Telecom Unplugged:

Ushering in a New Digital Era

By Deborah S. Collier
and Thomas A. Schatz

INTRODUCTION

In October 2007, Citizens Against Government Waste (CAGW) published *Telecom Regulation: Pulling the Plug on Government Interference.* The report noted that the rapid deployment of new technology was leaving a bevy of federal regulations over the telecommunications and cable industries in the dust. Today's converging communications and information technology (IT) environment has greatly enhanced and expanded how people around the world communicate and share information. The rapid adoption of Smartphone technology has enabled people to carry computers in the palms of their hands, and today's college freshmen are routinely equipped with laptops, cell phones, and tablets. The list of new mobile computing devices grows daily. This report, *Telecom Unplugged: Ushering in a New Digital Era,* updates CAGW's 2007 report.

Music and video are no longer limited to the living room but can be enjoyed through a wide range of options, including cable, fiber optic, satellite, and broadband, as well as wireless devices, anywhere at any time. Social media platforms including Facebook, Twitter, Pinterest, and others have become major sources of information sharing. At the 2013 Cable Show, cloud-based video platforms were introduced by Comcast and Time Warner Cable that would provide video programming and storage to consumers. Despite these innovations, the communications industry is still saddled with a regulatory regime that harkens back to the early 1930s and, for common carriers, back to the early days of the railroad industry in the late 1800s.

The Communications Act of 1934 was the first formal attempt to provide regulatory continuity to the growing telephone industry as it began to reach across the nation and connect people thousands of miles away from each other through a copper-wire line. In 1992, the Cable Act was passed in response to concerns that the broadcast industry needed protection when dealing with cable companies. The Telecommunications Act of 1996 further regulated both the telephone and cable industries following the breakup of the Bell companies.

None of those laws foresaw today's rapidly changing innovative marketplace, nor did they account for any future changes in technology that will greatly expand communications. While the communications industry continues to rapidly evolve, the federal government moves at a snail's pace to adapt, leaving in place old models governing technology and communications that should no longer apply to modern times. Unfortunately, these obsolete telecommunications regulations are stifling innovation and putting taxpayers and consumers at risk.

In his 1984 book, *Burning Money, The Waste of Your Tax Dollars,* that summarized the Grace Commission's findings, Peter Grace described the technological ignorance pervading the federal government. At the time of the book's publication, the average age of a government computer was 6.7 years; the average computer used by a U.S. business was three years old. Government computer systems were incompatible and required service technicians specifically trained to maintain the outdated equipment. The extra bodies added $1 billion to the federal payroll over a three-year period. Meanwhile, in the private sector, IBM's General Systems Division updated its computer technology, saving $360,000 in the first six months after installation, and the Boeing Military Airplane Company's new word processing system saved $483,000 over a nine-month period.

In the 30 years since Mr. Grace published his book and co-founded CAGW with syndicated columnist Jack Anderson, the federal government's technological ineptitude has persisted. The current telecommunications debates and the federal government's attempts to regulate the industry are symptoms of larger problems.

From 1989 to 2000, 223 bills were introduced in Congress dealing with some portion of the telecommunications industry; 22 of them, including the Telecommunications Act of 1996, were signed into law. From 2001 to 2010, only 78 such bills were introduced, seven of which became law. The 2012 edition of Title 47, the chapter of the U.S. Code governing the telecommunications industry, now encompasses 3,668 pages. While the private sector speeds ahead with more innovation in response to consumer demand, the federal government lags behind trying to play catch up and fails to see the impact of its policies on taxpayers and consumers.

The telecommunications industry generates approximately $347 billion annually or 2.4 percent of the GDP as measured by output, labor, input, investment and international trade;[1] and provides 2 million

[1] OECD (2013), "STAN Industry Rev. 4," STAN: OECD Structural Analysis Statistics (database), Doi: 10.1787/3151-00649-en, http://www.oecd-ilibrary.org/industry-and-services/data/stan-oecd-structural-analysis-statistics/stan-industry-rev-4_data-00649-en;jsessionid=h5cd4n3j3vr9.x-oecd-live-01?isPartOf=/content/datacollection/stan-data-en.

direct and indirect jobs.[2] Yet this innovative and important sector of the economy remains hampered with antiquated laws and regulations.

This paper reviews several areas where government intervention or lack of intervention harms taxpayers and consumers. Topics include the implications of current and proposed Internet tax laws, federally funded broadband deployment, the provision of tools such as spectrum to enable improved communications across the nation, and Internet governance issues in the United States and around the world.

