



ML Strategies Legislative Update

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Telecommunications Issues in the Lame Duck and 113th Congress

Introduction

This post-election analysis offers a discussion of how President Obama's re-election, as well as changes in Congress, will likely affect telecommunications issues both in the lame duck and in the next session of Congress. While clearly this election was quite positive for Democrats, ultimately the results of the election continue to provide the *status quo* of divided government. Notably, this was the first election since 2004 where neither Congressional chamber nor the presidency changed control. Because telecommunications and technology issues are less partisan than other areas, individual members on key Congressional committees often have more impact on the policy discussion than do party lines. In addition, key personnel changes in the Administration as well as in Congress will impact the legislative agenda for the 113th Congress. The following update provides a summary of these personnel changes as well as a look at the top telecommunications issues for the lame duck and 113th Congress.

Lame Duck

With the lame duck session largely focused on "fiscal cliff" issues and emergency funding in the wake of Hurricane Sandy, few telecommunications issues will be addressed. Two exceptions may be cybersecurity and spectrum.

Cybersecurity

With a victory for President Obama, there is an increased chance for an Executive Order on Cybersecurity before the end of the year. Senator Reid announced in October that he planned on bringing cybersecurity legislation to the floor when Congress returns for the lame duck session, and may do so as early as this week.

In addition, Commerce Committee Chairman Rockefeller sent letters to all of the Fortune 500 companies in September seeking information about the companies' cybersecurity practices. Chairman Rockefeller also asked the companies for feedback on proposed cybersecurity legislation. The responses were due by the end of October, and we understand that the Committee staff are in the process of analyzing the responses, dealing with non-responders, and expect to take action accordingly in the coming months.

Tangentially related to issues of cybersecurity, it appears that the Senate may consider amendments to the Foreign Intelligence Surveillance Act that would reauthorize U.S. ability to spy on foreign communications without a judicial warrant. The current extension of the authority is set to expire in January, and the House has already approved another five year extension.

Spectrum

It is possible that spectrum issues could be raised in connection with resolving the fiscal cliff if Congress or the Administration thought that the revenue from spectrum auctions, in addition to those required by the Middle Class Tax Relief and Job Creation Act of 2012 last February, would make a useful contribution to reducing the debt. Post-election reports have already surfaced on the possibility that the 1755-1780 MHz band, currently used by DoD, could be a target. That band had been in the Senate version of the Tax Relief Act but was removed under pressure from DoD.

The 113th Congress

Cybersecurity

If cybersecurity is not resolved in the lame duck, we expect it to continue to be an issue in the 113th Congress. Even if an Executive Order is issued, there are areas of cybersecurity policy that would need to be addressed with legislation, such as liability protections for companies that share cyber threat information with other companies and the government. The main legislative vehicle has been the Cybersecurity Act of 2012 co-sponsored by Senators Lieberman, Collins and Rockefeller. Because of opposition to the legislation from the business community, compromise has not been reached. However, the responses to Chairman Rockefeller's cybersecurity letters to Fortune 500 companies may provide some insight that could lead to a deal with industry.

Online sales tax

Big box retailers have been pushing for online sales tax legislation that would force online retailers to collect remote sales taxes. Throughout the debate on this issue a main point of

contention has been whether there should be a small business exemption, and if there is such an exemption, who should set it and what should it be. Bipartisan proposals have been introduced in both the House and Senate, and there is a push from some Senate sponsors to get internet sales tax added to a tax extenders package, or included in a tax reform overhaul or fiscal cliff package.

Privacy

After the Department of Commerce and the Federal Trade Commission released privacy white papers in 2012, Congress may consider privacy legislation in the 113th Congress. Specifically, we could see legislation based on the Administration's principles of a "Consumer Privacy Bill of Rights." Chairman Rockefeller has been pushing for a legislative solution rather than voluntary industry standards to protect consumer privacy online. Senators John Kerry (D-MA) and John McCain (R-AZ) have introduced a bipartisan online privacy measure and there have also been other measures aimed at protecting children's privacy in the House that could see movement in the next session. In addition, the FTC is in the process of proposing updates to the Children's Online Privacy Protection Act (COPPA) and is expected to issue its final update in the coming months.

The House Commerce Committee Republicans most closely identified with privacy issues in the last Congress, Rep. Stearns (FL) and Bono-Mack (CA), both lost their re-election bids, so a new Republican leader on the issue will have to step forward.

Cable Act rewrite

Because the television marketplace looks very different from when the Cable Act was passed in 1992, some are pushing for the law to be re-written in the 113th Congress. Specifically, issues surrounding online video distribution create questions that could be resolved through new legislation. Also, program blackouts caused by retransmission consent negotiations have caused members of Congress, as well as the general public, to become more interested in revising this issue. With the looming expiration of the Satellite Television Extension and Localism Act (STELA), which frees satellite television providers from retransmission consent requirements, at the end of 2014, many see the need to extend the measure as a potential vehicle to offer amendments in whole, or in part, to the Cable Act.

