



Legislative Alert

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Telecommunications in the 113th Congress

The 112th Congress saw a lot of activity focused on new and changing technologies, but few legislative breakthroughs. Early in the year, there was significant activity around intellectual property and online piracy issues, culminating in the controversy surrounding the Stop Online Piracy Act (SOPA) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PROTECT IP or PIPA). A number of cybersecurity proposals passed the House, but the Senate was not able to come to an agreement and cybersecurity remains a top policy priority for both Congress and the White House.

Even though there were few legislative breakthroughs in the last session, the spectrum provisions in the Middle Class Tax Relief and Job Creation Act constituted a major policy change. Spectrum will continue to be a key issue moving forward, and oversight of the FCC's incentive auction process is expected to be a priority for Congress in the 113th Congress. In addition, we may see some piecemeal legislation introduced in an attempt to update the Telecommunications Act of 1996 and the Cable Act of 1992. Perhaps the only "must-pass" piece of legislation is the Satellite Television Extension and Localism Act (STELA) reauthorization. This law expires in 2014, so reauthorization is a top priority, and may serve as a vehicle for other video related legislation.

Cybersecurity

Although both the House Homeland Security Committee and Senate Homeland Security and Government Affairs Committee will see new leadership, cybersecurity remains a priority in the 113th Congress. Chairman Mike McCaul (R-TX) and Chairman Tom Carper (D-DE) met in December to establish a working relationship because they agree that it is crucial for both chambers to work together to create a successful cybersecurity solution. In addition to the work of the committees of jurisdiction, President Obama is expected to release an Executive Order focusing on using his authority under existing law to establish a framework for designating "critical infrastructure," including elements of communications and broadband networks, and develop best practices to secure it against cyberattacks. The White House has been reaching out to the private sector in drafting this Executive Order over the last few months, and we expect it to be released sometime early this year, perhaps even before the State of the Union. A draft circulated in late November contained provisions addressing these issues as well as information sharing and privacy and civil liberties protections. One controversial issue is whether the Executive Order will exempt information technology companies from the definition of critical infrastructure.

With respect to cybersecurity policy more generally, most industry players remain opposed to new regulation in this area. A Business Roundtable report released on January 9 argues that the government's proposed cybersecurity solutions are too focused on compliance. The Roundtable report states that legislation to facilitate robust, two-way information sharing with appropriate legal and privacy protections between government and the private sector would be more effective. 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. According to Chairman Mike Rogers (R-MI) and Ranking Member Dutch Ruppersberger (D-MD), the House Intelligence Committee will also continue to work on cybersecurity legislation on a bipartisan basis.

Privacy

Online and mobile privacy remain priorities for Congress in the 113th Congress. Senator Al Franken (D-MN) plans to re-introduce the Location Privacy Protection Act, which cleared the Senate Judiciary Committee in December. The bill would require mobile app developers to obtain explicit consent from consumers before recording mobile device location information. The Senate Judiciary Committee is also expected to consider updates to the Electronic Communications Privacy Act (ECPA), which was first enacted in 1986. An attempt to attach an amendment updating ECPA to a bill revising the Video Privacy Protection Act (VPPA) failed in December. The VPPA bill passed both chambers without the ECPA amendment, and was signed into law by President Obama on January 10. It permits "video tape service providers" (a term that has been interpreted to include streaming video sites) to get advanced consent from subscribers to share video viewing information on social media sites on an ongoing basis for up to two years.

The FTC amended the Children's Online Privacy Protection Act (COPPA) in December, and the revised rule goes into effect July 1, 2013. The updated rule includes modifications to the definitions of key terms including operator, personal information, and website or online service directed to children. The amended rule also updates the requirements for notice and parental consent, and also adds data retention and deletion provisions. As industry works to understand and implement these updated rules, children's privacy is expected to remain part of the larger privacy discussion in Congress.

In addition, Commerce Committee Chairman Jay Rockefeller (D-WV) is expected to continue to work for a federal baseline privacy standard rather than voluntary industry standards. Behavioral advertising and Do Not Track remain key issues for industry as well as privacy advocates, and we expect Chairman Rockefeller to re-introduce the Do Not Track Online Act in this session. Sen. Rockefeller may be especially motivated to pass privacy legislation now that he announced his retirement at the end of this Congress. The House Commerce Committee Republicans most closely identified with privacy issues in the last Congress, Reps. 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. Rep. Lee Terry (R-NE) will replace Bono-Mack as chair of the Manufacturing and Trade Subcommittee, and it is likely that he will become a leader on privacy issues in this session. Like other issues in the telecommunications space, we are expecting to see a number of hearings and bills on privacy acting on an agreement or comprehensive legislation will be difficult.

Cable Act Rewrite

The Cable Act was first passed in 1984 and revised again in 1992 and 1996. Because the television marketplace looks very different from when the Cable Act was last considered by Congress, some are pushing for the law to be re-written in the 113th Congress. The Senate Commerce Committee is expected to hold numerous hearings on video issues in the coming months. Interestingly, the Commerce Committee will see the departure of two Senators who were particularly active on these issues – John Kerry (D-MA) and Jim DeMint (R-SC).

