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Broadband Regulation

Not Ready to Ride Into the Sunset: Chairman Wheeler and the Fight for Internet Regulation

BY DR. GEORGE S. FORD

There is a long-standing tradition in American politics that when your term of office is over, you retreat quietly into the background and allow a tasteful period of time to pass before you get back into the arena. Former Federal Communications Commission Chairman Tom Wheeler, however, does not appear to have bought into that tradition.

Mr. Wheeler, apparently unhappy about the efforts of his successor, Ajit Pai, to undo the former chairman's signature regulatory enactment—the imposition of legacy common carrier price regulation on the internet—has continued to advocate for the survival of the regulatory structures he instituted while in office.

Just one month after leaving office, Mr. Wheeler traveled to the Mobile World Congress in Barcelona, where he blasted his replacement for proposing to reverse the FCC's *2015 Open Internet Order*. And last month, at a ''town hall'' with Congressman Don Beyer outside of Washington D.C. on the so-called Net Neutrality ''Day of Action,'' he accused Chairman Pai of helping ''broadband providers abuse their dominant position.''

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Most recently, Mr. Wheeler sat down for an interview with FastCompany—a media site that describes itself as ''written for, by, and about the most progressive business leaders''—to plead once more the case for maintaining price regulation of internet access service. Mr. Wheeler's defense of the wisdom and necessity of his policies, however, appeared to ignore or mischaracterize numerous pertinent facts.

For instance, Mr. Wheeler described Chairman Pai's concern about declining investment in broadband infrastructure as ''balderdash,'' asserting that broadband providers didn't tell Wall Street that the FCC's 2015 rules would harm investment. But in their Annual Reports to investors, AT&T bluntly told its investors that Mr. Wheeler's approach ''will *damage investment*'' and Verizon declared it ''could *depress long-term capital investment in infrastructure*, discourage innovation in broadband internet and related services, and cost the economy thousands of middle-class jobs.''

Mr. Wheeler then pointed to Comcast's quarterly financial report as evidence that investment as a share of revenue had remained constant for the company. Even if that were true, proof of stable investment would not support Mr. Wheeler's promise that his regulatory interventions would result in *accelerated* investment in broadband facilities and services. But the evidence relevant to Mr. Wheeler's claims, viewed broadly and fairly, demonstrates that for the ten largest broadband firms—whose efforts account for almost all of the industry's investment—capital spending as a share of revenue was down 8.1 percent between 2014 and 2016 (about $6 billion). Viewed in that light, investment is down, and the former chairman's rigid regulatory regime appears to be the reason why.

Broadband Capital Spending

	2016	2014
Revenue	$501.5 Billion	$440.0 Billion
Capital Spending	$67.4 Billion	$64.4 Billion

Share	13.4%	14.2%

Financial documents of AT&T, Verizon, Comcast, Charter, CenturyLink, Sprint, T-Mobile, Frontier, Windstream, and U.S. Cellular. Constant 2016 dollars.

Statistical Analysis Mr. Wheeler's critique of analysis of broadband investment is similarly incomplete and unpersuasive, focusing on a single blog post by economist Hal Singer while declining to address numerous other papers offering extensive statistical analyses of the data. Ignored completely by Mr. Wheeler are serious statistical analyses of government data on telecommunications investment revealing that since reclassification was first proposed in 2010, the nation has lost around $80-$125 billion in infrastructure investment, a 25 percent decline through 2015. Statistics also confirm capital spending in 2016, a year after his 2015 decision, was down again by a shockingly large amount. In the wireless industry, for instance, investment was about $6 billion below expectations in 2016, a stunning decline of 20 percent. As the broadband providers predicted, internet regulation has cost the nation billions in infrastructure spending—along with 100,000 telecommunications jobs annually—and the pace of broadband quality increases has decelerated.

Mr. Wheeler also claims that between 50 and 75 percent of all households have one or fewer choices for high-speed broadband (defined as 25 megabits per second). FCC data released less than ten days after Mr. Wheeler's departure, however, show that 90 percent of Americans have access to such speeds. Unfortunately, the description in a Wall Street Journal article of Mr. Wheeler living in an ''economics-free zone''—by his hand-picked Chief Economist no less—remains valid today.

Self-Interest or Customer Protection? Mr. Wheeler also supports the need for internet regulation by asserting that in 2005 Comcast interfered with ''peer-to-peer video [] because it interfered with some of the services they wanted to make profits off of.'' This depiction of what happened inexplicably ignores several cogent facts.

First, peer-to-peer software such as BitTorrent was not used to stream video legally in competition with traditional television service. In fact, it was—and probably still is—mostly used to pirate copyrighted music and videos.

Second, Comcast's action was motivated by its customers' complaints regarding quality problems with stand-alone, over-the-top VoIP providers such as Vonage, problems directly caused by the BitTorrent peer-to-peer protocol's lack of etiquette in constraining congestion. As the Supreme Court observed in *MGM v. Grokster*, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781, 75 U.S.P.Q.2d 1001, 18 ILRD 79, 2005 ILRC 2031, 33 Med. L. Rptr. 1865, 73 U.S.L.W. 4675 (2005), the ''creator of the [peer-to-peer] software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network.'' So, in truth, Comcast was not attempting to sabotage a rival as Mr. Wheeler claims.

Time for a Change It is difficult to see how the former chairman's internet policy is likely to make broadband services more available, better, or cheaper. Whatever the role the FCC has to play in the modern communications market, Mr. Wheeler's retrogressive regulatory approach is counterproductive. America appears now to be suffering the consequences of it.

If, as the data appear to suggest, Mr. Wheeler's signature regulatory contribution has cost the nation billions in network investment, reduced employment by 100,000 telecommunications jobs per year, and slowed improvements in broadband quality, it is incumbent on his successor to press forward with the clean-up hastily. Happily, Mr. Pai appears intent on doing precisely that.

The sooner the broadband industry gets to say, ''good riddance'' to the Wheeler FCC's Title II regulatory regime, the better.