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MODERNIZING THE COMMUNICATIONS ACT:
COMPETITION POLICY AND THE ROLE OF THE FCC

Verizon welcomes this opportunity to provide comment on the third in a series of white papers regarding the efforts by the Committee on Energy and Commerce to modernize the laws governing the communications and technology sectors. As the Committee recognizes, the telecommunications landscape has "changed dramatically" since Congress last revisited the Communications Act in 1996 "and will continue to evolve at a rapid pace." There has been an evolution in technology and competition, accompanied by significant shifts in consumer preferences. The Committee is right to acknowledge that these changes have "called into question the adequacy of the current Communications Act and the monopolistic assumptions on which it is based."

Indeed, whereas the Communications Act has its roots in 19th Century railroad regulation and was designed for regulating legacy communications services in a "Ma Bell" monopoly era, today's telecommunications landscape looks markedly different. Quite simply, the world has changed. In the almost two decades following the last revisions to the Act, companies traditionally regulated by the FCC compete among themselves *and* with those historically outside the reach of the FCC. But current FCC regulations generally ignore competition among the platforms and services they regulate, and fail entirely to recognize competition with those they do not.

Today, consumers can choose to communicate in any number of ways, including voice, texts, tweets, e-mail, video chat, social networks and others, with the Internet and broadband networks providing a platform for continued innovations that will lead to even more choices tomorrow. Those consumers are no longer limited to taking service from just the legacy telephone company in their area. Consumers can obtain voice services from a variety of landline, wireless, satellite, Voice over Internet Protocol (VoIP) and other providers. Moreover, within the Internet ecosystem, network providers, applications providers, device manufacturers, online service providers and others simultaneously cooperate and compete to meet consumers' evolving communications demands. As a result, consumers now experience dynamic competition among both platforms and services. This dynamic competition has several important implications for the governing policy framework.

I. Competition Should Not Be Defined and Regulated within a "Siloed" Approach.

As the Committee notes, the Communications Act currently consists of seven titles that define and govern seven specified sectors of the communications space in different ways, as if those sectors exist separately – without overlap – and warrant different treatment. At some point this may have been the case, but today it is not.

Technology and competition have evolved to the point where many communications players do not operate within just one of the traditionally defined sectors. More importantly, those distinctions do not matter from the consumer's perspective. Consumers now have a variety of different options across and outside the traditional dividing lines of telco versus cable versus wireless versus satellite. They can choose voice, broadband and video services from multiple competing wireline, wireless and other providers, as well as utilize Wi-Fi in tens of thousands of hot spots across the country – and even in the air.

Consumers also now rely heavily on IP-based Internet services to communicate over-the-top, including e-mail, instant messaging, various forms of voice and video services (e.g., Skype, FaceTime or Vonage), social networking services and others. In these circumstances, consumers move from one platform to another and from one service to another many times throughout the day. Their choice of platform/service is determined by many different factors, including convenience, mobility, the intended audience, and the length and complexity of the message, as well as preferences for devices, operating systems, applications, platforms and providers.

Accordingly, the choices available to consumers as they decide how to communicate span the range of network providers, Internet companies, device manufacturers, operating system developers, application developers and others to meet consumers' communications needs. All of these intermodal providers compete intensely to attract consumers and – in other contexts – collaborate with each other to develop innovative service offerings for the same purpose. This dynamic competition pays little attention to the boundaries drawn among the "silos" of the various regulatory sectors.

For example, Microsoft's Skype and Apple's FaceTime provide popular – and free – web-based alternatives to traditional telephone service. Similarly, Facebook competes with mobile carriers in the text messaging space with its $19B acquisition of WhatsApp, and also reportedly plans to offer broadband access using drones. And, while Google's main business is Internet search, it competes via YouTube with other video providers in the content/media space, competes via Android and Chrome with Microsoft and Apple in the operating system space, competes via GoogleVoice in voice communications, and competes via Google Fiber with cable and telephone companies in the broadband space.

