Introduction

Under Section 706 of the Communications Act, the Federal Communications Commission (“FCC”) is charged with encouraging “the deployment of advanced telecommunications services to all Americans.” 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,” and how as “an entrepreneur and as an investor, [he] understand[s] the importance of supplying businesses with certainty.” Commissioner Mignon Clyburn wants the agency’s policies “to provide the degree of certainty needed for both the industry and consumers to function.” Commissioner Jessica Rosenworcel is concerned about telecommunications providers having “the certainty they need to confidently invest in their network infrastructure,” while Commissioner Ajit Pai argues that “regulatory certainty ... has spurred fiber deployment throughout the United States.” Commissioner Michael O’Reilly concurs, noting that “a climate of certainty and stability” leads to “broadband investment and Internet innovation.”

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. 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 and each million spent supports ten information-sector jobs and perhaps twenty-four jobs economy wide (and in this economy, good jobs remain scarce).

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When it comes to providing certainty, however, the agency is all bark and no bite. Despite the Commission acknowledging the importance of regulatory certainty to the deployment of modern broadband infrastructure, the reality remains that over the last few years the Commission 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,11 there can be no doubt that over the past several years—evidenced particularly with the current net neutrality debate—we have hit a new nadir.12

Indeed, as we show in this PERSPECTIVE, 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.13 As to be expected, the propriety of that deregulatory move by the FCC has been criticized by the purchasers of such services ever since.

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Finally acceding to this pressure, in 2012 the Commission 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—i.e., two competitors have collocated in a single Metropolitan Statistical Area—is “not working as predicted.” In particular, the Commission 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.”14

In its 2012 Order the Commission 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 Commission issued such a data request in 2012,15 and received OMB approval two years later, prompting the Commission to announce recently that it is about to proceed with the data collection.16 While we do not know how the Commission 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 precedent17 collectively signal an increase in the probability of heavy-handed regulation.

To us, this radical policy reversal on Special Access makes little sense. As 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 broadband.”18 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).19 Given the above, it is unclear why the agency would dedicate further Commission 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 Commission 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 Commission 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.20

In [the Phoenix and Omaha Forbearance Orders], you had (a) the same carrier (b) submitting data showing a similar competitive landscape and (c) a Commission whose staff was probably 90% unchanged. Yet, the agency reached two entirely different and conflicting decisions. This disparate outcome is the essence of regulatory uncertainty. The conflicting decisions are likewise a strong indicator of politicization.

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 Commission whose staff was probably 90% unchanged. Yet, the agency reached two entirely different and conflicting decisions.21 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,”22 over the past several years the Commission has done its very best to ensure that its standard for Section 10 forbearance is impossible to satisfy.23 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 telecommunications and information technologies and services to all Americans....”24
Example No. 3: Preemption of State Municipal Broadband Laws

When the Commission first squarely addressed the issue of state laws restricting or prohibiting municipal broadband back in 2001, a Democrat-controlled Commission unanimously ruled that the agency lacked any legal authority to preempt such laws—a ruling which was ultimately upheld by the United States Supreme Court. While there was tremendous political pressure to pre-empt state legislatures at the time (indeed, then-Chairman William Kennard wrote that he voted on this item “reluctantly”), the Commission declined to grant preemption because it was so clear that the agency does not have the legal authority to do so.

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, “I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband.” And to put this power to the test, Mr. Wheeler has, in the words of one senior FCC official, essentially “rolled out the red carpet” 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. Second, should the agency decide to grant the Chattanooga petition, it will nakedly pick a fight with both the bi-partisan National Governors Association and the National Association of State Legislatures (the latter explicitly threatening to sue the Commission in court). Third, notwithstanding the agency’s mandate to encourage broadband investment under Section 706, the Commission 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”.

Without a doubt, the agency’s about-face on preemption of 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 Commission has classified cable broadband, wireline broadband, wireless broadband and even broadband over powerline as Title I information services. The Commission’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
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 Commission was contemplating its initial set of Open Internet Rules. While the Commission 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).

Which brings us to the current state of affairs with the Commission’s new efforts to write legally-sustainable Open Internet rules. To be fair, the Commission has proposed to move forward under its Section 706 authority. However, the Commission’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 Commission specifically went out of its way to exclude from the majority of its first set of Open Internet rules in 2010). While the Commission 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”, 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.” And, just recently, Mr. Wheeler testified before the House Small Business Committee that “Title II is very much on the table.”

In addition, 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. And Commissioner Mignon Clyburn—who recently gave a full-throated endorsement of imposing strict Open Internet rules on wireless broadband providers—has been a staunch advocate of Title II reclassification going all the way back to 2010. Given such statements from the majority of FCC Commissioner’s, significant re-regulation of the Internet almost seems a fait accompli.

Regulatory risk is not a static phenomenon; it is not resolved by issuing a single order. Regulatory risk is established by decisions made over time.

Other Examples

These four cases are but a sample of actions taken by the Commission 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 Commission has refused to reach such a determination, despite compelling evidence of improved market performance. Likewise, the agency’s gerrymandering of the evidence to conclude that broadband networks are not being “reasonably deployed” was unquestionably intended to expand the agency’s regulatory authority, which is has and apparently intends to use to aggressively regulate the industry. And, less than four years after the agency told...
providers that they could receive federal funding to deploy broadband services of 4 Mbps or better, Chairman Wheeler recently proposed to increase the threshold to 10 Mbps.53

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.
NOTES:

1 Dr. George Ford is the Chief Economist, and Lawrence J. Spiwak is the President, of the Phoenix Center for Advanced Legal and Economic Public Policy Studies. The views expressed in this PERSPECTIVE do not represent the views of the Phoenix Center or its staff.


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17 See, e.g., Remarks of FCC Chairman Tom Wheeler, COMPTEL 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).


23 See supra nn. 20 and 21.

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27 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 Commission 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.”)


29 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); 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) (“I believe the FCC has the power—and I intend to ask the Commission 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) (In light of the D.C. Circuit’s decision in Verizon upholding its Section 706 authority, the “Commission 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.”).


31 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.


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


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43 New Open Internet NPRM, supra n. 7.


45 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.”)


49 Id.


