies could better carry out their statutory obligations if operating under a unified regime. Analysis of issues such as those the FTC is currently working to address would benefit from subject matter expertise currently housed in the FCC; and vice versa. Maintaining the FCC and FTC as separate agencies with closely related subject matter jurisdiction divided along an uncertain technological boundary is the functional equivalent of silo-based regulation. It is, in fact, worse, because the silos are administered by separate agencies.

Duplication between the FCC and other agencies also creates undue burdens for regulated firms and consumers. Regulated firms face increased costs and uncertainty as they need to appear before, and comply with the orders of, multiple agencies. Where the agencies do work together to proscribe a firm's conduct, they may also effectively get "multiple bites at the apple," making it exceptionally difficult for firms to challenge agency abuses of power. Similarly, consumers currently face the uncertainty of multiple agencies when filing consumer complaints relating to Internet technologies. This confusion is harmful to consumers, and also limits the agencies' abilities to coherently and comprehensively respond to consumer concerns. Indeed, where agencies are competing for resources or authority, there may be incentives for the agencies *not* to share information.

Similar duplication, leading to needless conflicts, confusion, and cost, exists between the FCC and other agencies. For instance, the FCC shares jurisdiction with the Department of Justice and the FTC in reviewing mergers; the FCC and NTIA perform some similar spectrum management functions; and, the FCC's Universal Service Program, which is primarily administered by the Universal Service Administrative Company, pursues some of the same goals as programs administered by the Rural Utilities Service.

The Benefits and Viability of Eliminating Duplication

Transitioning from the silo-based approach to competition-oriented regulation of the communications industry would increase the extent to which the FCC's authority is duplicative of the FTC's authority. Even absent such a change, the current understanding of the FCC's Section 706 authority sets the agencies upon a collision course. It is time for Congress to step in, clarify the boundaries and rationalize the responsibilities of the FCC and its various sister agencies.

To be clear, we are not advocating eliminating the important functions that the Commission can and should play in the communications industry – whatever functions the Commission currently has or would have under a revised Communications Act would still exist. Where other agencies with duplicative or complementary functions or resources exist, those functions and resources previously

assigned to the FCC would be transferred to its sister agency. The largest bulk of the Commission's current structure would be merged with the FTC – its lawyers, economists, and engineers working to support the FTC's existing and growing portfolio of communications-related matters. Some functions currently performed by the Commission may not have a natural home in another agency – such functions would be preserved under the auspices of a new agency with limited jurisdiction and discretion.

We acknowledge that this proposal presents various substantial practical and political problems. It is not, however, unprecedented. The notion of rationalizing responsibilities of federal agencies has had currency for some decades. When Congress ended public utility-style regulation of the airlines, the Civilian Aeronautics Board's remaining functions were transferred to the Department of Transportation; functions relating to surface transportation were shifted from the Interstate Commerce Commission to the Surface Transportation Board. Creating the Department of Homeland Security involved merging and reassigning elements of various other agencies; the Department of Defense resulted from the merger of the previously independent military agencies. The current Department of Health and Human Services and the Department of Education were once part of a single department. President Obama has endorsed the idea of merging duplicative agencies in the past. The move to make government more efficient through consolidation and re-conception of agencies is supported broadly by Americans and is also enabled by technological advancement.

It would not make sense to merge all of the Commission's functions with the FTC. A few of these functions deserve particular note here and are discussed below. Other functions inapposite to the FTC's structure, function, resources, or purpose should either be assigned to another of the FCC's sister agencies or would find a home in the new, smaller agency mentioned above.

Universal Service

The Commission is the primary federal agency responsible for overseeing and directing Universal Service programs. These functions clearly do not fit within the FTC's mission. Individual aspects of the Universal Service Program may fit with other agencies' missions – for example, the Departments of Agriculture, Education, and Health and Human Services. Alternatively, it may make sense to create a specialized agency to oversee the continuing development of the program, perhaps incorporating aspects of the Universal Service Administrative Company.

In a broader sense, the future structure and management of the Universal Service programs is a central question that should be considered in the Communications Act update process. The proper agency or agencies to home all or parts of the program is an issue that could (and should) be considered if this process moves forward.

Spectrum

The FCC has unique expertise in managing spectrum allocation, a discrete function which belongs in a stand-alone agency, perhaps combined with the government spectrum functions currently performed by NTIA. Congress should consider different forms for this agency, including a semi-autonomous entity with sufficient authority to reassign underutilized spectrum from government to private sector use.

The market-oriented spectrum policy reforms adopted by Congress and operationalized by the FCC

over the past two decades have generated enormous benefits for consumers, and are one of the main reasons the U.S. now has the world's most advanced mobile wireless services. Market-based spectrum allocation has allowed spectrum to flow away from inefficient uses to more highly valued ones and thus made possible the explosive growth of mobile broadband.

A single agency with jurisdiction over allocation of spectrum for both commercial and government use could help to correct the current over-allocation of spectrum to lightly-used and technologically stagnant government systems. We suggest that consideration be given to the creation of a US Spectrum Service with the power to reallocate spectrum from government to the commercial sector, to conduct auctions, to establish transmission power levels and receiver standards, and to perform other functions currently executed by the FCC or NTIA in the furtherance of the public interest where spectrum is concerned.

Public Safety

The Commission currently has various public safety and infrastructure security functions which are ill-suited to the FTC's competencies and mission. These functions may be well suited to the Department of Homeland Security. Alternatively, questions relating to infrastructure security – including infrastructure cybersecurity – are broad, important, and specialized enough to be housed in an independent regulatory authority.

Conclusion

The U.S. leads the world in information and communications technologies. We were the first country to commercialize telephone, radio, television, and the Internet. We are also home to the world's leading software, Internet, and mobile companies. Maintaining America's leadership requires us to re-think the way ICT industries are treated by law and public policy.

To reiterate, the key benefits of this proposal are that it would:

- Rationalize and strengthen competition oversight and consumer protection regulation.
- Eliminate the duplication, confusion, and cost associated with multiple regulatory agencies with overlapping jurisdictions.
- Reduce the regulatory burden on industry in complying with outdated rules and duplicative obligations.
- Clarify consumer protection procedures with one point of contact for complaints and redress.
- Facilitate efficient development of evidenced-based policies that promote innovation throughout the Internet ecosystem, enhance economic growth, and maximize consumer welfare.

The last major statutory reform of our nation's communications regulations was the bi-partisan 1996 Telecommunications Act, which made broadband and the Internet a largely deregulated space, unleashing market forces to generate unprecedented benefits for all Americans and, indeed, for people throughout the world. We applaud the Energy and Commerce Committee for initiating this process to create a market-oriented framework that will protect and facilitate the continuing growth of the Internet ecosystem.

Respectfully,

Richard Bennett
Visiting Fellow

Jeffrey Eisenach
Visiting Scholar

James Glassman
Visiting Scholar

Bronwyn Howell
Visiting Fellow

Gus Hurwitz
Visiting Fellow

Roslyn Layton
Visiting Fellow

Bret Swanson
Visiting Fellow