

Telecom and Broadcast Policy Under the Obama Administration

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Network Neutrality

Network neutrality (or open Internet) has been subject to fierce debate in the United States. While there may be as many different definitions of net neutrality as there are proponents, the Federal Communications Commission ("FCC") has stated as a matter of policy that consumers be entitled to: (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) have the benefit of competition between and among network providers, application/service providers and content providers. President Barack Obama's policy on the Internet is to "support the principle of network neutrality to preserve the benefits of open competition on the Internet." His office published a detailed technology and innovation plan supporting network neutrality protections.

Arguments for and Against Net Neutrality

Proponents of network neutrality regulation include major Internet application companies, such as Microsoft, Google, Yahoo, eBay and Amazon. Arguments in favor of net neutrality are based on the principles of non-discrimination and free and open technology. Proponents support the adoption of net neutrality legislation to ensure that cable and telephone companies allow independent Internet service providers unfettered access to end users for their applications and content. In particular, they seek to ensure that network operators do not afford preferential treatment to their own Internet content above the content of other, unaffiliated providers. Advocates of neutrality also argue that preferential treatment of Internet traffic would forestall competition and innovation.

Opponents of regulation include telecommunications and cable companies such as AT&T. They argue that network management, which may prioritize traffic, for example, is essential given the fact that the vast majority of Internet bandwidth is used by a very small minority of customers for file sharing and the like, potentially creating network congestion for other customers. They further contend that common carrier regulation would chill the major investment required for broadband infrastructure development, and recreate a form of market intervention, which policymakers have largely eschewed in favor of competition.

Net Neutrality Legislation

As noted above, the FCC has adopted a set of network neutrality principles, and has had occasion to address two net neutrality cases thus far. In one decided last August, the FCC upheld a complaint against Comcast that it had inhibited customer Internet usage by blocking file sharing using the BitTorrent application. Comcast has appealed the FCC's resolution, arguing that the FCC does not have the authority to enforce net neutrality principles. This poses the issue of whether legislation is necessary to supplement the broad FCC policy principles that have so far governed the Internet world.

Network neutrality legislation has previously been introduced in Congress, but without success. Depending on the outcome of the Comcast appeal, another effort may be made to pass a net neutrality bill. In the meantime, however, net neutrality language has been included in the draft stimulus bill released by the U.S. House Appropriations Committee last week - language that would apply to the \$5.75 billion in broadband infrastructure projects that would be funded by the bill.

President Obama's recent choice to chair the FCC is Julius Genachowski. Mr. Genachowski served as the top technology adviser to the president during his campaign and as top policy attorney to former FCC Chairman Reed Hundt during the early years of the Clinton administration. After leaving the FCC, he worked at Barry Diller's IAC/InterActive Corp. in various executive positions. He is a former Harvard Law School classmate of the president and co-founder of LaunchBox Digital, a Washington, D.C.-based venture capital firm.

Next-Generation Broadband

Within President Obama's technology plan, broadband access in every community in the United States is also a priority. He favors a "true broadband" that would provide broadband access to rural areas, regardless of economic status. He plans to achieve this by implementing a "combination of reform of the Universal Service Fund, better use of the nation's wireless spectrum, promotion of next-generation facilities, technologies and applications, and new tax and loan incentives." Possibly, one purpose of reforming the Universal Service Fund may be to provide subsidies to broadband providers that extend their services to rural areas.

Arguments supporting this policy affirm that the implementation of a federal policy that mandates universal broadband are likely to enable and stimulate economic growth. The president also believes that broadband penetration can enrich democratic discourse, enhance competition and bring significant consumer benefits.

Consistent with the thrust of the new president's promises, the draft House stimulus bill would provide \$2.825 billion for loans, loan guarantees and grants to be awarded by the Rural Utilities Service, and another \$2.825 billion for grants to be awarded by the National Telecommunications and Information Administration (NTIA). Both programs are intended to improve broadband infrastructure, especially in rural areas. NTIA-funded broadband facilities would include both wired and wireless technologies, and basic as well as advanced services. Basic broadband service, for example, is defined as being at least five megabits per second downstream and one megabit per second upstream. More information on broadband support is to be expected from the new administration in the months to come.