[2] "Industry Data," National Cable and Telecommunications Association, https://www.ncta.com/industry-data.

CHAPTER 5: UPDATING TELECOMMUNICATIONS LAW AND REMOVING REGULATORY BURDENS

The telecommunications industry generates approximately $347 billion annually or 2.4 percent of the GDP as measured by output, labor, input, investment and international trade; while providing 2 million direct and indirect jobs.[199] This success has occurred despite the fact that the FCC imposes nearly $142 billion in annual regulatory costs on the communications industry, which is the third largest regulatory impact in the federal government behind the Environmental Protection Agency ($353 billion) and the Department of Health and Human Services ($184.8 billion).[200] Compliance with wireless spectrum regulations and broadband regulations constitute the two largest costs. However, the total compliance cost could be higher, as gathering data on the more than 25,000 specific regulatory restrictions within the FCC's jurisdiction is difficult due to a lack of transparency.[201]

On June 12, 2013, former FCC Commissioner Robert McDowell delivered an address in Rome entitled The Siren Call of "Please Regulate My Rival": A Recipe for Regulatory Failure.[202] Commissioner McDowell stated in his speech, "repeating the same government actions of regulating more and spending more of the public's money will only produce the same results: shrinking economies and growing debt. It is time to reverse these trends, but doing so will require tremendous courage."[203] The communications industry has been subject to so much excessive regulation for so long that individual

[199] OECD (2013), "STAN Industry Rev. 4", STAN: OECD Structural Analysis Statistics (database). Doi: 10.1787/3151-00649-en (Accessed on 15 October 2013), http://www.oecd-ilibrary.org/industry-and-services/data/stan-oecd-structural-analysis-statistics/stan-industry-rev-4_data-00649-en;jsessionid=h5cd4n3j3vr9.x-oecd-live-01?isPartOf=/content/datacollection/stan-data-en, and "Industry Data," National Cable and Telecommunications Association, viewed September 16, 2013, https://www.ncta.com/industry-data.

[200] Ryan Young, "Regulatory Report Card: FCC," Competitive Enterprise Institute, February 21, 2013, http://cei.org/sites/default/files/Ryan%20Young%20-%20FCC%20Regulatory%20Report%20Card.pdf.

[201] Ibid.

[202] Robert M. McDowell, "The Siren Call of 'Please Regulate My Rival': A Recipe for Regulatory Failure," Federal Communications Commission, Remarks before the Associazione Ego and Puntoit Italian Parliament, Rome, Italy, June 28, 2012, http://www.fcc.gov/document/commr-mcdowells-speech-possible-itu-regulation-internet.

[203] Ibid.

companies have resorted to using regulations as a tool to promote their own interests.[204]

In September 2013, AT&T Senior Executive Vice President James Cicconi called upon the FCC to update its historic mission to reflect the fundamental evolution in communications.[205]

On December 3, 2013, House Committee on Energy and Commerce Chairman Fred Upton (R-Mich.) announced that the committee would be undertaking a multi-year process to review the regulatory burdens imposed on the telecommunications industry under the Communications Act of 1934, and amendments to the Act, with the intent to revise and update the law and bring it into conformity with twenty-first century innovations. To begin this process, the committee released a white paper outlining issues it plans to address in the coming year, posing questions to stakeholders on the eventual structure of communications law; what provisions of the law should be either retained, adapted or eliminated; whether the jurisdiction of the FCC should be changed; how to build into a new communications environment the flexibility to adapt to a rapidly changing technological environment; and, whether information and telecommunications services should remain separate, and if not how the two services should be rationalized.[206]

This chapter reviews ongoing reform efforts.

OLD LAWS, NEW TECHNOLOGIES

The Telecommunications Act of 1996 amended the Communications Act of 1934. The 1996 Act was enacted 12 years after the breakup of the Baby Bell companies in order to promote competition in the local exchange carrier (LECs) markets by requiring incumbent local exchange carriers (ILECs) to lease parts of their networks to competitors at cost; provide wholesale discounts to competitors for any service provided by the ILEC; and, charge reciprocal rates in termination of calls to their networks and the networks of

