

**#CommActUpdate: PERSPECTIVES FROM FORMER
FCC CHAIRMEN**

HEARING
BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS AND
TECHNOLOGY
OF THE
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COMMERCE
HOUSE OF REPRESENTATIVES
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**#CommActUpdate: PERSPECTIVES FROM
FORMER FCC CHAIRMEN**

WEDNESDAY, JANUARY 15, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2123 of the Rayburn House Office Building, Hon. Greg Walden (chairman of the subcommittee) presiding.

Members present: Representatives Walden, Latta, Shimkus, Terry, Rogers, Blackburn, Scalise, Lance, Guthrie, Gardner, Pompeo, Kinzinger, Long, Barton, Upton (ex officio), Eshoo, Doyle, Matsui, Braley, Lujan, Dingell, Pallone, Matheson, and Waxman (ex officio).

Staff present: Gary Andres, Staff Director; Ray Baum, Senior Policy Advisor/Director of Coalitions; Sean Bonyun, Communications Director; Matt Bravo, Professional Staff Member; Andy Duberstein, Deputy Press Secretary; Gene Fullano, FCC Detailee; Kelsey Guyselman, Counsel, Communications and Technology; Sean Hayes, Counsel, Oversight and Investigations; Grace Koh, Counsel, Communications and Technology; Gib Mullan, Chief Counsel, Communications and Technology; David Redl, Counsel, Communications and Technology; Charlotte Savercool, Legislative Coordinator; Tom Wilbur, Digital Media Advisor; Jessica Wilkerson, Staff Assistant; Shawn Chang, Chief Counsel, Communications and Technology; Margaret McCarthy, Professional Staff Member; Kara van Stralen, Policy Analyst; and Patrick Donovan, FCC Detailee.

OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WALDEN. I will call to order the Subcommittee on Communications and Technology and thank our witnesses for being here for this first of what will be many hearings as we look to update the Communications Act. Few sectors of our economy are equal to the communications and technology sector when it comes to innovation, investment in the American economy, and job creation. In these tough economic times, we as policy makers should be committed to fostering this critical sector of the economy. Yet, the laws that regulate the industry are outdated at best, and some are affirmatively damaging. This is why Chairman Upton and I, along with members of this subcommittee, have decided to undertake the difficult task of updating the Communications Act of 1934. In the

eight decades since its passage, Congress' have come and gone. Some have even made substantial though targeted changes to the law. But none have undertaken to rethink the act for the environment of convergence and innovation in which we live today. It is time for our laws to reflect our modern technological landscape, one grounded in the networks and services of our past and driven by our IP and mobile future.

Just yesterday, the DC Circuit issued its decision in the net neutrality case, striking down the rules ordered by the Federal Communications Commission. I for one was pleased to see the Court remove the Government from the business of making management judgments and give providers the freedom to make decisions that are pro-competitive and pro-consumer. While this decision benefits consumers and providers alike by keeping the Internet free from Government interference, the rationale highlights the ongoing confusion regarding regulation of different services. This is yet another example of why it is vital that we take a hard look at the laws in this space and reconcile them with the realities of technology. The answer is not to subject new technology to outdated regulations, but rather to craft laws appropriate to innovative services and platforms.

As we embark on this effort, it should come as no surprise that I am focused on ensuring that we engage in a transparent and collaborative process, not just with our colleagues here in the Congress but also with the many stakeholders outside of these halls. All we want is a dialogue.

Last week, the committee released the first of what will be a series of white papers seeking input from the public. And I hope that interested parties will take the opportunity to make their voices heard to us.

Today's witnesses provide a unique and valuable perspective on the Communications Act. As Chairmen of the agency tasked with carrying out Congress' will in implementing the act, the four witnesses today have had a front row seat to witness the act in the real world to see where it works and where it doesn't. These Chairmen have varied experiences and viewpoints that in many ways represent the evolution of modern communications.

When Chairman Wiley led the agency, telephone service was a Government-regulated monopoly. Consumers got their news from broadcast television and print newspapers, and the Internet was still years away. Sixteen years later, when Reed Hundt took the reins, the Internet was coming into full force and mobility was beginning to take off. Chairman Powell's tenure saw the convergence of services towards the bundled offerings we see today, as well as the deployment of broadband to Americans. And in the 4 years since Michael Copps served as Acting Chairman, there have been dramatic changes to the way we communicate and the technology that powers our lives. For example, the title of today's hearing contains a hashtag. Twitter, then with no vowels in its name, had yet to be "discovered" by—at South by Southwest.

Neither we nor the august panel before us can predict the future and what technological changes it will bring. But by learning the lessons of the past, we can do our best to create a legal and regu-

latory environment that will foster innovation and competition, encourage consumer choice and optimum services.

So again, I want to thank you for—to our witnesses for this impressive panel. We look forward to hearing your testimony. And we appreciate your public service.

[The prepared statement of Mr. Walden follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Few sectors of our economy are equal to the communications and technology sector when it comes to innovation, investment in the American economy, and job creation. In these tough economic times, we as policymakers should be committed to fostering this critical sector of the economy. Yet the laws that regulate this industry are outdated at best and some are affirmatively damaging. This is why Chairman Upton and I, along with the members of this subcommittee, have decided to undertake the difficult task of updating the Communications Act of 1934. In the eight decades since its passage, Congresses have come and gone. Some have even made substantial, though targeted, changes to the law. But none have undertaken to rethink the act for the environment of convergence and innovation we live in today. It's time for our laws to reflect our modern technological landscape—one grounded in the networks and services of our past and driven by our IP and mobile future.

Just yesterday, the DC Circuit issued its decision in the net neutrality case, striking down the rules ordered by the FCC. I was pleased to see the court remove the Government from the business of making management judgments, and give providers the freedom to make decisions that are pro-competitive and pro-consumer.

While this decision benefits consumers and providers alike by keeping the Internet free from Government interference, the rationale highlights the ongoing confusion regarding regulation of different services. This is yet another example of why it is vital that we take a hard look at the laws in this space and reconcile them with the realities of technology. The answer is not to subject new technology to outdated regulations, but rather to craft laws appropriate to innovative services and platforms

As we embark on this effort, it should come as no surprise that I am focused on ensuring that we engage in a transparent and collaborative process, not just with our colleagues here in Congress, but also with the many stakeholders outside these halls. What we want is a dialogue. Last week, the committee released the first of a series of white papers seeking input from the public, and I hope that interested parties will take the opportunity to make their voices heard.

Today's witnesses provide a unique and valuable perspective on the Communications Act. As Chairmen of the agency tasked with carrying out Congress's will and implementing the act, the four witnesses today have had a front row seat to witness the act in the real world; to see where it works and where it doesn't. These Chairmen have varied experiences that in many ways represent the evolution of modern communications. When Chairman Wiley led the agency, telephone service was a Government-regulated monopoly, consumers got their news from broadcast television and print newspapers, and the Internet was still years away. Sixteen years later, when Reed Hundt took the reins, the Internet was coming into full force, and mobility was beginning to take off. Chairman Powell's tenure saw the convergence of services towards the bundled offerings we see today, as well as the deployment of broadband to Americans. And in the 4 years since Michael Copps served as Acting Chairman, there have been drastic changes to the way we communicate and the technology that powers our lives. For example, the title of today's hearing contains a hashtag. Twitter, then with no vowels in its name, had yet to be "discovered" at South by Southwest.

Neither we nor the august panel before us can predict the future and what technological changes it will bring. But by learning the lessons of the past, we can do our best to create a legal and regulatory environment that will foster innovation and competition, encourage consumer choice, and optimum services. Again, thank you to our impressive panel of witnesses today—we look forward to hearing your testimony and we appreciate your public service.

Mr. WALDEN. With that, I would yield to the vice chair of the subcommittee, Mr. Latta, for any opening comments he may have.

**OPENING STATEMENT OF HON. ROBERT E. LATTA, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO**

Mr. LATTA. Well, thank you very much, Mr. Chairman, and thank you very much to our panel of distinguished witnesses for testifying before us today. I appreciate you all being here.

Since 1996, we have witnessed an unprecedented technological evolution in the communications industry. The rapid emergence of new and innovative technologies has fostered increased investment throughout the industry and the development of a vibrant, competitive communications marketplace. As we move into the future, it is important to examine the Communications Act to ensure that our public policy continues to encourage this kind of growth and innovation that is essential to fueling our economy. Reforms to current law should reflect the technology we enjoy today and be able to adapt to the technology of tomorrow without further Government intervention. Our efforts should be dedicated to ensure that the laws governing the communications marketplace do not stifle current and future investment, innovation, economic growth and consumer choice in this dynamic and converging digital age of communications.

I look forward to the testimony from our witnesses today. And again, Mr. Chairman, I thank you very much for holding this hearing.

Mr. WALDEN. I thank the gentleman for his comments. Now, I turn to the gentlelady from California, Ms. Eshoo, the ranking member of the subcommittee, for her opening comments. Good morning.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, and good morning to you, to all of the members and the warmest welcome to each of the witnesses that are at the table. Your combined public service is—really stands as a hallmark of devoted service to our country, but also to move the country forward in one of its most important economic sectors. So welcome to you. It is wonderful to see all of you at the same time at the table.

With news of the Court's net neutrality decision, today's hearing I think is a timely opportunity to hear from each one of you who have led the expert agency, the FCC. And combined, it represents over 4 decades of services. That is nothing short of extraordinary. And each of you have had a hand in really I think changing our Nation's communications and technology landscape. So not only kudos to you, thank you to you, but a recognition of what each one of you accomplished.

When Congress passed the Telecommunications Act of 1996, it was my second term in Congress, my first term on the committee. And there were just 11 references to the Internet—the word Internet, and only one mention of broadband across a 128 page bill. Many proponents of updating the act have cited this as evidence that the act is outdated and unable to keep up with changes in technology.

But as Chairman Wheeler affirmed last week, the Communications Act continues to provide the FCC with ample authority to exercise its role in this new environment. The Court's decision yesterday I believe furthers this argument by upholding the FCC's existing authority to oversee broadband services. And I think that is very important for consumers across the country.

I make these points not to discourage the subcommittee's review of the act. I join with the chairman to review this. I think that it is a worthy exercise. But rather, we need to ensure that we know what problems we are trying to fix before undertaking a multi-year examination that include hearings, stakeholder meetings, white papers, and such.

Since the '96 act was enacted, hundreds of new entrants of emerged, and more than \$1.2 trillion has been invested by U.S. telecommunications companies. I want this success story to be an unending one. And I think that is the goal of everyone on this wonderful subcommittee.

So to that end, my goal throughout the subcommittee's review will be to see more competition, greater consumer choice and more innovation. I am so proud, as the Chairman was making his opening remarks, that so much of this has been born in my congressional district. And so, innovation, innovation, innovation. And these goals were imbedded in the '96 Act, and they remain just as important today.

At the same time, our process of examining the Communications Act should not derail, in my view, a more immediate update of our video laws, a view shared by a majority of the witnesses at a September subcommittee hearing. Recurring TV blackouts, coupled with the rising cost of broadcast television programming with limited choice has left consumers frustrated and looking to Congress and the FCC for answers. I believe that working together on a bipartisan basis, we can make this happen in 2014.

So, Chairman Walden, thank you for holding today's hearing on the Communications Act. I welcome the review, and I look forward to hearing the unique insights from the top experts from our country who have given so much in terms of their leadership in leading the expert agency. And with that, I have 34 seconds to yield to Congresswoman Matsui.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. Thank you, Ranking Member. And I want to welcome all the former Chairmen. We welcome you here for your ideas and experience that provide a basis for discussions moving forward.

As technology evolves, I believe it is important that we consider appropriate updates to the Communications Act that with goals that promote competition and innovation in the marketplace. To that point, I am pleased that yesterday, the DC Circuit affirmed the FCC's authority to oversee broadband services. In my opinion, that was the crux of the debate, and the FCC's argument prevailed on the question of authority over broadband. The FCC will need to exert its authority to ensure now that all Americans have access

to a free and open Internet. A competitive marketplace with checks and balances will fare well for all Americans.

I look forward to the hearing today, and I yield back the balance of my time.

Mr. WALDEN. The gentlelady yields back the balance of her time. The Chair now recognizes the distinguished member from Michigan, the chairman of the full committee, Mr. Upton, for opening comments.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman.

Last month, you and I announced our plans for a comprehensive update to the Communications Act of 1934. And the changes in technology since the last update in '96 have been dramatic, and existing laws have failed to keep pace with the vibrant and dynamic telecommunication industry.

Communications and technology sectors have consistently been areas of American leadership, innovated—innovation and job creation, certainly. But the Communications Act is showing its age, and our continued international leadership is indeed at stake.

Yesterday's net neutrality decision, while a victory for consumers in the economy, illustrates the uncertainty flowing from the current statutory scheme and the need for this action. It is time to revamp these laws to reflect the new competitive landscape and changing consumer expectations. And as we begin the open process leading to a Comm Act Update, we are looking for input—yes, we are—from all of the stakeholders in the communications and technology world. Where better to start than with our distinguished panel of former leaders of the FCC? These leaders served during diverse times in the evolution of the communications sector, and they have seen the market operate under the strong hand of the U.S. Government and the challenges with them divorcing the Government from its heavy regulation of the communications sector from times before. They have seen cable grow from its stages of struggling startup. They have seen satellite services succeed in bringing competition to the video market, and failed to find success as a competitor to mobile phone service. And they have seen the Internet grow from a DOD project to a tool for research universities, and now as the commercial economic force that we know today.

Throughout the many nuanced iterations of Communications Act, today's witnesses have firsthand seen the act at its finest, and also when its inability to keep pace with technological innovation has impacted those vital economic issues. So I want to thank the witnesses for taking their time to share their experiences with us. We value indeed their expertise and welcome their thoughts on how we can ensure the Communications Act fosters our communications and technology sectors well into this century.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

In December, Chairman Walden and I announced our plans for a comprehensive update to the Communications Act of 1934. The changes in technology since the last

update in 1996 have been dramatic and existing laws have failed to keep pace with the vibrant and dynamic telecommunications industry. The communications and technology sectors have consistently been areas of American leadership, innovation, and job creation, but the Communications Act is showing its age and our continued international leadership is at stake. Yesterday's net neutrality decision, while a victory for consumers and the economy, illustrates the uncertainty flowing from the current statutory scheme and the need for this action. It's time to revamp these laws to reflect the new competitive landscape and changing consumer expectations.

As we begin the open process leading to a #CommActUpdate, we are looking for input from all of the stakeholders in the communications and technology world. Where better to start than with our distinguished panel of former leaders of the Federal Communications Commission. These leaders served during diverse times in the evolution of the communications sector. They've seen the market operate under the strong hand of the U.S. Government and the challenges with then divorcing the Government from its heavy regulation of the communications sector. They've seen cable grow from its days as a struggling startup. They've seen satellite services succeed in bringing competition to the video market—and fail to find success as a competitor to mobile phone service. And, they've seen the Internet grow from a DoD project, to a tool for research universities, and now as the commercial economic force that we know today. Throughout the many nuanced iterations of the Communications Act, today's witnesses have seen firsthand the act at its finest and also when its inability to keep pace with technological innovation has impacted these vital economic sectors.

I thank the witnesses for taking time to share their experiences with us. We value their expertise and welcome their thoughts on how we can ensure that the Communications Act fosters our communications and technology sectors well into the 21st century.

Mr. UPTON. And I yield the balance of my time to the vice chair.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. And thank you, Mr. Chairman. And if I had my iPhone in my hand, I would hit re-tweet for everything that he has just said.

We do appreciate that you all are here. We do want to take advantage of the perspective that you have had. Think about what has happened in the past 17 years since '96 and the changes that we have seen, not only in how we communicate but the rapidity of those communications and entertainment and how we access that, how we take it with us, how we consume it. So we know that the pace of change means that we have to be very judicious and careful as we look at a rewrite. We know that there are issues that are going to come on the plate that we are going to have to discuss also as we look at not only the telecom rewrite but at the use of the virtual space, privacy, data security, the way the virtual marketplace is used and the way our constituents want to have a toolbox to protect, as I call it, their virtual you online.

So we appreciate your time, your willingness to be with us this morning. And I yield back to the chairman of the committee.

Mr. UPTON. Yield back.

Mr. WALDEN. The gentleman from Texas, Mr. Barton, will use some of that time.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you. Thank you, Mr. Chairman. I have served on this committee since 1986. I have served with three of the four former Chairmen. Mr. Wiley preceded me. We have had

some agreements. We have had some disagreements. So it is good to have all four of you gentlemen here today.

When I was chairman of the full committee back in 1996, my committee introduced a bill we call the COPE Bill, the Communication Opportunity Promotion Enhancement Act of 2006. It dealt with national franchising, net neutrality, public educational and governmental access, E911 and what we now call VOIP. It passed this committee 42 to 12, and passed the House 321 to 101. But it didn't come up for a vote in the Senate. I voted for the Telecommunications Act of '96 and the Cable Act of '92. And I hope this year to get to vote for another major bill that comes from the leadership of Mr. Upton, Mr. Walden, Mr. Waxman and Ms. Eshoo. This is a good thing to be doing. And we are going to get some good information from you gentleman. And we appreciate you being here.

Mr. WALDEN. The gentleman's time has expired. I appreciate his comments. We will now go to the former chairman of the committee, Mr. Waxman, for opening comments.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. I appreciate your convening this morning's hearing and launching the subcommittee's examination of potential updates to the Communications Act. And I want to thank our distinguished panel for being here to help us think through these ideas. And I think I have been in Congress during the time that all of you have been the heads of the FCC.

Technology has changed at a blistering pace since the enactment of the 1996 Telecommunications Act, 18 years ago. The communications and technology industries are a thriving sector of our economy. As broadband plays an increasingly central role in the daily life of our Nation, having a strong Federal Communications Commission to oversee its successful growth is more critical than ever.

Yesterday, the DC Court affirmed what never should have been in question. The FCC is the expert agency charged by Congress to oversee broadband networks. In doing so, the Court reaffirmed that the FCC has broad, flexible authority to regulate in the broadband and digital age. However, while the Court recognized the FCC's jurisdiction, it also overturned the specific rules the Commission had adopted in the open Internet order. I believe the FCC now has an opportunity, as well as a duty, to exercise the authority the Court recognized yesterday and reinstate the no-blocking and non-discrimination rules. An open Internet is critical to the continuing growth of this economic sector.

The Internet is a vibrant platform for commerce, innovation and free speech. Having enforceable, open Internet rules of the road means that consumers are in control of their experience online. I am pleased that Chairman Wheeler has stated his intention to expeditiously adopt a new set of rules following the Court's guidance. And I look forward to working with the chairman and my colleagues in Congress to make sure these pro-consumer, pro-competi-

tion policies will continue to guide the expansion of broadband services.