Telecom Act rewrite

The Senate Commerce Committee is expected to begin discussions soon on rewriting the Communications Act of 1934, which was last revised by the Telecommunications Act of 1996. The telecommunications landscape has changed dramatically since this last revision, so many stakeholders agree that another update is necessary. Among the issues potentially in play are revisions to the legislation to shield IP-based voice and other services from legacy common carrier regulations, an idea championed by the Bell companies; modifications to media ownership rules; and possibly codification of FCC authority to impose net neutrality requirements on broadband providers. Movement on this issue will depend on the outcome of key court cases before the DC Circuit, including Verizon's challenge to the FCC's current net neutrality rules.

Spectrum

Regardless of the outcome of the fiscal cliff issue, spectrum issues will continue to be an important element of communications policy discussions in the 113th Congress. Providers continue to argue that demand for mobile broadband services requires the allocation of additional spectrum for both licensed and unlicensed uses – but it is unclear where additional spectrum will come from. Broadcasters and other stakeholders will be closely watching the FCC's actions to “repack” the broadcast band and institute incentive auctions to encourage broadcasters to relinquish spectrum so that it can be made available for mobile broadband. Also of interest will be the FCC's determinations on whether to impose new limits on the amount of spectrum any entity can hold and whether it will apply those limits to the spectrum auctions mandated by the Middle Class Tax Relief and Job Creation Act.

Intellectual property

After the controversy surrounding the Stop Online Piracy Act (SOPA) in the 112th Congress, it is still possible that the 113th Congress will address online piracy among other intellectual property issues. The House Judiciary Committee is expected to focus on technology related intellectual property issues under the leadership of its new Chairman, Rep. Bob Goodlatte (R-VA). Other issues include performance royalty fees for songs played on terrestrial broadcast radio. High profile patent disputes such as that between Apple and Samsung may be a catalyst for Congress to address patent reform in the next session. In addition, the performance royalty issue has been receiving attention from device manufacturers as well as broadcasters and online and satellite radio companies because of proposals to require AM/FM receivers be built into smartphones. This issue could see some traction in the 113th Congress because of attention from public interest groups.

Key Players

Administration

FCC Chairman **Julius Genachowski** is expected to step down shortly after the President is sworn in for a second term. NTIA Administrator **Larry Strickling** is at the top of the list for who will be the next chairman of the FCC, but if Genachowski leaves before a replacement is approved, Commissioner **Mignon Clyburn** will likely be appointed on an acting basis. The other Democratic FCC Commissioner, **Jessica Rosenworcel**, is also an option for acting Chair or as Genachowski's permanent successor. Other names that have circulated outside of NTIA and the Commission are **Tom Wheeler** formerly of CTIA, **Scott Harris** of Neustar, and **Blair Levin**, a former FCC chief of Staff who also oversaw preparation of the National Broadband Plan.

House

The House Energy and Commerce Committee will see significant changes in the 113th Congress. At least ten members from both parties are leaving the Committee. As noted above, Subcommittee on Manufacturing and Trade **Chair Mary Bono Mack (R-CA)** lost to Democratic challenger Paul Ruiz. The defeat of **Rep. Cliff Stearns (R-FL)** opens up the chairmanship of the Subcommittee on Oversight and Investigations. **Rep. Lee Terry (R-**

NE) and **Rep. Marsha Blackburn (R-TN)** are both vying for the position left by Stearns on the Oversight Subcommittee, but Terry is a more likely choice as he outranks Blackburn. Because **Rep. Blackburn** is currently vice-chair of the Manufacturing and Trade Subcommittee, she is a likely choice to replace Bono Mack as chair.

In addition, **Rep. Bob Goodlatte (R-VA)** is expected to replace **Rep. Lamar Smith (R-TX)** as Chairman of the House Judiciary Committee. Rep. Goodlatte is currently chair of the Subcommittee on Intellectual Property, Competition, and Internet and was instrumental in crafting the Stop Online Privacy Act (SOPA) last year. Accordingly, Rep. Goodlatte is expected to make online piracy a top priority if named chairman of the full committee. In addition, Rep. Goodlatte is also focused on other patent and copyright enforcement issues, including music performance fees.

Senate

On the Senate side, with the retirement of **Sen. Kay Bailey Hutchison (R-TX)**, **Sen. Jim DeMint (R-SC)** is expected to become ranking member on the Senate Commerce Committee. Sen. DeMint is expected to push the Next Generation TV Marketplace Act that he introduced along with Rep. Steve Scalise (R-LA) in 2011. This bill would repeal many key provisions of the 1992 Cable Act, including the rules for retransmission consent negotiations, compulsory licensing, and must-carry channels.

In addition, Homeland Security and Government Affairs Committee **Chairman Joe Lieberman (I-CT)** is retiring, and **Sen. Tom Carper (D-DE)** is expected to be the next chairman of the Committee. **Sen. Tom Coburn (R-OK)** is next in line to become ranking member of the Committee after Sen. Susan Collins steps down in January because of term limit rules. Sen. Carper was a co-signer to the Cybersecurity Act of 2012 while Sen. Coburn is likely to advocate for the Republican sponsored SECURE IT Act, which shows that the new chairman and ranking member have different approaches to the front line issue of cybersecurity. Furthermore, there also could be some movement on the Senate Judiciary Committee with **Sen. Amy Klobuchar (D-MN)** replacing **Sen. Herb Kohl (D-WI)** as chair of the Antitrust Subcommittee after he retires at the end of the year. This Subcommittee oversees major mergers between U.S. companies, which is an important issue for American telecommunications companies.

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