Telecom & Cable Policy

A Hillary Clinton Telecom/Media Policy Overview

Back in March, we previewed what a potential Trump telecom policy would entail ([LINK]).¹ We now ask what would a potential Hillary Clinton telecommunication policy look like?

Simple Answer: A Third Obama Term. Most, if not all, of the current FCC and Administration telecom/media policy initiatives would continue with the same implications in terms of corporate winners and losers.

But that answer misses two big points.

Point One: The Agenda will Change. As is true in any administration, the environment changes. For example, there are the issues that most do not anticipate that, over time, matter more than what is apparent when the new Administration takes office. So in telecom policy, there are a series of things that we believe are likely to happen for which the Obama telecom policy does not provide an obvious direction. We will discuss what we think are the most likely such events in a note we will release next month on the issues, both commonly known and generally overlooked, that the next Administration may face.

Point Two: Continuity as to which Obama Telecom Policy? The second way in which the simplistic answer of a third term is misleading is that there was a significant change during the Obama administration between the first and second terms. There were initiatives, such as with spectrum, in which the first and second terms proceeded in a fairly straight direction. But a review of the history illustrates notable changes in approaching a number of subjects.

A Change in Policy: Title I Morphs to Title II and a Regulatory Tide Rises. Some of the turns reflect an actual change in policy. Most notably, in the first term, an adverse court decision caused then FCC Chairman Julius Genachowski to propose a “Title II Lite” regime. Larry Summers, then head of the White House National Economic Council, called the Chairman to the White House and urged him to reverse his position. Genachowski did so, reverting to a legal theory that his own General Counsel had publically written would likely be overturned by the courts.

The General Counsel proved correct. When another Court overturned Genachowski’s Title I approach, the new Chairman, Tom Wheeler, mused about a number of jurisdictional approaches, including a hybrid of Title 1 and Title II. Near the end of the Chairman’s consideration and a multi-month public process, the President publicly advocated for a clean Title II approach.

¹ Actually, our first Trump effort was a tongue-in-cheek version in July 2015. In the spirit of non-partisanship we also tried to do a comedic version for Clinton. But as late night comedians know, writing jokes about Trump is easy; Clinton is hard.

² 70% of Wall Street apparently believes Clinton will win. We believe predicting this race is like predicting the outcome of the best offense in baseball versus the best defense in football in a game of basketball.
Subsequently, the Chairman agreed and in February 2015, the Commission reclassified ISPs as being subject to Title II.

**Why the change in the White House view?** Some note that after the 2014 election the President moved to his left on a variety of issues. Others suggest the change in personnel from the strong-willed Larry Summers to the more “honest-broker” NEC role made the difference. Others argue a second losing court effort to protect Net Neutrality through Title I forced the FCC to change its legal position and adopt that originally advocated by the agency’s General Counsel in 2010. All these factors played a role. An additional, often overlooked, factor was the state of the economy. It is difficult to exaggerate the abyss Obama’s economic advisers peered into during the 2008 transition and continuing well into 2010. The sensitivity to the perceived risk of potential impacts on investment, as well as the actual risk of impacts, was much higher in 2010 than in 2014. That sensitivity played a key role in the different Obama approaches.

That history is important to remember, as there are a number of environmental factors, particularly macro-economic factors, which play a role in policy adoption. Title II is far from the only example of a more activist second-term Obama Administration, both in communications and in other sectors. Major economic moves are hard to predict but we have no doubt they will play a role in the next Administration.³ We will discuss in our note next month how the macro-economic environment could affect the policy preferences of either a Democratic or Republican regime.

**A Change in Personnel: Far More Significant.** But the biggest change in the Obama terms goes not to a policy preference but to the nature of the two different FCC Chairmen.