In this respect, the Committee correctly observes that the current statutory framework "fails to contemplate or address the convergence and evolution of services in the modern digital

era …." Nor does it make sense to continue to divide these overlapping sectors into separate "silos," subject to different regulation based on the different types of network technologies used and the particular services provided. As the Committee notes, "[t]he practical result" of the current statutory framework is that "providers of functionally equivalent services – whether technologically or from the consumer perspective – are regulated in drastically different ways."

Unlike their more heavily regulated counterparts, most of these competitors have not been subject to the same legacy regulatory regime which often requires permission to introduce new services and features or to move away from others that fail to meet consumer demands. Instead, these Internet-era competitors have had flexibility to quickly respond to consumers' changing demands and innovate at broadband speed. This is not to suggest that the same type of prescriptive regulation that traditionally was applied to legacy voice providers now should apply to newer competitors and services from the other "silos." Just the opposite: consumers will benefit most if Congress adopts a new policy framework that more accurately reflects the nature of competition in today's communications marketplace and provides *all* companies in the communication and Internet ecosystem with the flexibility necessary to encourage innovation and investment, while simultaneously protecting consumer interests.

In short, a modern definition and approach should embrace the dynamic competition in today's market, while allowing for future innovations and market participants. The statutory framework should be drafted and applied in a way that reflects all those players in the communications marketplace that are competing by offering functionally equivalent or similar services and cooperating in constantly changing ways to offer products and services for consumers.

II. Competition Policy Should Be Based on Key Principles that Account for Continuing Changes in the Marketplace.

Given the fundamental shifts in technology, consumer preference and competition, Congress should eschew simply tweaking around the edges of the current statute or targeting only the most out-of-date provisions. Instead, Congress should start from scratch and ask what would work best now and in the future, regardless of what was done in the past to achieve those core policy objectives. In place of today's silos and inconsistent treatment across the full range of technologies or services now available to consumers, Congress should focus on a set of technology-agnostic policy principles to guide regulation and provide a level playing field going forward. In particular, a modern policy framework should be based on three technology-neutral principles:

- encourage investment and innovation,
- promote competition, and
- protect consumers.

Adhering to these principles will better allow for future adjustments as market changes, new technologies, and shifts in consumer preferences continue to arise and evolve. Policymakers should take into account relevant consumer expectations of all players competing in the communications market in evaluating the best way to accomplish these principles. More specifically, to satisfy these goals, a workable 21st Century approach should have the following key elements:

A. ***Light-Touch Regulatory Regime.*** The new framework should borrow from what has been successful with respect to wireless and Internet services, which have proliferated largely outside of the more prescriptive, legacy framework that has been applied to traditional wireline voice providers and services. Internet services have been subject to the lighter touch regulatory approach applicable to "information services," while Congress' decision to require a less regulated approach to wireless services provided similar flexibility. That lighter touch has proven hugely successful, sparking competition and innovation. And it stands in stark contrast with the more traditional, permission-first approach that has been applied to regulated services and that is an anathema to innovation. What would have occurred if players like Apple, Google, Facebook or WhatsApp had been required to get approval from regulators prior to introducing innovations or making changes to better serve their customers? Lighter touch regulation allowed them the freedom to innovate – and the success of that approach provides a blueprint for how to proceed here.

B. ***Multi-Stakeholder Approach.*** A modern Act should embrace the flexible, multi-stakeholder governance approach that has been a key component in the Internet context, under which industry standards and practices are developed and used as a model for problem-solving as new issues emerge. This approach strikes the right balance for a diverse set of stakeholders, including consumers, academia, policymakers, technologists and private firms. After proving successful in the Internet context, the same multi-stakeholder approach can be expanded – particularly as Internet-based services and companies continue to take on an increasing role in communications.

C. ***Reliance on Competition rather than Economic Regulation.*** Today's dynamic marketplace requires a change from the old ways of regulating. Congress should depart from the old, prescriptive model that inhibits innovation or invites regulators to pick winners and losers and second-guess providers' choices in how best to serve their consumers and instead adopt an approach that relies on consumer choice and competition. Consumer choice should be the touchstone for any framework going forward and, in the presence of competition, should drive the market. Regulatory intervention should occur only if and where necessary to protect competition or consumers. After all, competition leads to the best outcomes for consumers, and government regulation generally should occur only where there is a demonstrated harm to competition or consumers and, even then, should be narrowly tailored to cure it.