This subcommittee is now embarking on a journey to update the Communications Act. And regardless of the advancements in network architecture or transmission protocol, the principles of competition and consumer protection remain as sound today as they were in 1934. I know Chairman Wheeler recognizes the importance of these values and the action of the FCC that plans to take later this month to initiate technology transitions trials reflects that.

I look forward to hearing from our witnesses about what Congress can do to help the FCC meet the challenges of the broadband and digital age.

Thank you, Mr. Chairman. I want to yield the balance of my time to Mr. Doyle.

OPENING STATEMENT OF HON. MICHAEL F. DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Mr. Waxman. Mr. Chairman, thank you for holding this hearing. And thank you to this distinguished panel. It is good to see all of you here in front of the committee.

I just want to briefly concur with Mr. Waxman in light of yesterday's decision by the DC Circuit that I want to encourage Chairman Wheeler to work quickly to ensure that the Internet remains an open platform for innovation, competition and economic growth, which the FCC now clearly has the authority to do. I look forward to working with the Commission and the stakeholders to put in place a robust framework that sustains an open Internet.

Mr. Waxman, I thank you for your courtesy. And I would yield back to you if someone else needs some more time.

Mr. WAXMAN. Would—like a minute? If not, I yield it back, Mr. Chairman.

Mr. WALDEN. The gentleman yields back the balance of his time. We will proceed now to our distinguished panel of witnesses and begin with Chairman Richard Wiley who was nominated by President Nixon and served as Chairman of the Federal Communications Commission from 1970 to 1977. As Chairman for most of the '70s, Chairman Wiley's tenure at the Commission predates many of the major changes in the communications sector. Chairman, we are glad to have you here today. Pull that microphone up close, and then we are good to go. Thank you for being here. You need to push the button on the microphone there one time.

STATEMENTS OF RICHARD E. WILEY, CHAIRMAN, WILEY REIN LLP; REED E. HUNDT, PRINCIPAL, REH ADVISORS; MICHAEL K. POWELL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE AND TELECOMMUNICATIONS ASSOCIATION; AND MICHAEL J. COPPS, SPECIAL ADVISOR, MEDIA AND DEMOCRACY REFORM INITIATIVE, COMMON CAUSE

STATEMENT OF RICHARD E. WILEY

Mr. WILEY. Thank you very much, Chairman Walden, Ranking Member Eshoo and other subcommittee members. Thank you for the invitation to testify today.

While I know it is not going to be self-evident due to my youthful appearance, I have been involved for nearly 45 years in Federal telecommunications policy. And from my own standpoint, what has occurred during that period is simply amazing. When I was at the FCC in the 1970s, the average American enjoyed just three broadcast television stations, and one local and long distance telephone provider. And the Department of Defense had just begun to explore a revolutionary computer project known as ARPANET. But today, our citizens have access to hundreds of video channels delivered by countless providers and transmission technologies, dozens of voice and tech services, numerous wire line and wireless companies. And, of course, ARPANET has morphed into the Internet, which has become a universal medium of communications.

Interestingly, the bulk of this stunning technological metamorphosis has emerged since the 1996 Telecommunications Act was passed. That legislation significantly altered the rules governing virtually every aspect of communications. The act's purpose was as simple in theory as it was complex in implementation. That is to provide for a pro-competitive, deregulatory national policy framework designed to accelerate the deployment of advanced services and open all telecom markets to competition.

To this end, the statute sought to eliminate cross-platform barriers and to encourage competition among service suppliers, previously treated as monopolies or oligopolies. Now to the credit of the drafters, the 1996 act helped to bring about the vibrant competition that consumers enjoy today in a variety of communication sectors, be it voice, data or video. Whether delivered by twisted pair coaxial cable, optical fiber or the electromagnetic spectrum, myriad providers today are offering their customers suites of advanced services in a marketplace that really could not have been imagined 18 years ago.

In my view, where the statute and indeed FCC implementation has succeeded is when a lighter regulatory touch has been applied to markets such as mobile and information services. The result has been that these sectors have thrived. For example, in the robustly competitive wireless marketplace, there are now more wireless subscriber connections than the population of the United States. Just think of that. And mobile broadband has spawned an entirely new industry. Mobile apps, one that is estimated to employ more than 500,000 developers and related jobs, and contributes billions to the economy.

A similar success story is unfolding in the delivery of digital content where seemingly unlimited video streaming Web sites have developed to compete against traditional MVPDs offering an eagerly waiting public new ways to consume video. This marketplace, I would suggest, is emerging because of innovation and competition and not because of Government regulation.

Conversely, where the Government has been less effective in maintaining is in maintaining highly restrictive regulations on traditional industries like, for example, wire line telephony and broadcasting. The end result has been to disadvantage these sectors, even though they may be providing services that are often equivalent to those offered by their less regulated competitors. In the developing IP centric world, all types of providers should be able to

market all kinds of services, employing the same computer oriented language that defines digital communications.

And yet, the 1996 act continues to regulate communications markets differently based on the conduit used to reach the customer, as well as the geographic location where traffic originates and terminates. Now, the underlying problem is not a failure of Congressional or FCC vision. Instead, the reality is that the Government has great difficulty in writing laws or promulgating regulations that can keep pace with advancing technology, and especially so in a dynamic and ever changing industry like communications.

Thus, I would suggest that the objective of a statutory rewrite should not be to legislate premised on the current state of the marketplace, or even on predictions of what it may look like in the future. Instead, Congress may want to consider a flexible and technologically neutral framework that will be capable of adapting to technical invention and innovation, whatever that may prove to be.

In this regard, let me close by setting forth a few principles that might guide the drafting of a new statute. First, the industry's silos embedded in the 1996 act should be abolished. And, instead, functionally equivalent services should be treated in the same manner, regardless of who provides them or how they are delivered to consumers. Second, the traditional dichotomy between interstate and intrastate services should be eliminated, because regulatory classifications based on geographical end points no longer makes sense in an IP environment. Third, legislation should be focused on maintaining consumer protection and public safety regulations. Conversely, economic regulations should be considered in the case of noncompetitive markets or in the event of demonstrated market failure. And, fourth, new regulations should be instituted with a lighter touch, as I said, accompanied by sunset provisions so that the rationale for continued Government intervention can be reviewed on a regular basis.

Thank you once again for the opportunity to testify.

[The prepared statement of Mr. Wiley follows:]

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Testimony of Richard E. Wiley

Before the
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives

#CommActUpdate: Perspectives from Former FCC Chairmen

Wednesday, January 15, 2014

Chairman Walden, Ranking Member Eshoo, other Subcommittee members, thank you for the invitation to testify today. While it may not be self-evident due to my youthful appearance, I have been involved for nearly 45 years in federal telecommunications policy. And, from my standpoint, what has occurred during this period is simply amazing.

When I was at the FCC in the 1970s, the average American enjoyed just three broadcast television channels, one local and long distance provider, and the Department of Defense had only begun to explore a revolutionary computer project known as Arpanet. But, today, our citizens have access to hundreds of video channels delivered by countless providers and transmission technologies, dozens of voice and text services, numerous wireline and wireless companies and, of course, Arpanet has morphed into the Internet which has become a universal medium of communications.

Interestingly, the bulk of this stunning technological metamorphosis has emerged since the 1996 Telecommunications Act was passed. That legislation significantly altered the rules governing virtually every aspect of the communications industry. The Act's purpose was as simple in theory as it was complex in implementation: to provide for a pro-competitive, deregulatory national policy framework designed to accelerate the deployment of advanced services and open all telecom markets to competition. To this end, the statute sought to eliminate cross-platform barriers and to encourage competition among service suppliers previously treated as monopolies or oligopolies.

To the credit of the drafters, the 1996 Act helped to bring about the vibrant competition that consumers currently enjoy in a variety of communications sectors, be it voice, data, or video. Whether delivered by twisted pair, coaxial cable, optical fiber, or the electromagnetic spectrum,

myriad providers today are offering their customers suites of advanced services in a marketplace that scarcely could have been imagined 18 years ago.

In my view, where the statute (and FCC implementation) has succeeded is when a lighter regulatory touch has been applied to markets, such as mobile and information services. The result has been that these sectors have thrived. For example, in the robustly competitive wireless marketplace, there are more wireless subscriber connections today than the population of the United States. And mobile broadband has spawned an entirely new industry – mobile apps – one that is estimated to employ more than 500,000 developers and related jobs and contributes billions to the economy. A similar success story is unfolding in the delivery of digital content where seemingly unlimited video streaming websites have developed to compete against traditional MVPDs offering an eagerly waiting public new ways to consume video. This marketplace is emerging because of innovation and competition, not due to government regulation.

Conversely, where the government has been less effective is in maintaining highly restrictive regulations on traditional industries like wireline telephony and broadcasting. The end result has been to disadvantage these sectors even though they may be providing services that often are equivalent to those offered by their less regulated competitors. In the developing IP-centric world, all types of providers should be able to market all kinds of services, employing the same computer-oriented language that defines digital communications. And yet, the 1996 Act continues to regulate communications markets differently based on the conduit used to reach the customer (as well as the geographic location where traffic originates and terminates).

The underlying problem is not a failure of Congressional or FCC vision. Instead, the reality is that the government has great difficulty in writing laws or promulgating regulations that

can keep pace with advancing technology, and especially so in a dynamic and ever-changing industry like communications. Thus, I would suggest that the objective of a statutory rewrite should not be to legislate premised on the current state of the marketplace or even on predictions of what it may look like in the future. Instead, Congress should consider a flexible and technologically neutral framework that will be capable of adapting to technical invention and innovation, whatever it may prove to be.

In this regard, let me close by setting forth a few principles that might guide the drafting of a new statute:

1. The industry silos embedded in the 1996 Act should be abolished and, instead, functionally equivalent services should be treated in the same manner, regardless of who provides them or how they are delivered to consumers.
2. The traditional dichotomy between interstate and intrastate services should be eliminated because regulatory classifications based on geographical end points no longer make sense in an IP environment.
3. Legislation should be focused on maintaining consumer protection and public safety regulations. Conversely, economic regulations should be considered in the case of non-competitive markets or in the event of demonstrated market failure.
4. New regulations should be instituted with a lighter touch, accompanied by sunset provisions so that the rationale for continued government intervention can be reviewed on a regular basis.

Again, thank you for the opportunity to testify today. And good luck, Mr. Chairman, on initiating what will be a very important effort.

Mr. WALDEN. Chairman Wiley, thank you very much for your learned comments. We appreciate your counsel. We go now to Chairman Reed Hundt who was nominated by President Clinton and served as Chairman of the FCC from 1993 to 1997. Chairman Hundt's tenure at the Commission saw the passage of the Omnibus Budget Reconciliation of '93, which granted the Commission the authority to auction spectrum licenses, and the Telecommunications Act of '96. So, Chairman Hundt, thanks for joining us today. We look forward to your comments as well.

STATEMENT OF REED E. HUNDT

Mr. HUNDT. Thank you, Chairman Walden. Thank you for inviting me. Good morning to Ranking Member Eshoo and to all the other members of this distinguished committee. I am very proud that many of you have become lifelong friends. And it is a pleasure to be here with you.

I also want to thank the DC Circuit for giving me a flashback to law school so that I was late last night scrambling to read the key case right before this class. I have a feeling I am not the only person here who did that, but I also want to note I didn't have any staff or classmates. So I apologize if I haven't read it correctly, but I thought that I would throw away my remarks and, for whatever it is worth, offer you my reading of the case.

In my view, the DC Circuit has written, first, a very, very well-reasoned and very important case. There is no question that this reflects that Circuit's experience in these topic areas, and that they have brought that experience to bear in a bipartisan way to express a view about how the United States looked to grant the authority to create the legal culture that governs broadband.

What have they said? I believe the Court has vindicated the wisdom of Congress in the 1996 act. Specifically, the Court has said that when Congress, in that act in Section 706 conveyed to its expert agency the "authority to enact measures encouraging the deployment of broadband infrastructure." In doing that, according to the DC Circuit, Congress said the FCC, you will be our instrument for creating a flexible and a supple legal culture that will change over time as the market changes and as technology changes, but that can always be used to protect competition, to protect consumers and, fundamentally, to make sure that absolutely everybody in America is participating in the common medium of the Internet, and that absolutely everybody in America is able to use it to publish their views and to review all the views of everyone else. Not all those words are in this decision, but almost all those words are actually in this decision.

Section 1706, of course, is just one part of the 1996 act. But I know I don't have to remind many of the Members here. Maybe I don't have to remind any of the Members here. That was passed by a very large bipartisan vote in the Senate and in the House. We all were—those of us who were in public service then remember being in the Library of Congress when President Clinton, the Democratic President, passed this law that was passed by a Senate controlled by the Republicans and a House controlled by the Republicans. And all came together and said we have a common vision. And that is that there will be networks. We did not know

technically speaking what they would all exactly look like, but that there would be networks that would connect all of us to each other and to all of the resources of information that in fact would be utilized for entrepreneurship, for innovation and for learning. And I have to say, this is what has happened.

Now, no one here thinks the Government built these networks. No one thinks the FCC built these networks. But everyone should know that the legal culture that was created by Congress and its expert agency, through the terms of Republican and Democratic Chairs, the legal culture is the legal culture that is regarded all around the world as the absolute best legal culture for governing the Internet. Any one of us knows 12 things that we think should be done differently, or maybe two dozen. But we ought to recognize, just for a little while, that we as a country should pat our country on the back and say, for the last 20 years, the legal culture that has been created that has governed the Internet has really created the best possible environment for innovation, for entrepreneurship for consumers. That is what has actually happened. And this Court has said and that law still exists. This Court has said, already, Congress has enacted the law that gives the FCC the authority to protect competition and consumers. And that authority, according to this Court, lies in Section 1706. And the Court also said that Congress can—that the FCC can, if it choose, classify broadband as a common carrier. It could use either of these methods. It could use one of these methods. But it can accomplish the goals that are stated in the act and that have repeatedly been restated by this Congress.

The only thing the Court said is if you are going to pass rules that look like common carrier rules, and you are going to classify broadband as an information service, then you are going to be creating a contradiction that we won't permit. You can't call it an information service and then pass rules that look like common carrier rules, because if it quacks like a duck, it is a duck. So that is why it was sent back.

I read a lot of articles that said that this was a victory for Verizon. This is a victory for Congress. If it was a victory for Verizon, it was a Pyrrhic victory. It was the most perfect example of a Pyrrhic victory since Pyrrhus. So I just want to compliment this Congress on passing a supple law that has worked well, and this Court has just said still will permit you to achieve your goals through the expert agency. Thank you.

[The prepared statement of Mr. Hundt follows:]

Testimony of Reed E. Hundt

Before the
Subcommittee on Communications and Technology
Committee on Energy and Commerce
U.S. House of Representatives

#CommActUpdate: Perspectives from Former FCC Chairmen

Wednesday, January 15, 2014

I thank the House Subcommittee on Communications and Technology for their invitation to speak here today on this important and timely issue. All chairs of the Federal Communications Commission, whether past, present or in the future, should welcome this Committee's question: should Congress fundamentally change the law that authorizes the FCC to implement Congressional intent by means of regulation?

My answer is: if it ain't broke, don't fix it – and the FCC is not only not broken, but also it is a model example of agency government.

Just yesterday the Court of Appeals for the D.C. Circuit remanded to the FCC the Open Internet order. This case surely requires more study than I have had the time to give it. But I suspect that the current FCC has the authority to re-write the regulation so as to accomplish its pro-competitive and pro-consumer goals, as they have been repeatedly stated by Congress. That, at any rate, is the mission this subcommittee ought to give the FCC.

This subcommittee and its counterpart in the Senate have created in the FCC a flexible, responsible and effective method for doing the people's business. As a result, the United States has a legal and regulatory regime for the information and communications technology ("ICT") market that is the envy of the world. Indeed, many countries have followed our paradigm of regulating so as to open closed markets and open new markets to innovation and investment. Imitation is flattery. But followership is not leadership. The success that Washington has had in creating a legal culture that welcomes ICT entrepreneurship has helped American businesses become wealth-creating, job-creating leaders of the global market.

Of course America also leads the world in self-criticism, and we can each of us find many ways that Congress and the FCC should have, could have, and would have done this or that better. The big

truth, however, is that Congress has repeatedly passed bipartisan legislation that has created an appropriately centralized and directed authority for the FCC to take the actions necessary to give Americans the chance to create the best ICT sector on the planet. Americans have seized that opportunity, and produced wondrous successes.

Congress has passed important laws delegating authority to the FCC about every two or three years in the 80 years since it created the FCC. Some of the key laws are the 1934 Communications Act (monopoly regulation), the 1992 Cable Act (monopoly regulation and program access), the 1993 OBRA (spectrum auctions), the 1996 Telecommunications Act (pro-competition), the 2005 Deficit Reduction Act (digital television), and the 2012 Middle Class Tax Relief and Job Creation Act (incentive auctions).

In recent years, Congress has asked the FCC to use regulatory and deregulatory means to open closed markets, to create new markets, to encourage firms in creating consumer welfare and public goods. Although the economic condition of the United States should be far rosier five years after the Great Recession ended, the ICT picture ought to give us pride and confidence. America is first among big countries in Internet access penetration, with 80% of residents using the Internet. (Twenty years ago, American internet penetration was less than 3%). Smartphone penetration is 60% and on its way to 100%. About 90% of the operating systems for smart phones in the world are American-originated; American mobile operating systems had a global market share of only 5% in 2005. Measured by revenue or market capitalization, American Internet firms dominate the top ranks of global corporations.

The characteristic American topology for Internet communication now is a seamless network of networks. These include vast racks of servers in data centers; long haul fiber connecting every city and most big buildings; metropolitan fiber rings and access networks; Internet access in two-thirds of homes,

and almost all other buildings, including classrooms, libraries, and medical care facilities; at least four cellular networks offering service to almost American; and Wi-Fi that soon will connect almost every computer, electrical appliance, and even many watches and glasses to the Internet.

This network of networks replaced the circuit-switched and analog networks of the 1980s. Almost nothing that worked on the old networks still works on the new ones. There is no more profound change in the history of business than the way that the digital networks of today supplanted the analog networks of the past. That construction project catalyzed the tech boom of the 1990s.

The boom accounted for about one-third of all economic growth in the decade of the 1990s. About one trillion dollars of private capital was poured into America's networks, creating vast fortunes, destroying some other wealth, producing huge productivity gains, and making America permanently better off. As a result of this investment, the ICT sector created about two million net new jobs in that halcyon era of full employment. In the rise and fall of the stock market from 1998 to 2002, the growth in some nations was offset by economic loss in other nations, but the global economy grew handsomely – and 98% of the total growth was American.

