



International Center
for Law & Economics

The Honorable Fred Upton
Chairman
Energy and Commerce Committee
U.S. House of Representatives
2183 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Chairman
Communications and Technology Subcommittee
Energy and Commerce Committee
U.S. House of Representatives
2182 Rayburn House Office Building
Washington, DC 20515

Re: Response to White Paper #3

Dear Chairman Upton and Chairman Walden,

TechFreedom and the International Center for Law and Economics (ICLE) respectfully submit the following comments in response to the Committee's third white paper in its examination of how communications law can be rationalized to address the 21st century communications landscape.

We applaud your attention to these important issues and we look forward to assisting the Committee in any way we can to advance the enactment of a communications law for the digital age.

/s/ Geoffrey A. Manne, ICLE

/s/ Berin Szoka, TechFreedom

/s/ Ben Sperry, ICLE

/s/ Tom Struble, TechFreedom

ICLE & TECHFREEDOM COMMENTS ON COMMUNICATIONS ACT REWRITE REQUEST FOR COMMENTS

Competition Policy and the Role of the FCC

For many years, government regulation assumed clear, stable boundaries between industries and markets. This assumption sometimes prompted regulators to view (and to regulate) firms in various industries differently, even when they offered similar services. It also caused regulators to address the threat of anticompetitive conduct on the part of some firms by barring them from certain industries and markets.

The time has come for another approach. Even if the lines between industries and markets were clear in the past, technological and market changes are now blurring them beyond recognition, if not erasing them entirely. Regulatory policies predicated on such perceived distinctions can harm consumers by impeding competition and discouraging private investment in networks and services. The Administration is therefore committed to removing unnecessary and artificial barriers to participation by private firms in all communications markets....

This was not the rhetoric of the Bush Administration or its FCC Chairmen, but the guiding vision of the Clinton Administration — the core of the “Telecommunications Policy Reform Initiative” released in January 1994.¹ Well before Newt Gingrich’s “Republican Revolution” swept into power, President Clinton and Vice President Gore were trying to clear the regulatory dead wood of the analog era and pave the way for competition in an era of convergence. Whatever the faults of their approach, which would have been Telecommunications Act of 1994, its basic thrust — against regulatory formalism — was right.

Unfortunately, while the Telecommunications Act of 1996 did do much to clear the way for competition within sectors of the telecommunications industry, it preserved

¹ White House Office of Commc’ns, Background on Telecommunications Policy Reform Initiative, 1994 WL 9916 (1994).

the outdated silos of voice, video, terrestrial broadcast, satellite broadcast, wireless, “information” services, and so on. Shortly after President Clinton signed the 1996 Act, John Podesta offered a particularly damning — and sadly prescient — initial assessment:

Technology, and especially the Internet, is about to sweep past this legislation and make it obsolete.... Congress failed to understand the potential of the Net to deconstruct the existing industry structure. Aside from hooking up schools and libraries, and with the rather major exception of censorship, Congress simply legislated as if the Net were not there.²

Podesta, who had been a senior advisor to the President on telecom issues and who would soon thereafter return to the White House and, eventually, become President Clinton’s Chief of Staff, expressed the frustration of the New Democrats who had tried to clear the way for competition, just as Alfred Kahn had, under President Carter, cleared the way for airline competition by dismantling the Civil Aeronautics Board.³

Bill Kennard, President Clinton’s second FCC Chairman, tried to make the most of the contorted and baroque statute Congress gave the agency by setting in motion most of the deregulation that made possible the services we take for granted today. Yet there was only so much he could do within the formalist confines of the Act. So, in 1998, he explained his intention to do the other thing an FCC Chairman could do without Congress: re-organize the structure of the agency along functional lines, rather than by industry silos:

At the very least, as competition develops across what had been distinct industries, we should level the regulatory playing field by leveling regulation down to the least burdensome level necessary to protect

² John D. Podesta, *Unplanned Obsolescence: The Telecommunications Act of 1996 Meets the Internet*, 45 DEPAUL L. REV. 1093 (1996).

³ See THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* (1986).

the public interest. Our guiding principle should be to presume that new entrants and competitors should not be subjected to legacy regulation. This is not to say that different media, with different technologies, must be regulated identically. Rather, we need to make sure that the rules for different forms of media delivery, while respecting differences in technology, reflect a coherent and sensible overall approach. To the extent we cannot do that within the confines of the existing statute, we need to work with Congress and others to reform the statute.⁴

This was the most diplomatic way an FCC Chairman could tell Congress that it needed to go back to the drawing board and start over. Yet here we are, twenty years after Clinton and Gore called for a technologically neutral communications act, and sixteen years after Kennard said the same thing — still watching the FCC struggle to apply the 1996 Act in a world that looks nothing like its basic assumptions, and where voice, video and information have become applications delivered over radically different platforms.

