

Modernizing the FCC: It's Not Complicated

It's September in Washington, my favorite time of year. We all pretend we've just gotten back from hobnobbing with the Obamas in Martha's Vineyard, and we're now ready to focus on the more important things. Like the Redskins. Oh yeah. And there's another budget crisis. Another debt ceiling deadline. Another Middle East war, maybe. Oh, and we have plenty of leaks, and even leaks about leaks. Not to mention leaks by the leakees about the leaker. We have another Obama speech labeled "the biggest of his presidency". And on vacation, we all read "This Town", or pretended we did. Because, after all, we had to find out if we were in it. And if we weren't, we had to be able to tell all our friends "thank God I wasn't in the book" while secretly wishing we were. Even if it meant getting trashed.

But for us telecom junkies, all this pales. In our own in-bred, anti-Copernican world, we're consumed not by these issues. Instead, we're buzzing about a new FCC Chairmanship. We are truly our own self-contained universe.

Yes, like all of you, I put out my statement praising Tom Wheeler and the many virtues I know he'll bring to his job. I mean really-- even Susan Crawford put out a statement, so I'm not sure how impressed the incoming chairman is by all these expressions of devotion. But, in this case, I actually think we have a good chance of being right. (And that's not because Free Press took the opposing view... though with their track record, it is a validation of sorts.)

So, with faith that we'll all be saying the same wonderful things at the end of Chairman Wheeler's tenure that we're saying before he starts, I wanted to offer a few modest thoughts about the big challenges our new FCC chairman will face in this time of huge technological upheaval in communications. But best to begin with his exquisite conundrum.

First, the FCC today is a regulatory agency created and structured to address issues in an industry that no longer exists. The core assumptions of its governing law and its key regulations are that

- wireline voice service is still a monopoly;
- there is no Internet;
- content is delivered only by over-the-air broadcast or by a single cable provider; and that
- wireless is a niche service that serves a small fraction of the population, and then only as a supplement to a wired voice service.

In short, the FCC is a wired, analog agency operating in a wireless, IP world. And that only works with cognitive dissonance.

Second, the prospect of changing the law to fix this problem is bleak. It's not news to anyone in this room that it is next to impossible to push major, controversial, comprehensive legislation through Congress these days.

Third, despite problems #1 and #2, the final puzzle is that the mission of the agency and the nature of regulations *must* change. It is 2013, not 1934 or even 1996. There have been massive changes in the industry, in technology, and in consumer choices and expectations. For 70 years, the pace of change in communications was slow and incremental. But in less than a decade, an explosion of innovation has changed every business in this industry. Today, it resembles nothing that has ever existed before, and its potential for helping every human being on the planet is almost unprecedented. In this situation, the FCC's historic mission must be modernized to reflect the fundamental evolution in communications that IP technology and the Internet have wrought. If it doesn't, the agency will become irrelevant. The same pace of change that leaves a slow-footed business behind will have no mercy on an agency that can't keep up.

To make that last point clear, let me give you some statistics. Btw, I love numbers... Which is weird for a lawyer, I know. Unless they're billable hours. But humor me, ok?

Skype just celebrated its 10th birthday by announcing that it had reached a record 70 million people *simultaneously* using Skype online to communicate. That's out of a total of 500 million registered users. To put those numbers in perspective, in our 2nd Quarter SEC filings, AT&T stated that we had 13.9 million POTS access lines, and Verizon said it had about 7.2 million POTS access lines in service. In other words, Skype had 3 times as many users *simultaneously* using its service last month as we and Verizon had total POTS access lines in service.

500 million registered users versus 21 million-- it's not complicated folks.

And speaking of "not complicated", let's talk about wireless. In October 2012, Apple's CEO Tim Cook announced that Apple's iMessage platform had been used to deliver 300 billion text messages with an average rate of 28,000 per second. Last June, What'sApp, a very popular over-the-top text messaging application, sent or received 27 billion texts in one single day. As you can see, new technologies are rapidly replacing the services provided by the "carriers" the Communications Act was written to cover.

And those services are being deployed through applications and technologies by companies that have traditionally been beyond the scope of the FCC's jurisdiction. It really isn't complicated. If the FCC doesn't modernize its mission, the pace of technology will leave it in the dust.

So the mission of the FCC has to change. It has to be modernized. And as you might expect, I have some ideas on that topic that I'd like to share with you and Chairman Wheeler as he begins his chairmanship.

