



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 Communications Act Update White Paper #4

Dear Chairman Upton and Chairman Walden,

TechFreedom¹ and the International Center for Law and Economics (ICLE)² respectfully submit the following comments and attached appendices in response to the Committee's fourth white paper³ in its examination of how communications law can be rationalized to address the 21st century communications landscape.

The Telecommunications Act of 1996 has been outdated since the moment it was signed into law, and we applaud the Committee for taking up the task of bringing it up to date. The Act's

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³ <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140715WhitePaper-Interconnection.pdf>.

siloed approach reflects the assumptions of the pre-Internet era, and is completely out of sync with the market it now governs. The sooner it is replaced with a technologically neutral act focused on how regulated conduct affects consumer welfare, the better, as we argued in our earlier comments in this ongoing inquiry.⁴

As the Committee recognized in its fourth white paper, interconnection issues are nothing new, and have been a part of communications law in America since before the 1934 Communications Act was enacted. However, interconnection and peering in the digital age are significantly different than their analog (TDM) counterparts. Data traffic utilizing the TCP/IP networking protocols does not require a direct connection from one endpoint to another, and can be broken down into multiple different pieces that travel over and across the network (in the form of packets) toward their destination via multiple different routes simultaneously.

These advancements in networking technologies make data traffic much more robust, since it can be actively routed to reduce congestion, avoid network infrastructure outages, and even minimize transit costs by finding the cheapest route from endpoint to endpoint—all things that would have been difficult or even impossible to do with circuit-switched TDM traffic. Additionally, substituting packet-routers for local switches has greatly reduced the number of interconnection points needed to connect all users to one another, down to around just a dozen for IP traffic, as compared with the hundreds or even thousands needed to manage TDM traffic.

Simply put, in most cases, the transit market provides an effective alternative to direct interconnection. So even if a broadband provider refused to deal with an edge provider, the edge provider still has a variety of options for getting its traffic to the subscribers of that broadband provider. So long as the transit market is competitive and it is not technologically possible (and cost-effective) for a broadband provider to discriminate among sources of traffic coming from transit providers (in real time), it is unlikely that a refusal to interconnect (or a breakdown in interconnection negotiations) will actually harm consumers.

The available data supports the conclusion that the transit market is highly competitive. In fact, transit prices have plunged from \$1200 per mbps in 1998 to \$0.94 in 2014 (a factor of 1297x).⁵ These prices act as a ceiling on direct interconnection prices, and the transit market checks whatever power might theoretically exist by virtue of a broadband provider's supposed "terminating access monopoly."

While the risk of under-regulating in the IP-based interconnection market is low, the risk of *over-regulating* is high. Unnecessary intervention risks foreclosing pro-competitive practices and thus reducing consumer welfare. For example, setting prices at zero for interconnection could reduce the incentive for ISPs to supply capacity, harming consumers who would, ironically, get

⁴ http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/WP3_Responses_64-84.pdf#page=49.

⁵ WILLIAM B. NORTON, THE INTERNET PEERING PLAYBOOK 33 (2013); *see also* <http://drpeering.net/white-papers/Internet-Transit-Pricing-Historical-And-Projected.php>.

slower access to favorite content.⁶ Meanwhile, existing antitrust laws can address any remaining anticompetitive practices—but consumers are simply extremely unlikely to be harmed in so a competitive marketplace.⁷

Any consideration of a legislative framework for addressing interconnection should begin by re-examining the Digital Age Communications Act (DACA) proposed by a working group of telecom experts and academics from across the political spectrum.⁸ Assembled in 2005 by The Progress & Freedom Foundation, the group produced S. 2113, which Sen. Jim DeMint introduced in 2006.⁹ In general, DACA would have made the FCC work more like the Federal Trade Commission: before regulating, the agency would have to show market power and harm to competition.¹⁰ But with respect to interconnection, the FCC would only have to show

practices that pose a substantial and non-transitory risk to consumer welfare by materially and substantially impeding the interconnection of public communications facilities and services in circumstances in which the Commission determines that marketplace competition is not sufficient adequately to protect consumer welfare, providing that in making any such determination the Commission must consider whether requiring interconnection will affect adversely investment in facilities and innovation in services.¹¹

In other words, DACA gave the FCC *greater* discretion over interconnection (than elsewhere) by dropping the market power requirement.¹² Nonetheless DACA's interconnection regulations wisely maintain the Act's fundamental restraint and consumer focus by requiring the FCC to

⁶ Geoffrey Manne, *Understanding Net(flix) Neutrality*, DETROITNEWS OPINIONS AND EDITORIALS (June 24, 2014), available at <http://www.detroitnews.com/article/20140624/OPINION01/306240007/Understanding-Net-flix-Neutrality>, attached as Appendix D.

