

Patton Boggs TechComm 2010 Forecast
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The Patton Boggs TechComm Group expects a number of important technology and communications issues to be addressed in 2010 by regulators, legislators and courts. These issues reflect the ever-growing role of Internet, wireless and broadband-based technologies in our society and the ongoing convergence and evolution of traditional markets and services.

Changing priorities of the new Administration, including Net Neutrality, along with passage of the Stimulus Act and its corresponding requirement for development of a National Broadband Plan, have increased regulatory activity. In addition, the announcement of the proposed merger of Comcast and NBC Universal has led to a renewed emphasis on several industry issues. Here is our forecast of important issues for 2010.

Net Neutrality

FCC. The FCC is currently seeking comment on proposed net neutrality rules, with initial comments due by **January 14, 2010** and reply comments by **March 5, 2010**. The FCC's net neutrality Notice of Proposed Rulemaking (NPRM) proposes the following:

- Binding rules around the four current FCC Internet Policy principles that suggest consumers are entitled to: (1) access 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) competition among network providers, application and service providers and content providers;
- Binding rules would include a fifth principle, requiring a broadband Internet access service provider to treat lawful content, applications and services in a nondiscriminatory manner, and a sixth principle, would require a broadband Internet access service provider to disclose information concerning network management and other practices as is reasonably required for users and content, application and service providers to enjoy anti-competitive protections;
- The principles would be subject to reasonable network management procedures and would not supersede any obligation a broadband Internet access service provider may have, or limit its ability, to deliver emergency communications or to address the needs of law enforcement, public safety or national or homeland security authorities, consistent with applicable law; and
- The six principles would be applied to all platforms for broadband Internet access, and comment is sought on how, in what time frames or phases, and to what extent the principles should apply to non-wireline

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forms of Internet access, including, but not limited to, terrestrial mobile wireless, unlicensed wireless, licensed fixed wireless and satellite.

- Comment also is sought on how net neutrality principles should address “managed” or “specialized” services, which are Internet-Protocol-based offerings provided over the same networks used for broadband Internet access services. Managed services could include voice, video, and enterprise business services, or specialized applications like telemedicine, smart grid or eLearning offerings.

Broadband operators providing service over all platforms should review their network management procedures and determine if current practices comply with all six principles. If compliance is not possible or feasible, you may want to consider commenting to the FCC by the deadlines noted above. Providers also should review their Terms and Conditions to ensure they have accurately described their network management procedures.

Congress. Federal lawmakers continue to show interest in net neutrality. The issue was revived last year during the U.S. presidential campaign when Barack Obama said he would support net neutrality laws and regulations.

Representatives Ed Markey (D-MA) and Anna Eshoo (D-CA) proposed legislation in July, H.R. 3458, to address net neutrality concerns, but exclude “reasonable” network management practices from regulation. The bill would: (a) make it unlawful for an ISP to “block, interfere with, discriminate against, impair, or degrade the ability of any person to use an Internet access service to access, use, send, post, receive, or offer any lawful content, application, or service through the Internet”; and (b) direct the FCC to enforce these rules and establish a consumer complaint system for the public to alert the Commission to possible violations.

On October 22, Senator John McCain (R-AZ) introduced S. 1836, a bill that would prohibit the FCC from enacting rules that would regulate the Internet and allow ISPs to slow down or block Internet content or applications of their choosing. McCain said that his legislation, which he introduced simultaneously with the Commission’s release of its net neutrality NPRM, is necessary because a “government takeover of the Internet will stifle innovation, in turn slowing our economic turnaround and further depressing an already anemic job market.” Representative Marsha Blackburn introduced companion legislation to the McCain measure, H.R. 3924, in the House.

The House and Senate bills will continue to garner attention next year, particularly as Committees with jurisdiction over the issue monitor the FCC’s net neutrality NPRM. Democrats, who typically support net neutrality rules, have seen a break in their ranks with more than 70 House Democrats recently expressing concern to the FCC about net neutrality regulations. Still, there are many Congressional net neutrality advocates. In the House, Chairman Henry Waxman (D-CA) of the House Energy and Commerce Committee added himself as a co-sponsor of the Markey/Eshoo bill. Representative Donna Edwards (D-MD) issued a statement supporting the FCC’s net neutrality proposal. In the Senate, Senators Byron Dorgan (D-ND) and Olympia Snowe (R-ME) issued a joint statement reiterating support for net neutrality rules.

