

The FCC Faces Questions and Challenges as It Awaits a New Chairman

By [Cecilia Kang](#), Apr 11, 2013 10:00 AM EDT

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President Obama hasn't [picked](#) a [new chair](#) for the Federal Communications Commission, but Washington is abuzz with opinions on what the new regulator needs to do. [Phil Weiser](#), a former senior adviser for Obama on technology and innovation, sees the nomination as an opportunity to rethink the role of the FCC and how it could oversee the massive and expanding telecom and Internet broadband market.

Weiser is the dean of the University of Colorado's law school and each year hosts a tech policy conference that often draws top government officials. The former antitrust deputy assistant attorney general for the Justice Department talked to The Washington Post about his views on the future of the [FCC](#). Here's an edited version of the discussion:

Q: What are the top priorities of the FCC?

- A. Among the top is freeing up spectrum — not only for consumers — but also for machine-to-machine communications.

Such uses are becoming more important than ever, especially because there are more sensor networks being deployed and wireless connectivity is being built into more and more equipment. In the face of increasing demands for access to spectrum, the question is how do we use this resource most effectively? A core challenge for the FCC and the government is to create more access to spectrum, which will enable more entrepreneurs, companies and individuals to use it in interesting ways. In addition to freeing up licensed spectrum, the government could also make available additional unlicensed spectrum, including in the form of sharing spectrum with government users. It merits note that the original unlicensed band wasn't entirely unused when it was made available for low power uses. Rather, industrial machines were using it and, by authorizing low powered uses on an unlicensed basis, the FCC made possible a market for devices like garage openers and WiFi. In the future, we don't know what uses will come from access to additional spectrum.

What are your predictions for the [spectrum auction](#)?

The FCC has an ambitious job ahead. In short, it needs to conduct two auctions simultaneously, or close in time -- the sale by broadcasters of their licenses and then the purchase of swaths of spectrum by commercial carriers. Such a "two-sided auction" has not been done before. The FCC did a fabulous job with the initial spectrum auctions, reflecting a lot of thought and care about how to conduct them. In this case, the FCC will also have to make a number of important decisions about how the two sides of the auction will be carried out. Because there is no longer free and open spectrum that the government has that it can give out, it is extremely important that the FCC develops this new model and implements the two-sided auction successfully.

What is the role of the FCC in the phone-to-broadband transition?

All current policy is built on the use of legacy technology and thus the transition away from it is a major challenge for the FCC. Rather than necessarily attempt to simply transfer all legacy policy into the IP world, the FCC will need to ask ‘What policy regimes and policy goals are important?’ Consider, for example, the issue of access to video programming by the hearing impaired: what approach closed captioning should apply to Internet-delivered TV programs? Similarly, there are questions about how to provide next generation 911 access in an IP world. Another big issue will be whether and how to oversee interconnection arrangements. In short, there are big opportunities and challenges because we don’t have to do things in the way we have done them so far.

And what does this all mean as the FCC is being sued in federal court for its broadband policies? The DC Circuit opinion in the [Open Internet](#) case raises a million-dollar question: What authority does the FCC have in the Internet environment? The FCC has maintained that it has ancillary jurisdiction, but depending on what the DC Circuit court says, that question could go to the Supreme Court. If the FCC is said to have no authority and there are severe limits to what it can do, that will increase the pressure on Congress to act.

What could Congress do?

It could say the current [communications act](#) is broken and there needs to be a new title of the Act. Until and unless Congress acts, however, the FCC has to figure out what a 21st century communications policy looks like and what capabilities and strategies it needs to be effective.

What would be top on that list?

The FCC should develop a more effective enforcement strategy. Instead of being an agency that says, ‘You have to ask for permission for everything,’ which puts a brake on innovation, it should say: ‘I will give you freedom to act and if you do something bad, I’m going to come down on you like a ton of bricks.’ The FCC shouldn’t regulate every detail but should announce broad principles, allow technology and the market to evolve in a way consistent with them, and keep a close eye on things.

Does it do a good job of enforcement now?

The FCC’s data-gathering capability and adjudication processes are pretty limited. It has room for improvement in this area, such as measuring how spectrum is used and when spectrum licensees create harmful interference. To do that, it needs enough technologists in the building as well as tech-savvy lawyers and economists to make decisions based on a deep understanding of what is going on. This enforcement-centric model is different from evaluating what arguments are on different sides and then trying to split the baby. The FCC needs to be less reliant on the arguments made by the parties and more able to make its own independent judgments.

If you could start from scratch, how would you build a new FCC?

I would rethink the functionality and operations of how the agency operates. If the only tool an agency has is a hammer, everything looks like a nail. If it uses other tools, such as reporting and sunlight on company, that can have a healthy disciplining impact on the market. The FCC, like the Federal Trade Commission, could use, to a greater degree than it does, after-the-fact adjudication and self-regulatory efforts to address emerging issues.

Why is that so hard to achieve?

The institutional challenge for any FCC chair is to take a long view and invest in the agency's institutional capacity, knowing that those investments will not pay off for years into the future. Building adjudicative capacity, and the use of administrative law judges, is not something the agency has focused on up until now. The FCC's case against Comcast in the Bit Torrent complaint a few years ago, for example, was decided based on what essentially were comments filed by the parties. The FCC didn't develop its own factual findings based on hearing evidence that was tested by cross examination as a court would have required. By contrast, the Microsoft antitrust case involved just this sort of decision and was ultimately upheld (in large part) by the DC Circuit. At some point in the future, the FCC will need to develop this capacity.