⁷ See Hal J. Singer, *Mandatory Interconnection: Should the FCC Serve as Internet Traffic Cop?* 3-4, PROGRESSIVE POLICY INSTITUTE (May 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/05/2014.05-Singer_Mandatory-Interconnection_Should-the-FCC-Serve-as-Internet-Traffic-Cop.pdf (arguing that in light of the evidence it would be a “stretch to defend an interconnection obligation as a means to address monopoly.”).

⁸ See Progress & Freedom Found., *Digital Age Communications Act: Proposal of the Regulatory Framework Working Group* (June 2005) [DACA Report], attached as Appendix A.

⁹ See <http://thomas.loc.gov/cgi-bin/query/z?c112:S.2113.IS:/>

¹⁰ DACA Report, at 3 (“the Working Group concluded that regulation in the digital age should be based, almost exclusively, on competition law principles drawn from antitrust law and economics. Regulation should respond to instances of abuse of market power, which are more than transitory in nature, and regulation should address such instances of abuse as they occur.”).

¹¹ *Id.* at 36.

¹² *Id.*

show that a failure to interconnect substantially harmed consumer welfare *and* that markets would not solve the problem before regulating.¹³

By grounding the FCC's approach to interconnection in sound economics, with a presumption against mandatory interconnection, DACA provides a model for how to address interconnection concerns going forward — and not just on an ex post basis.¹⁴

We urge the Committee to carefully consider the bipartisan consensus of DACA as it studies the issue of interconnection. If anything, DACA's standard may even have set the analytical bar too low for justifying intervention in interconnection negotiations. The subsequent nine years have shown no problem that needs fixing in this market. But if there is a problem, an approach grounded in economic rigor remains the best way to ensure that regulatory intervention does not inadvertently harm consumers. And DACA remains the best starting point for drafting such aspects of a rewrite of our sorely outdated telecom laws.

We attach, for the Committee's benefit, the following articles:

- **Appendix A:** Progress & Freedom Found., *Digital Age Communications Act: Proposal of the Regulatory Framework Working Group* (June 2005): Landmark bipartisan working group proposal to reform the Communications Act
- **Appendix B:** Raymond L. Gifford, *The Continuing Case for Serious Communications Law Reform*, (Mercatus Center Working Paper No. 11-44, Nov. 2011): Summarizes DACA and provides a fresh perspective on communications reform
- **Appendix C:** A STATEMENT OF THE DACA REGULATORY FRAMEWORK WORKING GROUP, THE DIGITAL AGE COMMUNICATIONS ACT'S REGULATORY FRAMEWORK AND NET NEUTRALITY (2006): Brief discussion of the DACA approach, and how it would ameliorate Net Neutrality concerns
- **Appendix D:** Geoffrey Manne, *Understanding Net(flix) Neutrality*, DETROITNEWS OPINIONS AND EDITORIALS (June 24, 2014): Op-ed explaining the economics of interconnection as it relates to Netflix and Comcast's agreement and distinguishing interconnection from net neutrality.

We remain eager to assist the Committee in its work and look forward to seeing draft legislative language soon.

/s/Berin Szoka, TechFreedom

/s/Geoffrey Manne, ICLE

/s/Tom Struble, TechFreedom

/s/Ben Sperry, ICLE

¹³ See *id.*; see also A STATEMENT OF THE DACA REGULATORY FRAMEWORK WORKING GROUP, THE DIGITAL AGE COMMUNICATIONS ACT'S REGULATORY FRAMEWORK AND NET NEUTRALITY 3 (2006) [DACA Working Group Statement], *attached as Appendix C*.

¹⁴ Raymond L. Gifford, *The Continuing Case for Serious Communications Law Reform* 5 (Mercatus Center Working Paper No. 11-44, Nov. 2011), *attached as Appendix B* (citing DACA Report, at 18-19).