Courts. *Comcast Corp v. FCC* (Case No. 08-1291) is pending in the D.C. Circuit. Comcast appealed an FCC finding that Comcast’s efforts to terminate “peer-to-peer” Internet connections violated federal policy and violated an FCC directive for Comcast to submit a compliance plan. This case may decide two important issues: (1) the FCC’s ability to impose compliance plans without prior notice and comment rulemaking; and (2) the limits of FCC ancillary jurisdiction to regulate the Internet. Depending on the outcome of this case, the FCC may need to conduct a rulemaking before it may impose compliance plans on companies and, importantly, Congress may need to amend the Communications Act to give the FCC express jurisdiction to regulate the Internet.

Comcast/NBC Universal Merger

Background. Comcast plans to acquire 51 percent majority ownership of NBC Universal (“NBC”) from General Electric Co., which will retain 49 percent.

NBC controls the rights to NBC Entertainment; NBC News; NBC Universal Sports & Olympics; Telemundo; USA Network; Bravo; Syfy; MSNBC, co-owned by Microsoft; CNBC; Oxygen; The Weather Channel; iVillage online community for women; and Hulu.com, an online video service co-owned by News Corp., Walt Disney Co. and Providence Equity Partners.

Comcast provides cable service to 23.8 million customers, high-speed Internet service to 15.7 million customers and voice service to 7.4 million customers. Comcast controls the rights to Comcast.net; Programming Group, which includes E! Entertainment Television, Style Network and the Golf Channel; Comcast Interactive Media, which includes Fandango, DailyCandy.com and Fancast; Comcast Sports Group; and Comcast-Spectacor, which owns the Philadelphia Flyers NHL hockey team, the Philadelphia 76ers NBA basketball team and their two arenas.

The \$30 billion deal has already triggered statements from members of Congress and consumer groups about potential anti-competitive effects. Video and broadband providers are concerned about what the deal might mean for access to content. The merger will spark further debate over media concentration, access to programming by competitors, Internet distribution of video and access to the cable platform by independent programmers.

FCC/DOJ. In 2010, the FCC will review the deal relative to the parties' communications assets and determine whether combining those assets is in the public interest. The merger will also be subject to antitrust review by the Department of Justice. Separately, the FCC announced plans to consider a program access Report and Order addressing terrestrially-delivered, cable-affiliated programming during its January Open Meeting.

Congress. In the House, Judiciary Committee Chairman John Conyers (D-MI) announced his plans to conduct a hearing (probably early next year) on the Comcast-NBC Universal deal. "A merger of this magnitude involves a complex regulatory process and heavy public scrutiny," Conyers said recently in a statement. "The committee will consider the benefits of potential advances in content delivery and the impact on consumers." Chairman Rick Boucher (D-VA) of the House Subcommittee on Communications, Technology and the Internet ("House TechNet Subcommittee") also plans hearings.

Senate Commerce Committee Chairman John "Jay" Rockefeller (D-WV) also weighed in: "I have some serious questions about the deal announced for Comcast to assume control of NBC Universal. When major media companies swell to control both content and distribution, we need to make sure consumers are not left with lesser content and higher rates." Hearings are expected from Rockefeller and Commerce Communications Subcommittee Chairman John Kerry (D-MA), who said he would monitor the transaction. A hearing also is expected by the Senate Judiciary Antitrust Subcommittee, chaired by Senator Herb Kohl (D-WI).

Courts. *Cablevision Systems Corp. v. FCC* (Case No. 07-1425) is pending in the D.C. Circuit and presents an issue that may be relevant to some of the anti-competitive concerns raised with respect to the Comcast/NBC merger. Cablevision appeals the FCC's decision to extend by another five years its rules prohibiting exclusive contracts between vertically integrated programming vendors and their affiliated cable operators. The FCC had concluded that cable operators still have the incentive to withhold programming from competing multi-channel video program distributors ("MVPDs"). If the court rules in favor of Cablevision, then exclusive contracts will be permitted and competing MVPDs may lose access to programming or be required to pay higher prices for continued access.

