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UTILITIES AND TELECOMMUNICATIONS ALERT

HOUSE ENERGY AND COMMERCE COMMITTEE WHITE PAPER ON REVISITING THE 1996 ACT

The House Committee on Energy and Commerce ("Committee") announced in December that it would be issuing a series of White Papers, conducting a series of hearings and seeking feedback on modernizing the laws governing the communications and technology sector. There is expected to be roughly one new topic each month. In its first such White Paper issued on January 8, 2014, the Commission provided a broad review of the history of federal communications regulation since the Communications Act of 1934 and posed a series of questions concerning whether there is need for reform of the current law and how such reform might take shape. The Committee requested **comments by January 31** and will conduct its first hearings, featuring former FCC Chairmen Wiley, Hundt and Copps, on Wednesday, January 15, 2014.

The White Paper, accompanying this summary, discusses the distinction in the Telecommunications Act of 1996 ("1996 Act") between "telecommunications services" and "information services," and claims that the Act "did not address the Internet in a forward-looking manner." It also emphasizes the "siloed" nature of the Communications Act deriving from the seven titles and regulating different sectors of the communications industry based on what types of services a carrier provides, ranging from radio to common carrier to cable. While recognizing the historic basis for this approach to regulation, the White Paper claims that the 1996 Act did not envision the intermodal competition that exists today. It also raises what appear to be the Committee's concerns that there are different regulatory obligations based on the mode of technology, and that the FCC itself is structured along these same lines.

The White Paper also notes that one result of this approach has been regulatory uncertainty over the classification of certain data-based services, such as Internet and VoIP services. The White Paper also expresses concern that the "Commission has nonetheless sought to impose regulations that stem from its Title II authority," creating uncertainty for innovators and opening the Commission to legal challenges. This aspect of the Committee's first White Paper is all the more topical today in the wake of the D.C. Circuit's net neutrality decision questioning the extent of the Commission's authority to regulate broadband.

Companies whose businesses rely on the guarantees of the 1996 Act—whether relating to interconnection, resale, unbundling, number resources or other matters—should seriously consider responding to the Committee's questions and participating in the process to ensure that the Committee has a thorough understanding of how your business relies upon the 1996 Act. Companies may also want to emphasize the benefits of intramodal competition of the kind encouraged and enabled by the 1996 Act. There have also been those who have advocated for more aggressive enforcement and implementation of the 1996 Act in lieu of sweeping reforms. The Committee is likely to understand and consider the issues of competitive carriers if your company and others raises its issues throughout the year, as opposed to arriving at the eleventh hour as legislation is being drafted.

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The specific questions on which the Committee has requested comment are listed below, and **comments are due by Friday, January 31**.

House Energy and Commerce Committee questions:

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

2. What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?

3. Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?

4. As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology neutral?

5. Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

*This Utilities and Telecommunications Alert is intended to keep readers current on matters affecting businesses and is not intended to be legal advice. If you have any questions about the White Paper, or the ongoing House Energy and Commerce review of the Telecom Act, please contact **Jim Falvey** at 202.659.6655 or **Brett Freedson** at 202.659.6669.*

Modernizing the Communications Act

The Committee on Energy and Commerce is issuing a series of white papers as the first step toward modernizing the laws governing the communications and technology sector. The primary body of law regulating these industries was passed in 1934 and while updated periodically, it has not been modernized in 17 years. Changes in technology and the rate at which they are occurring warrant an examination of whether, and how, communications law can be rationalized to address the 21st century communications landscape. For this reason, the committee initiated an examination of the regulation of the communications industry, and offers this opportunity for comment from all interested parties on the future of the law.

History of Communications Laws

The Communications Act of 1934 ("the Act") consolidated the regulation of telephone, telegraph, and radio communications into a single statute. Title I of the Act created the Federal Communications Commission, replacing the Federal Radio Commission as the body tasked with implementation and regulation of the law. Title II addressed common carrier regulation of telephone and telegraph, modeled on the assumption of a utility-like natural monopoly, and title III addressed radio communications, expanded in 1967 to include television broadcasting. The three other original titles addressed administrative and procedural matters, penalties and fines, and miscellaneous matters. An additional title was added in 1984 covering cable television.

One of the major changes to the Act was the Cable Television Consumer Protection and Competition Act of 1992 ("the Cable Act"), which aimed to foster competition, diversity, and localism in the cable television industry. Among other things, the Cable Act prescribed federal rate regulation for cable services, established the must-carry and retransmission consent rules for cable providers, and set consumer protection standards. Congress also required the FCC to report annually on the progress of competition in the video marketplace.

In 1993, the Omnibus Budget Reconciliation Act amended the Communications Act with the creation of the statutory classification of Commercial Mobile Radio Services (CMRS) – what many commonly call cellular or wireless services – and authorized the FCC to conduct auctions for spectrum licenses. The telecommunications provisions of OBRA were intended to promote competition in the mobile service sector. To measure the progress toward this goal, Congress required an annual report from the Commission analyzing the competitive conditions in the industry.