---

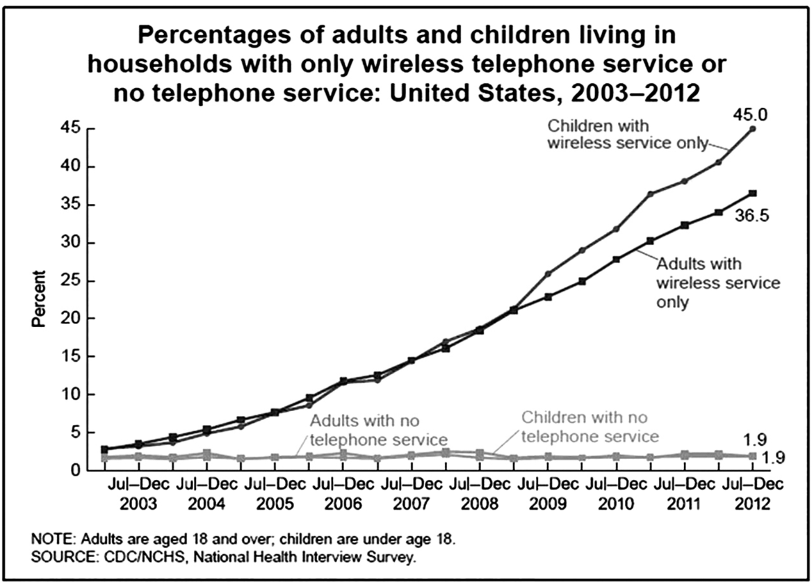
[204] Adam Thierer, "FCC Commish Robert McDowell on Regulatory Failure & Regulate My Rival Politics," The Technology Liberation Front, June 28, 2012, http://techliberation.com/2012/06/28/fcc-commish-robert-mcdowell-on-regulatory-failure-regulate-my-rival-politics/.

[205] John Eggerton, "AT&T's Cicconi to FCC: Change or Be Irrelevant," *Broadcasting and Cable,* September 10, 2013, http://www.broadcastingcable.com/article/495399-AT_T_s_Cicconi_to_FCC_Change_or_Be_Irrelevant.php.

[206] "Modernizing the Communications Act," House Committee on Energy and Commerce, January 8, 2014, http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf.

local competitors.

While the law addressed the state of communications at the time of enactment and included the Internet in broadcasting and spectrum allotments, it did not anticipate the dramatic changes that have occurred in the marketplace over the past 17 years. The convergence of voice, data, and video has created a new ecosystem that existing law is ill-equipped to regulate. Outdated ideas such as retransmission consent, must carry rules, compulsory licensing agreements, and non-duplication schemes must all be reevaluated.



For example, cloud computing has changed how information is stored and shared, and how video viewing in the future will be accomplished. Cable companies and other content providers will soon begin rolling out new platforms that will make streaming video content faster, smarter, easier, and more personalized. Some of these new platforms were on display at the 2013 Cable Show, such as TV Everywhere which allows viewing of cable programming anywhere the subscriber can access a Wi-Fi connection.

In June 2013, the CDC released a report showing the number of households using only wireless telephone services has risen from less than

5 percent in 2003 to 36.5 percent in 2012.[207] This trend reinforces the need to update existing telecommunications law to reflect the current state of the marketplace. Americans are no longer reliant on only one form of communications service; they are using innovative tools and devices that rely on wireless services, broadband Internet, and fiber optic lines.

Sadly, the federal government appears incapable of keeping up with technological changes. This is one of the reasons that reforming laws such as the Telecommunications Act of 1996 and the Cable Act of 1992 should be done in a technology and vendor-neutral manner, with a light touch on regulatory mandates that inhibit free market growth and innovation.

THE TIME IS RIGHT TO UPDATE RETRANSMISSION RULES

In 1950, the cable industry was still in its infancy, serving approximately 14,000 homes in 70 communities.[208] Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992) in response to cable television rate increases following deregulation, a lack of competition in the cable marketplace and the concern of broadcasters that their local stations would not be carried by cable companies. This law amended the 1934 Communications Act by prohibiting cable operators and other MVPDs, which now include satellite and fiber optic networks, from rebroadcasting or "retransmitting" commercial television, low power television and radio broadcast signals without first obtaining the originating broadcaster's permission.

The Cable Act of 1992 provided broadcasters with a choice every three years to either demand that an MVPD carry their local commercial and noncommercial television broadcast signals under "must carry" rules, or negotiate a price with the MVPD to give permission to "retransmit" their signal. If the broadcaster decides that the MVPD must carry its signal, the broadcaster cannot demand compensation from the MVPD for retransmission of the signal. MVPDs are also restricted to dealing with a single local station under "non-duplication" rules, despite the fact that other external markets

[207] Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2012," Centers for Disease Control, Division of Health Interview Statistics, National Center for Health Statistics, June 2013, http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201306.pdf.

[208] "Evolution of Cable Television," Federal Communications Commission, http://www.fcc.gov/encyclopedia/evolution-cable-television.

might carry the same programming and are willing to negotiate a lower price.