The Outdated Competition Policy of the 1996 Act and its Precursors

It is important to recall the purposes of the 1996 Act and the role of competition policy within it. At the time, the central competition issue for communications law and policy was viewed as the facilitation of entry into long-distance and enhanced telephony markets following the breakup of AT&T and the implementation of the court order (the “MFJ”) regulating the resulting BOCs.⁵ In the most important respects the central purpose of the 1996 Act was mandatory unbundling — facilitating entry on the assumption that new entrants couldn’t build new infrastructure to compete with incumbent carriers. Much of the Act’s approach to competition policy flows from that purpose.

But today we face a very different marketplace. Perhaps (although the jury is still out) *because* of the competition policy aims of the 1996 Act, competitive constraints

⁴ FCC, *A New Federal Communications Commission for the 21st Century*, I-D (1999), available at <http://transition.fcc.gov/Reports/fcc21.html> [hereinafter “Kennard Strategic Plan”].

⁵ See Podesta, *supra* note 2, at 1104-08.

on network (particularly last-mile network) market power abound. We have shifted from a world where simplistic structural regulations aimed at mandating interconnection (and/or impeding vertical integration) by price-regulated, monopolist networks makes some economic sense, to a more complicated world in which both the causes and effects of market power are far more ambiguous. Resolution of today's competitive issues doesn't turn on simply facilitating new entry, but on adjudicating complex disputes over a wide range of both horizontal and vertical relationships among sophisticated players, all possessing market power, bargaining advantages and technological supremacy in varying and uncertain degrees. In other words, while infrastructure competition is important, the heavy lifting in FCC competition policy today concerns significantly different and more nuanced issues than those at the core of the existing regulatory framework.

The 1996 Act focuses heavily on vertical relationships and the threats to competition that can arise from (regulated) monopolists' extensions into complementary markets. The *Hush-a-Phone* and *Carterfone* disputes of the Ma Bell era centered on AT&T's attempts to control complementary markets, and eventually gave rise to the divestiture of the BOCs and the MFJ that governed them and mandated structural separation, the FCC's *Computer Inquiries* of the 1970s and 1980s, and ultimately the 1996 Act. Compared to the previous regulatory frameworks, the 1996 Act is somewhat "deregulatory," insofar as it eschews strict structural separation for what amount to, largely, conduct regulations.

Yet even the allegedly deregulatory 1996 Act takes an inherently structural view. While it eschews the strict structural *separation* of the MFJ, it nevertheless adopts the same, strict structural framework, imposing extensive unbundling and interconnection (access) requirements on infrastructure providers on the assumption that entry into complementary markets requires specific restraints based on formalistic distinctions between price-regulated infrastructure and complementary services. Whether or not that makes sense for the telecommunications services regulated under Title II, the extension of those presumptions to non-price-regulated broadband

services makes no sense at all.⁶

Moreover, the 1996 Act's formalism isn't limited to vertical structures. Rather, it contemplates competition only within its specified technological silos, and does not readily accommodate the intermodal competition that characterizes today's communications ecosystem. Thus, where wireless service competes with wireline service, VoIP provides the same functionality as wireline and wireless telephony, and where IP video challenges cable television, the regulatory structure of the 1996 Act is out of sync with the markets it now governs.

The 1996 Act thus incorporates at least two basic, formalistic premises that underpin its approach to competition issues:

1. First, competitive concerns arise from anticompetitive extensions of monopoly power by operators of the core physical layer into the provision of various services connected to it, where "network" and "services" are inherently distinct and where the overriding concern is for competition in services, not the physical networks.
2. Second, competitive concerns are essentially *intramodal*, arising from the divergent incentives of incumbent providers and new entrants, on the one hand, and affiliated and unaffiliated services on the other, all operating upon the same underlying technology.

Unfortunately, these presumptions are overly rigid given current market realities. VoIP presents perhaps the simplest example of the failings of such rigidity. While VoIP is decidedly an application running atop IP-enabled physical infrastructure, it offers functionality that is essentially identical to that provided by the public switched telephone network. Meanwhile, while cable ISPs offer VoIP services

⁶ We have discussed this issue at length in our filings in the IP Transition docket. See Starr, Manne & Szoka, Toward Modern Modest Regulation for the IP Transition, Comments, In the Matter of the Technological Transition of the Nation's Communications Infrastructure, GN Docket No. 12-353 (January 28, 2013), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7022113680>; Manne, Starr, Szoka & Downes, How the FCC Can Lead the Way to Internet Everywhere by Enabling the IP Transition, Reply Comments, In the Matter of the Technological Transition of the Nation's Communications Infrastructure, GN Docket No. 12-353 (February 25, 2013), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7022125022>.

through channels dedicated to their proprietary cable networks, unaffiliated VoIP providers offer identical services over the public Internet channels and/or wireless networks. And at the same time, cable-network VoIP services have significantly eroded the market share of ISDN telephony and POTS running on switched copper networks, and wireless telephony has further eroded the dominance of all of these wireline telephony services.