National Broadband Plan

FCC. In the American Recovery and Reinvestment Act of 2009 ("Stimulus Act") Congress directed the FCC to submit a National Broadband Plan ("Broadband Plan") by **February 17, 2010**, although the FCC is now asking Congress for more time. The National Plan goal is to ensure that all Americans have access to broadband, and to establish benchmarks for meeting that goal.

In a December 2009 interim report on its Broadband Plan progress, the FCC provided five guiding principles in creating the Plan: (1) provide an open and transparent process; (2) build on specific attributes of the American broadband ecosystem; (3) aspire high, but find a practical and sustainable path; (4) recommend concrete action based on data and analysis; and (5) focus on the future.

The interim report also identified reform options in 10 key areas: (1) reforming Universal Service; (2) improving infrastructure access; (3) improving access to spectrum; (4) serving Tribal Lands; (5) innovating set-top boxes to increase broadband access and adoption; (6) providing consumers accurate information regarding broadband access, speeds and competition; (7) ensuring that new media benefits all Americans; (8) improving adoption of

broadband; (9) improving accessibility for persons with disabilities; and (10) providing broadband to public safety. Other key areas to be addressed in January 2010 include education, energy, health care and civic participation.

So far, the FCC has released 28 Public Notices seeking comment on implementation of the Broadband Plan. Some of the issues addressed include:

- Definition of Broadband
- Implementation of a Smart Grid
- Broadband Accessibility for People with Disabilities
- Access to More Spectrum for Broadband
- Public Safety, Homeland Security and Cybersecurity
- Middle Mile Infrastructure and Access
- Broadband Deployment and Adoption on Tribal Lands
- Connecting Anchor Institutions
- Broadband Needs in Education, Including Changes to E-rate
- Broadband Adoption
- Health Care Delivery
- Universal Service and Intercarrier Compensation
- Moving Towards a Digital Democracy
- Transition from Circuit-Switched Network to All-IP Network
- Use of Spectrum, Including Broadcast Spectrum
- Video Device Innovation

While the Commission provided 10 key areas for reform in its National Broadband Plan Interim Report, there are three areas that deserve particular attention, including revising the universal service program, innovating and integrating the set-top box market and allocating more spectrum for wireless broadband services.

With respect to the set-top box market, the National Broadband Plan Interim Report posits that delivering Internet video to a consumer's TV could drive higher broadband adoption and utilization because of the ubiquitous nature of the TV (99 percent of households have TVs), but convergence of the television and the Internet is currently hindered by the lack of innovation in the set-top box market. The FCC hopes to open the set-top box market, to allow more than just cable or satellite providers into consumers' homes through their TVs, thus driving further innovation. Blair Levin recently proposed the idea of forcing cable and satellite providers to supply low-cost set-top boxes that integrate video service with broadband service. In the National Broadband Plan, the FCC will address current barriers to implementation of the CableCard, which has not yet achieved its intended goal of stimulating a market for retail navigation devices, and require MVPDs to provide low-cost devices that bridge the proprietary MVPD network elements to common, open-standard, widely-used, in-home communications interfaces. This would enable any retail navigation device or set-top box to operate on any MVPD platforms.

The FCC also highlights the need to repurpose spectrum for wireless broadband service. The FCC plans to consider all options in its National Broadband Plan while balancing the need for more spectrum against engineering and policy constraints under the current allocations. Some options on the table include:

- exploring access to TV spectrum while maintaining over-the-air television, access to federal spectrum in conjunction with NTIA and use of terrestrial operations in mobile satellite spectrum;
- resolving pending spectrum allocation and use issues in the AWS 2 & 3 proceedings, the WCS mobility proceeding, the 700 MHz D block proceeding and the TV White Spaces proceeding; and
- identifying new spectrum for licensed and unlicensed use.

