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**The FCC**

Recent actions by the Federal Communications Commission bespeak an uncertain time for investors in the media, technology, and telecommunications sector, write Dr. George S. Ford and Lawrence J. Spiwak of the Phoenix Center for Advanced Legal and Economic Public Policy Studies.

**The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband Investment**

BY GEORGE S. FORD AND LAWRENCE J. SPIWAK

**U**nder Section 706 of the Telecommunications Act, the Federal Communications Commission is charged with encouraging “the deployment of advanced telecommunications services to all Americans.”<sup>1</sup> To support the private investment required to fulfill this mandate, all five of the FCC’s Commissioners have professed a desire to provide investors with “regulatory certainty.” For example, Chairman Tom Wheeler talks about the need for “certainty about the rules of the road,”<sup>2</sup> and how as “an entrepreneur and as an investor, [he] understand[s] the importance of supplying

businesses with certainty.”<sup>3</sup> Commissioner Mignon Clyburn wants the agency’s policies “to provide the degree of certainty needed for both the industry and consumers to function.”<sup>4</sup> Commissioner Jessica Rosenworcel is concerned about telecommunications providers having “the certainty they need to confidently invest in their network infrastructure,”<sup>5</sup> while Commissioner Ajit Pai argues that “regulatory certainty . . . has spurred fiber deployment throughout the United States.”<sup>6</sup> Commissioner Michael O’Reilly concurs, noting that “a climate of certainty and stability” leads to “broadband investment and Internet innovation.”<sup>7</sup>

<sup>1</sup> See 47 U.S.C. § 1301 *et seq.*

<sup>2</sup> Statement of Tom Wheeler, Chairman Federal Communications Commission, Before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, Hearing on “Oversight of the Federal Communications Commission” (May 20, 2014) (available at: <http://www.fcc.gov/document/fcc-chairman-tom-wheeler-house-oversight-hearing-testimony>).

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<sup>3</sup> Remarks of Tom Wheeler, Chairman, Federal Communications Commission, National Cable & Telecommunications Association (April 30, 2014) (available at: <http://www.fcc.gov/document/chairman-tom-wheeler-remarks-ncta>).

<sup>4</sup> Remarks of Commissioner Mignon L. Clyburn, Free State Foundation Sixth Annual Telecom Policy Conference (March 18, 2014) (available at: <http://www.fcc.gov/document/clyburn-remarks-free-state-foundation-telecom-policy-conference>).

<sup>5</sup> Remarks of Commissioner Jessica Rosenworcel, Practising Law Institute, 30th Annual Telecommunications Policy and Regulation Institute (December 13, 2012) (available at: <http://www.fcc.gov/document/comm-rosenworcel-remarks-practising-law-institutes-event>).

<sup>6</sup> Remarks of FCC Commissioner Ajit Pai Before the Internet Innovation Alliance, *The IP Transition: Great Expectations or Bleak House?* (July 24, 2014) (available at: <http://www.fcc.gov/document/Commissioner-pai-remarks-internet-innovation-alliance>).

<sup>7</sup> See Dissenting Statement of Commissioner Michael O’Reilly in *In the Matter of Protecting and Promoting the Open Internet*, FCC 14-61, 29 FCC Rcd 5561, NOTICE OF PROPOSED RULE-MAKING (rel. May 15, 2014) (hereinafter “*New Open Internet*”).

Building, maintaining, and upgrading telecommunications networks requires massive and sustained, long-term investments, and uncertainty about regulatory policy that could threaten returns makes firms reluctant to invest.<sup>8</sup> The Commissioners' attention to certainty is prudent, especially because when it comes to capital expenditures, the country's broadband telecommunications companies are the nation's biggest spenders<sup>9</sup> and each million spent supports ten information-sector jobs and perhaps twenty-four jobs economy wide (and in this economy, good jobs remain scarce).<sup>10</sup>

When it comes to providing certainty, however, the agency is all bark and no bite. Despite the FCC acknowledging the importance of regulatory certainty to the deployment of modern broadband infrastructure, the reality remains that over the last few years the FCC has become entirely unpredictable, largely, we believe, because of the increased politicization of the agency's deliberative process. While there has always been an element of politicization to regulation,<sup>11</sup> there can be no

NPRM") (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327104A6.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327104A6.pdf)).