One attribute of the current regulatory framework, as suggested above, is that it is more concerned with preserving and favoring innovation and competition in the applications/content market, rooted in the assumption that network/infrastructure monopolies threaten that market's competitiveness. Concomitantly, the framework is little concerned with innovation and competition in network/infrastructure markets. But this emphasis is ill-supported in today's marketplace, and the focus on edge provider innovation to the exclusion of network innovation (and investment incentives) that permeates the Net Neutrality debate, for example, is in part a symptom of this residual myopia.

In the first place, this emphasis is inconsistent with basic economic logic, which counsels in favor of focusing regulatory attention on increasing competition in the *least* competitive segment of a vertical structure. As Prof. Christopher Yoo has noted:

One of the basic tenets of vertical integration theory is that any chain of production will only be as efficient as its least competitive link. As a result, competition policy should focus on identifying the link that is the most concentrated and the most protected by entry barriers and design regulations to increase its competitiveness. In the broadband industry, the level of production that is the most concentrated and protected by barriers to entry is the last mile. This implies that decisions about Internet regulation should be guided by their impact on competition in that portion of the industry.⁷

⁷ Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 8 (2005), available at <http://jolt.law.harvard.edu/articles/pdf/v19/19HarvJLTech001.pdf>.

Undoubtedly there is less competition among infrastructure providers and ISPs than among content providers. But, as Net Neutrality advocates implicitly insist, the 1996 Act (and especially its Title II provisions) aims at preserving and maximizing competition in the most competitive sector of the stack, and essentially assumes the absence of or need for innovation and competition in the network.

Undoubtedly this is in part a function of the Act's design — a design predicated on government-guaranteed, rate-regulated, monopoly infrastructure. But in broadband (and increasingly in telecommunications), this presumption is unwarranted. While infrastructure is certainly less competitive than content, it is becoming increasingly so, and the infrastructure used for broadband is not rate regulated. We are ill-served by appealing to the Act's presumption that network competition is hopeless. Instead, we would do better to focus on removing direct barriers to competition, both wireline and wireless.⁸ And for our competition policy, as Yoo further notes:

[P]ublic policy would be better served if Congress and the FCC were to embrace a "network diversity" principle that permits network owners to deploy proprietary protocols and to enter into exclusivity agreements with content providers.

* * *

Intervening by mandating network neutrality would have the inevitable effect of locking the existing interfaces into place and of foreclosing experimentation into new products and alternative organizational forms that transcend traditional firm boundaries.

The decision to permit network diversity to emerge, then, does not necessarily depend on a conviction that it would yield a substantively

⁸ We will also file comments on this topic in response to the FCC's inquiry regarding promoting broadband deployment, focusing on the agenda laid out by the National Broadband Plan: opening more spectrum to serve consumers and facilitating deployment of infrastructure by both wireless and wireline providers, especially through more rational local infrastructure policy. See, e.g., Berin Szoka, et al., Don't Blame Big Cable. It's Local Governments that Choke Broadband Competition, WIRED (July 16, 2013), available at <http://wired.com/opinion/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/>.

better outcome, but rather from a “technological humility” that permits exploration to proceed until policymakers can make a clearer assessment of the cost-benefit tradeoff.⁹

Moreover, it is not even clearly the case that content markets *themselves* are best served by being directly favored to the exclusion of infrastructure. The two markets are undoubtedly symbiotic, in that gains for one inevitably produce gains for the other (*i.e.*, increasing quality/availability of applications/content drives up demand for broadband, which provides more funding for networking infrastructure, and increased bandwidth enabled by superior networking infrastructure allows for even more diverse and innovative applications/content offerings to utilize that infrastructure). Absent an assessment of actual and/or likely competitive effects, it is impossible to say *ex ante* that consumer welfare in general, and regarding content in particular, is best served by policies aimed at encouraging innovation and investment in one over the other. Given such uncertainty, the rigid presumptions of the existing Act are a poor fit for regulation of broadband and the applications that rely on it.

In short, as a former advisor to both Chairman Kennard and Chairman Hundt put it:

Broadband—and IP-based services more generally—attack the fundamental skeleton of the Communications Act itself, eroding the framework around which the Act’s regulations are built.¹⁰

Or as we have noted elsewhere:

There is, quite simply, no economic basis for extending a regulatory system intended to open markets to competition through regulated access mandates to copper networks that were built by the Ma Bell monopoly to cover infrastructure investments by ILECs in new fiber networks made long after the AT&T breakup. Expropriation by forced access deters investment, and is not needed to maintain competition

⁹ Yoo, *supra* note 7, at 9, 11.

¹⁰ John T. Nakahata, *Broadband Regulation at the Demise of the 1934 Act: The Challenge of Muddling Through*, 12 *COMMLAW CONSPPECTUS* 169, 169 (2004), available at <http://scholarship.law.edu/commlaw/vol12/iss2/7/>.

in today's telecommunications market.... [S]o long as the principles of unbundling and forced access remain enshrined in law, network owners will not be able to reap the full fruits of their investment. Instead, investment will be curtailed as risk-adjusted expected returns will always be diminished by the possibility of future, more significant expansions of the scope and extent of regulation. In the end it is consumers who will suffer for these reduced investment incentives.