For example, a cable or satellite distributor serving metropolitan Washington, D.C. must carry WUSA Channel 9, the area's CBS affiliate, and cannot currently negotiate for a lower price with WJZ Channel 13, the local CBS affiliate in nearby Baltimore, Maryland. By inserting "must carry," "retransmission," and "non-duplication" provisions into the law, Congress sought to protect broadcasters with a choice in how their broadcast signals would be carried, and open up the cable marketplace to more competition by placing subscriber rates in non-competitive markets under the authority of either a franchising authority or the FCC and prohibiting exclusive franchises within a local market.

Television has changed vastly since the days analog signals carried only three major networks and one or two other channels over the airwaves. Today, there is a wide range of viewing options available to consumers, ranging from cable and fiber optic networks on the ground, to satellite feeds and online distribution of programming. In the second quarter of 2013, television programming was distributed as follows: wired cable (56.621 million households); satellite (35.243 million households); broadcast only (10.947 million households); and, telephone fiber networks (10.857 million households).[209] Broadcasters no longer deal with a single cable monopoly; on the contrary, broadcasters choose among multiple providers ranging from cable to satellite to fiber optic networks. As a result, broadcasters now hold enormous negotiating power under old retransmission consent rules. This re-balancing of power has led to service disruptions and increases in the cost of service for consumers.

Current law does not adequately address the problem of programming blackouts experienced by millions of consumers who have fallen victim to tense negotiations between broadcasters and MVPDs, as broadcasters have used their upper hand to "hold hostage" programs in an effort to force MVPDs to pay exorbitant fees or carry extra channels on basic tiers. As a result, consumers not only sometimes experience a programming blackout until a deal has been reached, but also see an increase in their bills as broadcasters' ransoms are passed off in the form of higher rates. Those who are against ending the retransmission provisions in the Cable Act have indicated that for years MVPDs have attracted subscribers using broadcast programming which, according to the National Association of Broadcasters, receives higher

[209] "Viewing on Demand: The Cross-Platform Report," The Nielson Company, September 2013, p. 14, Table 6, http://www.nielsen.com/us/en/reports/2013/q2-2013-cross-platform-report.html.

ratings than other programming offered on pay-TV channels.[210]

In March 2011, the FCC adopted a notice of proposed rulemaking on potential changes to the retransmission consent rules.[211] Specifically, the FCC asked for comment on proposals that would provide more guidance on good faith negotiation requirements, improve notice to consumers of possible service disruptions caused by impasses in negotiations, and eliminate the FCC's network non-duplication and syndicated exclusivity rules.[212] The proposals would also allow disputing parties to enforce certain exclusive contracted rights to network or syndicated programming through the commission rather than the courts. However, further action on this proposed rulemaking has not yet occurred.

One of the reasons for the FCC's proposed rulemaking was the impact of blackouts that occur during retransmission negotiations. For example, in 2010, viewers lost access to events such as portions of the Oscars and New York Knicks games.[213] While the broadcast industry claims that retransmission consent contracts generally span three to five-year periods and are calendar based, not tied to content or programming, it is interesting that these particular negotiations occurred during major television events.

Other examples of retransmission blackouts include the loss of local Fox stations by Midcontinent Communications subscribers in Minnesota and North Dakota in April 2012.[214] Subscribers in North Dakota were unable to access their local CBS and NBC programming when disagreements occurred during negotiations in May 2012 between Dish Network and Hoak Media Corporation.[215]

During a July 24, 2012 hearing before the Senate Commerce, Science and Transportation Committee, Time Warner Cable Executive Vice President

---

[210] "Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market," National Association of Broadcasters, May 2013, http://www.nab.org/documents/advocacy/retransmissionConsent/RetransIssueSheet.pdf.

[211] Amendment of the Commission's Rules Related to Retransmission Consent, Federal Communications Commission, 10-70, Notice of Proposed Rulemaking, March 2011, http://www.fcc.gov/rulemaking/10-71.

[212] Media Bureau Announces Notice of Proposed Rulemaking in the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, Published in the Federal Register March 28, 2011, Federal Communications Commission, March 28, 2011, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-564A1.pdf.

[213] "Television Blackouts in U.S. Reach Decade-High Over Fee Fights," *Newsmax*, October 11, 2010, http://www.newsmax.com/SciTech/tvblackoutsdecadeshigh/2010/10/11/id/373202.

