2015 again proved to be another extremely productive year for the Phoenix Center, so much so that all of our many accomplishments and accolades cannot be summarized here.

As always, the Phoenix Center’s research in 2015 was prolific. To begin, the Phoenix Center issued six (6) scholarly papers in 2015. Moreover, we published six (6) “mini” law reviews in BLOOMBERG BNA. We are also extremely proud to report that three (3) Phoenix Center papers were published, or accepted for publication, in academic journals. Finally, Phoenix Center staff authored ten (10) op-eds in various media outlets.

In 2015, the Phoenix Center also took steps to bolster our digital presence. Among other items, we authored several blogs on @LAWANDECONOMICS, the official blog of the Phoenix Center. We also again participated actively on Twitter with our handle @lawandeconomics, and we are pleased to report that we have approximately 2,200 followers.

Once again, our efforts have not gone unnoticed. For example, Phoenix Center Chief Economist Dr. George Ford remains in the top 1% of authors downloaded on the Social Science Research Network, and I am not far behind in the top 1.5%. More importantly, the Phoenix Center’s webpage received well over 1.5 million hits in 2015.

But there is more: Not only was our work cited prolifically in both the press and in the academic literature in 2015, but our research made a significant impact in the policy debate. Most notably, soon after our paper Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service was published in the FEDERAL COMMUNICATIONS LAW JOURNAL, it was widely reported that edge providers aggressively lobbied the FCC to prevent BSPs from charging for terminating access, and the agency at the last minute agreed. As both the Appellants and the Phoenix Center in our amicus brief pointed out, the FCC’s actions became a central issue on appeal.

We also tried to contribute to the broader telecom community. To this end, I was again pleased to serve as the co-chair of Federal Communications Law Association’s committee to oversee the FEDERAL COMMUNICATIONS LAW JOURNAL. In addition, I was honored to be appointed to the TPRC Program Committee. Moreover, Phoenix Center Chief Economist Dr. George Ford was appointed by Alabama Governor Robert Bentley to serve on the state’s Broadband Taskforce.

Finally, in addition to being invited to participate in a variety of conferences across the country, the Phoenix Center also put on five fantastic programs of its own this year. First, we held a variety of “teleforum” to talk about a wide variety of issues including municipal broadband and the FCC’s Open Internet Order. Second, we held our Fourth Annual Rooftop Policy Roundtable Discussion, where we had an excellent set of interactive conversations about how the FCC should be thinking about its consumer privacy regime in the post-reclassification world with FTC Commissioner Maureen Ohlhausen and a panel of legal experts over drinks and cigars. Finally, we held our Fifteenth Annual U.S. Telecoms Symposium to another standing-room only crowd. As always, we had leading policymakers and practitioners participate and the discussions were both informative and lively.

Once again, not a bad year…

— Lawrence J. Spiwak, President
PHOENIX CENTER PUBLICATIONS

The Phoenix Center continued to publish a prodigious amount of scholarly research in 2015. As always, all of the Phoenix Center’s research is available free on the Phoenix Center’s web page and on the Social Science Research Network.

PHOENIX CENTER POLICY PAPER SERIES

The Phoenix Center’s POLICY PAPER SERIES seeks to provide an in-depth analysis of the current regulatory and political paradigms, as well as to provide constructive and well-reasoned solutions to the problems of the day. In 2015, the Phoenix Center issued the following POLICY PAPERS:


- **PHOENIX CENTER POLICY PAPER NO. 49,** Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC (October 2015).

PHOENIX CENTER POLICY PERSPECTIVES

The Phoenix Center’s POLICY PERSPECTIVES SERIES is designed to provide a forum for its individual staff members to express their personal views on current policy developments. The Phoenix Center published the following POLICY PERSPECTIVES in 2015:

- **PHOENIX CENTER POLICY PERSPECTIVE NO. 15-01:** Why Chattanooga is not the “Poster Child” for Municipal Broadband (January 20, 2015).