It is difficult to see what could possibly justify further delay in recognizing that unbundled access and interconnection mandates for IP networks lack economic and legal justification. The FCC would do well to recognize that today's wireline providers are no longer the "dominant" heirs to Ma Bell they once were — and thus end such mandates once and for all.¹¹

And as Commissioner Pai has similarly observed:

[O]ur rules continue to presume static domination by monopoly providers. We need a forward-looking regulatory framework that will expedite the Internet Protocol (IP) transition and accommodate — indeed, encourage — the most important technological revolution of our time....[T]he Task Force should resist the urge to simply import the rules of the old world into the new.¹²

An Alternative Competition Framework for the FCC

There is, however, a fairly simple (philosophically, at least) solution: Adopt effects-based competition principles from antitrust to adjudicate disputes arising within the purview of the FCC, and reject the formalistic presumptions and resulting regulatory apparatus of the Communications Act. Such a framework is the best way, perhaps the only way, for Congress to give the FCC both the flexibility needed to keep up with technological change and the analytical rigor needed to ensure that the FCC's

¹¹ Starr, et al., IP Transition Comments, *supra* note 6, at 7-8.

¹² Ajit Pai, Statement of Commissioner Ajit Pai On the Formation of a Technology Transitions Policy Task Force (Dec. 10, 2012), *available at* <http://www.fcc.gov/document/pai-statement-formation-technology-transitions-policy-task-force>.

interventions actually do more to help consumers than to harm them.

In 2005, a diverse group of academics and tech policy experts – Democrats and Republicans, moderates, progressives, New Democrats, conservatives and libertarians – forged a consensus for how to rewrite the Communications Act. This working group recognized that “competition law and economics provides the only sound basis for governing communications markets in the future, as those markets become more competitive.”¹³ At its heart, the consensus behind the Digital Age Communications Act¹⁴ rested on essentially the same principle as Kennard’s vision: “In short, we will be guided by one principle: the elimination of rules that impede competition and innovation and do not promote consumer welfare.”¹⁵ In other words, Kennard argued that the FCC should focus on effects rather than formalism. Thus, the DACA model did away with “the persistent technological silos . . . [and instead opted] for the antitrust-derived standard of consumer welfare and embrace[d] competitive markets as the first protection of that welfare.”¹⁶ Even current FCC Chairman Tom Wheeler recently embraced the same (rhetorical) approach, declaring that “the mantra today at the FCC is ‘Competition, Competition, Competition.’”¹⁷

Such an approach stands in stark contrast to the 1996 Act:

The 1996 Telecommunications Act is not deregulation but a vast new regulatory program designed to mold and shape competition through mandatory wholesale leasing of pieces of an incredibly complicated network at prices that are based on regulators' imperfect understand-

¹³ See RANDOLPH J. MAY & JAMES B. SPETA, DIGITAL AGE COMMUNICATIONS ACT: PROPOSAL OF THE REGULATORY FRAMEWORK WORKING GROUP, RELEASE 1.0, 18 (Washington, DC: Progress and Freedom Foundation, June 2005), available at <http://www.pff.org/issues-pubs/other/050617regframework.pdf>.

¹⁴ See generally JOHN F. DUFFY, ET AL., DIGITAL AGE COMMUNICATIONS ACT: REPORT FROM THE WORKING GROUP ON INSTITUTIONAL REFORM (Nov. 2006), available at http://www.freestatefoundation.org/images/Final_Published_DACA_Report.pdf.

¹⁵ Kennard Strategic Plan, *supra* note 4, at IV-B.

¹⁶ Raymond L. Gifford, *The Continuing Case for Serious Communications Law Reform* 5 (Mercatus Ctr. Working Paper No. 11-44, 2011), available at http://mercatus.org/sites/default/files/publication/Gifford_Communications_Law_Reform.pdf.

¹⁷ FCC, Remarks of Chairman Tom Wheeler at the National Cable & Telecommunications Association 4-5 (Apr. 30, 2014), available at <http://www.fcc.gov/document/chairman-tom-wheeler-remarks-ncta>.

ing of costs.¹⁸

Whereas the 1996 Act, particularly in Title II, adopts formalistic presumptions and imposes specific regulatory outcomes, even in the face of ever-increasing uncertainty and technological change, an effects-based approach would generally employ *ex post* analysis of conduct and a broad assessment of its economic consequences to determine the propriety of various actions. Instead of foreclosing or mandating specific conduct, it allows innovation, technological development and changes in consumer preferences to guide conduct, intervening only where actual competitive harms develop (or, in a few cases, are substantially likely to develop in the future).

Of course, we acknowledge that the FCC's public interest standard is broader than the consumer protection standard utilized by the FTC and that, as a political matter, Congress is likely to insist that the FCC continue to factor non-economic concerns into its decision-making processes. Thus, even after a rewrite, the FCC might still be required to support some programs or regulations even if they have negative or minimal impact on competition. For example, MVPDs might be required to carry Public, Educational, and Governmental (PEG) programming (under the must-carry regime) to advance free speech rights or increase the vibrancy of the marketplace for ideas, even though a truly competitive market would result in these channels being replaced by more consumer-oriented and advertising-supported programming.