The networks of the 1990s were generative: that is, they led to waves of new innovation. The networks themselves continued to evolve. So too did the products and services on them. As Marc Andreessen has colorfully put it, "software eats everything." Less pungently, it can be said that the ICT evolution has spawned creative destruction in almost every market for goods and services. In fact, the repercussions of the ICT breakthroughs in the 1990s are increasing. Most obviously, the narrowband and digital cellular networks of the 1990s are now being replaced by broadband, wif-fi mesh, and LTE networks in this decade. Even more importantly, the current networks carry the seeds of software and hardware innovation into every other business and social activity.

Now in the third decade of the Internet, we are on the verge of seeing what monumental changes to health care, education, and energy will stem from the new innovations arising from ICT. Sensors and motes will be gathering data transmitted to wearables that provide life-enhancing information specifically destined for an individual in a specific situation. That data will be transmitted over airwaves governed by the FCC. It will be aggregated on networks the FCC's legal culture encouraged entrepreneurs to build. It will be managed in data centers that could not exist but for the networks the FCC governs.

I am not saying that the FCC built these networks. I am saying that bad government can stifle any entrepreneur, curtail any form of economic growth, and deny to citizens even the most easily obtained fruits of progress. Plenty of bad governments prove this sad point.

On other hand, academics have concluded that a sound legal regime is the key to a growing, successful national economy. But a sound regime, according to Daron Acemoglu and James Robinson, has a difficult mission. It must permit "creative destruction, which replaces the old with the new in the economic realm and also destabilizes established power regimes in politics."¹

In some nations, ICT regulators are what Acemoglu and Robinson would call "extractive institutions that are structured to extract resources from the many by the few and that fail to...provide incentives for economic activity."² A way for an agency to become "extractive" is to become captured by dominant incumbents in markets that the agency is supposed to regulate. Legislators too know well that if they lose focus they can be swayed by the arguments of powerful incumbents in any industry. Moreover, any firm can be tempted to try to use governmental power as an extractive tactic to benefit its shareholders, instead of the common good.

¹ Acemoglu & Robinson, "Why Nations Fail: The Origins of Power, Prosperity, and Poverty," (New York: 2012), page 430.

² Ibid.

However, when we look at the record of Congress and the FCC we must conclude that by and large, under Republican and Democratic leadership both, government has enabled in ICT a generative, creative, wealth-creating opportunity. And Americans have taken that opportunity. Indeed, it's fair to say that no country in the world has a legal regime for ICT that is superior to what we have here in America, and almost every country has an inferior legal and regulatory code. The FCC itself has a highly satisfactory range of legal authority. It is permitted, for instance, to rule ex ante on market structures, entrepreneurial opportunities, and public interest duties. It can help avoid path dependence, lock-in, and entrenched monopoly, each of which can block innovation and entrepreneurship. It can and does create new markets and new opportunities for new entrants to enter old markets.

Moreover, the FCC also houses the greatest competence and experience of any similar agency in the world. Any business executive in ICT can list a dozen ways the FCC could do better. Then that executive would admit that no other regulator in the world is superior in terms of integrity, knowledge, vision, and effectiveness.

Congress should take pride in the expert agency it has created, authorized, and funded.

What can Congress and its agency justly claim they got right over the last two decades, and how can the right choices be made in the present?

First, when the Internet was in effect invented commercially in 1992-93, thanks to the combination of the CERN protocols and the Mosaic browser, the United States wisely decided to allow Internet service providers full use of the existing telephone network without paying the owners – the Bell companies – anything. That is, Americans could unhook their telephone lines from telephones and connect them to computers, dial an ISP's phone number, and get on the Internet. The telephone companies were not allowed to charge an interstate access fee – then about 3 cents or more a minute –

because the FCC would not permit that. They were not permitted to limit the ISP's access to telephone lines. They had to pay what were called reciprocal compensation. These decisions were intended to allow thousands of ISPs to get started. That's what happened. They were intended to keep the local access telephone monopoly from extending its monopoly power to the Internet. That worked. These decisions were intended to give Americans the fastest, cheapest, best access to the Internet of any country in the world. That happened.

Further, in the 1996 Act, Congress required that the FCC provide internet access in every library and classroom. Now libraries are the gateway to economic success in America for all those who lack broadband at home; classrooms are where digital learning is destined to give American youth the chance to get smarter faster and better and cheaper than in any other country of the world. To this end, plainly the FCC needs to re-imagine the e-rate, with much higher goals for bandwidth, usage, spending, and outcomes. But in its first era, the e-rate has been a wildly successful way to bring the advantages of digital learning to children and adults, poor and rich, private, public and parochial, everywhere in the country. No other country has a better or more egalitarian form of universal broadband than the United States.

The FCC and Congress wanted the Internet's entrepreneurs at least to have the opportunity to subsume all other media, if its technological prowess and business models could do that.³ And that's what happened. The American government hoped that American firms would lead the whole world on to the new global platform. Aided also by the international telecommunications treaty of 1997, that's what those firms did. That leadership continues to this day. Because all communications platforms support not just economic activity but cultural formation, our leadership is integral to creating the opportunity for our values of freedom and liberty to have a chance to flourish everywhere in the world.

³ See Reed E. Hundt, "The Internet as 'The Common Medium,'" 19 Media L & Pol'y 143 (2010).

And that's just what the Internet is doing now, especially if we are able to persuade governments and firms to craft a much-needed global compact to guarantee an open Internet across all borders.

Second, Congress and the FCC wanted digital cellular to replace analog wireless, and to give American firms the chance to supplant the industry leaders – then in Europe. To that end, with Congressional authority, the FCC gave the new digital American wireless industry the chance to become the common medium of conversation and communication, supplanting the role of the fixed line telephony businesses.⁴ And that's what happened – so robustly that the two biggest wireline firms, SBC and Verizon, eventually transformed themselves into the biggest wireless firms in America. (These are the two most successful large-scale corporate transformations in business history). The means for opening the possibilities of digital cellular included spectrum auctions, spectrum caps that assured competition, number portability, wireline interconnection, pre-emption of state regulation, pole attachment regulation, and other specific FCC actions.

In the 1990s many of these regulatory steps were opposed by incumbents in the wire line industry. The wire line-wireless interconnection and termination regime, for instance, shared network effects with wireless firms when the latter had less than a fifth of the market size possessed by the wire line industry. The duopolists in analog cellular did not welcome all these steps either. Number portability and spectrum caps, for example, benefited new entrants like Sprint PCS and T-Mobile much more than the incumbents. Some states opposed the federal preemption (just as they oppose similar efforts to empower the Federal Energy Regulatory Commission). But the Congressional mandate to use rules, and also to take deregulatory steps, to promote innovation was conveyed to the FCC with sufficient legal authority to permit the FCC to craft in the 1990s the most robustly competitive digital cellular market

⁴ See Reed E. Hundt, "Wireless: The Common Medium of Conversation," 20 Media L & Pol'y 95 (2011).

structure of any country in the world. As a result, American firms running and riding on wireless networks caught up to the rest of the world very rapidly, and now lead in many respects.

From 1992 to 2000, wireless subscriptions went from 11 million to 109 million. Wireless investment had amounted to \$11 billion in 1992; it increased by nine times in the 90's. Wireless average monthly bills went from the high \$60s to the low \$40s per month. As Al Gore used to say, everything that was supposed to go up, went up; everything that was supposed to go down, went down.

What was not so clear in the 1990s became the huge story of the 00s: namely, that the wireless boom and the Internet boom would converge so that smart phones and tablets would provide untethered access to the Internet. But it's a mistake to think that Internet data mostly travels on cellular networks; it does not. Mostly, data is transferred on fiber, through access networks, over Wi-Fi, and to nomadic and handheld devices. Wi-Fi of course exists because Congress and the FCC also made the correct decision to allocate unlicensed spectrum. Auction a lot, and leave a lot unlicensed for innovation and experimentation that does not require a government permit: that's American spectrum policy and it is the envy of the world.

The key principles of the American legal regime in ICT in their modern form are three: competition among similar networks, efficient creation and distribution of public goods over those networks, and ample opportunity for innovation and experimentation.⁵ Technological and market change are constants, but so also should be these principles. The law as it exists now permits the FCC to apply these principles openly, fairly, and effectively. Leadership at the agency and support from Congress, as well as appropriate deference in the appellate process, are all necessary. But surely everyone agrees, as current FCC chairman Tom Wheeler has admirably said, that networks are at the

⁵ See Reed E. Hundt & Gregory L. Rosston, *Articulating a Modern Approach to FCC Competition Policy*, 66 Fed. Comm. L.J. 71 (2013), containing a discussion of how wire line network effects and scale economies were shared by rule with wireless networks.

core of the FCC's focus. No better explanation can be found than in the national broadband plan. Written under the leadership of my former chief of staff Blair Levin, the plan makes clear that the American goal is faster, better, cheaper Internet access that includes everyone and also provides a platform for efficient and creation of public goods.⁶

To these ends, the FCC always must address new patterns of fact and new technological possibilities. As the expert agency of Congress, acting on delegated authority, the FCC should constantly alert Congress to the pending issues and seek the sort of detailed guidance that this Committee has historically provided. The Chairman acting as CEO under the pertinent statute ought to re-organize the agency as seems fit to accomplish Congressionally mandated purposes, while always being transparent and mission-directed in effecting re-organizations.

As an example of success, we can look at the digital wireless market. There is much evidence that wireless network competition has encouraged rapid penetration, new investment in upgraded bandwidth, and falling prices per device and per unit of bandwidth. However, as the American wireless market approaches saturation, wireless firms naturally will test the willingness of government to allow consolidation. Public policy should focus instead, in my view, on motivating and enabling firms to innovate instead of merely to seek higher margins on existing products by way of reducing competition. At the same time, it is fairly clear that the FCC ought to have taken more effective action in the past to provide lower frequency spectrum to all competing firms, lower cost backhaul access, clearer spectrum aggregation rules, and more predictable rules for using re-purposed spectrum for wireless broadband. In all these respects, the current FCC is poised, I suspect, to act, and I am sure that like all FCC chairs, the current chair would like your guidance and support.

⁶ See, Hundt & Levin, "The Politics of Abundance: How Technology Can Fix the Budget, Revive the American Dream, and Establish Obama's Legacy." (Odyssey e-book: 2012).

New challenges in existing and future markets always exist. For instance, the FCC should be less than delighted with the status of DSL in America. The unbundling regime dictated by the 1996 Act was not, I'm sorry to say, effectively applied in the 00s. I believe this is one reason why our country does not have more robust innovation in DSL. I speak as a board member of the leading DSL software and hardware firm ASSIA so I admit to a motivated perspective. But still, it would be useful, as the FCC debates the transition to all IP-networks, to consider whether that evolution could be coupled with greater expansion of DSL either by proprietors or by rivals that could use fiber-to-the-curb and copper-to-the-house as a platform for providing competitive fixed line broadband service. ASSIA estimates that about 75% of American homes can be reached by FTTC and VDSL ("vectored" is the "V") at a cost of about \$400 per household. AT&T is a leader in this respect and reportedly can lower costs below that level. The throughput is said to be 50 to 100 Mbps. This topic alone might be worth this subcommittee's consideration.

The re-imagination of the e-rate is another welcome opportunity for the FCC to apply its time-honored policies to a changing situation. It can and should upgrade not just access networks to libraries and classrooms, but also to lift up the aspirations for digital learning that we ought to have for all our people. Unlike when the '96 Act was passed, we see now that libraries and schools need to provide Wi-Fi access in all parts of their buildings. All learners – young and old, in and out of school - need broadband to take advantage of rich media that instructs, trains, provides access to public services, and simply delights the mind. That broadband should be very high speed, catalyzing higher demand for commercial access in homes and offices. Libraries in particular need to fund architectures that focus on BYOD – users bringing their own devices – while assuring security and protection from inappropriate material for users. Libraries and school districts need better tools for buying the piece parts of new networks; they would benefit from streamlined processes at the FCC and at the administrative entity

managing the e-rate. My views here are shaped by my role as attorney to the Urban Libraries Council, but I suspect that most members of this Committee would like to see these modernizing steps taken.

Congress does not need to pass a new law to have its expert agency address these, or any of the other important issues that need addressing if the United States is to maintain its leadership in creating the world-best legal culture for ICT. If the appellate courts err, Congress may wish to step in. If the FCC blunders, Congress also has the power and the duty to step in to correct its expert agency. But history shows that at least as to this sector, government's mistakes are outweighed by its successes and I am confident that this committee and the very able new FCC chair, who has assembled a very savvy team, can continue that history into the future.

VOICE. Thank you.

Mr. WALDEN. Thank you, Chairman Hundt. We appreciate your comments and your staying up all night to cram for our hearing. We will now turn to Chairman Michael Powell who was nominated by George W. Bush and served as Chairman of the FCC from 2001 to 2005. During Mr. Powell's Chairmanship, they saw a significant increase in the deployment of broadband to American homes, as well as convergence of services toward the bundles of services that are common today, among many other things. Chairman Powell, thank you for joining us today. And please, go ahead.

STATEMENT OF MICHAEL K. POWELL

Mr. POWELL. Thank you, Mr. Chairman. And as a former Chairman, I am happy to be sitting around with a bunch of these other Chairmen offering, as best we can, our historic perspectives on how to prudently go about rewriting the act, should that be your intention. And I am pleased to be with Ranking Member Eshoo again and all the distinguished members of the committee.

I think it goes without saying, and all of us will say it in different ways that the world has changed quite radically from 20 years ago in terms of markets and services. But don't ask us, ask your kids. Ask them to name three broadcast networks, if you will. Ask them to do without the Internet for a week. And for God sakes, ask them to put their phone down at dinner and see what reaction you get. I think you will be convinced.

That transformation has taken place largely because of an enormous revolution in network architecture in the form of the Internet, which has unleashed a form of intermodal competition that heretofore wasn't really possible. And it has really introduced an exciting world. And we should remember, gave birth to a host of companies and opportunities that never were envisioned before, the companies that aren't here—Google, Facebook, Amazon, eBay, Twitter, Instagram, you name it—all able to be born and flourish because of this transformation.

I would say that any consideration of the act should start with not only cataloging its ills but cataloging its success, as much as Reed was alluding to. I think it is really important to note that over this period, we have seen the most stunning amount of investment in infrastructure and architecture that we have ever seen. We have reached 90 percent of Americans faster than any other technology in world history. Innovation and growth have continued at exponential rates with broadband increasing over 19 times just in the last decade, doubling basically, increasing about 50 percent annually. That is a stunning achievement and something we should make sure we keep going. So I think, you know, being guided by the old maxim of do no harm is an important cautionary tale.

As I thought about how you might think about architecting a new regime, I am guided by the idea of the Internet itself, which is the fundamental principle of simplicity as a design principle. It has been a very, very powerful one in the Internet. And I think it offers some guidance in this space as well.

So I would like to, toward that end, offer—I am going to see Mr. Wiley's four principles and do them three better and offer you seven as briefly as I can. The first is we have heard a lot about

innovation. I do think the principle goal of the Government should be to nurture that innovation. This is the kind of fermenting change we have never been able to harness as fully as we are today. Innovation has allowed us to bring completely new products and services and network changes to the market. It has created a form of creative destruction that keeps the market energetic and keeps a monopoly in check. And I think it has created new kinds of transparency for the American consumer through crowdsourcing and visibility. And we should study the conditions that go into innovation and make sure we harness them. I think three are critical. Innovations really do require freer markets. And a market that moves at Moore's Law speed, the pace of adaptation, transformation and change are incredibly fast. And there needs to be a constant and intense dialogue between producers and consumers. And we should be careful to protect that.

Innovation requires risk taking. And as we know, most new adventures fail. There has to be room in Government policy for failure. There has to be room in Government policy for encouraging taking those risks. And innovation requires stability. Investing more than a trillion dollars, as Congressman Eshoo was talking about earlier, since 1996 is stunning. But it requires a stable regulatory environment to provide that uncertainty. Because if investment slows, innovation will slow with it.

The second rule of simplicity I think is once you have created a lighter regulatory environment by trying to pursue the maxim of less is more, organize it better. We certainly have heard about the challenges of silos and buckets. Clearly, that had its place in another time when these technologies, applications and type of companies were deeply intertwined, were not able to provide alternative services in other spaces. That day has moved on, and we certainly crave a more unified, integrated kind of legal regime that doesn't make those sorts of distinctions. In fact, as I have heard mentioned today, I think yesterday's court decision in the multi-year debate on net neutrality that illustrates the almost torturous challenges, sometimes, of addressing a modern circumstance in using provisions of last century's rules. I think there is certainly widespread agreement on core principles around an open Internet. After somewhat kludge past we have had to follow in an effort to implement them has made the matter, I believe, infinitely more complex and controversial than necessary. And the threat of radically upending the longstanding light regulatory foundation of broadband on which massive investment and growth have been built with good effect, to implement one set of rules seems distressing. Any shift of that magnitude, I do think would require Congress—the people's representatives to weigh in on.

A third principle, give regulators the ability and obligation to address changing markets. As we have said, the markets move drastically. And the FCC often has limited ability to make those migrations. Yes, in places they have. There are other instances in which they have not been able to, even when they concede that the fundamental circumstances are changed.

Fourth, the law should ensure competitive parity and technical neutrality. There is a hodgepodge of applications of statutes I could point out in which certain rules apply to one sector of a service and

not to other sectors. This has just really been an outgrowth of the passage of years and the changing nature of companies. But there are many rules that apply to cable, for example, that don't apply to DBS for no discernible reason. One very valuable thing for the committee to do is prune through the statute to try to harmonize those differentiated treatments as best as possible.

Fifth, the FCC should police markets, not create them. I think this is genuinely well understood. But there is a role for a cop on the beat. What I don't think there should be is a master chef who believes it is the Commission's objective to make markets or create the conditions and circumstances for them.

And, finally, the last two, timeliness. If you are working in Moore's Law, you need timely and prompt decisions from the Government.

Lastly and most importantly, the law still needs to preserve important societal values and protect consumers from harm. And the FCC and the Government will always have a sacred responsibility in that regard.

Thank you for your time.

[The prepared statement of Mr. Powell follows:]

TESTIMONY OF MICHAEL K. POWELL

on

THE COMMUNICATIONS ACT UPDATE

before the

Subcommittee on Communications and Technology

Committee on Energy and Commerce

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

January 15, 2014

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me today to offer my perspective as a former FCC Chairman as you begin your work on the Communications Act update. I welcome this important hearing and look forward to a continuing dialog with you on the complex but critically important work of updating the Communications Act.