D. ***Ex-Post Enforcement, Rather than Ex-Ante Regulations.*** Today's framework is based on prescriptive regulation on the front end, which acts as a deterrent to subsequent innovation, investment and new entrants. To combat this, Congress should adopt an enforcement-based regulatory model under which government intervenes on an ex-post, rather

than ex-ante basis. This is similar to the approach the Federal Trade Commission (FTC) utilizes in competition matters; it can provide the flexibility necessary to encourage the kind of experimentation that is vital for economic growth, while still allowing government to step in if a problem arises. In other words, government should provide a backstop to address anti-competitive or anti-consumer behavior that occurs on a case-by-case basis. But the regulatory scheme should not preempt innovation with prophylactic, ex-ante rules that cannot keep up with changing technologies.

III. The FCC's Role in Competition Policy.

As a result of its outdated statute, the structure of the FCC's current jurisdiction creates a bureaucratic, multi-layered regulatory and legal playing field that often see-saws among companies providing functionally equivalent or similar services. Some companies in the marketplace are regulated heavily – often based on a dominant position from decades past which bears no resemblance to their position in today's marketplace – while no regulations or only light regulations apply to others. For example, "incumbent local exchange carriers" are often singled out for intrusive regulation such as unbundling, price regulation and the like based solely on their long-expired monopoly position, even as they have lost more than half of their customers in recent years to facilities-based competitors. Congress should ensure that all companies in the communication and Internet ecosystem operate under the same rules and that those rules reflect today's marketplace realities. But, rather than impose additional regulation on those previously subject to a lighter touch, the new framework should provide all parties the flexibility necessary to encourage innovation and investment, while simultaneously protecting consumer interests.

In that regard, Congress should move the regulatory approach in the communications area from an ex-ante, rules-based approach to an ex-post enforcement model, with the same regulator applying the same standards to all relevant marketplace participants. However, there are some areas unique to the communications space that deserve particular focus. Given the special nature and importance of issues such as public safety/911, universal service, disabilities access, and spectrum management, Congress should consider particularized provisions to manage these important areas as technology and the ways people communicate continue to evolve.

With respect to spectrum policy, it is vital that there be a federal government agency with responsibility for spectrum management and ensuring that spectrum is being used in a manner that best serves consumers. Making more spectrum available is essential to satisfy consumers' increasing demand for mobile services. Congress should take the lead on identifying and cultivating long-term spectrum solutions for commercial use in future auctions and in identifying and freeing up federal government spectrum for licensed use. Regardless of the precise form these solutions may take, it is essential to make spectrum available to competitors without unnecessary strings attached. Competition and, ultimately, consumers will benefit if more spectrum is made available to more competitors on reasonable terms.

IV. The Communications Act Should Be Subject to Periodic Review and/or Sunset.

Given the rapid changes in technology, competition and consumer choices that take place in the communications market, a mechanism for automatic review or sunset of regulation should be built into the Act and into agency regulations. Maintaining a statutory scheme that no longer fits with current conditions can harm consumers and competition. These concerns can be alleviated by adopting a flexible approach that allows for experimentation and innovation, with a government backstop as needed to address harm to competition or consumers. But Congress nevertheless should establish a sunset on the new provision it adopts in the Act or – at minimum – establish periodic review of the Act's provisions on a going forward basis.

CONCLUSION

As the Committee recognizes, there is a significant disconnect between the existing statutory framework and today's highly competitive communications marketplace. The current Communications Act reflects a legacy regime designed to prescriptively regulate monopoly voice services and to pigeonhole different providers and services into different sectors subject to different (and inconsistent) requirements. That regime does not fit in a world with dynamic competition and technology that traverses the traditional silos defined by the Act. Congress should take this opportunity to build a new framework that reflects the realities of today's marketplace and builds on the lessons learned from the wireless and broadband industries, protecting consumers and competition, while adopting a light regulatory touch to encourage the investment and innovation necessary to develop new solutions and meet evolving consumer preferences.