[214] Kenneth Artz, "Retransmission Dispute Results in ND, MN Blackouts," Heartland, viewed September 13, 2013, http://news.heartland.org/newspaper-article/retransmission-dispute-results-nd-mn-blackouts.

and Chief Video and Content Officer Melinda Witmer testified that the number of blackouts that have occurred during retransmission negotiations had risen from 12 in 2010 to 51 in 2011.[216] By the end of 2012, subscribers experienced 91 separate programming blackouts due to disagreements over retransmission consent.[217]

The summer 2013 retransmission battle between CBS and Time Warner Cable was one of the most publicized disputes since the passage of the Cable Act of 1992. CBS even disrupted online broadcaster content for Time Warner Cable subscribers during the breakdown in negotiations between the two parties. The negotiations were finally completed on September 3, 2013. As noted by *Variety's* TV columnist Brian Lowry, "…don't be surprised if this latest let's-see-who-blinks-first-skirmish is just the first of several bigger battles to come, leaving consumers caught in the middle. In fact, it might just be a preview of coming attractions."[218]

Broadcasters have argued that the free market for broadcast television programming would be threatened if retransmission was ended. However, it appears from past negotiation history that the existing system is failing to protect consumers. In retransmission consent negotiations, consumers lose viewing time and pay increased costs.

Consumers should not have to be victims of a system that allows broadcasters to pit one MVPD against another, threatening to withhold consent for its signal if agreements are not reached. Old government policies have inhibited the free market by dictating the rules which govern these negotiations and no longer reflect the vibrant content and cable provider marketplace. Today's competitive video distributor marketplace offers consumers choices among fiber, cable, and satellite. Yet the rules that govern broadcast signal carriage still operate as if working within a monopolistic single-provider structure.

The House Energy and Commerce Committee held hearings on

---

215 "Two Local Dish Network Channels Blacked Out, Negotiations Continue," *Grand Forks Herald*, June 13, 2012, https://secure.forumcomm.com/?publisher_ID=40&article_id=238615&CFID=535543954&CFTOKEN=36766645.

216 Melinda Witmer, "'The Cable Act at 20,' Testimony before the Committee on Commerce, Science and Transportation," United States Senate, July 24, 2012, http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=bd33c7c9-bd4d-43c0-93d5-091e1fd3328b.

217 Michael Calabrese, "The CBS-Time Warner Cable Blackout Battle: Time for Congress to Rescue the Hostages," *Slate*, August 9, 2013, http://www.slate.com/blogs/future_tense/2013/08/09/cbs_time_warner_cable_blackout_battle_congress_should_rescue_hostages.html.

218 Brian Lowry, "CBS vs. Time Warner Cable, Big Companies, Bigger Battles," *Variety*, August 2, 2013, http://variety.com/2013/voices/columns/cbs-vs-time-warner-cable-big-companies-bigger-battles-1200573148/.

February 13, 2013, June 12, 2013, and September 11, 2013 on the Satellite Television Extension and Localism Act (STELA). Authorization for STELA expires on December 31, 2014. STELA provides for a compulsory license that allows satellite operators to import distant network-affiliate TV station signals into a market without negotiating for that retransmission. The debate over STELA's reauthorization has opened an opportunity to Congress to reevaluate retransmission rules.

As part of the hearing process, members and witnesses have begun evaluating retransmission and other reforms to the video licensing and copyright provisions of the Cable Act of 1992. In September 2013, Rep. Anna Eshoo (D-Calif.) introduced draft legislation to reform retransmission consent rules and prohibit blackouts when retransmission disputes occur. However, the provisions in the draft legislation would increase government interference into the video marketplace, further inhibiting a free-market approach to negotiations that are already saddled with existing unbalanced regulatory burdens.

On December 13, 2013, Reps. Steve Scalise (R-La.) and Cory Gardner (R-Colo.) introduced H.R. 3720, the Next Generation Television Marketplace Act. This comprehensive reform legislation will repeal provisions of the Cable Act of 1992 that require MVPDs to set aside portions of their channel capacity for mandatory carriage of local commercial broadcast stations, and directed the FCC to repeal network non-duplication, along with other burdensome regulations including syndicated exclusivity and sports blackout rules.

The bill also repeals media ownership caps, which limit the number of broadcast stations a single company can own in a given media market, and lifted the ban on broadcasters owning a newspaper in the same market. Additionally, the legislation eliminates the compulsory copyright license, in which the government dictates the royalties MVPDs pay to broadcasters for their content instead of allowing these royalties to be determined by a free market.

The existing television regulatory regime inhibits the free market, reduces competition by undercutting smaller providers' ability to compete on price, increases costs for consumers, and frustrates millions of Americans by shutting off popular programming at peak viewing periods.