My first observation on the mission of the FCC would be to leave competition policy to the antitrust laws and antitrust enforcers. In the days of a communications monopoly, it might have made sense to have multiple agencies enforcing different variants of competition policy-- with one driven by a vague "public interest" standard. But that world no longer exists. As more communications services are becoming

applications that ride over broadband infrastructure-- and are being provided by non-traditional, non-carrier companies-- the need to have multiple agencies charged with “protecting competition” has vanished.

Too often lately, the FCC has acted in the name of competition policy to actually ignore competition in the marketplace. One need only review its annual wireless competition reports to see that the FCC refuses to even acknowledge the competitive markets its own data proves overwhelmingly to exist. A dirty little secret of our industry is that we all know the FCC is afraid to draw the conclusions Congress mandated that it draw, because doing so would impede its ability to shape markets as it sees fit. All in the name of “protecting competition.”

Invariably, when the FCC says it is acting to protect competition, it is really acting to pick winners and losers among companies. This is an inappropriate thing for government to do in most cases, particularly when you have a competitive market. In a competitive market, consumers pick the winners and losers by choosing whose product or service to use. So when the FCC enters this space, in the absence of any proof that a company has abused market power, it is, in effect, substituting its judgment for that of consumers. This is an odd way to “protect competition” and sure seems to lack the regulatory humility one expects. But we see it time after time.

In the area of special access, the FCC last year suspended pricing flexibility rules while at the same time acknowledging they lack the information about what is happening in that market to make any judgments on the competitiveness of those markets. In fact, they have virtually no information about the presence of competitive services and

facilities in any market in this country. Yet they acted despite an admitted dearth of evidence. And when they acted, they vacated rules established 14 years ago by a Democratic-led FCC which found evidence that competition existed in those markets. Since that time, we've seen even more competitors enter special access markets, including the cable companies. Clearly, in its ruling last year, the FCC decided which companies it wanted to help and which it wanted to hurt, unembarrassed by their admission that they lacked the most basic facts on which to base a judgment.

But my particular favorite was when the FCC denied Qwest (now CenturyLink) some relief from wholesale pricing obligations in Phoenix, while refusing to acknowledge that wireless substitution had any competitive impact on the market. Amazing, isn't it? As all of us know, what really happened is that the FCC decided which companies it wanted to help, and which it wanted to hurt, then dismissed any facts that got in the way. And to do so in this case, they had to ignore what any teenager watching TV ads or walking into Best Buy knows to be true. Not to mention the government's own statistics which prove cord-cutting to be real, and accelerating at a dramatic pace. Yes, according to the FCC, there is no such thing as wireless substitution, and local "phone" companies are still presumed dominant in the voice market. C'mon, guys, it's not complicated.

In my opinion, these are just a few among many examples of the FCC using the cover of competition policy to overtly pick winners and losers in competitive marketplaces. Other industries have the certainty of established antitrust law and competition precedent to guide their

investment decisions. Our industry, in contrast, faces the uncertainty of arbitrary competition standards based on skewed or ignored facts, and whatever the FCC decides is “in the public interest.” Also, most other industries do not face multiple competition oversight or merger reviews. One is deemed sufficient for nearly the entire American economy. And the time has come to treat communications the same. The FCC is indeed the expert agency on communications. But it is not the expert agency on competition law or antitrust. For the good of industry investment and job creation, the FCC should focus on its own areas of expertise, and should yield to the expertise of others when it comes to competition and antitrust.

So if competition policy is not going to be the mission of a modern FCC, what should be the focus of that mission? One inarguable priority should be consumer protection. While I might disagree with the FCC on particular matters, I would concede readily that this is an appropriate area for regulation by an expert agency. Indeed, I think the FCC can play a strong role in protecting consumers, and it has demonstrated that in recent years. In the area of consumer bill shock, for example, the FCC identified a problem, and worked with CTIA to create a good system of notices advising customers when they’re in danger of additional charges. That partnership produced a public service that has benefited consumers across the board.