<sup>8</sup> See, e.g., J. Laffont and J. Tirole, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (1993), at Chs. 9, 10; B. Bernanke, *Irreversibility, Uncertainty, and Cyclical Investment*, 98 QUARTERLY JOURNAL OF ECONOMICS 85-106 (1983); E. Teisberg, *Capital Investment Strategies under Uncertain Regulation*, 24 RAND JOURNAL OF ECONOMICS 591-604 (1993); see also J. Laffont and J. Tirole, *Should Governments Commit?* 36 EUROPEAN ECONOMIC REVIEW 345-353 (1992) and P. de Bijl and M. Peitz, REGULATION AND ENTRY INTO TELECOMMUNICATIONS MARKETS (2002); N. Bloom, S. Bond, J. Van Reenen, *Uncertainty and Investment Dynamics*, 74 REVIEW OF ECONOMICS STUDIES 391-415 (2007); A. Cikierman, *The Effects of Uncertainty of Investment under Risk Neutrality with Endogenous Information*, 88 THE JOURNAL OF POLITICAL ECONOMY 462-475 (1980); A. Dixit and R.S. Pindyck, INVESTMENT UNDER UNCERTAINTY (1994); R.S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 JOURNAL OF ECONOMIC LITERATURE 1110-1148 (1991); P. H. Birnbaum, *The Choice of Strategic Alternatives under Increasing Regulation in High Technology Companies*, 27 THE ACADEMY OF MANAGEMENT JOURNAL 489-510 (1984); A. Desai and R. Stover, *Bank Holding Company Acquisitions, Stockholder Returns, and Regulatory Uncertainty*, 8 JOURNAL OF FINANCIAL RESEARCH 145-156 (1985); J. Ishii and J. Yan, *Investment Under Regulatory Uncertainty: U.S. Electricity Generation Investment Since 1996*, Center for the Study of Energy Markets (2004); D. Partino-Echeverri, P. Fischbeck, and E. Kriegler, *Economic and Environmental Costs of Regulatory Uncertainty for Coal-Fired Power Plants*, 49 ENVIRONMENTAL SCIENCE AND TECHNOLOGY 578-584 (2009); G. Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO JOURNAL 295-325 (2001); K. Fabrizio, *The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation*, 29 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 765-798 (2012).

<sup>9</sup> D.G. Carew and M. Mandel, *U.S. Investment Heroes of 2014: Investing at Home in a Connected World*, Progressive Policy Institute (September 2014) (available at: [http://www.progressivepolicy.org/wp-content/uploads/2014/09/2014.09-Carew\\_Mandel\\_US-Investment-Heroes-of-2014\\_Investing-at-Home-in-a-Connected-World.pdf](http://www.progressivepolicy.org/wp-content/uploads/2014/09/2014.09-Carew_Mandel_US-Investment-Heroes-of-2014_Investing-at-Home-in-a-Connected-World.pdf)).

<sup>10</sup> T. R. Beard, G. S. Ford, and H. Kim, *Capital Investment and Employment in the Information Sector*, 38 TELECOMMUNICATIONS POLICY 371-382 (2014).