Government rules and regulations should drive businesses into the twenty-first century, not hold them back. In retransmission consent negotiations, consumers lose viewing time and pay increased costs. It is time to repeal antiquated regulatory schemes, including retransmission consent, and provide a new regulatory structure that reflects the current competitive marketplace.

THE IP TRANSITION: THE NEXT STEP IN COMMUNICATIONS TECHNOLOGY

In December 2009, the FCC began the process of evaluating the transition from a circuit-switched communications network to an all-Internet Protocol (IP) network.[219] This technology opens the doorway to new methods of communications using the infrastructure created for the Internet.

On November 7, 2012, AT&T requested that the FCC initiate IP transition testing for those who remain on copper wireline plain old telephone service (POTS) and have yet to adopt new technologies such as fiber or cable.[220] In its petition, AT&T asked the FCC to keep these tests free of legacy regulations that are currently imposed on ILECs and to declare that ILECs would no longer be the dominant provider for POTS.[221] This request for a study to evaluate transitioning subscribers of POTS to the all-IP system comes as 36.5 percent of U.S. homes use wireless service only.[222]

A January 8, 2013 article in *Ars Technica* noted that copper-wire POTS connections will begin to fade from existence by 2018. AT&T Vice President for Federal Regulatory Division Hank Hultquist explained that the telephone networks the U.S. has relied upon for service are rapidly becoming obsolete and difficult to repair due to a lack of spare parts. Because of the number of different services offered by POTS systems, transitioning to an

---

[219] Public Notice: Comment Sought on Transition from Circuit-Switched Networks to All-IP Network, National Broadband Plan Public Notice #25, Pleading Cycle Established, GN Docket Nos. 09-47, 09-51, 09-137, Federal Communications Commission, December 1, 2009, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2517A1.pdf.

[220] Bob Quinn, "Beta Testing the Final Transition to IP Broadband," AT&T Public Policy Blog, January 28, 2013, http://www.attpublicpolicy.com/broadband-policy/beta-testing-the-final-transition-to-ip-broadband/.

[221] Elise Ackerman, "FCC Calls for More Feedback On Switch To New, National IP-Based Phone Network; Punts on AT&T Request," *Forbes,* May 12, 2013, http://www.forbes.com/sites/eliseackerman/2013/05/12/fcc-calls-for-more-feedback-on-switch-to-new-national-ip-based-phone-network-punts-on-att-request/.

[222] Stephen J. Blumberg and Julian V. Luke, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January - June 2012," Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, December 2012, http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf.

all-IP network will be challenging. Merging different services configurations, such as voicemail with or without caller ID and various kinds of dialing capabilities, creates complications in moving from existing legacy POTS systems to the new all-IP networks.[223]

On February 25, 2013, the Phoenix Center for Advanced Legal and Economic Public Policy Studies released its analysis of AT&T's petition for wire center trials.[224] Citing the benefits of real world testing of the transition to an all-IP network, the report stated that while legacy communications rules remain in place, the testing itself will be conducted with a "regulatory blank slate" on which the FCC can build its new model and determine which existing legacy regulations remain appropriate once the all-IP transition is completed. The report also highlighted the economic benefits for companies participating in the testing to be on their best behavior, thereby setting a precedent for reasonable behavior within the new all-IP regulatory structure. Finally, the analysis offered that the FCC would continue to have its enforcement charge within the new all-IP regime consistent with its existing regulatory mission.[225]

On October 8, 2013, the Internet Innovation Alliance released a report on the all-IP transition. The report stated that legacy switched communications traffic amounts to less than 1 percent of IP traffic today, and the new platforms that transport IP, including fiber, cable, satellite and mobile broadband, have provided consumers with multiple choices in an increasingly competitive marketplace. By 2017, use of ILEC-maintained copper-wire POTS systems will diminish to less than a fraction of a percent. Those platforms (including Internet, cable, and wireless) that are the least regulated have been the most successful, while the most regulated platforms, such as ILECs, have been forced to waste capital and operating funds maintaining obsolete copper-wire POTS connections.[226]

Between 2006 and 2011, ILECs invested $81 billion on legacy copper-wire POTS and $73 billion on modern broadband infrastructure.

---

[223] Jon Brodkin, "The Telephone Network Is Obsolete: Get Ready for the all-IP Telco," *Ars Technica,* January 7, 2013, http://arstechnica.com/information-technology/2013/01/the-telephone-network-is-obsolete-get-ready-for-the-all-ip-telco/.