- **PHOENIX CENTER POLICY PERSPECTIVE NO. 15-02:** Auction 97 and the Value of Spectrum (February 4, 2015).

- **PHOENIX CENTER POLICY PERSPECTIVE NO. 15-03:** The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder (June 29, 2015).

- **PHOENIX CENTER POLICY PERSPECTIVE NO. 15-04:** Ugly is Only Skin Deep: An Analysis of the DE Program in Auction 97 (July 20, 2015).

ACADEMIC PUBLICATIONS

In 2015, the Phoenix Center had three of its papers published, or accepted for publication, in academic journals:

- **Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,** 67 FEDERAL COMMUNICATIONS LAW JOURNAL 1 (2015) (originally released as PHOENIX CENTER POLICY BULLETIN NO. 36).


- **Lessons Learned from the U.S. Unbundling Experience,** FEDERAL COMMUNICATIONS LAW JOURNAL (forthcoming 2016) (originally published as PHOENIX CENTER POLICY PAPER NO. 45).

“MINI” LAW REVIEWS PUBLISHED IN BLOOMBERG BNA

The Phoenix Center published the following “mini” law reviews with BLOOMBERG BNA in 2015:
PHOENIX CENTER PUBLICATIONS

- Why the FCC Can’t Preempt States on Muni-Broadband, BLOOMBERG BNA (February 20, 2015).
- The FCC’s New Municipal Broadband Preemption Order Is Too Clever by Half, BLOOMBERG BNA (April 10, 2015).
- How the AWS Auction Provides a Teachable Moment on the Nature of Regulation, BLOOMBERG BNA (April 28, 2015).
- Bait-and-Switch—Or Why the FCC’s ‘Virtuous Circle’ Theory is Nonsense, BLOOMBERG BNA (May 18, 2015).

CONFERENCE PAPERS:

The Phoenix Center presented the following papers at academic conferences:

- Information, Investment and the Internet of Everything, presented at “The Internet of Everything: Data, Networks and Opportunities” Conference sponsored by the U.S. Chamber of Commerce Foundation.

OP-EDS:

The Phoenix Center had the following op-eds published in 2015:

- The FCC’s Legal Gymnastics: Why Wheeler’s Title II Approach to Network Neutrality Will Lead to Litigation, MULTICHANNEL NEWS (February 23, 2015).
- Direct Auto Sales Could Raise Car Prices, DETROIT NEWS (April 2, 2015).
- FTC Misses Mark with New “Unfair Methods of Competition” Statement, THE HILL (September 22, 2015).
- A Small Deregulatory Victory at the FCC, THE HILL (October 5, 2015).
- Why the FCC’s AllVid Remains a Really Bad Idea, THE HILL (October 14, 2015).

@LAWANECONOMICS BLOG:

In 2015, the Phoenix Center published the following items on @lawandeconomics, the official blog of the Phoenix Center:

- Special Access and the FCC’s Regulatory Revival (October 20, 2015).
- Tom Wheeler’s Recent Braggadocio (November 20, 2015).
CONTRIBUTING TO THE PUBLIC DIALECTIC

2015 provided fertile soil for those interested in policy research. In this section, we highlight what we at the Phoenix Center found to be the most interesting policy issues of 2015, and some examples of where we believe we added constructively to the debate.

Network Neutrality

Perhaps no issue dominated the telecoms debate more in 2015 then the FCC’s controversial decision to reclassify broadband Internet access as a common carrier “telecommunications” service under Title II of the Communications Act. As always, the Phoenix Center was in the center of the mix.

While the Phoenix Center authored a variety of papers and op-eds highlighting both the legal and economic problems with the FCC’s Order as well as the procedural irregularities with the White House during the FCC’s deliberations, perhaps our biggest impact was that our academic research pressured the FCC to alter the Open Internet Order at the last minute, thus creating one of the central (and fatal) legal weakness on appeal.