<sup>11</sup> An interesting paper addressing the political nature of regulation is R. Ghosh and C. Kimmich, *Information, Regulatory Commitment and the Investment Dilemma*, JERUSALEM PAPERS IN REGULATION & GOVERNANCE, WORKING PAPER No. 51 (2013) (available at: <http://regulation.huji.ac.il/papers/JP51.pdf>); see also T.R. Beard and G.S. Ford, *Splitting the Baby: An Empiri-*

doubt that over the past several years—evidenced particularly with the current net neutrality debate—we have hit a new nadir.<sup>12</sup>

Indeed, as we show below, over the past five years the FCC either has reversed, or is threatening to reverse, some of the most significant bi-partisan deregulatory achievements of the past two decades. This dramatic reversal of FCC policy is a catalyst of uncertainty. Investors and carriers can no longer predict the agency's actions, nor can they expect the agency to commit to its decisions. Unfortunately, the agency's bias is toward increased market intervention through heavy-handed regulation, thereby signaling to investors in network broadband infrastructure that they should expect reduced returns.

More specifically, in communications markets we are typically dealing with very long-term investments, so investors evaluate uncertainty over very long periods. "Certainty" must have an element of "stability," which comes from a credible commitment to a long-term policy. Yet, the FCC has proven it will not make such commitments; its policies are anything but stable. Since communications networks are long-lived and costs are recovered over long-periods of time, a lack of stability in the FCC's policies combined with a pro-regulatory bias at the agency creates an uncertainty that is especially insidious; the consequences are as predictable as they are undesirable.

**Example No. 1: Special Access.** Businesses and other telecom service providers, such as wireless carriers, use high capacity "special access" circuits to provide reliable and guaranteed bandwidth between business locations and cell phone towers. The FCC traditionally regulated these high-capacity circuits pursuant to rate-of-return and, later, price cap regulation, but beginning in 1999 the FCC began to grant incumbent local exchange carriers ("ILECs") pricing flexibility on a Metropolitan Statistical Area ("MSA") basis if the ILEC documented the presence of alternative competitive facilities.<sup>13</sup> As to be expected, the propriety of that deregulatory move by the FCC has been criticized by the purchasers of such services ever since.

Finally acceding to this pressure, in 2012 the FCC released a *Report and Order* that would suspend, on an "interim" basis, its rules for automatic grants of pricing flexibility for special access services "in light of significant evidence" that the current deregulatory trigger—

*cal Test of Rules of Thumb in Regulatory Price Setting*, 58 KYKLOS 331-351 (2005); T.R. Beard and H. Thompson, *Efficient vs. "Popular" Tariffs for Regulated Monopolies*, 69 JOURNAL OF BUSINESS 86-87 (1996).

<sup>12</sup> *Id.* As evidenced by the million comments filed in the FCC's recent Open Internet Proceeding, the agency's deliberations appear motivated by survey evidence than by a careful examination of the law and economics of the matter. See L. Downes, *The Biggest Net Neutrality Lie of All*, FORBES (July 17, 2014) (available at: <http://www.forbes.com/sites/larrydownes/2014/07/17/the-biggest-net-neutrality-lie-of-all>). See also L.J. Spiwak, *Is the FCC Still Trying to Stifle Political Speech?* *The Hill* (February 24, 2014) (exposing FCC's proposal to force non-profits to disclose donor lists) (available at: <http://thehill.com/blogs/congress-blog/civil-rights/199067-is-the-fcc-still-trying-to-stifle-political-speech>).

<sup>13</sup> *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) (hereinafter *Pricing Flexibility Order*), *aff'd sub nom. World-Comv. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

i.e., two competitors have collocated in a single Metropolitan Statistical Area—is “not working as predicted.” In particular, the FCC found that the geographic territories contained in most MSAs are “overly broad” and, in contrast, most competitive entry is occurring only in areas with “extremely concentrated demand.”<sup>14</sup>

In its 2012 *Order* the FCC conceded that it “currently lack[s] the necessary data to identify a permanent replacement approach to measure the presence of competition for special access services” and promised both (a) to issue a comprehensive data collection order within sixty days once OMB signs-off; and (b) to “undertake a robust market analysis to assist us in determining how best to assess the presence of actual and potential competition for special access services that is sufficient to discipline prices.” The FCC issued such a data request in 2012,<sup>15</sup> and received OMB approval two years later, prompting the FCC to announce recently that it is about to proceed with the data collection.<sup>16</sup> While we do not know how the FCC will evaluate or interpret the data it receives, the increased activity in this proceeding, the suspension of deregulation, and the agency’s lack of commitment (if not animosity) to its precedent<sup>17</sup> collectively signal an increase in the probability of heavy-handed regulation.