The communications marketplace today is completely different from the market that Congress faced nearly 20 years ago when it last made serious amendments to the Communications Act. Services within this Committee's jurisdiction have been evolving at a blinding pace, largely driven by robust high-speed Internet networks that now connect nearly all American homes. Among other things, the widespread deployment of IP technology has made intermodal competition possible: networks once constructed and optimized to provide a single service – voice or video, for instance – are now capable of providing voice, video, and data. The Internet has evolved to be without question a critically important means of communication, connectivity, and content, spawning a new class of companies like Google-YouTube, Facebook, Amazon, Skype, and Netflix that play a critical role in the communications space.

These dramatic marketplace developments warrant consideration of how to better reflect the reality of today's multi-platform marketplace. This market requires a greater degree of business flexibility, fewer prescriptive rules, and an assurance that any government involvement is applied on a technology-neutral basis and creates a better investment climate. At the same time, consumer protection and public safety, the driving forces behind many of the existing Communications Act's provisions, remain important in any legislative effort.

Any consideration of a new Communications Act should be guided by the oath to "first do no harm." The communications infrastructure and market in this country have thrived, in

stark contrast to the challenges with the power grid, or the transportation system. There has been exceptionally strong investment. Innovations have flourished at a remarkable rate. The network has reached over 90 percent of Americans faster than any technology in history. And the sector has provided jobs and spurred economic growth, even during the darkest recession since the Great Depression. Rewrite efforts often focus on problems. It is important here not to try and fix what is not broken.

Beyond doing no harm, I would suggest to you that the prime directive in considering how to build a new Communications Act is to keep it simple.

A Simplicity Framework

The current Act is excruciatingly complex and lengthy. It runs over 750,000 words and attempts to prescriptively address thousands of topics. A new effort should be a fresh start with the express goal of having a dramatically simpler framework. The first principle of simplicity is that “less is more.”^{1/} The Internet world itself offers compelling guidance on the power of simplicity. The Internet has opened a floodgate to new content creation and innumerable services and devices designed for the online ecosystem. The genius of so much positive innovation and growth has largely come from simplicity as a design principle. Indeed, the Internet bloomed because of its radically simplified design; it has no central control, and uses common protocols.

Practicing simplicity can be scary. It takes courage to discard old ideas and rules that are no longer needed. However, thoughtful reduction leads to greater simplicity and a better product for consumers. What is true of products and services is equally true of regulation.

^{1/} See John Maeda, *The Laws of Simplicity: Design, Technology, Business, Life*, The MIT Press; Third Impression edition (August 21, 2006). This principle represents the intuitive view that we should make things simpler by reducing things to their essence. Maeda stated this principle succinctly as, “When in doubt, just remove. But be careful what you remove.”

The overwhelming success of Apple products in a very crowded market is perhaps the most famous example of the success of simplicity. It has been said that Steve Jobs was obsessed with simplicity – that to him, simplicity was a religion.^{2/} The original vision for Apple was to bring really great design and simple capability to something that doesn't cost much. "It takes a lot of hard work," Jobs once said, "to make something simple, to truly understand the underlying challenges and come up with elegant solutions."^{3/} Jobs understood that people have greater emotional connections to simple things and inherently trust them more than complicated things.

Scientists and philosophers around the world, too, endorse simplicity, applying the principle of Ockham's Razor to their work – the straightforward idea that when there are competing hypotheses, choose the one that requires the fewest assumptions. In other words, simple explanations are generally better than complex ones.

Applying The Principle of Simplicity To The Upcoming Communications Act Rewrite

So, what does simplicity have to do with rewriting the Communications Act? Rather than dialog and debate around well-worn constructs like regulation and deregulation, free markets versus industrial policy, and competition and monopoly, we should talk more about simplicity – guiding our companies and our regulatory policies by the concept. To guide us to a simpler, more effective statute, I recommend the following seven principles:

^{2/} See Ken Segall, *Insanely Simple: The Obsession That Drives Apple's Success*, Portfolio Hardcover (2012).

^{3/} Walter Isaacson, *How Steve Jobs' Love of Simplicity Fueled a Design Revolution*, SMITHSONIAN MAGAZINE, (September 20, 2012), <http://www.smithsonianmag.com/arts-culture/How-Steve-Jobs-Love-of-Simplicity-Fueled-A-Design-Revolution-166251016.html>.

1. Nurture the conditions for innovation.

In stark contrast with past communications markets, the modern market re-invents itself constantly and rapidly. A new Communications Act should encourage, protect, and incent this innovation. The current statute was written largely to regulate known quantities – we understood the players, the basic services they offered, and the basic cost and investment structure. Today, that is not possible. Any new statute has to accept uncertainty, unpredictability and constant change. What promotes innovation?

Innovation requires free markets. Requiring providers to arrange and offer service in a particular way hinders their ability to create and respond to market demand. The constant invention and adaptation in this marketplace has been good for consumers and for our economy. The government needs to resist early and premature entry into these markets based on hypothetical harm, and instead focus on addressing problems if and when they arise. Experimentation in new services and new business models should be encouraged.

Innovation requires risk taking. Taking greater risks is key to achieving innovative breakthroughs. Too often, regulators prematurely frown on novel approaches that might upend familiar regulatory approaches. Additionally, regulatory costs can tip the scales against bringing new ideas to market. Innovators always face a substantial market risk because inevitably most new ventures fail. Adding government risk can significantly affect the calculus of whether to go forward. The government must ensure that for those ideas that succeed, these risks are worth the potential reward. Maintaining a simple, deregulatory environment that does not devalue the reward promotes risk taking.

Innovation requires stability. Communications markets require a constant flow of risk capital. The private sector has invested *more than \$1 trillion* in our Internet infrastructure since

1996, including *more than \$250 billion* in the past three years alone. As a result of these investments, consumer Internet speeds in the U.S. have *increased by 19 times* in the past six years while we've maintained the world's *third-most affordable entry-level pricing* for broadband.^{4/} But legal instability can cast a cloud of uncertainty over continued investment; a regulatory climate must provide certainty. Otherwise, as investment slows, innovations slow, depriving consumers of the benefits of cutting-edge products, services and functionality. Simple laws promote stability. In contrast, Erroom's law (Moore's law backwards) tells us that despite all our advances in technology, more complex processes can lead to fewer results. More complex is not always better.

2. Organize the statute better.

After reducing unnecessary rules as much as possible to let innovation flourish, we must better organize what remains. A question in the white paper asks whether structuring the Act around particular services works for the modern communications sector. The answer is no. A different regulatory model for each type of provider made sense years ago when each provider generally offered only one service: voice, video, or data. Today, providers offer a multitude of services, using a variety of platforms and technologies. The new Communications Act should eliminate silos to reflect how companies and consumers think of services.

3. Give regulators the ability and the obligation to address changing markets.

The white paper asks whether the FCC's jurisdiction needs to change to address developments in communications. In some respects, it does. In 1992, cable served 98 percent of all multichannel video homes, the top ten multichannel video distributors were all cable

^{4/} International Telecommunications Union, *Measuring the Information Society* (2013) at 82, available at http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2013/MIS2013_without_Annex_4.pdf.

companies, the typical cable system offered 30-40 analog video channels, and cable broadband and voice services did not exist. Today, cable serves 54 percent of multichannel video homes, and the second, third, fifth and sixth largest multichannel video distributors are not traditional cable companies, but DBS or telco service providers. The typical cable system offers hundreds of digital and HD channels as well as VOD and DVR capabilities, broadband speeds from 10-30 Mbps are standard and many networks offer up to 100+ Mbps, and cable provides voice service to one in three homes that use wireline voice service. Yet the law remains the same, as if none of these developments had occurred, and the FCC is limited in its ability to make substantial changes in the law's requirements to reflect the changed environment. Going forward, rather than prescribe detailed regulatory requirements designed for today's marketplace conditions, the law should be as streamlined as possible and give the FCC the ability – and the duty – to modify legal requirements as market changes demand.

4. The law should ensure competitive parity and technical neutrality.

Historically, which law governs a communications business has been based on three elements: the technology used, the particular service being offered, and the particular type of company doing the offering. For example, twisted copper wire, offering voice service by a telephone company, is a telecommunications service and has its own unique set of regulations.

Modern data networks are capable of virtually any kind of communications product or service. The answer to the white paper's question of how laws can be more technology-neutral is simple: similarly situated companies should not be regulated differently. Like services should be treated alike, and all providers of those services should play by the same rules. Under existing law, cable operators remain subject to a number of statutory requirements that DBS providers are not, even though – from the consumer's perspective – they provide the same type

of service and the DBS providers are much larger than all but one or two cable companies. Only cable operators are subject to rate regulation and “must-buy” requirements; DBS providers essentially avoid PEG and leased access obligations; and DBS providers have no obligations to make their affiliated networks available to competing multichannel video programming distributors.

There is a serious threat to innovation and competition when the law confers any regulatory advantage on particular technologies, or deregulates not when market forces warrant, but when a favored technology is used. Companies facing fierce competition will respond to what consumers want, as providers continuously seek to differentiate themselves and their products and services. Their response should not be driven, or even affected, by a need to fit a service into a particular regulatory box. A regulatory scheme that successfully encourages innovation will not require providers to spend time debating which side of the line a service feature puts them on.

Today’s technology darling is IP. And as it becomes useful to introduce IP (or any other new technology) more and more into the distribution of services, *all* providers, including current cable operators, will do so. The law and regulatory scheme should be structured to encourage, not interfere with, that natural progression. Moreover, the danger with having the government picking technology winners and losers, particularly in a field as dynamic as communications, is that the initial technology choice may be wrong, and government cannot anticipate what’s around the corner. A technology-based approach creates a perverse incentive for providers to select the technologies they use based on a particular regulatory result even if they do not necessarily respond to consumer demand most effectively and efficiently, and it may lock them into particular technologies long after those technologies have outlived their usefulness.

5. The FCC should police markets, rather than try to create them.

The FCC is one of the last regulatory agencies with the authority to affirmatively create economic conditions for markets and set terms, conditions, and prices. This role has become increasingly problematic. There should be minimal economic regulation, allowing competition to rely on market forces wherever possible. The market has worked well to ensure that new developments enabled by technological advances reach consumers. Where there is market failure or anticompetitive harm, the government should look to principles of antitrust enforcement and competition policy rather than seek to institute economic regulations *a priori*. As the newly appointed Chairman Wheeler recently explained, “If the facts and data determine that a market is competitive, the need for FCC intervention decreases.”^{5/} There should be demonstrable evidence of harm to justify any FCC intervention in economic decisions.

6. The law should prioritize timeliness.

Markets need timely answers. When regulators leave proceedings open-ended, fail to give definitive answers on questions that drive product and service development, and act so ambiguously as to lead to excessive and lengthy litigation, providers and consumers suffer. Open proceedings with no clear end in sight and no sense of progress create an agonizing feeling of unnecessary complexity. Rather than try to draft extensive prescriptive standards that address all possible contingencies, the law should set simple, flexible standards that affected parties can understand and implement. Regulators and new policy frameworks could make huge strides in simplifying the legal process by focusing on timeframes, disclosures, and progress measures.

^{5/} Prepared Remarks of FCC Chairman Tom Wheeler, The Ohio State University, Columbus, OH (Dec. 2, 2013), available at <http://www.fcc.gov/document/remarks-fcc-chairman-tom-wheeler-ohio-state-university>.

Not only will this alleviate the pain of the process, it will create a better set of expectations and a sense of goodwill toward the regulatory process.

7. The law should preserve important social values and consumer protections.

Even a simpler Act must contain the core obligations that promote and preserve important societal values. Providing emergency services like 911 and E-911, cooperating with law enforcement, supporting universal service, and ensuring access for persons with disabilities are important. Providers should ensure that their service reaches and serves every segment of society. While regulation should be no greater than what is necessary to ensure the fulfillment of those responsibilities – and they should be consistent across providers – these important public protections should not be abandoned.

Consumer protection, too, is important. The law must protect against fraud and abuse, prevent physical harm, and ensure transparency so consumers can make informed choices. But it must also ensure that regulators do not use the guise of “consumer protection” to stray into what is really economic regulation, such as regulating rates or terms of service.

Thank you again for the opportunity to appear today. I look forward to the discussions over how best to regulate this vibrant marketplace.

Mr. WALDEN. Chairman, thank you. Speaking of cops on the beat—

Mr. COPPS. Here I am.

Mr. WALDEN. We will now go to Michael Copps, served as Acting Chairman of the Federal Communications Commission from January to June of 2009, and served as Commissioner from 2001 to 2011. Prior to joining the Commission, Commissioner Copps worked right here on Capitol Hill and the U.S. Department of Commerce. Commissioner Copps, Chairman Copps, thank you for being with us. And we look forward to your comments to round out our panel.

STATEMENT OF MICHAEL J. COPPS

Mr. COPPS. Thank you, Chairman Walden, Chairman Upton, Ms. Eshoo, Mr. Waxman, vice chairmen, former chairmen, and all the members of the committee. I am delighted to be here.

We are here today to review whether the Communications Act needs to be updated or otherwise reformed. I have heard some say that simply because the act is old, it must be obsolete, that no matter how well it has served us, an act written 18 years ago cannot have relevance in today's altered world. Now, as someone only a little younger than the original act of 1934, I would raise a caution flag or two. The Declaration of Independence and the Constitution were written long ago, too. Yet, we still find them critically relevant in our lives. While it is praiseworthy to ponder changes to the law, I would suggest firstly that the framework of the current statute remains in many ways strong, and secondly that the current act's provisions can still do much to improve our communications landscape to enlarge economic and social opportunity for all of us and nourish the kind of civic dialogue upon which successful self-government inevitably rests.

In an ideal world, most of us would welcome an up-to-the-minute rewrite of the law to reflect how we believe it could be improved. The last such revision in 1996 was born of a unique political moment that aligned a sufficient and sundry number of stakeholders across sectors and constituencies who were able to negotiate a compromised statute that, while far from perfect, at least envisioned delivering to every American, no matter who they are, where they live or the particular circumstances of their individual lives, the most advanced communications, technologies and services feasible at reasonable and comparable prices, replete with consumer protections, rights of privacy, assurances of public safety and utilizing competition to help achieve these goals. Putting the statute to work to deliver these benefits was my mission at the FCC, working with some of the most amazing public servants anywhere. Nowadays, I carry out my public interest mission in the nonprofit sector at Common Cause.

In the immediate wake of the new law's passage, the Commission indeed made important strides to carry out these congressional mandates. But, alas, things changed. Some of the very interests who helped negotiate the new Communications Act spend more time undermining the statute than implementing it. Such efforts continue to this day, as we saw in yesterday's court decision that,

left unaddressed, will seriously jeopardize the future of the open Internet.

I appeared in front of this panel many times over the years to voice my dissent on Commission decisions involving the reclassification of communication services, industry consolidation across both our telecom and media sectors, the elimination of policies that had long safeguarded the public interest, and the heavy toll thereby exacted on consumer choices, consumer prices, and slowing the deployment of competitive, low-cost, high-speed broadband—this century’s most important infrastructure.

We can I know debate for hours, but a record of these hearings needs to show that many people do not share the easy optimism that others express about the state of America’s communications readiness. As you consider legislation in the coming months, some will tell you that America is a veritable broadband wonderland, a triumph of free market entrepreneurship that puts us at the front of high-tech nations. But there are stubborn facts we must never avoid. The United States, originator of so much of the technology behind the Internet, has fallen from leader to laggard in broadband penetration. According to the OACD, our country is 16th in wired broadband connections for 100 residents. Worse, comparative research shows that Americans are paying more and getting less than wired broadband consumers in competitor countries. The Department of Justice has noted that the local wireless marketplace offers consumers little in the way of choice, even as mobile data plans are saddled with data caps that harm consumption and innovation alike. And once again, for the third time, the FCC found itself unable to certify that we enjoy a competitive wireless marketplace. Surely, the time is now for proactive and pro-consumer measures to make quality broadband universally affordable once and for all.

While we are not gathered here this morning to rehash those decisions, I do think it is important to understand that many of the faults attributed to the current statute are more the result of powerful industry efforts to undermine it and of Commission decisions that too often aid and abet the effort. So while we open discussions on revising communications law, let us recognize that our present statute has been interpreted and implemented in ways not originally intended, and that many of its constituent parts are still relevant, workable and consumer-friendly. There is a statute to enforce, and putting that job on hold while we consider changing it is not a good option.

Additionally, I think most of us here this morning understand that finding a new correlation of interest that can come together to forge the Communications Act of 2015 or 2020 would be even more challenging than the jockeying that gave birth to the current law.

As the world races ahead, we have a duty to make the best possible use of the laws we have in order to achieve the ongoing goals that Congress laid out. These remain powerful interests. A statute that invokes the public interest over 100 times, that highlights the universality of service, competition, and consumer protection, and that underlines the necessity for media that informs communities and engages citizens cannot be all bad. Would I have some pref-

erences for a reworked statute? Of course, although a good part of it would be making sure the Commission and the industry follow through on what is already on the books, to foster competition and consumer protection, to deliver on public safety, to preserve privacy in this age of massive intrusion, to avoid never-ending industry consolidation, to put the brakes in gatekeeping in our media, both traditional and new, and to provide the FCC with the resources it needs to discharge its responsibilities.

My greatest disappointment at the Commission is that we didn't do enough to encourage media that truly reflects the diversity of our people. Can you believe that today there is no African-American-owned full-power commercial television station anywhere in the land? America is diversity. And if our media fails to represent diversity—diversity of providers and content and viewpoint and ownership—it fails us. The sad plight of communications across our native lands needs to be addressed with renewed urgency and additional resources. Imagine that there are still areas where the majority of first Americans cannot access even plain old telephone service, let alone the kind of high-speed broadband that is the most powerful tool they could have to create opportunity where there is so little opportunity now.

I would hope we could find ways to stimulate basic communications research by private-public partnerships. I am not talking about the next glitzy app, but the basic fundamental research that will determine who wins and loses in the global sweepstakes.

I am for making the Commission more efficient, like doing away with the closed-meeting rule that prevents more than two Commissioners from even talking to one another. And I hope that reform needs to go forward, whether or not it is accompanied by more far-reaching revisions. And I believe that when three Commissioners have something they want to do at the FCC, that item should go on the agenda.

My list could go on, and I welcome the opportunity to discuss such things today. But I always come back to democracy, because that is what concerns me most. Our country is in trouble, reminiscent in many ways of the severity of the economic, global, and social crises it faced in the 1930s, and there are no guaranteed happy outcomes. I just do not see how citizens can be expected to navigate through all these issues and come out with smart decisions for our Nation's future when the telecommunications tools we need are not available to all and in a media environment where community outlets have been short-circuited, investigative journalism hangs by a thread, and wherein we expect some invisible hand to produce those things that the market itself no longer produces and which in fact the market alone has never produced.