If one were to look at the stated policy positions of the two Obama Chairs, one would be hard pressed to find clear disagreements. But in terms of actual actions of the two FCCs they led, the difference is stark. Even putting aside Title II, on issue after issue, Genachowski’s approach generally was to state an aspiration but take limited action, if any. Indeed, it was largely consistent, we think, with how a McCain FCC might have handled the issue, as Genachowski often relied on voluntary efforts and limited his actions to fact finding. Wheeler has taken actions that are in line with what might have expected in 2008 from a Democratic FCC. Consider:

- **On municipal broadband and next generation wireline networks,** Genachowski gave a speech challenging states to take steps to cause next-generation fiber networks to be deployed but never took action at the FCC to assist. Wheeler led the FCC to pre-empting state laws putting up barriers to municipalities doing so, raised the definition for broadband, conditioned the approval of the AT&T/DirecTV deal on the company building out new 12.5 million fiber connections, and conditioned approval of the Charter deals on over-build commitments.

- **On E-Rate reform,** Genachowski held several highly publicized meetings and organized private sector efforts but limited the FCC action to allowing the E-rate fund to increase with inflation. Wheeler undertook comprehensive reform, including significantly increasing the size of the fund, prioritizing paying for in-classroom Wi-Fi, and providing potentially less expensive ways for school systems to obtain next-generation networks.

- **On Lifeline reform,** Genachowski focused his activity on removing ineligible persons from the program and philanthropic efforts to publicize adoption. Wheeler engaged in comprehensive reform, including making broadband an eligible service, removing incentives to bring ineligible persons into the program, and removing barriers to carriers participating in the program.

- **On High Cost Fund (now Connect America Fund) reform,** and inter-carrier compensation reform, Genachowski provided AT&T and Verizon the inter-carrier compensation the two

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³ One of the ironies for anyone who has had a principal job in the DC environment is he or she wants the job to affect, rather than simply reflect, policy but they often end up as more a weather vane than the weather. Indeed many in DC find themselves in the position of the Los Angeles weatherman protagonist in Steve Martin’s *L.A. Story*—lots of time in front of the camera but not really saying anything new or important.
companies had long sought without addressing the issues that would inevitably arise in the wake. On the other hand, Wheeler has addressed numerous issues head-on related to the Connect America Fund, sometimes reversing the approach of the Genachowski commission, and recently completing the reform of the program for rate of return carriers.

- On Set-Top Boxes, Genachowski asked questions about opening up set-top boxes but never took further steps. Wheeler commissioned an advisory committee to make recommendations and has started a rule-making to implement those recommendations, an effort that garnered the personal support of the President.

- On Special Access, Genachowski issued public notices in 2009, 2010, and 2012 but limited his efforts to data collection. Wheeler has started a rulemaking, which will be voted on this month and provides a fundamental restructuring of the regulation, one Wheeler characterized as “Out with the Old, In with the New.”

- On Privacy, Genachowski spoke on the subject and launched a website but took no action. Wheeler has started a rule-making expanding consumer protections and thereby potentially limiting ISPs’ ability to use consumer data.

- On the IP transition proposed in 2010, Genachowski took no action. Wheeler started a proceeding and authorized tests to create a record on which the terms of the transition could be based.

- On prison phone rates, Genachowski took no action. Wheeler brought a 2003 petition to a Commission vote, in which the Commission acted to lower rates and fees. The issue is now in the courts but phone rates have been lowered in a number of jurisdictions.

- On disclosure of broadband performance, Genachowski adopted a voluntary approach. Wheeler had the Commission adopt enforceable rules. Further, working with the Consumer Finance Protection Bureau, created a disclosure form that would serve as a safe harbor for required disclosures, adding some muscle to the effort.

- On enforcement, Genachowski took no notable actions. Wheeler’s enforcement bureau has taken a number of notable actions, including a $158 million fine against Verizon and Sprint for bill cramming; a $100 million fine against AT&T for throttling unlimited data plans without adequate notification; a $50 million fine for overbilling Lifeline; a $40 million fine to TracFone for throttling and capping “unlimited” data; and fines against hotel chains related to Wi-Fi blocking among others.