To us, this radical policy reversal on Special Access makes little sense. As FCC Commissioner Ajit Pai recently observed about the agency’s decision to reverse course on Special Access, “we have spent countless hours debating whether to suspend our rules, what data to collect, how to analyze that data, and whether we should reregulate the market . . . all for a product that does not even meet the FCC’s definition of broad-

band.”<sup>18</sup> Moreover, given the FCC’s definition of the Special Access market, economic theory indicates that price regulation of the service provides no benefit (it is, instead, a squabble over the rents).<sup>19</sup> Given the above, it is unclear why the agency would dedicate further FCC resources to formulate more price regulation for this dying service.

**Example No. 2: Forbearance.** Another example is the agency’s decisions on forbearance from the 1996 Act’s unbundling obligations. In 2005, at the request of Qwest Communications, the FCC used its authority under Section 10 to forbear from the application of (many of) the Act’s unbundling mandates in parts of the Omaha Metropolitan Statistical Area based on the presence of a facilities-based competitor. In 2009, a nearly identical forbearance request was made by Qwest for the Phoenix MSA. Not only did the FCC reject the petition, but it batterfanged its prior Omaha decision by rejecting its own precedent and establishing a new (and highly flawed) standard for forbearance that is impossible to satisfy.<sup>20</sup>

The agency’s radical reversal towards forbearance between the Omaha and Phoenix petitions is significant. In these two cases, you had (a) the same carrier (b) submitting data showing a comparable competitive landscape and (c) a FCC whose staff was probably 90 percent unchanged. Yet, the agency reached two entirely different and conflicting decisions.<sup>21</sup> This disparate outcome is the essence of regulatory uncertainty. The conflicting decisions are likewise a strong indicator of politicization.

Indeed, rather than promote meaningful forbearance of rules that have (in the words of President Obama) “outlived their usefulness,”<sup>22</sup> over the past several years the FCC has done its very best to ensure that its standard for Section 10 forbearance is impossible to satisfy.<sup>23</sup> Restricting the use of Section 10 is hardly a way to “provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunica-

<sup>14</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC 12-92, 27 FCC Rcd 10557, REPORT AND ORDER (rel. August 22, 2012) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-12-92A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-92A1.pdf)); G.S. Ford and L.J. Spiwak, *Set It and Forget It? Market Power and the Consequences of Premature Deregulation in Telecommunications Markets*, 3 NYU JOURNAL OF LAW AND BUSINESS 675 (2005).

<sup>15</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC 12-153, 27 FCC Rcd 16318, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING (rel. December 18, 2012) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-12-153A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-153A1.pdf)).

<sup>16</sup> See *FCC Moves Forward With Special Access Data Collection*, DA 14-1201 (rel. August 18, 2014) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0818/DA-14-1201A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0818/DA-14-1201A1.pdf)); see also Statement from FCC Chairman Tom Wheeler on OMB Approval of Special Access Data Collection (August 18, 2014) (We intend to “move forward with data collection and fact-based analysis . . . as we pursue the FCC’s statutory mandate to ensure special access services are provided at reasonable rates and on reasonable terms and conditions.”) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0818/DOC-328875A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0818/DOC-328875A1.pdf)).

<sup>17</sup> See, e.g., Remarks of FCC Chairman Tom Wheeler, COMPTTEL Fall Convention & Expo – Dallas, TX (October 6, 2014) (“. . . there are serious questions about the current special access regime’s ability to ensure continued access at just and reasonable rates, terms, and conditions. \*\*\* But we are not idly waiting for the data to come in.”) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db1006/DOC-329767A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1006/DOC-329767A1.pdf)).