Communications are vital to our economy, but they are the lifeblood—the lifeblood of our democracy. They must be available to all, open to all, never the exclusive province of the affluent or the few, always alive to the common good. We shouldn't see our communications world as part telecom, part media or part traditional media, part new media. We have one communications ecosystem. And our job is to make it work for everyone. And I know of no greater challenge that confronts the Congress, the Commission or the country.

Thank you for holding this hearing today and for inviting me to be a part of it, and I look forward to our discussion.
[The prepared statement of Mr. Copps follows:]

**ORAL TESTIMONY OF HON. MICHAEL J. COPPS
SUBCOMMITTEE ON COMMUNICATION AND TECHNOLOGY
HOUSE COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC
JANUARY 15, 2014**

Mr. Chairman, Ranking Member Eshoo, Members of the Committee: Thank you for inviting me to be a part of these preliminary discussions concerning possible revision of the Communications Act. Daunting as that process would be, it is important to have conversations broad, deep, and including the full range of viewpoints of people affected by the Act. That would be all of us because we all live in a world transformed by the awesome power of communications. So I urge this Committee, as I have frequently urged the Federal Communications Commission, to visit communities around the country to see and hear first-hand what consumers and citizens actually think about these issues.

We are here today to review whether the Communications Act needs to be updated or otherwise “reformed”. I have heard some say that simply because the Act is old, it must be obsolete—that no matter how well it has served us, an act written 18 years ago cannot possibly have relevance in today’s world. As someone only a little younger than the original Act of 1934, I would raise a caution flag or two. The Declaration of Independence and the Constitution were written long ago too, yet we still find them critically relevant in our lives. While it is praiseworthy to ponder changes to the law, I would suggest, firstly, that the framework of the current statute remains in many ways strong and, secondly, that the current Act’s provisions can still do much to improve our communications landscape, to enlarge economic and social opportunity for all of us, and to nourish the kind of civic dialogue upon which successful self-government inevitably depends.

In an ideal world, most of us would welcome an up-to-the-minute rewrite of the law to reflect how we believe it could be improved. The last such revision, in 1996, was borne of a unique political moment that aligned a sufficient and sundry number of stakeholders across sectors and constituencies who were able to negotiate a compromise statute that, while far from perfect, at least envisioned delivering to every American—no matter who they are, where they live, or the particular circumstances of their individual lives—the most advanced communications technologies and services feasible at reasonable and comparable prices, replete

with consumer protections, rights of privacy, assurances of public safety, and utilizing competition to help achieve these goals. Putting the statute to work to deliver these benefits was my mission at the FCC, working with some of the most amazing public servants anywhere. Nowadays, I carry out my public interest mission in the nonprofit sector at Common Cause.

In the immediate wake of the new law's passage, the Commission indeed made important strides to carry out these Congressional mandates. But, alas, things changed. Some of the very interests who helped negotiate the new Communications Act spent more time undermining the statute than implementing it. Such efforts continue to this day as we saw in yesterday's court decision that seriously jeopardizes the future of the Open Internet. I appeared in front of this panel many times to voice my dissent on Commission decisions involving the reclassification of communications services, industry consolidation across both our telecom and media sectors, the elimination of policies that had long safeguarded the public interest, and the heavy toll it exacted on consumer choices, consumer prices, and slowing the deployment of competitive, low-cost, high-speed broadband—this century's most important infrastructure.

We can, I know, debate this for hours, but the record of these hearings needs to show that many people do not share the easy optimism that others express about the state of America's communications readiness. As you consider legislation in the coming months, some will tell you that America is a veritable broadband wonderland, a triumph of free market entrepreneurship that puts us at the forefront of high-tech nations. But there are stubborn facts we must never avoid. The United States, originator so much of the technology behind the Internet, has fallen from leader to laggard in broadband penetration. According to the OECD, our country is 16th in wired broadband connections per 100 residents. Worse, comparative research shows that Americans are paying more and getting less than wired broadband consumers in competitor countries. The Department of Justice has noted that the local wireless marketplace offers consumers little in the way of choice, even as mobile data plans are saddled with data caps that harm consumption and innovation alike. And once again, for the third time, the FCC found itself unable to certify that we enjoy a competitive wireless marketplace. Surely the time is now for proactive and pro-consumer measures to make quality broadband universally affordable once and for all.

While we are not gathered here this morning to rehash those decisions, I do think it is important to understand that many of the faults attributed to the current statute are more the result of powerful industry efforts to undermine it and of Commission decisions that too often

aid and abet that effort. So while we open discussions on revising communications law, let us recognize that our present statute has been interpreted and implemented in ways not originally intended and that many of its constituent parts are still relevant, workable, and consumer-friendly. There is a statute to enforce, and putting that job on hold while we consider changing it is not a good option. Additionally, I think most of us here this morning understand that finding a new correlation of interests that can come together to forge the Communications Act of 2015 or 2020 will be even more challenging than the jockeying that gave birth to the current law. As the world races ahead, we have a duty to make the best possible use of the laws we have in order to achieve the ongoing goals Congress laid out. These remain powerful instruments. A statute that invokes “the public interest” over 100 times; that highlights universality of service, competition, and consumer protection; and that underlines the necessity for media that informs communities and engages citizens cannot be all bad.

Would I have some preferences for a reworked statute? Of course, although a good part of it is making sure the Commission and the industry follow through on what is already on the books to foster competition and consumer protection; to deliver on public safety; to preserve privacy in this age of massive intrusions; to avoid never-ending industry consolidation; to put the brakes on gate-keeping in our media, both traditional and new; and to provide the FCC with the resources it needs to discharge its responsibilities.

My greatest disappointment at the Commission is that we didn’t do enough to encourage media that truly reflects the diversity of our people. Can you believe that today there is no African American-owned full-power commercial television station anywhere in the land? America *is* diversity, and if our media fails to represent diversity of providers and content and viewpoint and ownership, it fails us all. The sad plight of communications across our Native lands needs to be addressed with renewed urgency and additional resources. Imagine that there are still areas where a majority of the First Americans cannot access even plain old telephone service, let alone the kind of high-speed Internet that is the most powerful tool they can have to create opportunity where there is so little opportunity now.

I would hope we could find ways to stimulate basic communications research via private-public partnerships—I’m not talking about the next glitzy app, but the basic, fundamental research that will determine who wins and who loses in the global sweepstakes.

I'm for making the Commission more efficient—like doing away with the “closed meeting” rule that prevents more than two Commissioners from even talking to one another. This reform needs to go forward now, whether or not more far-reaching revisions can be enacted. And I believe that when three Commissioners have something they want to do, that item should go on the agenda. My list could go on, and I welcome the opportunity to discuss such things today.

But I always come back to democracy, because this is what concerns me most. Our country is in trouble, reminiscent in many ways of the severity of the economic, global and social crises it faced in the 1930s, and there are no guaranteed happy outcomes. I just do not see how citizens can be expected to navigate through all these issues and come out with smart decisions for our nation's future when the telecommunications tools we need are not available to all and in a media environment where community outlets have been short-circuited, investigative journalism hangs by a life thread, and wherein we expect some invisible hand to produce those things that the market itself no longer produces and which, over the course of our history, the market alone has never produced. Communications are vital to our economy. But they are the life-blood of our democracy, too. They must be available to all, open to all, never the exclusive province of the affluent or the few, always alive to the common good. We should not see our communications world as part telecom, part media or part traditional media and part “new” media. We have one communications ecosystem and our job is to make it work for everyone. I know of no greater challenge that confronts the Congress, the Commission, or the country.

Thank you for holding this hearing today and for inviting me to be a part of it. I look forward to our discussion.

Mr. WALDEN. Chairman Copps, thank you for your thoughtful presentation. We appreciate it. And as you know, our subcommittee has moved forward on some of these initiatives, and we welcome encouragement over on the other side of the building on Sunshine Act and a few other things.

So I would like to open up the questioning process now with the questioning of Chairman Powell. Since you have presided over the Federal Communications proceedings that classified cable and telco-delivered broadband services as information services, do you think we would have seen the same level of broadband investment during the past decade had the FCC classified these services as common carrier communication services?

Mr. POWELL. I think in short, my judgment is no. I think the Internet at the time that that classification decision was made was more unknown than known. I think it was a period of rampant experimentation. I think the capital required to drive and produce the broadband networks that were not in place needed conditions that allowed them the flexibility to make those choices without the risk that they would be put back into kind of the monopoly era regulatory model. So I think it was an important component, dis-bursing that investment.

Mr. WALDEN. Chairman Wiley, does the Federal Communications Commission need to continue to have broad discretion over mergers and acquisitions, or should the Department of Justice anti-trust review be enough?

Mr. WILEY. Well, I think there has been duplication from time to time. Although I would point out that the Justice Department is looking at anti-trust aspects, and the FCC has got a broader public interest standpoint. I think the two agencies need to work together, and I think they have worked together through the years. So I think the process is appropriately developing. But I do worry sometime that we see great delays in the handling of these consolidations and mergers, which I think is contrary to the best interest of the companies involved, and also contrary I think to the public interest and consumers.

Mr. WALDEN. And to both Chairman Powell and Chairman Wiley, can the FCC ever really future proof regulations given how rapidly technology is changing? And are elements of the Communications Act holding the Commission back from flexibly addressing new technologies?

Mr. POWELL. No, I don't think any agency can future proof the regular environment, no more than Congress could write a statute that wouldn't overtime fray in its relevancy in a market that is driven by technological change. I do believe though that there are tools to give greater flexibility and not more prescriptive constraints that we have seen in some regulatory vehicles. So no, they can't future predict. And I thought—I think the other guidance is I think asking the Commission to engage in anything that requires predictive judgment about future outcomes should be avoided where possible.

Mr. WILEY. Yes, and that is why I suggested in my prepared testimony that we ought to have an opportunity to have a light touch here and have the Government—in your statute, have a very flexible technology-neutral type of approach to this, because it is very

hard to predict. And the 1996 drafters did not really foresee the development of the Internet to become a universal medium. And I don't think they predicted broadband to be what it is today. So I think you have to step back a little bit and I think allow the technology to develop and to allow innovation—invention to occur without stifling it.

Mr. WALDEN. OK. I am going to start with Chairman Powell, and then each of you can take this one in the minute and a half I have left. Should the Internet be regulated as a common carrier under Title II?

Mr. POWELL. Well, for me, that is easy. No. I think one of the things I would like to say about that though is that people should fully understand what that means. Even if that were able to give you a better basis for recovering these two components of the rules, it would be the instant application of thousands of pages of decades old regulations instantly to the Internet where they heretofore have not been, both through—on a bipartisan basis, we have had a much more regulatory environment. The shatter to investment backed expectations that would result I think would be exceedingly damaging and more than most people realize.

Mr. WALDEN. Chairman Hundt, do you care to comment on that?

Mr. HUNDT. Just two points. The 1996 act was shorter than the rules for Little League Baseball, meaning Congress does not necessarily have to write thousands of pages. And in its wisdom, it did not do so in 1996. And that act now has given the FCC the ability to achieve the fundamental goals. As I mentioned earlier, it can choose to use the specific methods that are dictated by the Common Carrier Treatment. But it absolutely does not have to use very many of these methods to accomplish its goals. In fact, the Court on page 61 outlined its view of what the FCC should do—

Mr. WALDEN. Right.

Mr. HUNDT [continuing]. And said you can treat it as common carrier and have about 30 words that establish the principles. I am not saying they should do that. I am saying they can do that.

Mr. WALDEN. Do you think they should?

Mr. HUNDT. I think what they should do—and I hesitate to say to the current Chairman what he ought to do, but since you asked, I think they ought to take a fresh look at all the facts and law as exist right now, and they also ought to be down here listening to you all and having a robust discussion. But the key point is they have the authority.

Mr. WALDEN. Got it. Real quickly, the two remaining, because I have gone over my time—violated the rule. Conclude.

Mr. WILEY. I think—OK.

Mr. WALDEN. No, go ahead.

Mr. WILEY. All right. I think it would be a big mistake to turn away from the information service pathway that we have started and go back to common carrier regulation however that might be defined. I think we want to provide an environment where there is I think opportunities for investment, encouraging innovation, allowing businessmen to try to experiment and try to find ways to serve the customer. And I think to go back to a 1934 style common carrier regulation, which was really based on regulating the railroads, I think doesn't make any sense at all.

Mr. WALDEN. All right. Mr. Copps, real quick?

Mr. COPPS. My answer is yes, I do. The Court says we have the authority to do that. Whatever we do, we need to do it quickly, promptly and provide some certainty in the marketplace.

Mr. WALDEN. OK.

Mr. COPPS. I have always stressed the importance of that reclassification. People talk about Section 706. I have always said that there is authority there to do a lot of things. But what—we don't need now to get into months of third ways and fourth ways and fifth ways to thread this needle. We need some clarity. Business needs clarity.

Mr. WALDEN. Right.

Mr. COPPS. Consumers need clarity.

Mr. WALDEN. Yes—

Mr. COPPS. The Commission needs clarity, too. And we have to make sure whatever we do that things like interconnection and those things, consumer protections, are provided.

Mr. WALDEN. Appreciate that. I thank the indulgence of the committee. I turn now to the Ranking Member, Ms. Eshoo, for 5 minutes.

Ms. ESHOO. Thank you, Mr. Chairman, and to each one of our distinguished witnesses. What a rich, rich hearing with your testimony. Thank you very, very much. To Chairman Hundt, thank you for your eloquent summation, without any staff or other counsel to assist you late last night.

In your testimony, you discussed the importance of the decision that this country made to allow Internet service providers full use of the existing telephone network without paying the owners anything. It was a very, very—I mean one of the essential platforms in the success of the Internet. So, essentially, we said the incumbents could not be gate keepers that charge a toll for getting online. In your view, does yesterday's circuit decision reverse that longstanding policy?

Mr. HUNDT. No, it doesn't. And I think, Congresswoman, that you have put your finger on the central issue, if I may say. Yes, Internet service providers are gate keepers. And they also are two-sided networks—or two-sided gate keepers, like any gate keepers.

Ms. ESHOO. Um-hum.

Mr. HUNDT. There is somebody on one side and somebody on the other side.

Ms. ESHOO. On the other—um-hum.

Mr. HUNDT. And so the situation then is very similar to the credit card industry. So we all have credit cards. And then there is the credit card company. And then on the other side of that, there is the restaurant. And it is very useful for restaurants that we all have credit cards. And it is useful for us that all the restaurants will take them. But it is not so useful if the gate keeper says now, some of these restaurants, we are not going to allow them to participate in the system.

Ms. ESHOO. Um-hum.

Mr. HUNDT. Translating that to the present, if the Internet service provider were to say, you know, not all the people that are putting the content on their computers, we don't want all of them to be able to have access to all of the users.

Ms. ESHOO. Um-hum.

Mr. HUNDT. That is a problem if the gate keeper behaves that way.

Ms. ESHOO. Um-hum. Thank you very much.

Mr. HUNDT. That is the central issue.

Ms. ESHOO. Yes, thank you very much. To Chairman Powell, it is wonderful to see you again. As you know, under current law, cable subscribers are required to buy the so called broadcast basic tier as a condition of getting access to any other cable programming. As we transmission consent fees continue to rise and are inevitably being passed on to consumers in the form of below the line fees—I mean, I don't think it is a sustainable business model, most frankly. I just don't think that it can continue to work this way. Do you think that the so called must buy requirement makes any sense? Shouldn't consumers have the ability to lower their bills by electing to receive broadcast channels over the air?

Mr. POWELL. I don't. I think it should be an extraordinary circumstance in which the Government tells the consumer you have to buy a television package as a prerequisite of buying more of what you want, which is essentially what the rule does.

Ms. ESHOO. Um-hum.

Mr. POWELL. The other grounds on which I think it is fatally flawed is only cable subscribers have that obligation. DISH and direct satellite subscribers do not have that obligation. And they are the second and third largest MVPDs in the United States. Yet, a consumer who subscribes to DirecTV does not have to, under a must-buy rule, purchase those programming. But if they switch to Comcast or Time Warner Cable, they do. That is the parity point that I was making, and I think is a perfect place for harmonization.

Ms. ESHOO. Um-hum. Thank you very much. Chairman Copps, thank you for being here today, the man with real wisdom, the man that we always count on to put—place Democracy front and center of everything.

Mr. COPPS. Thank you.

Ms. ESHOO. You know so well that since Citizens United, the last two election cycles that have set records for money spent, including hundreds of millions of dollars from undisclosed sources, the bulk of this so called dark money spending by outside groups that hide their donors go toward negative TV ads. We all know that. Would you recommend changes to the Communications Act to ensure that voters are informed about who exactly is behind these anonymous TV ads, and is there anything in your view that the FCC can do on its own without Congressional intervention?

Mr. COPPS. I would recommend enforcing the statute that we already have. And if you take a close look at Section 317, which has to do with sponsorship identification, and which goes back even before the Telecommunications Act of 1934 was written. It goes back to 1927—ensuring that listeners and viewers, more recently, know by whom they are trying to be persuaded, whether it is a commercial product or a political product. Those rules were last revisited in a meaningful way by the FCC in the 1960s, which repeated that people have a right to know by whom they are being persuaded. Since then, we have all these new avenues of dark money and super PACs and all of the rest. But we also have the authority, re-

cently reemphasized by the Government Accountability Office, the recommendation that the Commission update those rules and get on with the job. So we can have this kind of information available to consumers so that when you see that negative ad, and it says brought to you by citizens for Purple Mountain Majesties and Amber Waves of Grain, and it is really a chemical company dumping sludge into the Chesapeake Bay, potential voters—citizens have a right to know that and will know that. That is basic information that you need to have if you are going to have a viable civic dialogue. So this is something the FCC can do. It doesn't await a President to making a proposal to do this. It doesn't involve Congress having to pass a law. It involves the Federal Communications Commission doing its job. And it could do this within 90 to 120 days and update the rules to take mind of the new dark money avenues that I was talking about earlier. So this would be a real way to shine a little bit of sunlight on the dark world of TV political advertising.

Ms. ESHOO. Thank you very much. And, Mr. Wiley, thank you for your wonderful distinguished public service. I will submit my questions to you in writing. All right?

Mr. WILEY. All right. Thank you.

Ms. ESHOO. Thank you. Thank you, Mr. Chairman.