In particular, shortly before the FCC was to vote on its Open Internet Order, the Phoenix Center published an article in the FEDERAL COMMUNICATIONS LAW JOURNAL entitled Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service. In this paper, we presented a detailed legal and economic analysis which demonstrated that if the FCC moves forward with reclassification of broadband Internet access as a common-carrier telecommunications service under Title II, then edge providers become “customers” of broadband service providers (BSPs) and, as such, BSPs must be allowed to charge edge providers a positive price for terminating access (or, as the FCC itself described this service in its May 2014 “Notice of Proposed Rulemaking,” the “second side of the market”).

Soon after our paper was published, it was widely reported in the press that edge providers aggressively lobbied the FCC to prevent this outcome, and the agency agreed. Given time exigencies, the FCC attempted a last-minute fix by folding “terminating access” (i.e., the relationship between edge providers and BSPs) into the consumer-facing “broadband Internet access service” (BIAS), even though they are distinctly different services serving entirely different customers (a point made plain by the D.C. Circuit in Verizon v. FCC). In fact, FCC Chairman Tom Wheeler’s original idea was to reclassify as a Title II service only the termination side of the two-sided broadband market. Stuck with the apparent requirements of reclassification on the termination service (detailed in our paper), the agency concluded that it “need not reach the regulatory classification” for terminating access because termination is, the agency asserted, merely a component of end-user broadband service.

The FCC’s last minute fix became perhaps the most significant issue on appeal. As the Phoenix Center highlighted in its amicus brief before the D.C. Circuit, the FCC runs into trouble because under the plain terms of its net neutrality rules, the Commission clearly intends to regulate terminating access as a common carrier service (as the D.C. Circuit in Verizon previously recognized) by virtue of its “no blocking” and “no paid prioritization” rules and, as such, the FCC’s decision is a direct affront to the D.C. Circuit’s holding in Verizon, which clearly holds that the Commission cannot regulate a Title I information service...
CONTRIBUTING TO THE PUBLIC DIALECTIC

as a Title II common carrier telecommunications service. However, we also pointed out that if terminating access is in fact a Title II service (by virtue of it being a part of BIAS), then the FCC’s paid prioritization rule violates basic principles of rate-making because it both requires a confiscatory price of “zero” under Section 201 of the Communications Act (even though edge providers impose a cost on the network) and prevents “reasonable” discrimination as expressly permitted by Section 202 of the Communications Act. While it is impossible to make an accurate prognostication of how a court will rule, the tenor of the oral arguments indicated that the panel was very interested in the arguments we made. The D.C. Circuit is expected to rule sometime in 2016, and so the net neutrality debate is far from over.

Municipal Broadband

Perhaps the second biggest issue to dominate the telecoms debate in 2015 was the FCC’s controversial decision to use Section 706 of the Telecommunications Act to preempt two state laws that restricted municipal broadband deployment. Again, the Phoenix Center contributed significantly to the debate.

For example, in a paper entitled Why Chattanooga is not the “Poster Child” for Municipal Broadband, we presented a detailed economic analysis of the massive subsidies received by the Chattanooga network to show why that system was atypical of a traditional “greenfield” overbuild. We also authored two mini-law reviews for BLOOMBERG BNA on the various legal infirmities of the FCC’s Preemption Order. Finally, we held a Phoenix Center Teleforum to discuss this issue with a panel of experts. As the Sixth Circuit Court of Appeals will likely rule on the legality of the FCC’s Order sometime in 2016, we expect our research into this topic to continue in full next year.

The Nature of Regulation

We also spent a good bit of time focusing on the nature of regulation in 2015.

Of particular note is our POLICY PAPER entitled Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC, where we combined game theory and empirics to reveal how regulators exploit their power to grant or deny regulatory relief in exchange for political concessions from the entities it regulates. At the center of our analysis is the identification of a growing phenomenon that we label as “issue bundling.” As we explained, issue bundling occurs when the regulator and the regulated make a deal to combine a variety of unrelated issues in exchange for regulatory relief. Unfortunately, this growing and troubling practice of “issue bundling” renders legal precedent increasingly irrelevant and dramatically expands an administrative agency’s power beyond that granted by Congress.