<sup>18</sup> Remarks of FCC Commissioner Ajit Pai before the Internet Innovation Alliance: “*The IP Transition: Great Expectations Or Bleak House?*” (July 24, 2014) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328418A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328418A1.pdf)).

<sup>19</sup> T.R. Beard, G.S. Ford and L.J. Spiwak, *Market Definition and the Economic Effects of Special Access Price Regulation*, 22 COMM L&W CONSP. 237 (2014) (available at: <http://scholarship.law.edu/commmlaw/vol22/iss2/10>).

<sup>20</sup> G.S. Ford and L.J. Spiwak, *The Impossible Dream: Forbearance After the Phoenix Order*, PHOENIX CENTER PERSPECTIVE No. 10-08 (December 16, 2010) (<http://www.phoenix-center.org/perspectives/Perspective10-08Final.pdf>).

<sup>21</sup> For a more detailed explanation of this topic, G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, Presented at TPRC 42 (September 2014) (available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2418675](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418675)) and to be reprinted in 23 COMM L&W CONSP. (forthcoming 2015).

<sup>22</sup> B. Obama, *Toward a 21st-Century Regulatory System*, WALL STREET JOURNAL (January 18, 2011) (available at: <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html>).

<sup>23</sup> See *supra* nn. 20 and 21.

tions and information technologies and services to all Americans. . . .”<sup>24</sup>

**Example No. 3: Preemption of State Municipal Broadband Laws.** When the FCC first squarely addressed the issue of state laws restricting or prohibiting municipal broadband back in 2001, a Democrat-controlled FCC unanimously ruled that the agency lacked any legal authority to preempt such laws<sup>25</sup>—a ruling which was ultimately upheld by the United States Supreme Court.<sup>26</sup> While there was tremendous political pressure to preempt state legislatures at the time (indeed, then-Chairman William Kennard wrote that he voted on this item “reluctantly”), the FCC declined to grant preemption because it was so clear that the agency does not have the legal authority to do so.<sup>27</sup>

Such is not the case today. FCC Chairman Tom Wheeler has boldly (and repeatedly) stated that in light of the D.C. Circuit’s opinion in *Verizon v. FCC* affirming the agency’s authority under Section 706,<sup>28</sup> “I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband.”<sup>29</sup> And to put this power to the test, Mr. Wheeler has, in the words of one senior

<sup>24</sup> See House Report 104-458, 104th Congress (2d Session) (1996) (available at: <http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt458/html/CRPT-104hrpt458.htm>) (Emphasis supplied).

<sup>25</sup> *In re Missouri Municipal League*, FCC 00-443, 16 FCC Rcd 1157, MEMORANDUM OPINION AND ORDER (rel. January 12, 2001).

<sup>26</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

<sup>27</sup> See, e.g., Concurring Statement of William E. Kennard, *In re Missouri Municipal League*, supra n. 25 (“We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the FCC is constrained in its authority to preempt HB 620 by the D.C. Circuit’s *City of Abilene* decision and the U.S. Supreme Court’s decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.”)

<sup>28</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

<sup>29</sup> Remarks of FCC Chairman Tom Wheeler, Federal Communications Commission National Cable & Telecommunications Association (April 30, 2014) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-326852A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf)); Statement of Tom Wheeler, Chairman Federal Communications Commission, Before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, Hearing on “Oversight of the Federal Communications Commission” (May 20, 2014) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327165A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327165A1.pdf)) (“I believe the FCC has the power—and I intend to ask the FCC to exercise that power—to preempt state laws that ban competition from community broadband.”); see also Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules (February 19, 2014) (available at: [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-325654A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-325654A1.pdf)) (In light of the D.C. Circuit’s decision in *Verizon* upholding its Section 706 authority, the “FCC will look for opportunities to enhance Internet access competition. One obvious candidate for close examination was raised in Judge Silberman’s separate opinion, namely legal restrictions on the ability of cities and towns to offer broadband services to consumers in their communities.”).