Mr. WALDEN. Thank you. We will now turn to the vice chair of the full committee, the gentlelady from Tennessee, Mrs. Blackburn, for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And thank you all for the time this morning. I want to pick up where the subcommittee chairman left off talking about the responsibility of the FCC and what it would look like going forward. I think that it is fair to say—and, Mr. Powell, I will address this to you, because I have heard you say, you know, AOL was on top at one point when you were on top of the game. And where are they now I think was the comment. But anyway, looking at what the FCC would be, and as we look at the Telecom Act, should be begin to think in terms of the FCC being more as enforcement rather than regulatory in its scope? Mr. Powell, and then Mr. Wiley, I would like to hear from you.

Mr. POWELL. I think some aspects of that deserves a fresh examination. You know, the FCC, which I am a huge supporter of. I have served there with great people, and I think it does an enormously great public service and that we functions that are critical to it in spectrum management and many other things. But it is one of the last of the New Deal era agencies that actually has affirmative economic regulatory power, that is the ability to set the prices, terms and conditions of market activity as opposed to having a more significant enforcement, policing or consumer protection role. Not to say that some of that may or may not still be warranted, but I do think that is a kind of holdover from judgments of different administrative eras. And I would recommend, you should look at the dichotomy and the balance of that role.

Mrs. BLACKBURN. Look at the balance?

Mr. POWELL. I do think good leaders, and many of the sitting at this table have migrated more toward that more defensible role.

But many of those provisions still remain. And I think they are worthy of second consideration.

Mrs. BLACKBURN. OK. Mr. Wiley?

Mr. WILEY. Yes. I would agree with—largely with what Chairman Powell has suggested. I think the Commission does have strong enforcement efforts today. And some would say almost too strong in some instances. But I think frankly a lighter touch is the way to go in this area.

Mrs. BLACKBURN. OK. Let me ask you this, privacy data security, it is front-page news right now. It is going to be. Do you think that now is the time for the FCC to focus on its core competencies, or should it move over and look at privacy data security, or leave that to the FTC, Mr. Wiley?

Mr. WILEY. I didn't hear that one. I didn't hear it. I am sorry.

Mrs. BLACKBURN. Oh, privacy data security, leave it to the FTC and the FCC focus on its core mission, or what is your thought on that?

Mr. WILEY. I think so.

Ms. BLACKBURN. You think so.

Mr. WILEY. I would agree with that.

Mrs. BLACKBURN. OK. Mr. Powell, coming back to you, 706, we are hearing a lot about that today. And you may have had others who think that, you know, the FCC—that 706 is an invitation to come in and regulate Internet services. So as you look at 706, do you agree that the provision was intended to give the FCC the ability to forebear from regulations that would stifle broadband investment and innovation?

Mr. POWELL. I agree that the decision certainly gives them the power to forebear. And for many years, many people interpreted 706 as principally deregulatory. It speaks of removing barriers and removing obstacles, less so than introducing them. I certainly was serving at a time where the Commissions had held that that was not a separate basis of authority. And in fairness to the facts, every Commission had so held until recently. So that was the position of the law when I was there at least. I will say though that I think if the Commission is going to have a role in broadband, I highly would prefer that be under the construct of the light regulatory information services definitions that reside around with 706 than to make a radical transformation to Title II as a regulatory framework for those questions.

Mrs. BLACKBURN. OK. Thank you very much. Mr. Chairman, I will yield back the balance of my time.

Mr. WALDEN. The gentlelady yields back, and the Chair now recognizes the gentleman from California, the ranking member of the committee on the Democrat side, Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman. My colleague, Ms. Blackburn, suggested the FCC needs to act more like the Federal Trade Commission. The FTC does important consumer protection work, but I believe we need an agency like the FCC that can write forward-looking rules of the road for industry and consumers. Chairmen Hundt and Copps, do you agree with that?

Mr. HUNDT. Absolutely, Mr. Waxman. Forward looking is—here is the best example of a useful forward looking law. It is in the incentive auction legislation that you passed where this Congress

said we want the FCC to establish, before the auction, a generally applicable rule about how much spectrum anybody can buy. That has to be forward looking. You don't want to go into the auction with your money and not know whether or not you are going to be permitted to win in the—keep the license that you thought you were the high bidder on. That has to be forward looking. So that is a great example of you all asking for a forward looking rule and really deserving a forward looking rule.

Mr. WAXMAN. Um-hum. And, Mr. Copps?

Mr. COPPS. Absolutely. I concur. We all talk about how rapidly the telecommunications, technology and services are changing. The Commission has to be aware of that, have the flexibility to react to that, and certainly to fulfill its responsibilities to look into the future and try to determine how best to fulfill its mission, which includes consumer protection, includes privacy and includes ubiquity of services.

Mr. WAXMAN. Um-hum. Mr. Powell, in light of yesterday's decision, the DC Court circuit recognized the authority granted by Congress to the FCC in the '96 act. Do you believe that the Agency can properly oversee the growth of broadband infrastructure services?

Mr. POWELL. I do. For a matter of record, as Chairman of the FCC and the Commission that classified broadband the way that it is today, we quite pointedly recognized that the importance of that continuing role to a degree. And we believe that the authority existed within that Title I framework to take care of those circumstances. Whether you agree or disagree, the Court certainly validated yesterday, from a judicial standpoint, that Title I and 706 do provide that flexible authority.

Mr. WAXMAN. Um-hum. And, Mr. Wiley—

Mr. WILEY. Yes.

Mr. WAXMAN [continuing]. If you agree the FCC has the authority, do you think it ought to use it?

Mr. WILEY. Well, the Court said that the Commission could have authority in this area. I would strongly advise, in my own view, the Commission to let the marketplace develop and if problems do exist, then to step in. There are avenues—if we find blocking, if we find discrimination, there are avenues that can be taken. I think the problem is sometimes we are in search of a problem here that may not exist. I think if you look at all the suggestions of the carriers that have come out of the decision from yesterday, all want to keep the marketplace open, all want to give consumers access to various kind of content. And I take them at their word. I think that is going to develop.

Mr. WAXMAN. Um-hum. Mr. Hundt, if we want to keep the marketplace open, isn't it reasonable to anticipate that some of the players will not want it to be so open if it is to their financial advantage? Shouldn't the FCC play a role to make sure prospectively that we have an open, competitive market with the consumers being in charge?

Mr. HUNDT. I completely agree. And if I might, I think it is important—well, let me say this. I have the view that the case and the statute have the following meaning. Section 1706 gives the FCC the authority to accomplish the goals you just stated, without also requiring the FCC to make a classification decision.

Mr. WAXMAN. Um-hum.

Mr. HUNDT. That is to say it can make a classification decision and act with the authority that would come from that, but it doesn't need to do that in order to pass rules that are authorized under Section 1706. Meaning 1706 and the common carrier provision are two independent bases for FCC action. That is why the FCC can choose both or either in order to have a—making that would accomplish the goals you described.

Mr. WAXMAN. Didn't the Court say that the FCC made the wrong choice and they have two titles they can rely on? You are saying they don't need either title, they can just go ahead and think about regulation?

Mr. HUNDT. Yes, I think what the Court said is if you do choose the information services classification, then you are bound by the restrictions in that.

Mr. WAXMAN. Um-hum.

Mr. HUNDT. But you don't need to make that choice in order to accomplish the goals that you are desiring, which the Court has said that it approves of the goals.

Mr. WAXMAN. Um-hum. And you don't need to be a—regulate as a common carrier either?

Mr. HUNDT. Beg your pardon?

Mr. WAXMAN. You don't have to regulate it as a common carrier either?

Mr. HUNDT. The Court has said you can choose that, or you can choose 706 or you could choose both. The only thing you can't do is choose information services classification and pass common carrier like rules.

Mr. WAXMAN. Um-hum. I see. Thank you. That is very helpful. Thank you, Mr. Chairman. Yield back my time.

Mr. WALDEN. The gentleman yields back. And the Chair now recognizes for 5 minutes the former chairman of the full committee, the gentleman from Texas, Mr. Barton.

Mr. BARTON. Thank you, Mr. Chairman. I have listened to our testimony and our questions so far. I am going to make a brief statement before I ask a question.

I was here in 1996. And that act was a philosophical change from where the committee had been and, to some extent, where the country had been in terms of telecommunications policy. You had a Republican Congress, House and Senate for the first time in over 50 years, maybe 60 years. You had a Democratic President, Mr. Clinton, who came from a kind of conservative pro-business background down in Arkansas. And the former chairman of the committee, Mr. Dingell, and Mr. Waxman and Mr. Markey and some of those folks, had a very regulatory approach, although not totally so, and the Telco Act of '96, Mr. Bliley and Mr. Fields, we went—we decided to go with a market approach. And, Mr. Copps, as he has pointed out, markets don't always work. But, generically, if they are open and transparent, unless there is a natural monopoly, they do give a lot more choice to people. And that is what the Telco Act of '96 did. It rejected the philosophy that the Government knows best, that the regulatory knows best, that people can't—if they have access to appropriate information, can't make choices that are good choices. And we see reflected today in some of the

questions that Mr. Waxman especially just asked, you know, that some of my friends on the Democrat side just don't like a market approach. You know, how dare it be possible that under Title I, Informational Services, you can have an open, transparent Internet, and you don't need the FCC to tell you what to do? My God, that is scary. We better get that FCC back on the job. They just maybe—you know, if they can't do it under Title II as a common carrier, well, they are just going to have to figure out how to regulate under Title I.

Well, you know, if you look at the explosion and what has happened, I mean, I had a young person, a very young person about 9 years old, come into my office down in Texas and apparently did not know there was such a thing as a hard line telephone—did not know what that was on my desk. This young lady thought a phone was just something you carried around with you. And her parents were very young, and they didn't have hard line phones in their home. And they worked out of his truck doing contracting and stuff. She didn't know what it was.

So, you know, this thing that Mr. Upton and Mr. Walden are starting to take a real comprehensive review, and working with Mr. Waxman and Ms. Eshoo, it is a good thing. But philosophically, I don't want to go back to where I have to depend on the intelligence of Mr. Copps or Mr. Powell or Mr. Hundt or Mr. Wiley and the three or four other wise people at the FCC to know what is best for me in telecommunications policy. You know, I think if we set the ground rules—and I agree that you have to have a traffic cop. But I don't agree that you got to be so prescriptive that the market just flat gets strangled before it even has a chance to get underway.

So my question, and I throw it open to the panel: Is there still a need for a Title II in the telecommunication marketplace today, could we deregulate the telephone companies in totality because, you know, there really is no such thing as a natural monopoly anymore?

Mr. COPPS. If we can find a way to assure that some of the qualities that people fought for long and hard in terms of privacy and public safety and consumer protection do not accompany the new tools of broadband and the Internet as the accompanied telephone, then I think we are in trouble. I like the market approach, too. And it was decided long ago that the telecommunications industry, the media industries would operate on the capitalistic system. And you don't blame business for trying to seize market control or capture the market, or even to have gate keeping. But we have always, since very early in the last century, had protections against untrammelled building toward monopoly and duopoly.

I read the '96 act, and I wasn't as intimately involved with it as you were. But I followed it with some degree of interest. As being somewhat more proactive, I read that act as instructing the Federal Communications Commission to do what it needs to do to encourage bringing the most advanced telecommunications feasible to all of our citizens, no matter where they live at reasonably comparable prices, reasonably comparable services, allowing them to access media that serves communities and provides information that are necessary to exercise a citizen's responsibilities in a Demo-

cratic society. So I think yes, a light touch where possible. But, you know, we set here and talk about well, we have to do away with these stove pipes and all. And I agree to that with some extent. But we have—in trying that—I mean, if we are going to say we are going to treat a telephone call you make in the Internet entirely different than we make a telephone call somewhere else, that is not functional equivalent. That is not treating technologies alike. So I think—

Mr. BARTON. I know my time is way over. But it is something to think about, because we have got a real chance in the rest of this Congress and the next Congress to build on what we started in '96.

Mr. WILEY. I would just like to say that I agree with much of what you say. I think in a competitive marketplace that we see today with the kind of IP centric world, I think economic regulation has to be considered with some skepticism. Because if the markets are competitive, if you don't have market failure, then the question is why should the Government be stepping in? Consumer protection, E911, you know, those kinds of things, that is a different story.

Mr. BARTON. Right.

Mr. WILEY. But we are talking about economic regulation here. And I think it is more questionable. And I certainly wouldn't be thinking about going back to common carrier world in an information services environment. I don't think that makes sense.

Mr. WALDEN. Well, thank you. The gentleman's time has expired. And the Chair recognizes for 5 minutes the gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman. Once again, thank you to our witnesses for your testimony today. We have talked a lot about net neutrality in the court decision. So I would like to maybe go to a couple different topics and ask Chairman Hundt and Chairman Copps about special access. How can the FCC enhance competition in the special access marketplace? And is new statutory authority necessary, or do you think the Commission has the sufficient authority to ensure that the markets are competitive?

Mr. COPPS. On a special access, I think what needs to happen, yes, I think the Commission has the authorities for the FCC to make up its mind. I was before this committee, and I think you were here too. And perhaps it was Mr. Markey or somebody who asked us all back in 2007 to sign a letter saying we would have this problem resolved by September. And we all said whoopee, let us do that. And it hasn't been done yet. All these 7 years have gone by. Enormous amounts of money are at stake here. The ability of competitors to enter the business and to compete is at stake here. I am pleased to—at some signs now that the FCC is beginning to move. And I want to especially commend you, because I know you were a big proponent of getting this data collection process going. And that is the prerequisite of doing something final on this. The Commission also has to look at allegations of anti-competitive practices in special access, such things as loyalty mandates and excessive early termination and shortfall penalties. But getting this right is important. And each year that goes on is billions of dollars

going to maybe where they should go or maybe where they shouldn't be going.

Mr. DOYLE. Thank you. Commissioner Hundt?

Mr. HUNDT. I echo Commissioner Copps' remarks and would just add this is another example of a very useful forward looking rule. Or to put it another way, we could all use a forward looking rule on this topic.

Mr. DOYLE. Thank you. Yes. And, Commissioner Copps, we have been waiting years and years and years. And I hope before my tenure in Congress is over that we will see the FCC do something on special access.

Mr. COPPS. Yes.

Mr. DOYLE. And I intend to be here a little bit longer. Commissioner Copps, the FCC recently closed a very successful low power FM application process, and is currently considering thousands of LPFM applications. And I want to personally thank you for your efforts in that regards, and ask you what other opportunities you see for the FCC to further empower communities in innovative ways?

Mr. COPPS. Well, first of all, I want to thank you, because without you and the leadership of your colleagues here, this would not have happened. We wouldn't have had that window, the first one opened since 2000. And it is a window of enormous potential. So number one, we want that to move forward with all dispatch and maybe go from 800 low power stations to maybe thousands of them.

Going beyond that though, we just have to look at whatever kind of options we can think of to encourage community radio, to revivify the peg channels and make sure that they are not just cast aside as some of the big companies seem to want to do, look at new models for noncommercial media, nonprofit media. And that applies not just to media companies but to telecom companies, newspapers and so many other things. And there is a lot of potential here in a market that doesn't seem to be able to provide all the tools that we need for media and for news for nonprofit media to step in. But they are also dragging its feet on making a lot of these determinations that it should be making. So low power, yes, looking at channels five and six are all sorts of options out there, put some special emphasis on using community radio and diversity in communities and native lands. It is just a field that is rife with potential if we can just step up to the plate and realize our responsibility to do it.

Mr. DOYLE. Thank you. Gentlemen, thank you for your insight today. We appreciate it here on the committee. And I will yield back, Mr. Chairman.

Mr. LATTA [presiding]. Thank you very much. The gentleman yields back the balance of his time. And the Chair now recognizes himself for 5 minutes.

And, Mr. Powell, thanks again for you being here today. And if I could just start with some questions to you?

Mr. POWELL. Yes, sir.

Mr. LATTA. Yes, it is kind of interesting, because I am reviewing your testimony and also Mr. Wiley's. You both used very similar language in spots. And in your opening statement, you said that

this market requires a greater degree of business flexibility, fewer prescriptive rules and an assurance that any Government involvement is applied on a technology-neutral basis and creates a better investment climate. And I also saw that Mr. Wiley said in his testimony that the Government can't keep up, and there is a need for flexibility and a technology-neutral framework in his testimony, as well. So, very similar language.

But in your testimony, when you go through it—and I found it interesting, because when you are going through your seven points—and for simplicity—one of the things that you bring out—because you were also talking about flexibility and having a better business climate—you state in your testimony that since 1996, we have seen a trillion dollars invested in an Internet infrastructure. And then you also laid out that the simplicity has to be there. But in that simplicity, you said that practicing simplicity can be scary.

Mr. POWELL. Yes.

Mr. LATTA. And it takes courage to discourage—discard old ideas and rules that are no longer needed. Could you give a couple examples of those?

Mr. POWELL. Yes. It is a great, challenging question. I think I might actually go back to some of what Mr. Barton was talking about. If you think about one of the wisest things that was done in the 1996 act, it has nothing to do with the individual rules. It was the fundamental judgment that the Government rejected the natural monopoly thesis and believed instead that competition was the more fruitful approach. But common carriage law inherently is about a Government-sanctioned monopoly. It is essentially the queen of the realm who grants an exclusive license to a ferry boat captain to go across the river and in exchange for all the privileges of that monopoly, they agree to be bound to serve all the citizens in a nondiscriminatory way and other things that the sovereign wishes to have as part of that exclusive benefit—mutual in some regards: The monopolist gets the exclusive profits, and the realm gets the benefits of serving all the citizens.

In some ways, in 1996, the Government sued for divorce from companies through, you know, the notion of an exclusive monopoly and instead said, "Go compete, raise your own capital, no guaranteed return on investment, no guaranteed success." But yet, the lingering notions of common carriage, which are still in the statute and, by the way, still being raised in the context of the net neutrality debate, still hover around our regulatory questions. To me, whether the country comes to some committed conclusion that even with its challenges and the need for oversight that we are really about competition and are really ready to let go of common carriage is a great example, a fundamental one, of how to make that decision.

Mr. LATTA. Thank you. And let me follow up with another question. When you are looking at assessing the competition in the communications industry, do you think updating the Communications Act should modify how the FCC currently conducts its competitive analysis?

Mr. POWELL. I think so, only because I think there is some ambiguity there that when managed in responsible hands works fine. At times, it doesn't. I am worried about the FCC merger review proc-

ess in part because it professes to do a competitive analysis following essentially anti-trust guidelines administered by other departments. But under the public interest standard, which I do think is valuable, it turns into a competition of conditions. And as an anti-trust lawyer, I used to believe that the FCC, if they are doing something bad, shoot them. If they are not, don't let them cure harm by how many good jelly beans you can put on the scale and to make the thing go away. And then by doing it in a way that it extracts these concessions as a voluntary proffer, you make sure that the case can't be appealed to the courts, because you no longer have standing. I think insulating the review process from judicial review through the conditioning mechanism, and allowing the commissioning mechanism to be a vehicle by which the Commission can legislate beyond its authority can get companies to do things in the context of that proceeding it couldn't pass laws about, borders on kind of administrative improbability. So does that happen every time? No. Do I think it happens sometimes? Yes. And I think Congress should at least examine the review process and see if whether better controls could be in place.