We also issued a “mini-paper” in BLOOMBERG BNA where we asked the question: “Is the FCC’s Regulatory Revival Deterring Infrastructure Investment?” In this paper, we pointed out that it was
inappropriate to focus on changes in short-term capital expenditures to measure the impact of regulation, but instead to focus on the counter-factual – that is how much would have investment increased but for the regulation?

Finally, we spent a good bit of time focusing on the FCC’s poor handing of the Designated Entity Program in its recently-concluded AWS-3 Auction. For example, we performed an analysis of the auction results to demonstrate that the FCC knew within one week that bidding credits had exceeded $3 billion yet did nothing to stop the auction. We also published a mini-law review for BLOOMBERG BNA entitled How the AWS Auction Provides a Teachable Moment on the Nature of Regulation where we highlighted the fact because firms are not passive recipients of regulation, we should not be surprised when profit-maximizing firms seek to pursue all lawful means to exploit such regulation.

Intellectual Property

In 2015 the Phoenix Center continued to expand its intellectual property research agenda. Among other topic covered, we delved into the infamous Sony hack in the beginning of the year and published an op-ed explaining why this hack was not the moral equivalent of the SOPA/PIPA debate. We also presented a detailed critique of a study published by the Lisbon Council, a Brussels-based think tank in a piece entitled The Lisbon Council’s 2015 Intellectual Property and Economic Growth Index: A Showcase of Methodological Blunder. Coincidentally, we released this study while George and Larry were traveling in Europe to meet with officials in the European Union policymakers about the Digital Single Market.

Privacy and the Internet of Things

With the FCC’s controversial decision to reclassify broadband Internet access as a common carrier “telecommunications” service under Title II of the Communications Act, all broadband service providers now fall under the FCC’s Customer Proprietary Network Information rules pursuant to Section 222 of the Communications Act. In so doing, the FCC has created an asymmetrical privacy regime: an ex ante regime at the FCC for BSPs, and an ex post regime for everybody else at the Federal Trade Commission. The Phoenix Center was among the first to highlight the legal and economic implications of this policy in depth at our annual Rooftop Policy Roundtable with FTC Commissioner Maureen Ohlhausen. We also authored an essay for the U.S. Chamber of Commerce Foundation explaining that not only does such an asymmetrical regulatory regime prevent a comprehensive approach to privacy for the burgeoning “Internet of Things”, but if the FCC prevents BSPs from collecting consumer data while edge providers remain free to do so, then such an asymmetrical policy approach would result in a significant transfer of profits from the core to the edge, thus reducing investment and possible leading to increased market concentration among BSPs.
CONTRIBUTING TO THE PUBLIC DIALECTIC

Music Education

Among one of the more interesting research projects we undertook in 2015 was to look into the importance of music education. This research was prompted by an invitation for Phoenix Center Chief Economist Dr. George Ford to participate in a Symposium sponsored by music legend Todd Rundgren’s Spirit of Harmony Foundation in Little Rock Arkansas in conjunction with the Clinton School of Public Service. This Symposium was featured in a story on PBS NewsHour. (And while the academics were important, the best part was that George and Larry got to hang out with Todd and his band for the weekend, but that’s another story.)