Issues surrounding online video distribution create questions that could be resolved through new legislation. New technology that has enabled services like Aereo to distribute broadcast programming online without broadcaster consent has created legal questions regarding the applicability of copyright law. Act. Two federal judges considering the issue have come to different results. The cases are under appeal, and the forthcoming ruling could impact the larger debate over video regulation in the online era. Program blackouts caused by retransmission consent and program carriage negotiations have caused members of Congress to become more interested in revisiting these issues. Many in the video industry are also calling for a revision of compulsory licensing, must-carry rules, and local programming rules. With the 2014 expiration of the Satellite Television Extension and Localism Act

(STELA), which frees satellite television providers from retransmission consent requirements, many see this legislation 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 net neutrality and whether IP substitutes for traditional voice service should be subject to legacy common carrier regulations adopted for those traditional services. To that end, FCC Chairman Genachowski has created the Technology Transitions Policy Task Force to examine the issues presented by the move from copper-wire technology to today's broadband network.

It is also possible that codification of FCC authority to impose net neutrality requirements on broadband providers will become part of a telecom act rewrite. Movement on this issue will depend on the outcome of Verizon's challenge to the FCC's current net neutrality rules now pending before the DC Circuit. Senators Ron Wyden (D-OR) and Al Franken (D-MN) are working on legislation that would write net neutrality into the antitrust laws. FCC Commissioner Robert McDowell and Republicans in Congress have urged the FCC to close the docket in which some commenters urged the Commission to regulate broadband under common carrier rules.

Spectrum

Spectrum issues will continue to be an important element of communications policy discussions in 2013. Providers continue to argue that demand for mobile broadband services requires the allocation of additional spectrum – but it is unclear where additional spectrum will come from and how spectrum already identified for reallocation will be divided between licensed and unlicensed use. Congress will continue its ongoing oversight of the incentive auction process as the FCC implements the provisions Middle Class Tax Relief and Job Creation Act. Also of interest will be the FCC's determinations on whether to impose new limits on the amount of spectrum any entity can hold – either through hard spectrum “caps” or a softer spectrum “screen” to evaluate particular acquisitions – and whether it will apply those limits to the spectrum auctions that are scheduled to take place later this year.

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. Congress and the FCC will also continue to examine the issues surrounding uses of licensed and unlicensed spectrum. Chairman Greg Walden (R-OR) has indicated his desire that reclaimed broadcast spectrum be auctioned for licensed use to the maximum extent possible, although he and Vice Chair Bob Latta (R-OH) of the Communications and Technology Subcommittee have voiced support for Chairman Genachowski's efforts to examine spectrum in the 5GHz band for unlicensed devices and services. Subcommittee Ranking Member Anna Eshoo (D-CA), along with Rep. Darrell Issa (R-CA) sent a letter to the FCC Commissioners in December urging them to implement the incentive auction and resulting spectrum reorganization in a manner that optimizes the value of both licensed and unlicensed spectrum. According to the letter, one public benefit of use of unlicensed spectrum was the W-Fi Internet access during Hurricane Sandy when many wireless phone networks were overloaded or completely inoperable. House Energy & Commerce Ranking Member Henry Waxman (D-CA) has also referred to unlicensed spectrum as an incredible economic success story and encourages the FCC to create guard bands in the repurposed broadcast television spectrum that can be used for new unlicensed services.

Part of this discussion is efficient use of government spectrum. Last year the President's Council of Advisors on Science and Technology released a report on Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth (PCAST Report). The PCAST Report outlines a plan for spectrum sharing between the government and private sector and argues that spectrum clearing would take too long and be too costly. However, FCC Commissioner Ajit Pai has advocated for the clearing of federal spectrum in order to let the private sector put it to better use. According to Commissioner Pai, spectrum clearing is better than spectrum sharing because a private company is less likely to take the risks necessary to develop a piece of spectrum if the government can preempt its use of it. FCC Commissioner Jessica Rosenworcel has also advocated for developing incentives to serve as the catalyst for freeing more federal spectrum for commercial use.

Broadband

As access to high-speed broadband Internet continues to become increasingly important for every aspect of American society, Congress will continue to monitor programs that encourage broadband deployment and adoption. These programs include the FCC's Connect America Fund, NTIA's Broadband Technology Opportunities Program, and the RUS Broadband Initiatives Program. Similar to last session, we expect a number of oversight hearings to examine the efficiency and impact of these programs.

In addition, Congress may address bandwidth data caps, which are monthly limits on the amount of data a consumer can use over his or her Internet connection. These caps and usage-based billing have become standard practices for most Internet service providers. These practices have been met with some opposition from consumer groups who claim that the caps discourage the use of the Internet. Senator Ron Wyden is planning to introduce a bill to bring more transparency to wireless data caps. It is unlikely that any bipartisan consensus will emerge on this practice.