Media Ownership and Service Obligations

One of President Obama's principal communications policy objectives is to "encourage diversity in the ownership of broadcast media . . . and clarify the public interest obligations of broadcasters who occupy the nation's spectrum."¹ While the president's website offers no more in the way of specificity, it was commonly understood to be referring to measures that would constrain further consolidation of media ownership, and enhance broadcasters' local service obligations.

As a result of the Telecommunications Act of 1996, and FCC policies that pre-dated the legislation, the largest broadcast group owners, such as Clear Channel Communications, own hundreds of stations - a scenario that is a dramatic contrast to the prior limit of 7-7-7 per owner, that is seven AMs, seven FMs and seven TV stations.

Media ownership consolidation has triggered vocal opposition from numerous quarters, including minority groups and others. The opposition reached a head in the last few years as the FCC studied ways in which it might seek a further relaxation of the ownership limits, and ultimately adopted a rule to allow newspaper-broadcast ownership combinations in the top-20 markets.

Apart from ownership diversity, there is the matter of the Fairness Doctrine. Before its rescission in 1987, this FCC policy required broadcasters to afford time for the presentation of contrasting views on controversial issues of public importance. The policy represented fertile ground for license challenges by groups viewing a station's treatment of controversial issues as unbalanced. The policy was rescinded in 1987 on the grounds that it had a chilling effect on the presentation of programming dealing with controversial issues - that is, it was counterproductive - given the proliferation of media outlets since the policy was first adopted.

Attempts to reinstate the Fairness Doctrine are unlikely in this session of Congress. President Obama, for one, has not expressed public support for reinstatement. Nevertheless, 24 senators and 100 members of the House on the Republican side introduced a bill a few days ago that would bar reinstatement of the policy.

More likely than congressional action, however, may be action by the FCC to adopt stricter standards for the broadcast of locally oriented news and public affairs programming. The FCC has had a proceeding underway that looks to do this and, among other things, poses the question as to whether the Commission should mandate the broadcast of a certain amount of locally produced programming. Adoption of such standards by the FCC may be facilitated by the president's forthcoming nomination of a new chairman, which will lead to a 3 to 2 Democratic majority on the Commission. Adoption of such standards are likely to be consistent with the president's agenda for the broadcast media. Depending on the specifics, new localism rules may impact the broadcast of nationally syndicated programs, such as Rush Limbaugh and Air America Radio.

Digital Television Conversion

While Congress will be preoccupied in the months to come with economic issues, one broadcast issue is likely to be acted upon shortly, namely the February 17 digital television cutover date. The broadcast industry has been working on the transition for years and has made a concerted effort to publicize the cutover to the public. The federal government has been supporting the conversion with a voucher program that provides for a \$40 credit against the cost of a digital set-up converter box. However, there is a long waiting list for vouchers and funding problems with the voucher program.

It appears that several million viewers in rural areas, and among the low-income and the elderly, may be unprepared to make the conversion, leaving them without service on February 17. Mindful of this, John Podesta, co-chair of the Obama-Biden Transition Team, recently sent a letter to congressional leaders urging a postponement. The major broadcast networks have registered their support for such a measure. However, opinion is divided on the issue given that postponement may do more harm than good by creating public confusion. At this time, it is uncertain whether Congress will act to postpone the date, or take other action to address the voucher/funding problem.

To view President Obama's technology plan, please visit <http://www.whitehouse.gov/agenda/technology/>.

For Further Information

If you have any questions regarding this topic or would like more information, please contact [William K. Keane](#), [Richard Keck](#), any [member](#) of the [Information Technologies and Telecom Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

1. <http://www.whitehouse.gov/agenda/technology/>