TESTIMONY OF

JOHN SUNUNU, BROADBAND FOR AMERICA

BEFORE THE HOUSE ENERGY AND COMMERCE COMMITTEE, SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY

JUNE 22, 2011

Good morning Chairman Walden, Ranking Member Eshoo, and the distinguished members of this subcommittee. Thank you for the opportunity to appear before you today.

I am here on behalf of Broadband for America, a coalition of more than 300 companies and organizations, including the nation's leading providers of broadband Internet access, equipment manufacturers, content and application providers, and consumer advocacy organizations. Our mission is to promote policies and programs that will make broadband Internet access available to every household in the nation and that will encourage the private-sector investments in broadband networks necessary to ensure the Internet is an economic, cultural, and societal driver of growth and prosperity.

As you consider the process by which the Federal Communications Commission accomplishes its statutory duties, we agree that it is important for consumers and providers alike to ensure a good decision making process by our government agencies. However, I don't want to miss the opportunity to call your attention to the more fundamental ways that the statutory framework that governs this marketplace is based on obsolete premises that do not match the realities of the marketplace.

I'm not alone in asserting that the mismatch between today's broadband marketplace and the prevailing legal framework requires a new way of thinking about telecommunication policy. Indeed, current FCC Chairman Genachowski said last week that "the statute is imperfect" and "it would make sense to update it." As President Obama pointed out in this year's State of the Union address, "we live

and do business in the Information Age, but the last major reorganization of the government happened in the age of black-and-white TV."

The time is ripe for fresh thinking and a modern approach. Accordingly, Broadband for America urges Congress to consider the realities of today's modern, highly competitive marketplace as it considers new statutory changes that will promote innovation and broadband investment. I'd like to first offer a few observations about the broadband marketplace and then provide some suggestions for reshaping both the framework and processes that govern the communications sector.

THE VIBRANT BROADBAND MARKETPLACE

Today's broadband networks now offer an array of services – voice, video, Internet access, and more – over multi-purpose, high-capacity digital connections. Broadband providers also collaborate with market participants across the Internet space – from software makers to device manufacturers – to offer services that can attract the attention of consumers in this very competitive environment. No one company or category of provider can do it all, and it is consumers demanding innovation and choice that ultimately drive the market. This burgeoning competition is a boon for American consumers, delivering extraordinary choice, lower prices, improved service, and a rapid innovation cycle. Consumers thus have unprecedented access to services and devices and the array of digital content at consumers' fingertips is essentially limitless. Broadband providers have invested more than $250 billion over the past three years in the effort to expand access to broadband technology. The net results include economic efficiency, job creation, export growth, and global competitiveness. America remains the locus of innovation, and America's growing and diverse broadband networks power that innovation.

Although the modern broadband communications marketplace is marked by burgeoning competition, breathtaking innovation, and constant change, the legislative framework that governs this marketplace is based on obsolete premises. The Communications Act of 1934 as well as the

Amendments of the 1996 Act were built on assumptions of natural monopoly that have conclusively been proven false in the context of broadband services. The challenge confronting lawmakers is to ensure that the underlying statutory framework is appropriately tailored to advance continued American leadership in this competitive and dynamic marketplace. And, while the current Commission is appropriately grappling with these very same issues, the Commission is obligated to enforce the Communications Act as it is today. While many of the procedural reforms discussed today are good ideas, the FCC would operate more effectively under a statute expressly designed for the Information Age.

A REGULATORY FRAMEWORK FOR THE INFORMATION AGE

Now, I'd like to offer a few thoughts on reform that go both to the process and substance of communications regulation. Several of these are rightly the focus of Chairman Walden's draft legislation on FCC reform.

First, it is time to move away from industry-specific, anticipatory regulation and instead treat communications companies like other businesses throughout the economy that are disciplined in the first instance by competition, not regulation. Accordingly, legislative reforms should dispense with antiquated presumptions about natural monopoly in the communications marketplace. The default presumption now should be that regulatory mandates are necessary only in the face of demonstrated market failures or when essential to advance important consumer protection goals in a narrowly tailored manner.

Second, Congress should affirmatively require that the FCC account for actual competition among emergent, substitutable offerings in a consistent way. The statute cannot work properly without acknowledging all constituent parts of the broadband ecosystem, including web-based services, and their implications for competition and consumers.

Third, Congress should consider built-in structural inefficiencies that sometimes bring an already sluggish regulatory process to a screeching halt. I know that Chairman Walden's draft legislation focuses in particular on improving FCC process to address a variety of issues.

- The FCC's multi-commissioner structure can breed intra-agency conflict and belabor decision-making.
- The FCC rarely produces timely decisions when measured against the pressing decisional demands of the Internet era.
- The FCC asserts authority that duplicates the work of other agencies, most notably in the context of reviewing mergers. Given the role played by the expert antitrust agencies, there is no legitimate reason for the FCC also to assume responsibility for reviewing the competitive effects of a merger because the transaction happens to require a license transfer.
- The well-intended Sunshine laws have the perverse effect of slowing the deliberative process further by, for example, requiring an open meeting any time more than two commissioners wish to discuss official agency business.

Finally, the FCC should place greater reliance on self-regulatory and multistakeholder organizational alternatives to the FCC's adversarial rulemaking processes. One of the great successes of the Internet is its largely self-governing nature, in which government plays a minimal role. It fosters innovation while at the same time achieving consistency. The Commission should be directed to foster and show deference to that successful model.

CONCLUSION

To be clear, our critique is of the regulatory framework, not of this or any other FCC. We have every indication that FCC Chairman Genachowski understands and is committed to the concept of reform at the FCC. That has also been true of his recent predecessors, all of whom have seen changes in the

communications industry unanticipated by the 1996 Act, let alone the 1934 Act, and have found the agency ill-equipped, at times, to respond. Only reconsideration by the Congress of the FCC's purpose and role in a competitive 21st century environment can accomplish true reform.

We appreciate the opportunity to share our views on these important issues. Broadband for America looks forward to working with Congress on these and other legislative initiatives to promote increased broadband deployment and utilization. Together, we can unleash additional investment and foster continuing innovation to the great benefit of the American people.