Intellectual Property

Online piracy and patent reform remain intellectual property priorities as the 113th Congress begins. A year has passed since the controversy surrounding the Stop Online Piracy Act (SOPA), and lawmakers remain aware of the issue but unsure about how to address it. The House Judiciary Committee is expected to focus on technology related intellectual property issues under the leadership of Chairman Goodlatte (R-VA), former chair of the Intellectual Property Subcommittee and original sponsor of SOPA.

High profile patent disputes such as that between Apple and Samsung may be a catalyst for Congress to address patent reform again this Congress, less than two years after enacting the comprehensive America Invents Act. Technology and software industries continue to raise concerns about non-practicing entities – often called “patent trolls” – which are entities that use patents to generate revenue without planning on marketing or manufacturing the patented product or process itself. Representatives Peter DeFazio (D-OR) and Jason Chaffetz (R-UT) are planning on reintroducing the SHIELD Act (Saving High Tech Innovators from Egregious Legal Disputes) this year. This legislation would allow a court, upon finding that a party does not have a reasonable likelihood of succeeding in an infringement action, to award the recovery of full litigation costs to the prevailing party.

Other issues include performance royalty fees for songs played on terrestrial broadcast radio and a debate over the appropriate level of royalties to be paid by streaming audio sites like Pandora. As part of the debate over performance royalties, broadcasters have advocated for a requirement to require FM receivers be built into smartphones. The wireless industry has opposed this effort. Sprint's recent announcement to include an FM app on its smartphones may have largely resolved this dispute.

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. As we move into the 113th Congress, it is unlikely that online sales tax will be addressed in stand-alone legislation. With fiscal issues remaining at the forefront for the next few months, it would seem that proponents of this legislation will attempt to add online sales tax as part of a larger tax reform package.

Key Personnel

Federal Communications Commission: Some are expecting Chairman Julius Genachowski is to step down early this year, but others predict he may stay on into the spring. Recently U.S. ambassador to the Organization for Economic Cooperation and Development Karen Kornbluh has reportedly risen to the top of the candidate list as his replacement. Ms. Kornbluh served as director of the FCC's Office of Legislative and Intergovernmental Affairs in 1997, and was President Obama's policy director when he was in the Senate. NTIA Administrator Larry Strickling is also being considered to head the FCC, as is the author of the FCC's National Broadband Plan, Blair Levin. Jessica Rosenworcel is another possibility, should the president choose to elevate a current commissioner. She joined the Commission in 2012 after serving as Chairman Rockefeller's Telecommunications Counsel on the Senate Commerce Committee.

Senate Commerce Committee: Senator Jay Rockefeller (D-WV) is the Chairman (although he will retire at the end of this session), and Senator John Thune (R-SD) is expected to replace Senator Kay Bailey Hutchison (R-TX) as Ranking Member of the full committee. With Senator Kerry's appointment to the State Department, Senator Mark Pryor (D-AR) is next in line to chair the Communications and Technology Subcommittee, but some say that Senator Claire McCaskill (D-MO) is also interested in this position. Senator Roger Wicker (R-MS) is next in line to be Ranking Member on the Subcommittee, but there is also a possibility that the slot could go to Senator Roy Blunt (R-MO).

Senate Judiciary Committee: Senator Patrick Leahy (D-VT) remains Chairman and Senator Chuck Grassley (R-IA) remains Ranking Member of the full committee, and Senator Al Franken (D-MN) remains Chairman of the Subcommittee on Privacy, Technology and the Law, and Senator Orrin Hatch (R-UT) remains Ranking Member.

Senate Homeland Security and Government Affairs Committee: Senator Tom Carper (D-DE) replaces Sen. Joseph Lieberman (I-CT) as Chairman, and Sen. Tom Coburn (R-OK) replaces Sen. Collins as Ranking Member of the full committee.

Senate Select Committee on Intelligence: Senator Dianne Feinstein (D-CA) is the Chair and Senator Saxby Chambliss (R-GA) is the Ranking Member.

House Committee on Energy and Commerce: Rep. Fred Upton (R-MI) remains Chairman and Rep. Henry Waxman (D-CA) remains Ranking Member of the full committee. Rep. Greg Walden (R-OR) will remain Chairman and Rep. Anna Eshoo (D-CA) will remain Ranking Member of the Subcommittee on Communications and Technology.

House Judiciary Committee: Rep. Bob Goodlatte (R-VA) replaces Rep. Smith (R-TX) as Chairman and Rep. John Conyers remains Ranking Member of the full committee.

House Homeland Security Committee: Rep. Mike McCaul (R-TX) is Chairman and Rep. Bennie Thompson (D-MS) is Ranking Member of the full committee.

House Permanent Select Committee on Intelligence: Rep. Mike Rogers (R-MI) remains Chairman and Rep. Dutch Ruppersberger (D-MD) remains Ranking Member of the full committee.

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