TESTIMONY OF MICHAEL K. POWELL

on

THE COMMUNICATIONS ACT UPDATE

before the

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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, Eroom'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.