Intra-Brand Auto Competition

Finally, in 2015 the Phoenix Center authored a POLICY PAPER entitled The Price Effects of Intra-Brand Competition in the Automobile Industry: An Econometric Analysis. Using large samples of transactions for ten of the most popular new cars purchased in the state of Texas for the years 2011, 2012, and 2013, we estimated the effects of intra-brand competition on new car prices. We measured intra-brand competition as the distance (in miles) to the nearest same-brand dealer. Significantly, for all but one automobile model we considered in our empirical analysis, we found that intra-brand competition does, in fact, lower new car prices for consumers. For the popular Honda Accord, for example, increasing the distance between Honda dealerships by thirty miles raises the price paid by consumers by about $500. Given that retail margins on auto sales are quite small (about 6% on average), the price reductions resulting from intra-brand competition are substantial relative savings for new-car consumers. Moreover, we found that the price effects of intra-brand competition are relatively strong compared to inter-brand competition—at the sample means, moving an intra-brand dealer one mile closer reduces prices by the equivalent of an increase in 35 inter-brand rivals.

Conclusion

As policy debates have become increasingly politicized over the years, we still believe (perhaps over-optimistically) that, in the end, substance matters. The policy choices we face are hard, and they should be treated with the respect and analytical rigor they deserve. Hopefully, the Phoenix Center has contributed positively towards restoring some of this analytical rigor.
CONFERENCES AND SYMPOSIUM

ROOFTOP POLICY ROUNDTABLE:

This June, the Phoenix Center held our Fourth Annual Rooftop Policy Roundtable Discussion where we facilitated a set of interactive conversations on the roof of the University Club to a standing-room only crowd over drinks and cigars. This year, we explored whether or not the Federal Trade Commission’s and the Federal Communications Commission’s privacy regimes can be harmonized in light of the FCC’s decision to reclassify broadband as a common carrier telecommunications service under Title II of the Communications Act. Not only were we honored with a keynote discussion with FTC Commissioner Maureen Ohlhausen, but we had an amazing discussion from an all-star panel including Jules Polonetsky – Executive Director and Co-chair, Future of Privacy Forum; Chris Soghoian – Principal Technologist, ACLU Speech, Privacy and Technology Project; and Robert Quinn – Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T.

PHOENIX CENTER TELEFORUMS

The Phoenix Center’s Teleforum Series allows us both to walk through our relevant research and to hold discussions with industry experts about pressing policy issues of the day. In 2015, the Phoenix Center held a series of Teleforums to discuss a wide range of issues.

“Federalism, Preemption and Municipal Broadband”

This Teleforum focused on the about the bounds of the FCC’s preemption authority regarding state laws that restrict or prohibit municipal broadband. Discussants included Russ Hanser – Partner, Wilkinson Barker Knauer; Brad Ramsay – General Counsel, National Association of Regulatory Utility Commissioners; and Jeff Lanning – Vice President of Federal Regulatory Affairs, CenturyLink.

“The FCC’s Open Internet Order—A Law and Economic Analysis”

This Teleforum presented initial reactions to the FCC’s landmark Open Internet Order, in which it reclassified broadband Internet access as a common carrier telecommunications service under Title II of the Communications Act. Discussants included Sam Feder, Partner – Jenner & Block and former General Counsel – Federal Communications Commission; Angela Giancarlo, Partner - Mayer Brown and former Chief of Staff – FCC Commissioner Rob McDowell; Tom Navin, Partner - Wiley Rein and former Bureau Chief, FCC Common Carrier Bureau; and Jeff Lanning, Vice President of Federal Regulatory Affairs – CenturyLink.

USTelecom v. FCC—Understanding the Legal Arguments on Appeal of the FCC's Open Internet Order.

In this Teleforum, we were joined by council for both the petitioners as well as various amicus curiae to walk through their briefs in anticipation of the oral argument of the FCC’s controversial Open Internet Order before the D.C. Circuit Court of Appeals. Discussants included Scott Angstreich, Partner – Kellogg Huber Hansen, PLLC; Russ Hanser, Partner – Wilkinson Barker Knauer, LLP; and David Balto, Law Offices of David Balto.

PHOENIX CENTER ANNUAL TELECOMS SYMPOSIUM

On December 1, 2015, the Phoenix Center held its fifteenth Annual U.S. Telecoms Symposium to another standing-room crowd. The theme of this year’s Symposium was Regulatory Credibility and
CONFERENCES AND SYMPOSIUM

the FCC and the discussions were both informative and lively.