FCC official, essentially “rolled out the red carpet”<sup>30</sup> for the City of Chattanooga to file a preemption petition (including setting this petition on an expedited pleading cycle).

This sharp reversal in policy and change in the agency’s interpretation of its legal authority is troubling for a wide variety of reasons. First, the law remains clear that the FCC lacks the authority to preempt state laws that restrict or prohibit municipal broadband deployment.<sup>31</sup> Second, should the agency decide to grant the Chattanooga petition, it will nakedly pick a fight with both the bi-partisan National Governors Association<sup>32</sup> and the National Association of State Legislatures<sup>33</sup> (the latter explicitly threatening to sue the FCC in court<sup>34</sup>). Third, notwithstanding the agency’s mandate to encourage broadband investment under Section 706, the FCC is disregarding the advice of its own *National Broadband Plan* which explicitly recognized that “[m]unicipal broadband has risks” because it “may discourage investment by private companies”.<sup>35</sup> Without a doubt, the agency’s about-face on preempting state laws regarding municipal broadband creates uncertainty about whether and how privately-funded broadband networks will recover a return on their investment in markets where they may be competing with the government.

**Example No. 4: Title II Reclassification.** But perhaps the biggest Sword of Damocles of regulatory uncertainty the agency likes to dangle over the industry is the potential reclassification of broadband Internet access from a lightly-regulated Title I “information service” to a heavily regulated common carrier “telecommunications” service under Title II.

As we all know, over a period of years, the FCC has classified cable broadband,<sup>36</sup> wireline broadband,<sup>37</sup>

<sup>30</sup> Remarks of Matthew Berry, Chief of Staff to FCC Commissioner Ajit Pai, at the National Conference of State Legislatures’ 2014 Legislative Summit, Minneapolis, Minnesota (August 20, 2014) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0820/DOC-328916A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0820/DOC-328916A1.pdf)).

<sup>31</sup> For a full explanation of this topic, see L.J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws*, *Bloomberg BNA* (August 6, 2014) (available at: <http://www.phoenix-center.org/BloombergBNAMuniBroadband.pdf>); see also Berry, *id.*

<sup>32</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521825865>.

<sup>33</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521825443>.

<sup>34</sup> See, e.g., July 22 2014 Letter from National Conference of State Legislatures (NCSL) to FCC Chairman Tom Wheeler (available at: [http://www.ncsl.org/documents/standcomm/sccomfc/FCC\\_Preemption\\_LTR\\_072214.pdf](http://www.ncsl.org/documents/standcomm/sccomfc/FCC_Preemption_LTR_072214.pdf)).

<sup>35</sup> CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Federal Communications Commission (March 16, 2010) at p. 153 (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf)) (hereinafter the *National Broadband Plan*). It should also be noted that municipal networks do not provide lower prices or more services than do their private sector counterparts. See G.S. Ford, *Do Municipal Networks Offer More Attractive Service Offerings than Private Sector Providers? A Review and Expansion of the Evidence*, PHOENIX CENTER POLICY PERSPECTIVE No. 14-01 (January 27, 2014) (available at: <http://www.phoenix-center.org/perspectives/Perspective14-01Final.pdf>).

<sup>36</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>37</sup> See *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, FCC 05-150, 20 FCC Rcd 14853, 14862, REPORT AND ORDER AND NOTICE OF PROPOSED

wireless broadband<sup>38</sup> and even broadband over power-line<sup>39</sup> as Title I information services. The FCC's rationale for doing so was straightforward:

classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are appropriately applied to it.<sup>40</sup>

Notwithstanding, the last two FCC Chairmen have toyed with the idea of reclassification. For example, FCC Chairman Julius Genachowski floated the idea of a "Title II Lite" framework when the FCC was contemplating its initial set of Open Internet Rules.<sup>41</sup> While the FCC ultimately abandoned this idea, Chairman Genachowski steadfastly refused to terminate the Title II reclassification docket for the remainder of his Chairmanship (a docket which Mr. Genachowski's successor has also refused to close).<sup>42</sup>

