

COMPTEL’s Responses to Questions in “Modernizing the Communications Act”
January 31, 2014

COMPTEL, the leading industry association for competitive communications service providers, submits its responses to the questions in the Committee on Energy and Commerce’s first white paper on “Modernizing the Communications Act.”¹

For more than 30 years, COMPTEL has advocated for competitive policies in the communications industry. COMPTEL has more than 200 members, including local competitors, broadband providers, mobile and fixed wireless carriers, cable operators, cloud and other edge/application service providers, as well as suppliers and professional partners. COMPTEL has a number of large, national companies with thousands of employees. However, nearly two-thirds of our members are small and medium-sized businesses (“SMBs”), a majority of which have \$10 million or less in revenue and fewer than 100 employees. COMPTEL member companies utilize private investment to drive technological innovation and create economic growth with their competitive broadband, voice, video, Internet, data and other advanced services.

As the Committee begins to review the Communications Act, it should identify bipartisan goals for improving consumer access to the nation’s communications networks and services. Among the goals Congress should aim to achieve are:

- Ensuring that the communications networks serve everyone, including residential, business, and wholesale customers;
- Promoting competition, universal service, and public safety and security; and

¹ Modernizing the Communications Act
<https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20140108WhitePaper.pdf>

- Ensuring all consumers have access to advanced services and technologies and protecting the public interest.

Where the marketplace does not produce reasonably comparable services for businesses or individual consumers across the country, or deliver such service to rural or remote areas, then our nation's laws and policies must continue to require or incent providers to make such services available and maximize network coverage so that every American may take advantage of the opportunities and benefits of a connected nation.

Questions for Stakeholder Comment

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

There is much about the Communications Act that has worked well. A significant benefit of the current Act is that it was built upon the fundamental bipartisan principles of connected networks and competitive markets. Since 1996, an estimated \$1.2 trillion in investment has been made in the communications industry. New technologies and services have been introduced and widely adopted, many of which were in their infancy or not even in existence when the Act was passed. These developments demonstrate that the Act has succeeded in promoting significant investment and advancing the deployment of the networks and services over the last 18 years. It is important that Congress identify and review the statutory provisions that have worked well to promote these benefits and those that have not promoted these results. Congress must study the marketplace—the different types of consumers—residential, business and wholesale consumers; the types of services they purchase; where they purchase those services; how many providers are providing those services; whether consumers have adequate choice; and whether they are sufficiently

protected by a competitive marketplace. This is a complex task, one that Congress should consider requesting that its expert agency, the Federal Communications Commission (“Commission”), study. While the Commission offers some reports to Congress on various parts of the industry (e.g., Annual Mobile Wireless Competition Report), many areas are not adequately reported on, such as the business marketplace or the wholesale communications marketplace, and Congress should request that the Commission analyze and report on these matters.

- 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?*

If the examination of the Communications Act and the marketplace is as exhaustive as COMPTTEL suggests in our response to Question 1, a modern Communications Act would look very similar to the current Act. While there may be a number of provisions across the current Act that might be improved or updated, the fundamental, timeless policies that ensure access to networks and interconnection—principles that ensure consumers and businesses have a choice of providers—have to remain in place. These provisions are necessary to support a healthy wholesale communications marketplace, resulting in a more competitive retail market.

- 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 Commission’s authority to promote universal service and communications networks that are available to all consumers (residential, business, and wholesale) is critical for the nation’s security and economic growth. Today, consumers rely upon voice, video and data services. It is difficult to predict what services they may rely upon in the future, but one

thing is certain: the nation's networks deliver the services and applications that consumers rely upon. Accordingly, Congress must ensure that the Commission maintains the authority to advance the availability of communications networks and services throughout the nation. Moreover, the Commission must maintain appropriate jurisdiction to oversee these markets and, where necessary, intervene to ensure consumers have adequate choice and protection.

This Committee already has identified several improvements that should be made to ensure that the Commission can function more effectively through H.R. 3675, the Federal Communications Commission Process Reform Act. For example, that legislation will permit more than two Commissioners to meet without violating the Sunshine Act if certain conditions are met. COMPTEL believes, as the Committee does, that this provision will improve the Commission's internal deliberations. Moreover, it will facilitate the discussions of the Federal-State Joint Boards on Universal Service and Separations, as well as the Joint Conference on Advanced Services—three bodies on which state regulators and the federal Commissioners sit.