Such interventions should be the exceptions to the general rule that the FCC should be focused on advancing consumer welfare by rigorously assessing costs and benefits, including the error costs of over-regulating, which is both more likely and harder to correct than under-regulating.¹⁹ Moreover, the FCC should be required to approach even these non-economic concerns through an effects-based lens, weighing the tradeoffs and error costs as rigorously as possible.

¹⁸ Robert Crandall, *The Telecom Act's Phone-y Deregulation*, WALL ST. J. (Jan. 27, 1999), available at <http://www.brookings.edu/research/opinions/1999/01/27business-crandall>.

¹⁹ See Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153, 158-63 (2010) (noting that Type I errors condemning pro-competitive practices generally have higher costs than Type II errors allowing anti-competitive practices because the market tends to ameliorate the harms from Type II errors).

FCC Competition Policy's Net Neutrality Problem

In the last nine years since DACA, the need for a new Act has grown more acute. Yet, unfortunately, telecommunications policy has been bitterly polarized, most notably by the uniquely divisive and radicalizing issue of Net Neutrality.

Net Neutrality is, in some ways, borne out of the same realization that animates our comments here: The rise of broadband and the delivery of "Everything over IP" have so disrupted the existing regulatory regime that competition concerns can no longer be adequately addressed by the existing regulations. But where Net Neutrality falters is in its embrace of both the vertical structural assumptions of the Act, as well as its affinity for the Act's outdated, *ex ante*, prescriptive approach. Moreover, Net Neutrality is itself inherently non-neutral, in that it begins with the assumption (discussed above and enshrined in the Act) that innovation and competition in complementary markets should always trump network innovation and competition. As a result, instead of arguing for an *ex post* assessment of competitive effects arising out of the uncertain and always-evolving relationship between broadband networks and edge providers, Net Neutrality advocates essentially adopt the apparatus of Title II as their competition policy lodestar.

The FCC has twice tried to regulate Net Neutrality, first by claiming vague ancillary authority to enforce the FCC's 2005 Open Internet policy statement,²⁰ then by claiming only slightly less vague ancillary authority to enforce its 2010 Open Internet Order.²¹ Now, the FCC has proposed two alternative bases for jurisdiction, Title II (with forbearance) and Section 706. Both are efforts to overcome the formalism of the 1996 Act in order to invent, out of whole cloth, a new regulatory regime for the most important aspect of modern telecommunications competition policy: the intersection between broadband and applications. Both demonstrate the extreme dis-

²⁰ See FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC 05-151 (2005), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf; see also *Comcast Corp. v. F.C.C.*, 526 F.3d 763 (D.C. Cir. 2008) (rejecting the FCC's asserted authority to enforce the Open Internet Policy Statement).

²¹ See FCC, *Preserving the Open Internet*, Final Rule, FCC 10-201, 76 Fed. Reg. 59,192 (Sept. 23, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf>; see also *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

connect of allowing the FCC to continue applying the 1996 Telecommunications Act to a world of broadband-driven convergence and the need for Congress to start over with an effects-based approach.

On the one hand, the FCC proposes to place broadband into the regulatory silo of Title II, the set of public utility regulations designed for the monopoly telephone network — the very model of regulation that the Clinton Administration’s FCC tried to move away from in its prescient effort to promote the massive capital expenditures needed to build the infrastructure behind today’s Internet. Although there are superficial similarities between Title II’s formalistic approach to fostering competition through unbundling (a form of open access) and the sort of non-discrimination sought by Net Neutrality proponents, the competitive and regulatory dynamics are so different that today’s push for regulation borders on the absurd. In fact, those now advocating for reclassification essentially claim that the Title II silo fits Net Neutrality... but that it can and should simultaneously be leveled somewhat (through the forbearance process), to suit their needs.²²

Both claims are false: Title II is not a viable basis for modern competition policy, even from the perspective of those who advocate for Net Neutrality regulation. Far from banning prioritization (as Net Neutrality proponents so adamantly insist must be done) Title II simply requires that prioritization be “just and reasonable.”²³ While Title II will not get them what they most want, it *would* trigger, by default, a host of other regulations that are, as we have noted, wholly inappropriate for the current

²² This reclassification-with-forbearance approach was proposed in 2010 by Chairman Genachowski. In defense of the proposal, Genachowski’s General Counsel, Austin Schlick, asserted that: “The Commission is able to tailor the requirements of Title II so that they conform precisely to the policy consensus for broadband transmission services. Specifically, the Commission could implement the consensus policy approach—and maintain substantively the same legal framework as under Title I—by forbearing from applying the vast majority of Title II’s 48 provisions to broadband access services, making the classification change effective upon the completion of forbearance, and enforcing a small handful of remaining statutory requirements.” Austin Schlick, *Legal Framework: A Third Way Legal Framework for Addressing the Comcast Dilemma* (May 6, 2010), available at <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>.