Which brings us to the current state of affairs with the FCC's new efforts to write legally-sustainable Open Internet rules. To be fair, the FCC has proposed to move forward under its Section 706 authority.<sup>43</sup> However, the FCC's new *Notice of Proposed Rulemaking* openly invites the possibility of reclassification of broadband Internet access as a Title II telecommunications service—even including mobile broadband (a service which the FCC specifically went out of its way to exclude from the majority of its first set of Open Internet rules in 2010).<sup>44</sup>

While the FCC has yet to render a decision on the issue, the potential for massive re-regulation of both wireline and wireless networks remains very real. To

wit, not only did the Chairman recently write in an official FCC blog post that he would not "hesitate to use Title II if warranted",<sup>45</sup> but Mr. Wheeler also responded in writing to a group of Democratic senators that he is "seriously considering moving forward to adopt rules using Title II of the Communications Act as the foundation of our legal authority."<sup>46</sup> And, just recently, Mr. Wheeler testified before the House Small Business Committee that "Title II is very much on the table."<sup>47</sup>

Mr. Wheeler's two Democratic colleagues are also sending signals that they would prefer reclassification. For example, FCC Commissioner Jessica Rosenworcel said she was "pleased" that FCC Chairman Tom Wheeler is still considering whether to reclassify broadband as a Title II communications service, subject to common-carrier regulations.<sup>48</sup> And Commissioner Mignon Clyburn—who recently gave a full-throated endorsement of imposing strict Open Internet rules on wireless broadband providers<sup>49</sup>—has been a staunch advocate of Title II reclassification going all the way back to 2010.<sup>50</sup> Given such statements from the majority of the FCC's Commissioners, significant regulation of the Internet almost seems a *fait accompli*.

**Other Examples.** These four cases are but a sample of actions taken by the FCC that signal uncertain times for investors in this sector, especially investors in infrastructure upon which all else depends. There are others examples not detailed here. For example, across multiple administrations, the agency routinely concluded that the mobile wireless industry was "effectively competitive." In the agency's last several *CMRS Reports*, however, the FCC has refused to reach such a determination, despite compelling evidence of improved market performance.<sup>51</sup> Likewise, the agency's gerryman-

RULEMAKING (rel. September 23, 2005), *aff'd Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007).

<sup>38</sup> *In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, FCC 07-30, 22 FCC Rcd 5901, DECLARATORY RULING (rel. March 23, 2007).

<sup>39</sup> *In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, FCC 06-165, 21 FCC Rcd 13281, 13281, MEMORANDUM OPINION AND ORDER (November 7, 2006).

<sup>40</sup> *In the Matter of Federal-State Joint Board on Universal Services, Federal Communications Commission*, FCC 98-67, 13 FCC Rcd 11,830, REPORT TO CONGRESS (rel. April 20, 1998) (available at: [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/fcc98067.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf)) at ¶ 82.

<sup>41</sup> For full examination, see G.S. Ford, L.J. Spiwak and M.L. Stern, *The Broadband Credibility Gap*, 19 COMM'LAW CONSP'CTUS 75 (2010) (available at: <http://www.phoenix-center.org/papers/CommLawConsp'ctusBroadbandCredibilityGap.pdf>).

<sup>42</sup> J. Eggerton, *House Republicans to FCC: Take Title II Off Table, Broadcasting and Cable* (May 13, 2014) (available at: <http://www.broadcastingcable.com/news/washington/house-republicans-fcc-take-title-ii-table/131127>).

<sup>43</sup> *New Open Internet NPRM*, *supra* n. 7.