Mr. LATTI. Thank you very much. And I see my time has expired. And the Chair now recognizes for 5 minutes the gentlelady from California, Ms. Matsui.

Ms. MATSUI. Thank you, Mr. Chairman. And I want to thank all of the former Chairmen for being here. This has been really an interesting and formative discussion.

Under Section 254, carriers have certain obligations to provide universal access. In the DC Circuit's decision yesterday, the Court made clear the FCC has a similar charge under 706 to ensure that all Americans have access to broadband and that the FCC has authority over broadband providers to meet that mandate from Congress. I have two questions for all of the Chairmen relating to the Court's decision yesterday.

The first, do you agree the FCC should and must promote universal access to broadband for all Americans, Mr. Wiley?

Mr. WILEY. Yes, I would agree with that.

Ms. MATSUI. Sir?

Mr. HUNDT. Yes.

Ms. MATSUI. Mr. Powell?

Mr. POWELL. Yes.

Mr. COPPS. Absolutely. There is no way you can be a functioning member of society without access to this technology.

Ms. MATSUI. OK. Then does the Court's decision yesterday affirm the FCC's authority to transition the universal service fund to broadband, Chairman Wiley?

Mr. WILEY. Yes, I think the FCC has done a good job in looking at that. I am concerned somewhat with the size and the growth of the universal service fund, and I think the Commission has got to look at the competency, the pay and the covering that and some issue that has got to be looked at, I think.

Ms. MATSUI. But it is generally yes. Chairman Hundt?

Mr. HUNDT. Yes.

Mr. POWELL. Yes, I would commend Chairman Genachowski for migrating the fund toward broadband, and he did it on a theory of

706. So in that extent, I think seven—the ruling yesterday only strengthens the Commission moving in that direction.

Ms. MATSUI. Good.

Mr. COPPS. Yes.

Ms. MATSUI. Chairman Copps? That is great. I appreciate your views, because I believe that it is one of the potentially biggest unintended consequences avoided by the Court's decision, because transitioning a USF to broadband is really a critical step toward achieving universal access and adoption in this country.

Chairman Hundt, you said that yesterday's circuit decision is a victory for Congress and the smart flexible approach of the 1996 Telecom Act. How can we continue that success? Are there any unintended consequences we should watch out for as this committee starts the process of updating the Communications Act?

Mr. HUNDT. Well, I think as a number of you have mentioned, of course the FCC on remand needs to commence a new proceeding, which I believe Chairman Wheeler has already said that he intends to do.

Ms. MATSUI. Um-hum.

Mr. HUNDT. And, naturally, that should be and will be an open proceeding. I am sure this committee will have an ample opportunity to express its views. I don't myself have the ability to forecast where that will come out or should come out, because I think it is really, really important to examine all the new facts about emerging network architectures and about competition problems on both sides of the two-sided network. I would just say that is why it is so useful that the Court has said that the FCC's authority is broad and powerful, because the technologies in the network architectures and the competition problems are constantly changing. And the FCC, in rulemaking, has the ability to adapt to those changes, sometimes eliminating rules, sometimes writing new rules. So this is a very, very workable process that we have here. And, as I said before, congratulations to this committee for the 1996 act, which did create this legal culture.

Ms. MATSUI. Um-hum. Chairman Powell, would you like to comment?

Mr. POWELL. I am sorry. Can you refresh the question?

Ms. MATSUI. Well, I really—

Mr. POWELL. Sorry.

Ms. MATSUI. You know, we—as Chairman Hundt commenting that the Court decision he felt was a victory for Congress and for the smart flexible approach of the '96 act, are there any unintended consequences that we should watch out for as we reexamine and update the Communications Act moving forward?

Mr. POWELL. Yes. Yes, I more or less would agree with Chairman Hundt.

Ms. MATSUI. Oh.

Mr. POWELL. I mean, I think to the degree that, you know, in some ways I saw a quote the other day that I thought summed it up great, which is it is not a victory for any side, but it might have been a victory for the debate. And that is that the Commission continues to have a meaningful role in the oversight and protection of broadband without crossing the line into the more dangerous concerns around common carriage. And if that is ultimately the out-

come, maybe that is workable. Unintended consequences, I do think the Court even struggled with them itself, which is 706 is an extraordinarily broad, unconstrained provision. How it is interpreted, and how responsibly it is interpreted and applied, I think is important, because I think, you know, Congress hasn't spoken with much specificity about broadband regulation. And to take a provision as open-ended as vague as 706 and see that as the foundation for everything broadband going forward has potential risks and dangers, but I think that will be worked out over time through the—through its application and through dialogue with Congress.

Ms. MATSUI. Thank you very much. Chairman Copps?

Mr. COPPS. While I am pleased that the Court recognized the authority of the Commission, I don't know that I am ready to declare victory yet. If it is a victory for the debate, that is not necessarily a good thing, because we have had so many years of debate while the evolution of the Internet continues and gate keeping shows the rise of its ugly head. So it is a victory if the Commission reacts and reacts promptly and provides some certainty and some guarantees. But we have lost a couple of years looking for third ways and other ways, and I don't want to lose a couple more years going down that road.

Ms. MATSUI. Well, I think it is an opportunity here.

Mr. WILEY. Well, I was just going to say—

Ms. MATSUI. Yes?

Mr. WILEY [continuing]. I think if it is a victory, I think it is a victory for technical innovation, a victory for investment, and ultimately a victory for the consumer. And I think that we ought to see how the marketplace develops in this area, and see where the problems, as I said earlier, really come about as some people predict.

Ms. MATSUI. Well, I think this is an interesting moment in time. And we have to provide a thoughtful way as we move forward. And I appreciate all your comments. Thank you very much, and I yield back.

Mr. WALDEN [presiding]. The gentlelady yields back. The chairman now recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Welcome you all. It is good to have you. And I think it would be safe to say that no one envisioned this world in which we live in technologically, no one envisioned in '96. So really, the basic first question is, in a rewrite for public policy elected officials, or even folks in a Commission to envision what the world will be like 10 years after a rewrite, that is going to be—that is impossible to do, is that—most people view that as correct? No one knew what '96 would come. So that talks about what these basic premises that I enjoy, Democracy, freedom, marketplace, capitalism. The one thing that hasn't really been addressed is consumer choice, and how that really does drive innovation and drives—and it is that marketplace that—and I remember going to the consumer electronics show, and the MP3 was being unveiled. And I just was amazed at how much capital flowed for just music in this space, in the technology space. And that is the same thing now with Internet, broadband, downloads, Pandora, you name it. It has all migrated to that. So we don't ever want to lose the aspect of the power of the individual consumer in this de-

bate, you know, versus what some people would say would be the power of a governmental regulatory arena or agency. And, Mr. Copps, I think that is true for these segments of society that feel they don't have access. I think that you can pull together, based upon technology, ability to get the word out through broadband information, newsletters and the like. I mean, the technology has allowed us to really—there is really no excuse for people not to have access to information flow today, even if they go through a universal service fund or they go to the library, they get on broadband through what we have been able to do through the E-Rates and all that other stuff, which we talked about a lot in your day, Mr. Hundt. So here is the basic question I have, because I—and a couple of you, in your opening statements, talk about silos. You were all members of the Commission, and you all were Chairmen, which is a different position than just being a standard Commissioner, because you had the responsibility for the whole body of workers within the FCC. So we have got consumer—we have got the bureaus and other things other than the bureaus. I only talk about bureaus. But you go on the Web site, you see all these other little offices and stuff, consumer and government affairs, enforcement, international media, public safety, wireless and wire line. So in a rewrite of the '96 act, should there not be some discussion on how we reform the Commission itself based upon what current technology is today? And I think, Mr. Wiley, you kind of talked about this a little bit. And just a guess at where it might head in the future? I mean, there is a future look, right, Mr. Copps? There is a future. But how do we reform the FCC itself and start tearing down some of these silos, which some of you have addressed are a problem? And if we can go from left to right? Mr. Wiley, if you want to go first? And that will be the end of my questions.

Mr. WILEY. Yes. I think what has changed in the Internet world is that you find different parties doing the same kinds of services, providing the same kind of activities that you wouldn't have thought of before.

Mr. SHIMKUS. Right.

Mr. WILEY. You wouldn't have thought of broadcasters being in the technology end, or cable being in the wire line field. But this is happening now. And I think therefore the Commission probably does have to change its internal structure. In a digital world, if you have functionally equivalent services being provided by different parties, I think they should be regulated in a functionally equivalent way. And that is not the way the Commission has done it through the years. It is not the way they are organized. It is going to take some change. I—

Mr. SHIMKUS. Thank you. Mr. Hundt?

Mr. HUNDT. You know, the French say well, that works in practice, but, you know, maybe it doesn't really work in theory. And I think it is really, really important to focus on practice. The current structure allows the FCC Chair, in what I will definitely describe as an open process, to reorganize the FCC to meet the objectives that are set by any particular Congress in any particular situation. And that is a good thing. So when this Congress had the wisdom to ask the FCC to auction spectrum in 1993, I was allowed—thanks to you—but not because of a statutory mandate, but because of

flexibility, I was allowed to create a wireless bureau which previously did not exist. At any given moment, it is hard to say exactly what the administrative structure ought to be. And I think the current system, which tells the Chair, "Figure it out, tell us what it is, you are held accountable." That is a good system.

Mr. POWELL. I do think form follows function. And I think certainly when I was Chairman, we merged few bureaus. Cable was a separate bureau from broadcasting. Today, it is the media bureau now with changes we made to try to reflect. I think a common principle is organize around the way it is seen through the eyes and the ears of consumers. And, you know, to me, at the time, television was television to most Americans. And making sure you had cross-pollination of the bureaucrats, professionals who—the bureaucracy and the professionals who manage that I thought was important so that they saw their functions through the same eyes of our constituents. And I think that is one principle you can follow. I do agree with Reed. I think the Chairman is also CEO. The statute assigns them that responsibility. I don't think we talk enough about the CEO role and the management of that operation. But I think there is plenty of flexibility to respond to that, if it is clear what it is we are trying to execute.

Mr. COPPS. I don't think there is any magic formula. Certainly, there have been times when the stove pipe approach has been too much in presence. I think Michael tried to work against that and go towards a little more holistic type of view. So did Chairman Genachowski. That being said though, you need the experts in these specific bureaus. There is a specific telecom expertise in the wire line and the wireless and all the details of that, and special access and everything else we are talking about. So I think you still have to have those bureaus. But if you can have—I think Chairman Genachowski established a consumer taskforce whose job it was to go across those agencies and look at whatever—or those bureaus—at whatever those bureaus were doing to assess the impact on consumer wellbeing. So I think that is a good approach. But it is a management thin and something that I think is the product of good leadership at the Commission and good oversight by the committee.

VOICE. Mr.—

Mr. WALDEN. We need to move on to Mr. Dingell, I think, for the next 5 minutes. Mr. Chairman?

Mr. DINGELL. I want to commend you for this hearing. I think this has been an important hearing. In the events of this week, you tell us that it is time that the committee is going to have to start looking at what we are going to do about bringing the '96 act up to date. I have enjoyed the comments that my dear friend, Mr. Barton, made in announcing my position as being strongly regulatory. Sometimes I have a hard time recognizing my position when it is set forth by other members. In any event, that is not important. But I would just like to remind everybody that this business of the '96 act started when we began to try and get Judge Greene out of the business of regulating the telecommunications industry. It also started when we started trying to get the amount of spectrum that was held out of use by industry and business and government, and get that available to people, and to see to it that we had a fair pro-

gram for dealing with our legislation and a fair program for dealing with these matters. I would like to welcome our friends, the Chairmen here for their appearance and for their assistance to us, and for what it is that they have done with us over the years.

If there is an attempt made to update the Communications Act, I will offer my support. Yesterday's court decision vacating the anti-discrimination and anti-blocking rules of the Federal Communications Commission open Internet order is proof that the Congress needs to bring our communication laws into the 21st century. Only clear direction from Congress will strengthen consumer protections, promote competition and give industry the regulatory certainty it needs to innovate in the future.

Now, as we go about this important work, I caution that we do so with great care, and on the benefit of a carefully collected and substantial body of evidence. This is going to require a rigorous oversight by the committee and considerable work to get the information that we have need of so that we can legislate properly. And I hope that the undertaking will be bipartisan in order so that any final product that we complete here moves through the Senate and to the President's desk for signature.

We have to resolve a number of very important high line and hard questions to inform our work as we move forward. I respectfully suggest that these questions included—or rather include but are not limited to the following. First, how do we improve and protect American's access to content, while also preserving the ability of private companies to monetize their investments for future growth? Likewise, how do we best foster the ongoing development of future technologies that will ensure American leadership in the fields of technology and communications? And then we have to decide how we are to promote the more efficient and fair use of value and increasingly scarce commodities like spectrum, which we have not administered too well of late, and if administered at off times on the basis of perhaps the amount that we could get for it in money rather than how it would serve the Nation to allocate this spectrum? Lastly, we are going to have to decide how we will ensure that the Federal Communications Commission, the National Telecommunications and Information Administration, and other related bodies function smoothly, protect consumers and promote growth rather than hindering it. Regardless of these answers, and the answers to these questions and others, I submit that our work should proceed from the conviction that the public interest is still and always going to remain the central concern that we have with regard to the Communications Act.

I have had the good fortune to be one of the authors of almost every major piece of telecommunications legislation passed by the Congress in the past three decades. And the public interest is in the heart of each, going back to the '33 and '34 act. I see no reason why that should be any different this time around. The only issue here worth exploring is what that standard has meant in years past, and whether there is any reason to give the Commission different guidance for the future in interpreting it as we address the other questions I have just outlined.

Mr. Chairman, I wish you Godspeed in this endeavor. And I offer you my support. And I am delighted that the Chairmen of the

Commission who have been here this morning to assist us in beginning this process, which I hope will go forward with reasonable speed, with great care and again, with great attention to the public interest. I thank you all for listening to me.

Mr. WALDEN. Chairman Dingell, thank you for your kind comments and your always generous words and willingness to work to improve our communication and other laws. We look forward to working with you. My only disappointment is you did not have a list of yes-or-no questions for this panel.

VOICE. Yes.

Mr. WALDEN. Now, with that, we will turn to Mr. Terry from Nebraska. And we look forward to your comments and questions, sir.

Mr. TERRY. Yes, you do. Thank you. And I just, for our esteemed guests here today, I want to follow-up on what my friend from California, Ms. Matsui, began. And that is with high cost areas. But I want to take it from a little bit different angle and get your input.

As kind of mentioned here, we have seen a convergence of technologies and services that are all kind of being wrapped into one anymore. And the same as—we talked about it in my early days on this committee in voice, and Barton brought that up. Well, now, it is in video. And so when we talk about a rural telecom and the Internet as a basis of delivering video today, it is kind of making—well, it is altering the way that rural telecoms used to work. And so we have a current legal structure with this QRA, and a mindset of—on treating rural telecoms like old copper wires, which a lot of them still are using. So I just want to ask your opinions about in Reform 4—or within the FCC, should rural and high cost areas—so, Mr. Copps, it even comes back to inner-city where you have low-take by high-cost. How do we think about this differently in making sure that if you live in rural America, or you are setting up a wind farm where you want to continuously oversee but remotely, thereby requiring broad broadband for all of that data? Do we need to think about things differently than high-cost, rural high-cost, inner city? Mr. Wiley, why don't we start with you?

Mr. WILEY. Well, I am not an expert in the rural telephone area. But I still think there is a concern that is different than in the big cities. And I think, therefore, high-cost funds still are something that have to be part of the full equation, in my opinion. And you know that better than anybody in Nebraska.

Mr. TERRY. Yes.

Mr. WILEY. So I don't have any huge input to you today as to how to change the system.

Mr. TERRY. Yes. And later, I guess to clarify, since video and Internet are becoming the same, and your telecom is really maybe your sole provider of that, it is all meshed together. Does that change anything, Mr. Hundt?

Mr. HUNDT. I think that many people have said we really want broadband to be the network for everyone in the country. In rural areas, as I am sure you know, Congressman, there are many places where the cable broadband penetration is as low as 15 and 20 percent, not anything nearly as high as it is in Washington DC or in the suburbs. Now, that is a problem that the FCC really does need to think about in conjunction with the industry that Michael represents so ably. And in particular, not to touch too many other but-

tons, the recent increases in the prices of the content have a disproportionate impact in rural America. Because when those content price increases are passed on by the cable industry, they are taking a lot of money out of the wallets of the people in those areas, and those are the same areas where broadband is expensive. And so as people are paying more for the broadcast content and the cable channel content, they have less available to purchase broadband. This is a problem that is real and existing right now. And this also gives me a chance to pass the solution over to Chairman Powell.

Mr. POWELL. Congressman, I think you make a couple of important points that we should just put top of mind, which is the challenge of reaching that last five to seven percent is because under traditional market fundamentals, they are uneconomic. And if they are uneconomic, the only way to cure something is you have to change the economic equation. This is why I have always had no problem understanding and respecting the Government has a meaningful and significant role in terms of our ubiquity objectives in universal service, of universality and affordability, to play a role through either the universal service program or any other properly constructed program to try to change the economic equation that attracts the infrastructure that those communities deserve.

I think it is a more optimistic scenario in the modern world than it was before. Because in the old world, we had a single technology that tried to string twisted copper wire between two farms 300 miles apart, and that was enormously and hideously expensive. One of the things I think really opens up an opportunity today is because of a common IP platform, we can essentially deliver almost any kind of service over almost any kind of network. So that means that wireless and probably its companion of satellite available services have real hope and promise for rural America. That is they have very dynamically different cost characteristics. A satellite at 28,000 feet sees rural Nebraska no differently than it sees Manhattan. Wireless has a much lower cost infrastructure for some of those areas. So I think that isn't a complete answer. But putting a lot of energy and investment into how those services will solve those problems is useful. And I think as the Chairman of the FCC is moving toward and IP network common regulatory proceeding, that convergence you are talking about also can get harmonized and the universal service program get harmonized along with it.

Mr. TERRY. Thank you. Agree.