Mergers present a more complicated picture but again, the record suggests the two terms reflect different approaches. Both Genachowski and Wheeler turned down mergers though Genachowski’s rejection of the AT&T/T-Mobile deal (four months after the DOJ) was in line with what we think a Republican DOJ would have done (as a Republican DOJ and FCC did, for example in rejecting the DISH/DirecTV deal.) Genachowski approved the Comcast/NBCU deal, which we are not certain Wheeler would have done; nor are we certain that Genachowski would have rejected the Comcast/Time-Warner deal. We doubt Genachowski would have pre-emptively sent signals to block a T-Mobile/Sprint deal, as Wheeler did. We also note that Wheeler has insisted on a special master to oversee compliance with conditions for the ATT/DirecTV deal whereas compliance on the Comcast/NBCU deal is subject to a complaint process, much easier for the post-transaction entity. Further, the primary talking point for Genachowski’s approval of the NBCU was forcing Comcast to offer a low-income broadband program, a program the company’s General Counsel later revealed to be something the company wanted to do anyway and was saving as a sleeve off its vest for just such a negotiation. Wheeler’s conditions for the AT&T and Charter deals—garnering expensive build-out commitments designed to stimulate more competitive markets, for example—suggest he was a much tougher negotiator than his predecessor.5

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4 Whether one regards Wheeler’s ending the Genachowski “Quantile Regression Analysis” as a matter of policy, politics or simple math, we feel confident no Clinton (or Trump) FCC Chair will bring it back. Nor will any future FCC name a policy with two words that only mathematicians understand.

5 We would not go so far as to describe Wheeler as “Trumpian” but we are clear on which Chair’s use of leverage better represents the art of the deal.
**Next Chair Will Inherit Big Agenda.** Our point is not to weigh in on the merits of the two Chairmen but first, to outline the numerous proceedings a Clinton FCC would inherit. Many of the proceedings noted above will be still in the normal cycle of litigation challenges and regulatory reconsideration. (This would not be true if Mr. Genachowski had been as active as Mr. Wheeler, as the cycle would largely be over.) The next Chair’s view of these proceedings will occupy a great deal of the first few years of her or his tenure. Again, we will discuss the likely fate of these in next month’s note on the agenda for the next Administration.

**Personnel Becomes Policy: What Model Does the New President Favor?** We also list these differences to make the critical point that personnel become policy. A resume, however, can be a poor predictor of how someone will act in office as the requirements for obtaining the job bear little relationship with the skills necessary to do the job. Indeed, given the resumes of Genachowski and Wheeler, one might have thought their records would have been the opposite of what turned out. How one will approach the job and the critical question of whether one views it as a stepping-stone or capstone is unlikely to show up on a resume. Nor will a resume likely predict how one handles public controversies, as the nominees generally have no legacy of controversy (an exception being Chairman Kevin Martin, but he did not have to go through a new confirmation process). The legacy on the job, however, depends largely on how one copes with controversy. Genachowski prioritized avoiding it. Wheeler appears to rush full speed into it. The differences between the two chairs are so stark that we think it leads to the question for an incoming Hillary team as simply being: do they want a FCC Chair in the mold of Genachowski or someone who will model her or his tenure on Wheeler?

**Current Political Forces Will Favor Appointment in Wheeler Mold.** The politics of January 2017 likely will favor someone who will carry on in the Wheeler tradition. First, the primary season has moved the Democrats, as well as Clinton, to a more activist approach. Second, Wheeler is very popular with the Democratic base, having moved his image from John Oliver’s portrayal as a “Dingo” to the Verge’s characterization as a “Dragonslayer.” Third, while his decisions may be controversial on Capital Hill and on the editorial page of the Wall Street Journal, one sees very little pushback in other places. For example, it is difficult to find anyone publicly critical of his decision to block the Comcast/Time-Warner deal. Fourth, Wheeler is popular where Clinton has a deficit—the young, tech savvy demographic. Sanders has done very well with that crowd. While every President moves to the middle on some issues once elected, on other issues the President feels a need to keep the base happy. We suspect the telecom/tech agenda that Wheeler has led is one Clinton will think is in her interest to preserve.