²³ 47 U.S.C. § 202(a) (2012).

environment.²⁴

While the Act gives the FCC vast discretion under the standard (or non-standard standard²⁵) of the “public interest,” Section 10 of the Communications Act requires much more than this: affirmative findings about the state of competition, market by market.²⁶ But if the Commission could reverse course, and make forbearance as easy as proponents assert, then so too, by implication, would “un-forbearance” be just as readily available. That would mean that once a service was placed within Title II, it would *always* be potentially subject to the requirements of Title II, depending on the whims of the FCC. Such regime uncertainty, hinging ironically on the certainty of binary classification decisions under the Act, is merely another manifestation of the Act’s formalism. As such it would perpetuate the outdated structure of the Act and undermine investment in competing infrastructure – precisely the opposite of the pro-deployment agenda begun by the Clinton administration.²⁷

²⁴ At the same time, there is no easy way for the FCC to whittle Title II down to just the three Net Neutrality rules the FCC has tried to impose. Forbearance is simply not this easy, as we shall explain in our forthcoming comments on the FCC’s Notice of Proposed Rulemaking (FCC, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, FCC 14-61 (May 15, 2014), available at <http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm>).

²⁵ See Adam Thierer, *Is the Public Served by the Public Interest Standard?*, THE FREEMAN (Sept. 1, 1996), available at http://www.fee.org/the_freeman/detail/is-the-public-served-by-the-public-interest-standard.

²⁶ See 47 U.S.C. § 160 (2012). Indeed, if the FCC were to accept the dreary claims about the state of the market made by those now advocating Title II, it is difficult to see how the Commission could justify forbearing from the most important aspects of Title II. In fact, the FCC has made forbearance progressively more difficult over the years. See FCC, Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, Report and Order, FCC 09-56 (2009), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-56A1.pdf. See also *Qwest Corp. v. F.C.C.*, 689 F.3d 1214 (10th Cir. 2012) (rejecting appellant’s contention that wireless voice services compete with appellant’s wireline voice services, and then upholding the FCC’s denial of appellant’s forbearance petition because there were only two participants in the market—as defined—and duopolies provide too much threat of tacit price coordination to constitute effective competition).

²⁷ “How the FCC handles these issues, along with the ability of the Commission and state regulators to implement the interconnection mandate of the 1996 Act, will determine the speed at which the telephone, cable, and Internet-based networks converge into an open data network. The force of technology means that the inevitability of this convergence is not really in question, but the pace of convergence still rests with federal and state regulators.” Podesta, *supra* note 2, at 1114.

On the other hand, given the impracticality of Title II, and its harmful real-world consequences for broadband as well as edge providers, the FCC seems almost certain to issue new Net Neutrality rules under Section 706, which the FCC re-interpreted in 2010 as an independent grant of authority. The D.C. Circuit upheld this re-interpretation under *Chevron* in its *Verizon* decision, but required that any regulations under Section 706 leave room for “commercially reasonable” negotiation, lest they amount to *de facto* reclassification of broadband as a common carrier subject to Title II.²⁸

This limiting principle might actually be a sensible approach to competition regulation at the FCC, and one Congress should consider including in the analytical framework behind a new Communications Act. But that does not mean that Congress should stand idly by while the FCC turns Section 706 into the basis for a new approach to competition policy beyond the rigid confines of the 1996 Act. If anything, Section 706 evinces Congress’s intent to promote competition and deployment. Allowing it to become instead the *de facto* Telecommunications Act of 2014, however much we need a new Communications Act, would be an affront to the principle that the American people’s elected representatives, not unelected bureaucrats, should determine how telecommunications should be governed.²⁹

²⁸ See *Verizon*, 740 F.3d at 649-59.

²⁹ It is absurd to argue, as the D.C. Circuit did, that Congress intended Section 706 as a secret grant of power that could moot the rest of the Act simply because the sole piece of legislative history on this Section, the Senate Commerce Committee’s report, described this section as a “failsafe.” *Verizon v. F.C.C.*, 740 F.3d 623, 639 (D.C. Cir. 2014). Congress could have written such a grant of power in clear, explicit terms – and indeed, the Senate did precisely that in what would have been the subsequent section of the Act, only to have that section removed in conference with the House. Compare S. 652 ES, 104th Cong., Sec. 304 & 305 (June 15, 1995) (Engrossed in Senate), with S.652 EAH, 104th Cong. (Oct. 12, 1995) (Engrossed Amendment House) and S.652, 104th Cong. (Jan. 1, 1996) (Enrolled Bill), available at <http://beta.congress.gov/bill/104th-congress/senate-bill/652/text>; see also S. Rep. No. 104-23, at 51 (1995), available at <http://beta.congress.gov/104/crpt/srpt23/CRPT-104srpt23.pdf>. Rather than an independent grant of authority, Section 706 is a mandate to use other grants of authority in the Act for a particular purpose: promoting broadband deployment and competition, just as the FCC concluded in 1998. See FCC, Deployment of Wireline Servs. Offering Advanced Telecom. Capability, CC Docket No. 98-147, Memorandum Opinion and Order, FCC 98-188, at 77 (Aug. 7, 1998) (“[I]n light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section