The Symposium began with a presentation of recent research by Phoenix Center Chief Economist Dr. George Ford. Among other topics, Dr. Ford focused on our paper *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, which details how regulatory agencies are increasingly engaging in “issue bundling” with the firms they regulate—that is, when the regulator and the regulated make a deal to combine a variety of unrelated issues in exchange for regulatory relief. Two consequences of issue bundling are the weakening of legal precedent and the near unbridled expanse of regulatory power.

To explore this growing practice in greater detail, the first panel of the Symposium was entitled “Regulatory Revival and its Effect on the Communications Industry.” This panel was comprised of Dr. Tim Brennan, Professor of Economics – UMBC and former Chief Economist – Federal Communications Commission; Jeff Lanning, Vice President of Federal Regulatory Affairs – CenturyLink; Frank Louthan, Equity Research Associate – Raymond James Financial; and Dr. Hal Singer, Senior Fellow – Progressive Policy Institute.

Building on this discussion, our next panel was entitled “Regulatory Credibility, the Rule of Law and Potential Legislative Remedies.” For this panel we were joined by Robert Quinn, Senior Vice President, Federal Regulatory and Chief Privacy Officer – AT&T; Bryan Tramont, Managing Partner – Wilkinson Barker Knauer, LLP and former Chief of Staff – Federal Communications Commission; David Redl, Chief Counsel – House Subcommittee on Communications and Technology, House Energy and Commerce Committee; and Mary Brown, Senior Director, Government Affairs – Cisco.

The Symposium ended with the presentation of the Phoenix Center’s Annual Jerry B. Duvall Public Service Award to FCC Commissioner Ajit Pai. The Duvall Award does not seek to recognize the recipient’s personal politics; rather, the Duvall Award goes to the policymaker who most demonstrated the “political courage in, and contribution of analytical rigor to, the United States telecoms policy debate.” Given Commissioner Pai’s constant vigilance to adhere to legal precedent and ensure due process during one of the most tumultuous years in telecom policy in recent memory, we could think of nobody who epitomized this standard more in 2015.

“Since the force that is the Phoenix Center awakened 17 years ago, you’ve offered policymakers rigorous economic analysis and legal acumen second to none. Reading Phoenix Center publications always gives me a new hope that common sense and logic will rule the day in tech policy. Whenever shoddy reasoning enters the public dialogue, your scholars strike back and return to the facts – elegant weapons for a more civilized age. You are the rebels seeking to contain the government’s regulatory empire.

– FCC Commissioner Ajit Pai
YEAR IN PICTURES
MISSION STATEMENT

The Phoenix Center for Advanced Legal & Economic Public Policy Studies is a non-profit 501(c)(3) educational and research organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of telecommunications and high-tech industries.

Founded in 1998, the Phoenix Center’s mission is to provide independent assessments of the economic and material implications of regulatory and economic policy in the U.S. and abroad.

The Phoenix Center achieves this goal by providing an honest and credible voice in the public dialectic by supporting objective, solutions-based academic research to the forefront that is unencumbered by political hyperbole or agendas and is instead well grounded in fact, law and economic theory.

Long-Term Goals:

(1) The Phoenix Center’s seeks to remind stakeholders that it is crucial to avoid political hyperbole and instead approach public policy with the analytical rigor and solemnity it deserves.

(2) The Phoenix Center seeks to promote public confidence in the democratic process, government’s institutions and in the free enterprise system.

(3) The Phoenix Center seeks to foster an environment where citizens can openly and vigorously debate today about what kind of a world they want to live in tomorrow.

The “ideal of democracy rests on the belief that the view which will direct government emerges from an independent and spontaneous process. It requires, therefore, the existence of a large sphere independent of majority control in which the opinions of the individuals are formed.”

— Friedrich von Hayek

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