Public safety should fall within the FCC’s consumer protection mandate as well. People must be able to reach help in emergencies. No one can disagree with that. But here is another area where the FCC

needs to think afresh about the way it executes that responsibility. When Text-to-911 arose at the agency last year, the first instinct of the FCC team looking at the issue was an order that would have required only legacy wireless carriers using SMS technology to provide text-to-911 messages. Keep in mind that, for example, the “Text” button on an iPhone would not have been subject to this despite most consumers expecting otherwise. Thankfully, before this dubious proposition was tested on real people, the thinking behind that order changed. But it speaks volumes that the FCC’s first instinct was to operate in its comfort zone, relying on distinctions based on legacy technologies and legacy status under the Communications Act. Even though those distinctions are today irrelevant to nearly all consumers. In fact, consumers have quickly and uniformly moved past the silos described in that 79 year-old piece of legislation, and it’s time the FCC did as well. If it’s a public policy imperative to reach 911 (and I think it is), then we have to decide the services to which we’re going to attach those obligations and apply those obligations uniformly, regardless of the underlying technology used to provide the service. The FCC is not really protecting consumers if it doesn’t move past that legacy, Old World thinking.

Now I know some have argued that the way to deal with such problems is to import Title II into our new world. In effect, to pretend the Internet is simply an extension of legacy wired voice networks. That would be a disastrous and dangerous mistake. The beauty of IP technology is how it unlocks communications capabilities for consumers that enable a wide array of choices. You don’t have to own a network to reach your customer or sell your services. The types of

regulations embodied in our current law aren't necessary in an IP world. They're not even relevant. But again, I'd concede there will always be a set of core consumer protections that need to exist, like 911.

I have said to folks repeatedly that as we move to an all-IP world, AT&T understands that we are not moving into a regulation-free zone. We get that. But it would be just plain dumb to take regulations designed for a monopoly Bell System and try to apply them to modern, competitive Internet communications. Those legacy rules were designed to protect Company A against Company B. A true regime of consumer protection would protect consumers against abuse regardless of whether it was by Company A or Company B. And those consumer protection rules should be minimal and apply at the service level, regardless of the underlying technology used to provide the service. This means the FCC must discard its old-think philosophy, which relied upon distinctions based on technology or legacy status under the Communications Act. And in cases where the FCC's jurisdiction does not extend to all providers in a relevant market, it should not try to regulate only a subset of that market based on obsolete distinctions.

On the other side of consumer protection, we also recognize that the FCC will continue to play a role in both the world of wireline and wireless communications. The FCC remains the U.S. government's technical expert for communications. On the wireline side, the agency

also continues to oversee the universal service mandate. And on the wireless side, the FCC is a critical agent for spectrum issues.

In exercising its authority in these areas, the FCC should first and foremost focus on policies that are designed to promote investment in broadband infrastructure. One cannot read the FCC's own (excellent) National Broadband Plan and conclude otherwise.

In the area of spectrum management, the FCC can achieve that goal by working with the Administration to identify additional spectrum for the auction pipeline so our industry can continue meet the public's so far insatiable demand for bandwidth, and to conduct those auctions in a fair, transparent and market-driven manner. By doing that, we will raise the dollars needed by the government, and consumer demand will determine where spectrum resources go. This has worked well in the past—indeed, we are outpacing Europe and others by virtue of our fair and open auction processes for spectrum. The FCC must also continue to handle secondary market spectrum transfers in a way that completes those transactions in a fast, predictable and efficient manner. Consumers are best protected and served by spectrum being put to use.

It is also entirely reasonable for an agency like the FCC to require purchasers of limited spectrum resources to deploy that spectrum in a reasonable time period. Again, simply put, consumers don't benefit if the purchasers of spectrum simply sit on it. Overall, the object of the FCC ought to be encouraging investment in new broadband infrastructure, whether wired or wireless, And it should emphatically not be in the business of coddling speculators. Or those who would

rather use regulation to access the investments of others instead of building their own infrastructure. In practice, that's what it means for the FCC to focus on protecting consumers rather than picking winners and losers among companies.

On the wireline side, I think it equally important the FCC adopt policies designed to promote, not discourage, the deployment of broadband infrastructure. If our experience participating in the USF reform proceedings has taught us anything, it is that there are not enough dollars in universal service support to pay the cost of bringing broadband everywhere in this country where it's not present today. Consequently, the mission of the FCC should be to do everything it can to maximize the amount of private investment in broadband infrastructure so it can minimize reliance on USF subsidies and target those subsidies to where they'll do the most good.