Mr. COPPS. I have a little different answer. Reasonably comparable services at reasonably comparable prices is the injunction and the charge of the Telecommunications Act. Reforming USF, which the Commission is in the process of doing with lots of wrinkles and problems to work out, no question about that, is certainly an important part of the equation. But anybody who thinks that the universal service fund alone is going to bring this country the kind of high speed low-cost broadband that we need to have to be competitive in the world arena in the 21st century, I think is not looking at the situation as it is. This has to be an infrastructure mission. Our country has had infrastructure missions before when we came together to build highways and railroads and rural electricity, and so on and so forth. And that is what we need now. We are not going to be competitive. We are not going to get out of the

holes that we are in unless every citizen in this country has that access. And, yes, it is reaching that last five to seven percent. That is extremely important. But way more than half of our homes don't have the kind of high speed, low-cost broadband, fiber broadband, that we are going to really need to be competitive. So we need to look at that, not just as an FCC problem but as a problem confronting our Government and our society, and act upon it and figure out whether we are really serious of being competitive in the global sweepstakes.

Mr. TERRY. Thank you.

Mr. WALDEN. The gentleman yields back. I look to the gentleman from New Mexico, Mr. Lujan, for 5—

Mr. LUJAN. Mr. Chairman, thank you very much. And I must say, I was concerned with some of the approach that was being taken in the line of questioning leading up to those last responses to my colleague where for the first time I heard the importance of rural America. Coming from a western State, a congressional district that represents 17 of New Mexico's 22 tribes and the sprawling nature associated with what the west brings us, many parts of rural America where our food is grown, where energy is generated, critically important to be able to get coverage to these areas. And as I joked with Chairman Wheeler when we had him in front of us a couple of weeks ago, I explained to him that, you know, these last flights home, it has been great to see the TSA debating whether we can make phone calls at 30,000 feet. I know that I have streaming video content at 30,000 feet. I can communicate with my office and anyone else that I so choose to. So if I can communicate with constituents and get the video content that I want at 30,000 feet, why can't I do it on the ground in rural America? The technology is here. And there is no reason that we can't push it out. To the three responses, I just can't say thanks enough for that.

Chairman Copps, with the response associated with the very aggressive push to infrastructure investment in America, it is absolutely needed. And we shouldn't forget, especially as we talk about different ideals and philosophies that we have on this committee, and even in this Congress and across the country, that it was in many conservative and rural parts of America that benefited from Government investment with rural electrification, with major water projects that provide us power now that could be in question because of water flows—a whole other topic of conversation, but nonetheless that we need to make sure that we are addressing.

So, Chairman Powell, you talked about twisted pairs and what that brought us, decisions that were made as a result of the '96 act. And looking at Section 706(a), I am not certain what we are arguing about with concerns in that particular area. It is encouraging deployment of reasonable and timely basis on advanced telecom, especially for educational purposes. There may be some concerns with some of my colleagues on a price cap regulation. But regulatory for bands, measures that promote competition in local markets. This could be read by any member on this committee, encouraging ideals that I think that we all share.

But one thing that hasn't been talked about very much—and even given the fact that there was a huge data breach with Target, 70 million customers that were impacted, is the security of this

network. I would hope that—and I would like to get your opinion if 706(a) provides us the necessary standards to be able to bring safeguards, or if you think that that is something that needs to be addressed? And I would like to invite comments from each of you. Mr. Hundt?

Mr. HUNDT. As Chairman Powell said, Section 1706 is very broad. And I think that it is an opportunity and a duty for the FCC to dig into it and to create an appropriate framework, with the help of this committee and its counterpart in the Senate. If I might continue your point—your theme of rural America, there are a number of other provisions as well in the '96 act that the FCC can use to try to achieve the goal of completely widespread broadband, even in rural and high cost areas. And one that I would identify is the current proceeding to re-imagine the E-Rate.

The E-Rate, if we went—I just recently met with the chief librarian in Pima County, Arizona, which isn't very far away from you. And you know the geography is not dissimilar. They have a fantastic system of broadband for not just the central library in Tucson, but all the branch libraries. All over this very, very sparsely populated geography, the library is the number one public Internet access point in southern Arizona. Therefore, it is the proper focus of extra E-Rate support, and the proper focus of the combination of network architectures that might well resemble what Chairman Powell was talking about. We shouldn't decide that part. But we should decide that is a very flexible tool, also, that can be used to deliver the right participation in the American community to rural America.

Mr. LUJAN. Chairman Powell?

Mr. POWELL. Congressman, I really would like to put a punctuation on what you raise. Because I think it goes to the committee's desire, I hope, to try to harmonize and see the communication landscape as a single ecosystem. All the wonderful benefits we are bragging and celebrating are continuously and daily at risk. I think cyber threat, data retention, breach are all issues that are the Achilles Heel of all the promise of the network that we are celebrating. But they require very complex solutions that look through an entire ecosystem. 706 is no more—is not particularly up to that job. Why? Even for no other reason that you can't have a discussion without software involved. The cyber security question on a global—ecosystem basis means a conversation with every element of that massive connective chain. And that is the web companies, the infrastructure companies, wireless companies, content companies, there is just no way, in my opinion, even with its breadth that one could look hopefully to that as the single point of authority to make the most meaningful impact on this issue, mostly because 50 percent of that ecosystem aren't even implicated by that provision.

Mr. LUJAN. Chairman?

Mr. COPPS. I hope 706 is up to the job. I think it does confer a lot of authority. But I don't want this to become just a solution de jure and we talk about 706 for the next 2 years. And then another court somewhere strikes that down or whatever. I do want to highlight one thing that you mentioned in terms of getting broadband out. And I commend you for your interest and your work with native lands and Native Americans. And one area where I think

maybe a rewrite would help would be to more formally institutionalize—put some flesh on the bones of the trust relationship and the consulted—consultative mechanisms that we have between the Commission and Native Americans. It is not—it is working better than it has. I think there has been more emphasis in recent years. Obviously, back in Chairman Kennard's time, who is not here today, there was an interest in moving us forward and getting us into a new trust relationship. But that is 13 or 14 years ago. And the situation, as you point out, is so dire when one member of a tribe can't call somebody else, but you can make the call from 30,000 feet. That is something wrong there. But that might be a concrete area where the Commission can—or where the Congress can actually lend a hand.

Mr. LUJAN. Appreciate that.

Mr. WALDEN. Appreciate that. The gentleman's time has expired. We will now go to the gentleman from New Jersey, Mr. Lance, for 5 minutes.

Mr. LANCE. Thank you, Mr. Chairman. And to the distinguished panel, this is among the most interesting hearings in which I have ever participated. And it is my honor to be able to meet all of you.

I gather there is a consensus from the distinguished panel that the 1996 legislation needs, to some extent, statutory update and revision, is that accurate, from the panel?

VOICE. I would agree.

Mr. HUNDT. I don't agree.

Mr. LANCE. And, Chairman Hundt, if you would indicate why you do not agree there needs to be statutory update?

Mr. HUNDT. I think that the DC Circuit has made it very clear that the '96 act has given the authority to the FCC to address all the economic and social problems that this committee, in recent years and in past years, has asked the FCC to address.

Mr. LANCE. Other distinguished members—

Mr. COPPS. I basically concur and agree with what Chairman Hundt has said.

Mr. LANCE. Um-hum.

Mr. COPPS. Sure, it is always nice to have some additional clarity. But time is of the essence here. We have a statute that I think can deliver on a lot of the things that need to be delivered, and we should be about that job. I just—it is so difficult to see the correlation of forces coming together to give birth to an act after what we went through in 1996. And I don't think it is going to be any easier in 2014 to do that than it was 18 years ago.

Mr. LANCE. Chairman Powell?

Mr. POWELL. I think, by any measure, a deliberative process in the legislature would take a meaningful number of years, as the chairman—as Chairman Walden himself has recognized in setting out a multi-year process. I do think there are sufficient conditions to justify the institution of that kind of examination over that period of time, because I think the market is radically different and the relevancy of law as applied to reality should be a core principle of governance.

Mr. LANCE. Thank you.

Mr. WILEY. I think the very fact that you didn't have the Internet really developed, you didn't have broadband, you didn't have all

the technological changes that have occurred since 1996, really gives I think substance to taking another look. And I think that gives Congress an opportunity I think to perhaps make some suggestions to the regulatory body that I think would be very helpful.

Mr. LANCE. Thank you, Chairman Wiley. Am I accurate—I have not read the decision. I have reviewed its consequences, but I have not read it. And I certainly will read yesterday's decision. Am I accurate that the FCC decided in 2004 that Internet access services would not be classified as telecommunications services? Is that true, Chairman Powell?

Mr. POWELL. Yes, sir. That is correct.

Mr. LANCE. And if that decision were to be revisited, that could be revisited by the administrative agency, is that accurate as to how it could proceed?

Mr. POWELL. It is accurate. It could.

Mr. LANCE. And if there were to be a revisiting of the 2004 decision that this is not classified as telecommunications services, then there would have to be an extensive period of review, and there would have to be some sort of high level determination as to why a different decision were to be made. Is that the way it would work?

Mr. POWELL. Yes. Under administrative law, even with deference, the Agency has to provide a reasoned explanation for its change in policy. It would require a notice and comment proceeding, which is open.

Mr. LANCE. Yes.

Mr. POWELL. And I wouldn't—you know, the suggestion has been made that somehow that would lead to instant clarity. It would lead to another 3-to-4-year period of conflict and litigation—

Mr. LANCE. And litigation. And, Chairman Copps?

Mr. COPPS. But I would just say I don't think it would take forever to compile that record. I and a lot of other people I know would be happy to contribute to the rationale for that sort of action. So it is not really starting at—on the tabula rasa. I think a lot of that information is out there. It was just a route not taken. And now we need to go back and look at it.

Mr. LANCE. And the FCC's reclassification would be considered arbitrary and capricious unless there were a period of comment and refreshing the record, and some sort of heightened standard, is that accurate legally?

Mr. POWELL. Yes, sir. They have to follow the Administrative Procedure Act obligations.

VOICE. And I am certain they would.

Mr. LANCE. I would presume that would be the case. And, finally, the decision that yesterday possibly could be appealed to the Supreme Court, but it is not clear whether or not either side is likely to do that.

VOICE. That is correct.

Mr. LANCE. Thank you very much. My time has expired, Mr. Chairman.

Mr. WALDEN. I thank the gentleman. Now, I turn to Mr. Long from Missouri. I think our last member to ask questions. Please go ahead.

Mr. LONG. Thank you, Chairman. And, Chairman Hundt, last night you said that you spent quite a bit of time trying to go through the court ruling of yesterday. And most of the congressmen were home trying to read through a 1,562 page bill that we are going to be voting on this afternoon. So I have ordered my staff to bring a copy of that to you. And if you could peruse that over your lunch hour and kind of decipher it for me, I would appreciate it.

Earlier in your testimony, Chairman Hundt, you said that—and I didn't get—understand your point, I don't think, concerning the auction. You said, if I remember right, that we need a cap so people know what they are buying. Can you kind of tell me what you were—in full disclosure, I come from a 30-year career as an auctioneer before I came to Congress a few years ago. So I have got a lot of interest in how an auction operates and try and make it operate the best it can for the public and the taxpayers.

Mr. HUNDT. I remember very well that in our first auction, we had Senator Burns who had a—

Mr. LONG. Conrad Burns, you are right.

Mr. HUNDT [continuing]. Come and conduct the very first auction.

Mr. LONG. He is from Missouri. Now, he served from Montana, but he is originally from Missouri. So that is two of us.

Mr. HUNDT. He did claim that particular heritage. And he did a great job. And I would recommend to Chairman Wheeler that he should come and ask you to conduct the next auction.

Mr. LONG. I am not worried about conducting as much as I am the—you know, how it is put together. And that is what I have been trying to drill down on.

Mr. HUNDT. Well—

Mr. LONG. But what was your comment? I didn't understand you said that we need a cap so people know what they are buying. What exactly did you mean?

Mr. HUNDT. So in any auction, when folks come in, you want the high bidder to be able to walk away with whatever was auctioned. And the way to do that I believe is to make sure that everybody bidding in that auction knows the following, what are the rules about how much you can buy. It doesn't have to be a cap. It could be—some people think it should be an aggregation level. There is many different ways to define it. But people ought to know as they are about to take the money out of the wallet, as they are about to raise the hand and say that they are putting in the high bid, they ought to know that they can walk away with whatever they can buy, instead of having to have another proceeding where they ask the FCC or the Department of Justice later, am I permitted to walk away with this, because I don't know whether or not I have violated any of your aggregation rules. So this Congress, in the Incentive Auction Rule, did say that the FCC should create a generally applicable aggregation rule. And I think that was a very wise thing to do, that way everybody going into the auction can estimate in advance whether or not what they buy is what they—what they bid on and win on is what they can walk away with.

Mr. LONG. OK. Talking to the interested parties that are interested in buying this spectrum, they have told me—and this is probably a topic for another day. But they said if they can buy A, B

and C spectrum, then maybe they want to buy L, M, N, O, P later in the auction. Or if they can't buy A, B and C, L, M, N, O, P doesn't—if they can't but that too, then the first three things that they bought—so it is a very confusing situation. So do you any of you have any staff—anybody you want to get with my staff that we can talk about to kind of sort that out, I would appreciate it.

I want to move to Chairman Wiley for a minute. If you turn on the TV at night, the only reason it is not 100 percent phone company ads and the cellular companies and things is because it is interspersed with auto insurance ads. So there would be more—so it seems like there is quite a bit of competition out there now. And as far as the auction that I was talking about with Chairman Hundt, the wireless market I think appears to be extremely competitive. And you do have larger companies, AT&T, Verizon, T-Mobile, Sprint. And given that, doesn't it make sense that the FCC—why will they—should they not—they shouldn't handicap bidders, should they, to get the most money for the taxpayers and have the best auction they can where either some people are wanting to limit who can buy what? Can you kind of walk me through that?

Mr. WILEY. Well, my view is that the auction ought to be available, open to all. I think if Congress really wants to see the maximum amount of revenue derived in order to support the public safety network we are going to have to pay the broadcasters, it is a very complex process. And I do—I am concerned about the fact that we start to begin to limit people in this that you are going to find you are going to have less revenue than might be otherwise anticipated. I think a free auction ought to be open to all.

Mr. LONG. All right. When people would attend my auction, I was always interested in having the most people there and having them spend the most money that they could. And if they didn't want to bid, I would bid for them. I would tell them just to hold their hand up in the air. And when they paid enough, I would tell them to take it down. So with that, Mr. Chairman, I yield back.

VOICE. That is quite an auction.

Mr. WALDEN. I want to thank our distinguished panel of witnesses, both for your prior Government service and your continuing involvement and interest in public policy to assist us in our mission and goals in updating the Communications Act. I draw attention to those who are observing our hearing. They can go to our hashtag at CommsActUpdate. I think it is right in front here—and give us your information. A lot of people have been doing that during the hearing. We appreciate that. Another reflection of how technology is changing the world, and we need to keep up with it. So thank you for your participation. Our subcommittee stands adjourned.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

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February 11, 2014

The Honorable Richard E. Wiley
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Dear Chairman Wiley:

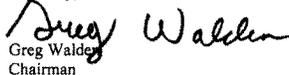
Thank you for appearing before the Subcommittee on Communications and Technology on January 15, 2014, to testify at the hearing entitled "#CommActUpdate: Perspectives from Former FCC Chairmen."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on February 25, 2014. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,


Greg Walden
Chairman

Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment



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February 24, 2014

Richard E. Wiley
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Greg Walden
Chairman
Subcommittee on Communications and Technology
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Washington, D.C. 20515
Attn: Charlotte Savercool

Dear Chairman Walden:

Thank you for allowing me to appear and share my views before the Subcommittee on Communications and Technology on January 15, 2014, at the hearing entitled "#CommActUpdate: Perspectives from Former FCC Chairmen."

I have attached my answers to the two questions I received for the record. If you should require any additional information, please let me know.

Thank you again for your invitation to testify and I look forward to working with you and the Committee as it undertakes rewriting the Communications Act.

Sincerely,

A handwritten signature in cursive script that reads "Dick Wiley".

Richard E. Wiley

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Attachment—Additional Questions for the Record

The Honorable Anna Eshoo

1. In your testimony, you emphasized the importance of having communication laws that treat functionally equivalent services in the same manner, regardless of who provides them or how they are delivered to consumers. Under the 1992 Cable Act, cable providers are prohibited from taking down broadcast signals during a Nielsen ratings "sweeps week," yet there is no such prohibition for a broadcaster that pulls their signal during a retrans dispute. Do you support updating the law to ensure parity between broadcasters and cable providers?

I believe that the retransmission consent process is working as Congress intended in the 1992 Cable Act. As I understand it, Congress envisioned marketplace negotiations between broadcasters and cable systems (and other MVPDs) concerning the value of the broadcast signals involved. Over two decades, this process has resulted in literally thousands of agreements with relatively few (and usually very brief) service interruptions. This is because both sides have something to gain and to lose and, in that sense, have parity. However, if cable operators were able to continue carrying broadcast signals after the expiration of retransmission consent agreements, broadcasters would lose the ability to negotiate competitively. Moreover, even where a signal is not present on one MVPD, it remains available over the air and often on other systems as well. Thus, for consumers, the signal is never really lost. In all, my view is that the law does not need to be "updated" or changed.

2. I know that states are often closest to the ground and have significant experience dealing with competition and consumer protection activities. At the same time, I recognize that there is not always the jurisdictional distinctions as there were in the days of local and long distance phone calls. How should the FCC work with the states to ensure that consumers are protected in a broadband era?

States have played and will continue to play an important role in the communications sector. State regulators are closer to conditions on the ground and can be an important source of information about the extent to which federal regulatory policies are working in the manner intended. Congress has recognized the important role that state regulators serve by establishing Joint Federal State Boards (for example, on Universal Service). These Joint Boards should continue to function, and Congress should consider whether additional Joint Boards are appropriate in the new IP world. For example, it may make sense to create a Joint Board on Broadband, which would allow state regulators to provide their federal counterparts with information about best practices on broadband adoption programs and offer solutions to the challenges of deploying broadband in high-cost areas. A Joint Board on Broadband also may serve as an important resource as the FCC considers changes to the E-rate program to ensure that schools and libraries are well equipped to meet the demands of a digital era.

However, it is imperative for continued broadband innovation and investment to eliminate the overlapping regulation between the FCC and states that is premised upon an obsolete dichotomy in an IP world. Because the jurisdictional dividing line between the FCC and the states (i.e., interstate and intrastate telecommunications) will soon cease to

exist, Congress should be wary of subjecting services that are inherently interstate to local regulation. Wireless provides a useful model. Recognizing that wireless services did not fit neatly into the traditional telephone regulation scheme, Congress vested the FCC with the primary role in regulating wireless services while at the same time preserving some limited authority for states to regulate wireless service providers. With wireless services ubiquitously available throughout the United States and with more mobile devices than U.S. residents, it is hard to argue with the success of this approach.