[224] George S. Ford, Ph.D., Lawrence J. Spiwak, Esq., "Searching for a New Regulatory Paradigm: A Comment on AT&T's Petition for Wire Center Trials," Phoenix Center for Advanced Legal & Economic Public Policy Studies, February 25, 2013, http://www.phoenix-center.org/perspectives/Perspective13-01Final.pdf.

[225] Ibid.

ILECs are losing circuit-switched voice and low-speed DSL subscribers. Yet, when they have deployed broadband fiber infrastructure, they gained Internet access and video subscribers. However, the ILECs remain encumbered by a regulatory framework that lags behind marketplace realities. For example, ILECs must ask the FCC for permission to stop using obsolete technologies such as POTS in a given geographic area.[227]

On May 13, 2013, the FCC's Technology Transitions Policy Task Force,[228] which was created to address issues surrounding IP interconnection, network resiliency, business broadband competition and consumer protection for voice services, requested public comment on potential trials for new technologies, including all-IP networks.[229] The FCC also asked for more details from stakeholders on AT&T's proposed geographic trials.

The all-IP trials create an opportunity to review outdated rules governing the communications industry and permit changes to the existing regulatory structure to meet the needs of the modern innovative paradigm. However, the FCC should move cautiously in promulgating rules for the all-IP networks to ensure that they can move forward with limited government interference.

PROCESS IMPROVEMENT AT THE FEDERAL COMMUNICATIONS COMMISSION

Free State Foundation President Randolph J. May wrote in his book, *Communications Law and Policy in the Digital Age: The Next Five Years,* that "marketplace and technological changes that have occurred since the last major revision of the Communications Act in 1996 have rendered existing law and policy woefully outdated, if not obsolete."[230] Citing industry changes such as the switch from analog to digital services and equipment,

[226] Anna-Maria Kovacs, Ph.D., CFA, "Telecommunications Competition: The Infrastructure-Investment Race," Internet Innovation Alliance, October 8, 2013, http://internetinnovation.org/images/misc_content/study-telecommunications-competition-09072013.pdf.

[227] Ibid.

[228] Sean Buckley, "FCC Unveils Technology Transition Task Force," *Fierce Telecom*, December 11, 2012, http://www.fiercetelecom.com/story/fcc-unveils-technology-transition-task-force/2012-12-11.

[229] Technology Transitions Policy Task Force Seeks Comment on Potential Trials, GN Docket No. 13-5, Federal Communications Commission Public Notice, May 13, 2013, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-13-1016A1.pdf.

[230] Randolph J. May, *Communications Law and Policy in the Digital Age: The Next Five Years,* Carolina Academic Press, 2012, p. xiv.

from narrowband to broadband network facilities, and from monopolistic to a generally competitive marketplace environment, May argued that these fundamental changes "call for a radical new communications law."[231]

On July 11, 2013, the House Energy and Commerce Subcommittee on Communications and Technology held a hearing on the FCC Process Reform Act and the FCC Consolidated Reporting Act.[232] During the hearing, panelists discussed two draft bills similar to bills that were passed on a bi-partisan basis by the House in the 112th Congress but died in the Senate. Former FCC Commissioner Robert McDowell told the subcommittee that all of Title 47, which regulates the communications industry, should be reformed.[233] Stating that "a comprehensive rewrite has not occurred since 1996, and even that left in place legacy 'stovepipes' that regulate technologies rather than market conditions," McDowell called for "a fundamental rewrite of the nation's laws regulating the information, communications and technology sector."[234]

In his testimony before the subcommittee, May reiterated the need for FCC reform, stating that "the Federal Communications Commission needs to change in a way that, in today's generally dynamic, competitive communications marketplace environment, it will be less prone to continue on its course of too often defaulting to regulatory solutions, even when there is no clear and convincing evidence of market failure or consumer harm."[235]

On September 9, 2013, H.R. 2844, the FCC Consolidated Reporting Act of 2013, passed the House by a vote of 415-0. The bill consolidates the FCC's reporting obligations in order to improve congressional oversight and reduce the reporting burdens on the commission. The new consolidated

---

231 Ibid.

232 "Improving FCC Process," Hearing before the House Energy and Commerce Subcommittee on Communications and Technology, July 11, 2013, http://energycommerce.house.gov/hearing/improving-fcc-process.

233 "Statement of The Hon. Robert M. McDowell, Visiting Fellow, Hudson Institute, Center for the Economics of the Internet, 'Improving FCC Process'," Testimony before the House Committee on Energy and Commerce, Subcommittee on Communications and Technology, July 11, 2013, http://docs.house.gov/meetings/IF/IF16/20130711/101107/HHRG-113-IF16-Wstate-McDowellR-20130711.pdf.