To do that, the FCC is going to have to do something that will be wholly against its nature: allow companies to retire the legacy technologies and services upon which its traditional regulatory authority is based. Look, we know how hard it is going to be for the FCC to get their minds around that concept. Earlier this year, the FCC decided that twelve months wasn't quite enough time for it to figure out it could let go of rules that remained from the days of telegraph regulation. Let me repeat that, *telegraph* regulation. I don't even think my friend Dick Wiley, who's been around forever, was at the FCC in the days of a vibrant telegraph industry.

And last year, in the special access proceeding I mentioned earlier, the FCC decided it would be a good idea to spend at least the

next 5 years trying to re-examine the pricing structure for legacy, copper-based 1.5 MBPS special access services. Let me put that in perspective for you. On the one hand, you have really smart folks like Blair Levin trying to figure out how we get more 1 Gigabit communities in this country with his GigU mission. And, I might add, an FCC chairman holding a press conference to endorse the idea. On the other hand, the FCC thinks it a good idea to spend the next 5 years figuring out how to re-price a service that was obsolete 5 years ago. I mean, seriously, sometimes you just want to throw up your hands. As I said before, it's really not complicated.

But the agency has to get its arms—and its minds-- around these concepts. It is *really* important. Every dollar spent maintaining and supporting POTS and TDM service is an investment dollar that is almost immediately stranded. And, more importantly, a dollar not being spent on broadband-- as the FCC's own National Broadband Plan points out. If we are going to get broadband everywhere in this country, we have to recognize that it makes no sense to mandate investment in antique architecture instead of modern architecture.

I'll give you some more facts. In Florida and Michigan-- two states in our wireline footprint-- only about 15% of homes are still connected to the POTS network. Given that, the economics of maintaining the POTS network and at the same time deploying broadband everywhere in those states just won't work. There simply aren't enough investment dollars to do both, even for a company as large as ours. When consumers speak clearly about what they want, we have to listen. And

they're speaking now—loudly and daily. They want wireless, and they want IP. We're listening-- they're our customers and we have to. But what we worry about most is that the FCC isn't listening.

We know this IP transition is going to be difficult for some. But we're also determined that we can't leave anyone behind. We've tried hard to focus on our customers and address their concerns. And I have to compliment Gigi Sohn and Harold Feld of Public Knowledge for identifying the key consumer protections needed for a successful IP transition. I've endorsed those. We may end up differing on details, but their framework is sound. Yet it can't just be Public Knowledge embracing this challenge. The FCC also needs to embrace the challenge and lead the country through this in an orderly way. We have the time to do this right, but we have to use it properly. The agency's very long delays in agreeing to a set of trials in only two wire centers-- out of 4,700 in our footprint alone—has, frankly been disconcerting. And keep in mind, these are trials the FCC itself would oversee. In my opinion, the FCC has no more important mission in the coming years. If it is truly committed to consumer protection, the FCC will stop fretting about its own authority, or the fears of companies who aren't investing, and start working with the industry to ensure an orderly transition of technologies. These changes are already underway. Consumers are driving them with the choices they make every day. The pace is accelerating. The failure of the FCC to plan risks confusion, disruptions, a squandering of resources, and even a new sort of digital divide. This is an area where we need the FCC to act like the expert agency it truly is. And it's an opportunity for incoming Chairman Wheeler to really distinguish himself and his agency by articulating a vision for a 21st

Century FCC and a truly modernized approach to regulation. And think all of us in this industry, both companies and stakeholders, would not only say, “amen”, but also “let’s get on with it.”

In conclusion, Chairman Wheeler has a tough job ahead. And trust me, I’m not telling him something he doesn’t already know. The times and circumstances call on him to change both the mission-- and the culture-- at the agency. And the latter may be the toughest part. I work for a large institution, and changing the culture of one takes real courageous leadership. The FCC has strong group of dedicated people, but a vision of their agency’s future can only come from on top. I know Tom and I think he can pull it off. And I don’t think he needs a major legislative change to get this done either. Sure, it would be helpful, but I don’t think it’s in the cards. If Chairman Wheeler starts by articulating a new, modern mission for the agency—a mission that’s forward rather than backward-looking-- things can fall in place quickly. It can start by recognizing that consumer choices exist and are being made in the marketplace daily. And respecting those choices. Letting go of the past, and pursuing policies that will result in the creation of more broadband infrastructure throughout the wireline and wireless networks of America. We all know that if you give a strong team a solid vision of their objective, they can accomplish almost anything. And if the new chairman does that, America’s consumers will continue to have the best and widest array of communications services in the world.

Thanks for listening, and I’ll be happy to take some questions.