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?*

The question is not which services to regulate or not regulate, but how the agency addresses market power or market dominance, and what tools are available for the agency to ensure a market is effectively competitive and consumers continue to benefit from innovation and choices of providers and services. Any policy framework that is flexible in its approach to the marketplace—allowing for changes in technology and services to continue to develop—will best serve the consumer. COMPTEL believes that the 1996 Telecommunications Act is this type of flexible framework.

It is unclear if current law can be more technologically neutral. It is actually agency interpretation and implementation of the law that has produced mixed results in relation to technology and services. For example, while the Act does not define network elements in terms of technology used and the definition of “telecommunications service” specifically precludes consideration of facilities used, the Commission has done just that with regard to its last mile access policies and failed to take sufficient action with regard to interconnection, resulting in implementation that is not technology neutral, even where the Act is for both last mile access and interconnection. Moreover, the FCC itself has recognized the problem with its own findings for last mile access, stating that “the FCC’s current approach is a hodgepodge of wholesale access rights and pricing mechanisms that were developed without the benefit of a consistent, rigorous analytical framework. . . . For example, some wholesale access policies vary based on technology – including whether the facility or service operates using a circuit-or packet-based mode or is constructed from copper or fiber-regardless of economic viability of replicating the physical facility.” *FCC National Broadband Plan* at 47. However, the Commission has yet to correct its course even though its own National Broadband Plan recommended doing so.

Indeed, the FCC has recognized that the “nation’s regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers” *Id.* Nonetheless, the Commission’s own inconsistent interconnection and access policies have a significant impact on the economy; and, as the physical facilities and technology of the network continue to transition, the negative economic impact will become more pronounced. Consequently, any legislative change should ensure the Commission focuses on impairment, barriers to entry, and

traditional market power analysis—not base its policies on the technology riding over the network.

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

A policy framework should focus on the necessary wholesale inputs needed to provide end-user services, regardless of the type of retail service being offered. In particular, the framework should focus on the interconnection of networks and last mile access to the customer. All networks should be required to interconnect. In addition, because last mile access to customers is the most costly to construct, the Act should provide wholesale access to the underlying transmission component of the last mile facility (i.e., access to the telecommunications service). Specifically, any legislation should ensure interconnection between networks and wholesale access to the transmission component at just and reasonable rates. This makes sense for two reasons: (1) focusing on interconnection and the transmission layer puts the focus on the layer of the network with the most potential for market power abuse (last mile access to the consumer);² and (2) ensuring a healthy wholesale market will

² According to the most recent data available from the FCC, 90% of households reside in areas where no more than two fixed broadband providers are capable of delivering speeds of 6 Mbps downstream. Federal Communications Commission, “Internet Access Services: Status as of June 30, 2012,” Industry Analysis and Technology Division, Wireline Competition Bureau, May 2013, p. 9 http://hraunfoss.fcc.gov/edocs_public/attahmatch/DOC-321076A1.pdf. This indicates a significant bottleneck of access to just two providers for most residential consumers. Moreover, the business market does not fare any better. Indeed, it is significantly worse. This is because cable does not have the presence in the business market it has in the residential market, so the ILEC is often the only last mile provider, meaning that the ILEC bottleneck is even more significant in the business market. According to the Commission’s latest Local Competition Report, as of December 31, 2012 there were 59 million wireline retail local telephone service connections to businesses, 25 million of which are served by a non-ILEC. Local Telephone Competition, Status as of December 31, 2012, Industry Analysis and Technology Division, Wireline Competition Bureau, November 2013, p. 5, Figure 4 (“November 2013 Local Competition Report”). Using USTelecom’s estimate that 96 percent of cable

minimize the need for regulation of the retail markets.

Thank you for the opportunity to comment.

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telephony lines serve residential customers, (USTELECOM, “Evidence of Voice Competition and ILEC Non-Dominance Mounts,” April 2, 2013, at 8; Available at: <http://www.ustelecom.org/news/research-briefs/ustelecom-research-brief-april-4-2013>.) of the 29 million lines on coaxial cable (see *November 2013 Local Competition Report* at 17, Table 6.), only 1.2 million lines served business customers. Based on these calculations **95% of the competition in the business market comes from traditional (non-cable) CLECs**, and they rely substantially on wholesale inputs from the large ILECs (typically the only last mile connection provider) to offer their services to this critical market. See *November 2013 Local Competition Report* at 9-10.