NASUCA
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

# THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADOVCATES ("NASUCA") RESPONSE TO HOUSE COMMITTEE ON ENERGY AND COMMERCE "MODERNIZING THE COMMUNICATIONS ACT" WHITE PAPER

NASUCA[1] submits these comments to the House Committee on Energy and Commerce ("Committee") in response to the Committee's request.[2] NASUCA comments on each of the five "Questions for Stakeholder Comment." NASUCA also comments on certain aspects of the White Paper's otherwise-accurate "History of Communications Laws," and the description of the "Current State of the Law and Criticisms." NASUCA very much appreciate the opportunity to comment at this first phase of dialog.[3]

**The five questions:**

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

[1] NASUCA is a voluntary, national association of consumer advocates in more than forty states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[2] http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf (issued January 8, 2014) ("White Paper").

[3] NASUCA was deeply involved in the 1996 Act -e.g., 47 U.S.C. § 254(a)(1) makes a NASUCA member part of the Federal-State Joint Board on Universal Service - and has presented numerous comments to the FCC in the intervening years.

Perhaps not. The goals of the CA that currently apply to Title II services should be extended to more services, those on which consumers increasingly depend. Those goals[4] include:

- Affordability: Broadband and wireless services are increasingly viewed as necessities. Policy makers should consider whether steps are necessary to mitigate affordability concerns.
- Limited Competition: Duopoly wireline broadband markets, and consolidating wireless markets, should be monitored to determine whether markets are delivering economically efficient outcomes.
- Reliability and Service Quality: Legacy wireline voice networks have delivered reliable and high quality service, providing value to consumers and contributing to the fulfillment of critical public safety objectives. As broadband and wireless are now viewed as necessities, reliability and service quality standards for new technologies must be addressed.
- Access to Emergency Services: The transition to an alternative technology platform does not reduce the importance of robust access to emergency service providers. Policy makers should monitor the oversight of the transition to IP-based broadband, and ensure that the benefits associated with high-quality systems continue. The issue of backup power also requires careful attention.
- Carrier of Last Resort and Universal Service: Carrier of last resort obligations ("COLR"), the requirement that local telephone companies make service available to all households in their service area, have ensured that affordable and reliable telephone service is available on reasonable request to all households. While voice services have been subject to COLR obligations, broadband services have not. Access to affordable, high-quality broadband services will be as important in the future as access to affordable high-quality legacy voice services has been in the past. Determining how COLR costs will be recovered, and the criteria required to ensure broadband availability will be critical.
- Informed Consumers and Consumer Education: During the transition to IP/broadband, policy makers should ensure that educational efforts are ongoing, so as to inform consumers of changes and the potential impact of changes, and to promote an open dialog regarding consumer needs during the transition.
- Finally, the states have a role in addressing the seven areas described above under state laws and the dual jurisdiction of the FCC and States should be preserved..

Any rewrite of the Communications Act must confirm these protections for the services on which consumers depend. That includes, at minimum, voice communications service, whether provided over a traditional platform or the newer Internet Protocol ("IP") platform. The protections should also apply to the broadband services that consumers use, which the FCC declassified out of protection in its early-21st century rulings.[5]

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[4] See FCC Docket No. WC-12-353, NASUCA ex parte (January 12, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521065326, attaching paper by Dr. Trevor Roycroft http://apps.fcc.gov/ecfs/document/view?id=7521065327.

[5] See *Verizon v. FCC* (D.C. Cir., January 14, 2014), slip op. at 45-62.

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

See previous answer. In today's communications environment, when preserving the core principles just discussed, the distinctions between telecommunications services and information services (similarly, between basic and enhanced services) can largely be disposed of. But the requirement of just and reasonable rates and the promise of affordable voice and broadband service must be maintained.

There is one provision that should be eliminated. That is the "deemed granted" in the forbearance statute, 47 U.S.C. § 160(c), which grants any forbearance request from Congressional language, no matter how broad, no matter how complex, if the FCC has not granted it within one year and ninety days.[6] Indeed, forbearance requests themselves are becoming rarer, so perhaps the entirety of § 160(c) could be eliminated.