Moreover, the FCC's interpretation of Section 706 could allow it not merely to craft a new competition policy for broadband, but to craft a new regulatory regime for competition, consumer protection, copyright, privacy, cybersecurity and so on across the entire field of "communications."³⁰ Thus, Section 706 could be used to regulate the very edge providers that those who advocate for prescriptive Net Neutrality regulations purport to be trying to keep "free." Most troublingly, Section 706, if it is an independent grant of authority, seems to allow the FCC to regulate informally, without the safeguards of formal rulemaking or the opportunity for judicial review that they offer. And Section 706(a) empowers not only the FCC, but also state regulatory commissions. Whatever the FCC's authority over edge providers, if any, it ought to be should be determined by Congress, not the FCC – and within an overall structure that reflects Congress' considered view of the changing and changed competitive conditions.

The FCC's Ongoing Informal Rewrite of the Communications Act

There is also reason to believe that leaving competition policy to the FCC's discretion under the current Act may yield problematic results. In several areas where it has purported to enforce competition principles directly — merger reviews, program access rules, etc. — the FCC has proved itself to be a less than reliable anti-trust enforcer, as a substantive matter.³¹ But perhaps even more disconcerting, the agency has used its transaction review authority to impose merger conditions that bear little or no relationship to competitive issues raised by transactions. In fact, arguably the FCC has itself found some of the formalism of the 1996 Act overly constraining and effectively undertaken to rewrite the substance of the Act through ap-

706 does not constitute an independent grant of authority."), available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98188.pdf [hereinafter "Advanced Services Order"].

³⁰ Subject only to two limits made clear by the D.C. Circuit's decision: (a) the FCC may not violate some specific provision of the act (such as the forbearance requirements of Section 10 or the prohibition on imposing common carriage requirements on an information service) and (b) the FCC must at least assert that its regulations will promote broadband deployment, investment, or competition.

³¹ We discuss the substantive defects in the FCC's merger review process in great detail in Geoffrey Manne, et al., *The Law and Economics of the FCC's Transaction Review Process* (TPRC 41: The 41st Research Conference on Communication, Information and Internet Policy, Aug. 23, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242681.

plication of merger conditions. Thus, for example, the FCC uses its leverage over the spectrum review process to require companies to commit to “voluntary” conditions that have allowed the agency to regulate nearly every aspect of industry conduct, without any real legal oversight and without Congressional mandate.³² And in several ways the FCC’s transaction review practices take it outside the rule of law.³³

In effect, the agency uses transaction reviews to impose the kinds of regulations that would otherwise require a formal rulemaking — or that the FCC could not legally impose because of limitations of the Act or even, most troublingly, constitutional constraints.³⁴ In addition to side-stepping notice-and-comment requirements, this regulation-by-merger-condition creates a crazy quilt where different rules apply to different companies, sometimes in different markets.³⁵ This creates a patchwork of rules and obligations, coerced without sound economic justification, in a fashion largely unreviewable by courts, and in contravention of limits placed on the FCC’s authority by Congress and the courts.³⁶

This approach to competition policy in the merger context at the FCC promotes neither sound competition policy principles nor even the competition policies underlying the Act. Unlike the FTC and DOJ, which have the burden of showing a potential merger will be anti-competitive, the FCC can place the burden on the merging parties to prove the benefits of a merger.³⁷ And while the competition authorities must review mergers under the consumer welfare standard delineated under antitrust law, the FCC has a much broader public interest standard of review that allows it to engage in analysis untethered to well-accepted antitrust law and economics.³⁸ Accordingly, the FCC uses its spectrum screen to implement essentially an

³² *Id.* at 10.

³³ *See generally id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 21.

³⁷ *Id.* at 4-5.

³⁸ *Id.* at 4 (“As the D.C. Circuit once stated, the FCC’s job is to ‘make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.’”) (*quoting* *United States v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980)).

outdated and discredited structural presumption model of antitrust.³⁹ And as mentioned above, the FCC can and does use its broad authority and ability to hold up transactions to leverage companies into conditions having little or nothing to do with promoting sound competition policy and consumer welfare—in stark contrast to earlier understandings of the aims of the Communications Act.⁴⁰

In short, a rewrite of the 1996 Act is already occurring — except it is being done by the FCC, informally, with no clear limits on its discretion, and with little analytical rigor.

In the end, however, and regardless of whether the FCC has the legal authority to effectively “rewrite” the 1996 Act to fit today’s messy reality into the Act’s neat boxes, doing so is plainly unwise. As we have noted elsewhere:

Title II regulations are hard-coded for both the technology and the artificial competitive environment of a dying TDM universe. They should not, and legally may not, be applied “as is” to IP networks. Nor can they simply be “adapted” to a new and more dynamic ecosystem.