<sup>44</sup> *Id.* at ¶¶ 148-155. It should be noted that the imposition of severe "Open Internet" encumbrances significantly reduced the value of spectrum during the 700 MHz auction. See G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks*, PHOENIX CENTER POLICY BULLETIN No. 20 (Second Edition) (May 2008) (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB20Final2ndEdition.pdf>). As a result, imposing stringent Open Internet obligations on mobile broadband could doom the FCC's upcoming voluntary incentive auction. See G.S. Ford, *Will Net Neutrality Politics Scuttle the FCC's Upcoming Incentive Auction? The Hill* (September 3, 2014) (<http://thehill.com/blogs/pundits-blog/technology/216462-will-net-neutrality-politics-scuttle-the-fccs-upcoming>).

<sup>45</sup> T. Wheeler, *Finding the Best Path Forward to Protect the Open Internet*, FCC Official Blog (April 29, 2014) available at: <http://www.fcc.gov/blog/finding-best-path-forward-protect-open-internet>; see also Remarks of Tom Wheeler, Chairman, Federal Communications Commission, National Cable & Telecommunications Association, *supra* n. 29 ("Let me be clear. If someone acts to divide the Internet between 'haves' and 'have-nots,' we will use every power at our disposal to stop it. I consider that to include Title II. Just because it is my strong belief that following the court's roadmap will produce similar protections more quickly, does not mean I will hesitate to use Title II if warranted.")

<sup>46</sup> See <http://apps.fcc.gov/ecfs/document/view?id=7521752140>.

<sup>47</sup> J. Hattem, *FCC "Very Much" Eyeing Web Rules Shake-up, The Hill* (September 17, 2014) (available at: <http://thehill.com/policy/technology/218059-fcc-very-much-eyeing-web-rules-shakeup>).

<sup>48</sup> P. Goldstein, *FCC's Clyburn Comes Out for Strict Net Neutrality Rules for Wireless Fierce Wireless* (September 25, 2014) (<http://www.fiercewireless.com/story/fccs-clyburn-rosenworcel-come-out-strict-net-neutrality-rules-wireless/2014-09-25>).

<sup>49</sup> *Id.*

<sup>50</sup> J. Eggerton, *Clyburn Defends Title II Reclassification, Broadcasting & Cable* (June 3, 2010) (available at: <http://www.broadcastingcable.com/news/technology/clyburn-defends-title-ii-reclassification/47507>).

<sup>51</sup> See, e.g., *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, FCC 10-81, 25 FCC Rcd 11,407, FOURTEENTH REPORT (rel. May 20, 2010); *In the Matter of Implementation of*

dering of the evidence to conclude that broadband networks are not being “reasonably deployed” was unquestionably intended to expand the agency’s regulatory authority, which it has and apparently intends to use to aggressively regulate the industry.<sup>52</sup> And, less than four years after the agency told providers that they could receive federal funding to deploy broadband ser-

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*Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, FCC 11-103, 26 FCC Rcd 9664, FIFTEENTH REPORT (rel. June 27, 2011); *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, FCC 13-34, 28 FCC Rcd 3700, SIXTEENTH REPORT (rel. March 19, 2013).

<sup>52</sup> G.S. Ford and L.J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, 16 JOURNAL OF INTERNET LAW 1 (January 2013) (available at: <http://www.phoenix-center.org/papers/JournalofInternetLawSection706.pdf>).

vices of 4 Mbps or better, Chairman Wheeler recently proposed to increase the threshold to 10 Mbps.<sup>53</sup>

**Policy Implications and Conclusions.** Regulatory uncertainty is not a static phenomenon; it is not resolved by issuing a single order. Regulatory risk is established by *decisions made over time*. And, as we demonstrate here with just a few examples, over the past few years, the FCC has been a model of regulatory uncertainty. Regulated (and unregulated) companies have no idea what sorts of regulations will impact their services and operations from administration to administration, though at present it seems sensible to presume there will be more regulation and not less.

So, when it comes to promoting certainty, of late the Federal Communications Commission has been a spectacular failure.

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<sup>53</sup> Prepared Remarks of FCC Chairman Tom Wheeler, *The Facts and Future of Broadband Competition* (September 4, 2014) (available at: <http://www.fcc.gov/document/chairman-remarks-facts-and-future-broadband-competition>).