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

The jurisdiction of the FCC needs to extend at least to those services and capabilities set forth in response to #1. The structure of the FCC should be flexible enough to "address systemic change in communications" while preserving stakeholders' rights to effective participation in public processes. In his recent remarks at the Computer History Museum, Chairman Wheeler stated, "[I]t is essential in the public interest of our country that the government, and by government I mean the FCC, have the power to oversee the broadband networks and to intervene to forestall their exploitation by unacceptable acts."[7] Chairman Wheeler reemphasized the importance of `competition generally and the need to protect consumers from market power. Chairman Wheeler has addressed protecting the Network Compact, which has three key elements: universal accessibility; reliable interconnection;, and consumer protection and public safety and security.[8]

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

Laws could track equivalent services, rather than the technology over which a service is supplied to consumers. As one example, voice telephony would be a continuing focus,

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[6] 47 U.S.C. § 160 sets a one-year limit for FCC action; the FCC can extend the limit by 90 days.

[7] Prepared Remarks of Tom Wheeler Chairman given on January 9, 2014 in Mountain View, California at the Computer History Museum, http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0117/DOC-325054A1.pdf.

[8] See http://benton.org/node/169354.

regardless of whether supplied by wireline carriers, cable companies, wireless carriers or other entities, and regardless of platform (Time Division Multiplexing ("TDM"), IP or other).

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

See answer to #2.

**Comments on "History of Communications Laws"**

As noted above, the History is for its greatest part both accurate and non-partisan (especially where "non-partisan" means not tied to a deregulatory philosophy), but there are a few points that NASUCA, on behalf of consumers, should make:

- The distinction between "telecommunications" services and "information" services is not a result of the Telecommunications Act 0f 1996 ("1996 Act").[9] The FCC had established a distinction between "basic" service and "enhanced" services,[10] which was both continued and muddled by the 1996 Act.
- The 1996 Act did not "distinguish that 'information' services would be largely unregulated while 'telecommunications' services would remain highly regulated...."[11] Certainly the regulation of telecommunications services has substantially diminished since 1996. More importantly, it was not the differential in regulation that caused information services to grow "at a rapid pace."[12] The technological revolution was far more important than a deregulatory revolution.
- The 1996 Act did direct the FCC to address the Internet in a forward-looking manner.[13] Unfortunately, The FCC has addressed the Internet in a fashion that limits to the detriment of consumers some of the key public interest goals addressed above.

**Comments on "Current State of the Law and Criticisms"**

- The White Paper notes that "there are different regulatory obligations based on the mode of technology, even though many of the technologies are functionally equivalent either technologically or from the consumer perspective."[14] NASUCA basically agrees, but would argue that these equivalencies mean that consumer protections should be extended to such services, not that all services should be stripped of protection due to "competition" among them.

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[9] White Paper, p.[2].
[10] See *Verizon*, fn.5, supra, slip op. at 7-9.
[11] White Paper, p.[2].
[12] Id.
[13] Id.
[14] Id., p.[3].

- It may be that "broad prescriptive rules can have unintended consequences for innovation and investment."[15] But the **lack of** prescriptive rules can also reduce investment and innovation, by allowing those with market power to harm competition and consumers.
- The "regulatory uncertainty with respect to FCC authority to regulate aspects of the Internet within U.S. Borders…" is pretty much the result of the FCC's unfortunate decade-old decision to classify broadband Internet access service as an information service, rather than the dual service that includes both telecommunications and information services.[16] It remains to be seen whether the FCC will act on this in the wake of *Verizon*. The "service" structure discussed above, if adopted by Congress, should alleviate such regulatory uncertainty.
- "It is vital that any changes to the law account for the impact on consumers and industry alike."[17] NASUCA applauds this recognition of consumer rights in the Committee White Paper.

**Conclusion**

NASUCA again appreciates the opportunity to provide these comments to the Committee. As NASUCA has stated in many previous contexts, the **public** interest is best served when regulators (and legislators) are not swayed by the business plans and pecuniary interests of particular companies - or indeed, particular industries. A balanced approach that considers the interests of consumers is best.

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[15] Id.
[16] See *Verizon*, slip op. at 45-46; *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975-977 ("*Brand X*").
[17] White Paper, p.[3].