While market forces may not always ensure the perfect alignment of industry conduct with the best interests of consumers, it does not follow that any particular regulatory solution—least of all regulation intended for entirely different circumstances—is preferable. In the face of significant non-government constraints, the case for blunt, prophylactic regulations like interconnection mandates to protect against future problems that may never arise is extremely weak.

Marketplace and reputational incentives drive interconnection and consumer protections in the market, and networks have little incentive to harm their own customers. These forces are bolstered by various multistakeholder processes that continue to evolve to regulate industry practices and to supplement direct company-to-company dispute

³⁹ See *id.* at 23-29.

⁴⁰ Kennard Strategic Plan, *supra* note 4, at IV-B.

resolution. At the same time, the FCC retains authority under Title I of the Communications Act to regulate for public safety, and antitrust and consumer protection laws govern IP services precisely because they are not regulated as common carriers (which are excluded from the FTC's otherwise general jurisdiction over the economy).⁴¹

The questions asked by the Committee regarding the proper definition and application of competition policy in the modern communications marketplace imply to some extent that there might be a distinction between the appropriate competition principles applied under the antitrust laws and those applied in the communications context and/or by the FCC. While there is certainly a substantial literature on the particular economics of network competition and communications networks, the basic principles of competition policy are well-established and directly applicable here. To some extent the same is true of process principles, as well: we have a pretty good idea how to apply competition policy.

As mentioned above, Congress should consider the DACA model to guide the FCC. Such a model would "be based on technology- and provider-neutral regulatory criteria[,] . . . premised on legal principles drawn largely from competition law[, and] the regulatory structure ought to pursue non-economic regulatory goals with as light a touch as possible[.]"⁴² These were the three "incontestable" principles the DACA working group was able to settle on in 2005, and they still hold true today.⁴³

As the current Congress once again considers these issues, they inevitably must come to the same conclusion: "[T]he antitrust model most appropriately captures the development of competition in telecommunications markets[.]" and "provides the best response to problems of sector-specific regulation."⁴⁴ This does not mean that a "pure" antitrust model must be adopted, and the FCC may be maintained as a "sector-specific regulator." But such a proposal should import "the general 'unfair competition standard' from the FTC Act as the principal substantive standard for

⁴¹ Manne, et al., IP Transition Reply Comments, *supra* note 6, at 10.

⁴² May & Speta, *supra* note 13, at 10.

⁴³ See *id.*

⁴⁴ *Id.* at 11.

FCC action."⁴⁵ Further specifics can be hammered out along the way, but competition law should be the lodestar to guide Congress in crafting an effects-based regulatory regime to govern the modern American communications marketplace.

Conclusion

Twenty years ago, Democrats and Republicans agreed on the need to refocus communications competition policy on promoting competition in an era of convergence, focusing on effects rather than formalism. Unfortunately, that focus was lost in the sausage-making process of legislation – and the FCC has been increasingly adrift ever since. The FCC has not waited for Congress to act, and has instead found creative ways to sidestep the formalist structure of the Act. It is high time for Congress to reassert its authority and to craft a new act focused on the effects of competition as a durable basis for regulation.

The antitrust statutes have not been fundamentally modified in over a century because Congress has not needed to do so: antitrust law has evolved on top of them through a mix of court decisions and doctrinal development articulated by the anti-trust agencies. At the heart of this evolution of common law has been one guiding concern: effects on consumer welfare, seen through the lens of law and economics. The same concern and same analytical lens should guide the re-write of the Communications Act that is, by now, two decades overdue.

While refocusing competition regulation on effects, Congress should give equal focus to minimizing remaining barriers to competition. In particular, that means minimizing regulatory uncertainty (and, in particular, avoiding any return to mostly archaic Title II regulations); maximizing the amount of spectrum available; simplifying the construction and upgrading of wireless towers to maximize the capacity of wireless broadband; and promoting infrastructure policy at all levels of government that makes deployment cost-effective.⁴⁶ As Blair Levin recently observed:

As we saw with the data from the National Broadband Plan, these

⁴⁵ See *id.* at 18-19.

⁴⁶ Examples include initiatives to facilitate use of open conduits (or “Dig Once” initiatives) and non-discriminatory pricing regimes for pole attachments covering all broadband providers equally.

networks are staggeringly expensive. Breaking free from the status quo requires both creative and viable economic models. After all, the broadband operators are businesses, not charities. If Communities do not work to lower barriers to entry and enable efficient builds, the necessary new investment simply will not happen.⁴⁷

There is still a consensus that can be reached on these issues, and much can be done to move the ball forward when it comes to promoting broadband deployment in America. We applaud the Committee, once again, for taking up this task, and we look forward to engaging more on these issues as the Committee proceeds.

⁴⁷ Blair Levin, *Holding Back High-Speed Internet for the Poor's Sake Just Hurts Everyone*, Wired (June 12, 2014), available at <http://www.wired.com/2014/06/holding-back-high-speed-internet-for-the-poor-sake-just-hurts-everyone/>.