234 Ibid.

235 "Testimony of Randolph J. May, President, The Free State Foundation, Hearing on 'Improving FCC Process'," Testimony before the House Energy and Commerce Subcommittee on Communications and Technology, July 11, 2013, http://docs.house.gov/meetings/IF/IF16/20130711/101107/HHRG-113-IF16-Wstate-MayR-20130711.pdf.

report, known as the "Communications Marketplace Report," will detail the state of competition in the communications marketplace; review the deployment of communications capabilities (formerly the Section 706 Report); explain whether laws, regulations, or regulatory practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers; provide the FCC's agenda for the next two-year period; and describe the actions the FCC has taken in pursuit of that agenda.[236] The bill had not been considered by the Senate as of January 10, 2014.

On December 13, 2013, H.R. 3675, the Federal Communications Process Reform Act of 2013, was ordered reported by the House Energy and Commerce Committee for consideration by the full House. This legislation would require the FCC to identify a market failure or consumer harm before proposing new rules; conduct a cost-benefit analysis before adopting major rules that will cost more than $100 million and establish performance measures to evaluate the effectiveness of these major rules; publish the full text of proposed rules that are under consideration; provide adequate time for the public to provide comments; and, set specific schedules to issue decisions and report back to Congress. The legislation also contains a requirement that sets in place a "shot-clock" that would force the FCC to make timelier decisions on licensing and authorizations of transfer agreements and prohibit the FCC from conditioning a merger on a party's acceptance of certain policies or rules unrelated to the specifics of a transaction.

Continuing to apply twentieth century rules and regulations to twenty-first century disruptive technologies and services will stymie innovation in a competitive marketplace. Passage of H.R. 2844 and moving H.R. 3675 forward are both positive developments, but a comprehensive review of Title 47 and how it applies to today's changing technology is also warranted.

[236] H.R. 2844, to amend the Communications Act of 1934 to consolidate the reporting obligations of the Federal Communications Commission in order to improve congressional oversight and reduce reporting burdens, An Act, passed by the House of Representatives on September 9, 2013, http://beta.congress.gov/113/bills/hr2844/BILLS-113hr2844rfs.pdf.

CONCLUSION

The telecommunications industry is one of the most dynamic, innovative sectors of the U.S. economy, providing $347 billion annually to the GDP and two million direct and indirect jobs. Common carrier regulations instituted for the railroad industry in the 1880s and the regulatory framework devised by the Communications Act of 1934, the Cable Act of 1992, and the Telecommunications Act of 1996 certainly do not apply to the dynamic communications industry of today.

Taxpayers are overburdened by taxes on communications services that can reach as much as 24 percent of a monthly telephone, cable or wireless bill. On the other hand, fortunately, since 1998 there has been a moratorium on taxes on Internet access and discriminatory or duplicative taxes on Internet services. Prior to the November 1, 2014 expiration of the Internet tax moratorium, the ban should be made permanent, and other communications taxes, such as the Universal Service Fund fee, should either be eliminated or substantially reduced. Such a decision would allow the telecommunications industry to truly thrive and grow.

The private sector has made large capital investments in building the network infrastructure upon which the Internet travels. Governments should curb the desire to invest scarce taxpayer resources to overbuild broadband networks as public utilities in direct competition with private industry.

Selling federal spectrum is an opportunity for the federal government to cash in on existing resources as well as help first responders. However, the federal government should avoid picking winners and losers in the auction process and allow the free-market system to work.

À la carte pricing for television viewing would permit consumers to select their programming from a menu and only pay for the individual channels they want to receive. However, much like choosing each individual component of a dinner as a side order, thereby increasing the ultimate cost of dining out, à la carte programming would increase costs to both video providers and consumers.

Internet governance is coming under increased scrutiny both in the U.S. and abroad. The current rules should be maintained and not turned over to a new regime that could undermine the Internet.

Following the January 14, 2014 D.C. Circuit Court's decision on the FCC's net neutrality rules, all of the major ISPs have pledged to continue to keep the Internet open. In the interim, both proponents and opponents of these onerous rules should be discussing what the next steps will be in determining how content will be accessed on the Internet.

TELECOM UNPLUGGED: USHERING IN A NEW DIGITAL ERA

The communications industry is in a constant, rapidly evolving, disruptive state, yet the rules and regulations governing this industry have failed to keep pace. It is time to move forward with commonsense reform measures to ensure that this vital industry continues to grow and innovate.