Certainly, there is significant industry push back on a number of initiatives (which will affect the long-term outcomes) but those are largely restricted to inside the beltway discussions, not the macro-politics that affect the appointment period. Further, while some Democrats on the Hill have had criticisms of specific Wheeler proposals, generally, the Chairman has enjoyed support from elected officials of his party. By way of contrast, Genachowski’s legacy and supporters of his tenure among Democratic ranks are hard to find, as would be advisers to Hillary who might argue that his approach was preferable to Wheeler. Indeed, there are a number of likely advisers to Clinton who either have worked closely with Wheeler or are likely to favor his approach.

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6 In this way, as to telecommunications policy one might think of a Hillary Clinton first term as an Obama second term, much as the Kennard FCC’s primary task was following up on the initial Hundt 1996 Act implementation.

7 We understand, for example, the cable industry supported Wheeler’s bid to be Chairman. Hey, to err is human and we see a lot of humanity in that choice.

8 He is not the only DC type for whom this is true. See footnote 3 above on weather vanes and L.A. weather reporters. So we don’t dismiss the possibility of the next FCC having such a Chair. We believe, however, that Wheeler has paved the policy path in a way that will be difficult for a Clinton FCC to reverse or for a new Chair to avoid controversy.
Tradition Favors Appointment of One with Strong White House Connection. Still, the character of the leader of the FCC is unpredictable. No one who has had that job has previously ever had an analogous job. Further, it may be9 that Clinton has a long-time friend (as Gore had Reed Hundt or Obama had Genachowski) who wants that job and other considerations are secondary or irrelevant. Hillary Clinton has many friends, a number of whom would be qualified to serve as FCC Chair.

Confirmation Process Will also Affect Appointment Calculus. We don’t know which party will control the Senate but it is highly unlikely that even if the Democrats take back a majority, they will not have a filibuster proof majority. (We note a high level of uncertainty here as some are already suggesting the Garland nomination and the Republican response could lead to a showdown in which the right to filibuster is eliminated.) In that regard, the fundamental tension will be that to keep the base happy Clinton will likely want to suggest she is appointing another Wheeler and the nominee will likely signal approval of the Wheeler approach, making it more difficult, once Chair, to back away from such commitments. But such language will create momentum among Republicans to oppose the nomination. Of course, Wheeler can stay on as Chair until his successor is seated, giving Clinton leverage in motivating recalcitrant Republicans to move forward with her nominee and giving him time to finish some of the proceedings he has started, to the extent that there is unfinished business, as well as giving him the opportunity to lead in defending and implementing some of his decisions.

Bottom Line: Early Continuity But Then Circumstances Start to Change Outcomes. Regardless of the Clinton’s choice, we do not see any Democratic Chair stepping away from the core Title II choice, unless a court totally overturns that 2015 decision. Of course, there are still a number of related decisions, such as how to evaluate different zero-rating approaches and how to respond to court decisions chipping away at FCC authority, that will give a new Chair a chance to put meaning to the decision, rather than reversing it wholesale.

It’s also likely the first Clinton Chair will continue a number of other Wheeler initiatives, such as supporting municipal broadband efforts, opening up the set-top box market, reforming special access, and imposing a new privacy framework on ISPs. Still, with all of those, the details matter and a new Chair will be confronted with a wide spectrum of choices of what details to pick. We will discuss these further in next month’s note on the Agenda Ahead. But for those think that the FCC’s activism will end with the election if Clinton wins, we suggest a recalibration.

9 If anyone wants the under on that bet, please call. The odds of Hillary Clinton not having a friend who wants to be FCC are about the same as the odds of Ted Cruz claiming John Boehner as his BFF.