The most comprehensive overhaul of the Act was the Telecommunications Act of 1996 ("the 1996 Act"), 62 years after the passage of the Communications Act. Enacted 12 years after the break-up of AT&T, the legislation was intended to increase competition and reduce regulatory barriers to entry in the telecommunications marketplace, in order to promote lower prices and better services. The 1996 Act represented a fundamental shift away from the assumption of a natural monopoly for the delivery of telecommunications services to a model that contemplated competition for local phone service. The 1996 Act set forth requirements for interconnection between carriers and wholesale access to incumbent networks, aiming to open both the local and long-distance markets to new entrants and lower barriers to entry for new

competitors. In addition, it codified the long-standing national policy of universal service and required that telecommunications carriers contribute to a subsidy fund to preserve and advance universal service. The 1996 Act also required the FCC to forbear from regulating carriers or services if the regulation is not necessary to ensure reasonable rates, protect customers, or otherwise promote the public interest.

One key result of the 1996 Act is the distinction created between "telecommunications" services and "information" services. This distinction came as the Commission was struggling with how the Communications Act could address telephone carriers' entry into data services. Under the 1996 Act provisions, "telecommunications" services were subject to common carrier regulation under Title II, while "information" services were not. Once the law distinguished that "information" services would be largely unregulated while "telecommunications" services would remain highly regulated, information services grew at a rapid pace. Data services and the commercial Internet, which are also largely exempt from state regulation, grew out of services that were categorized as "information" services. While the 1996 Act directed the FCC to initiate an inquiry into the deployment of advanced services, it did not address the Internet in a forward-looking manner.

In 2005, the Deficit Reduction Act included the Digital Television Transition, which shifted broadcast television from analog transmission to digital. The transition to a more efficient technology allowed for higher quality broadcasts and also freed up valuable spectrum for commercial wireless services and public safety communications. The cutoff deadline for full-power broadcasters to turn off their analog signal was ultimately set as June 12, 2009, after multiple delays. The transition resulted in 108 MHz of reclaimed spectrum, 24 MHz of which was allocated to public safety use. The remainder was auctioned for commercial purposes, bringing a total of $19.5 billion in proceeds.

In 2012, the Middle Class Tax Relief and Job Creation Act expanded the Commission's spectrum auction authority, authorizing the Commission to conduct two types of voluntary incentive auctions designed to provide an economic incentive for licensees to relinquish spectrum licenses for compensation. Under the legislation, the FCC has general authority to hold incentive auctions in which a licensee may relinquish spectrum for the Commission to auction. The law also grants authority for a one-time, specialized incentive auction in which broadcast television stations may relinquish spectrum for Commission auction. The grant of authority for both the general auctions and the broadcast incentive auction expires in 2022.

As technology evolved and the communications market changed, the Commission's authority has evolved as well through both judicial decisions and congressional action. The FCC's jurisdiction includes wireline and wireless communications, television and radio broadcast, satellite operators, and cable television. The Commission is also able to regulate by exercising ancillary jurisdiction over an issue when their general grant of authority covers the regulated subject, and the regulation contemplated is reasonably ancillary to the performance of the Commission's statutorily mandated responsibilities.

Current State of the Law and Criticisms

Currently, the Communications Act consists of seven titles: general provisions, common carriers, provisions related to radio, procedural and administrative provisions, penal provisions and forfeitures, cable communications, and miscellaneous provisions. Rules adopted by the FCC to implement the provisions of the Act are in Title 47 of the Code of Federal Regulations.

One of the most common criticisms of the Communications Act is the so-called "siloed," sector-based nature of the law and resulting regulation. Each of the titles governs a specific sector of the communications economy with inconsistent approaches to definition and regulation. By dividing the overall regulatory scheme into separate titles based on specific network technologies and services, the law does not contemplate the convergence of technologies in the modern digital era. While there were historic reasons for separating the Act into service-based titles, the Act and subsequent changes to it did not envision the intermodal competition that exists today. As a result, there are different regulatory obligations based on the mode of technology, even though many of the technologies are functionally equivalent either technologically or from the consumer perspective. Because the Commission is structured in much the same way as the Act, the assorted bureaus and divisions within the agency may duplicate certain functions and fail to cover other functions, resulting in a lack of clear regulatory authority.

Changes to the Communications Act have become problematic due to the rapid pace of innovation in technology. Narrow statutory provisions tailored to address specific circumstances can quickly become outdated by the pace of innovation. Conversely, broad prescriptive rules can have unintended consequences for innovation and investment.

A consequence of the technology-focused approach of the Act has been regulatory uncertainty with respect to FCC authority to regulate aspects of the Internet within U.S. borders. Because the regulatory approach varies depending on the classification of a service, data-based services such as the Internet and VoIP have presented classification challenges for the Commission. At the same time, absent clearly delineated classification for certain services, the Commission has nonetheless sought to impose regulations that stem from its Title II authority. At best, this approach creates uncertainty for innovators and opens the Commission to legal challenges. It is vital that any changes to the law account for the impact on consumers and industry alike.

Questions for Stakeholder Comment

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

2. What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?

3. Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?

4. As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology-neutral?

5. Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

These questions address thematic concepts for updating the Communications Act; and the committee intends to issue subsequent white papers on discrete issues. In addition to these, the committee will accept comments on any aspect of updating communications law. Please respond by January 31, 2014 to CommActUpdate@mail.house.gov. For additional information, please contact David Redl at (202) 225-2927.