This week, in fact, the Department of Justice and NTIA urged the FCC in a letter about the National Broadband Plan to free up additional spectrum for broadband services and suggested the FCC reallocate underutilized spectrum from commercial and government users.

Congress. As Congress awaits the submission of the Broadband Plan, some Members have launched initiatives concerning radio spectrum policy that will play out in 2010.

Senator John Kerry (D-MA) and Representatives Henry Waxman (D-CA) and Rick Boucher (D-VA) introduced similar versions of a Radio Spectrum Inventory Act (S. 649 and H.R. 3125, respectively) that would require the FCC and Department of Commerce's National Telecommunications and Information Administration (NTIA) to prepare an inventory of spectrum allocations and assignments in certain radio frequency bands. The pending Senate bill specifies a range from 300 MHz to 3.5 GHz, but gives the agencies discretion to expand the range. The House bill specifies a broader range of frequencies, from 225 MHz to 10 GHz. The bills would generally require an accounting of spectrum allocations to identify commercial licensees, government agency allocations and the number of devices deployed on the bands. Where available, the agencies must provide information on the types of wireless devices used on licensed and unlicensed frequencies in the designated bands. The results of the inventory would be available on the Internet. Both bills would exempt certain information from public access for reasons of national security, such as spectrum allocated for Defense Department purposes.

The bills would require the inventory to be completed and submitted to Congress within 180 days of enactment. The House bill also would require the NTIA and the FCC to update the spectrum inventory with an annual report to Congress identifying the least used blocks of spectrum and possibly recommending spectrum reallocation.

Other wireless issues may also re-emerge in Congress next year when the Broadband Plan is considered, such as reform of wireless handset exclusivity arrangements, consumer protection provisions and early termination fees.

Universal Service Reform

FCC. In developing the National Broadband Plan, the FCC sought comment on potential reforms to the Universal Service Fund (USF) and intercarrier compensation that would further the goal of making broadband more universally available. The FCC focused on whether the relative size of funding for each USF support mechanism is appropriate to achieve universal broadband, and whether funding should be increased for one or more of the support mechanisms, such as the E-Rate program supporting schools and libraries. Comprehensive universal service reform, including adding broadband to the list of supported services, can reasonably be expected to be part of the FCC's National Broadband Plan.

Congress. This issue seems certain to heat up in Congress, as several key legislators are promoting initiatives to ensure that a sustainable USF continues to provide basic, affordable telephone service for Americans, while expanding its contribution base and designated uses.

Most prominent is a draft proposal by Chairman Rick Boucher (D-VA) and co-sponsor Representative Lee Terry (R-NE) of the House TechNet Subcommittee to reform the USF in the following ways:

- Capping the total amount of universal service support, other than support for schools, libraries, rural health care, lifeline, link-up and toll limitation programs.
- Expanding use of the fund for build out of broadband lines, requiring USF recipients to offer broadband service with downloads of 1.5 mbps or greater within five years of the law's enactment.
- Expanding the contribution base of the fund and directing the FCC to choose a contribution methodology based on revenues, numbers or a combination of the two.
- Ensuring that universal service high-cost support is available to carriers that rely on it to provide service and adopting a competitive bidding process for determining whether mobile wireless service providers are eligible for support.

The proposal also addresses intercarrier compensation, phantom traffic and traffic pumping.

Bills to extend the USF Lifeline program were introduced in both the Senate and the House. In the Senate, Senator John "Jay" Rockefeller (D-WV), Chairman of the Commerce Committee, introduced S. 2879 to establish a two-year pilot program to expand the FCC's Lifeline program and support the recurring cost of basic broadband service for eligible low-income households. The bill also would direct the FCC to provide Congress with a report on expanding the Link-Up program to assist with the costs of securing computer equipment to start up broadband service.

In the House, Representative Doris Matsui (D-CA) introduced H.R. 3646 to establish a Lifeline Assistance Program for universal broadband adoption. The bill would, among other provisions, direct the FCC to establish a broadband lifeline program enabling qualifying low-income customers in urban and rural areas to purchase broadband service at reduced charges. Providers would be reimbursed for each such customer served.

Towers and the FCC Bird Proceeding Remand

FCC. This proceeding is important because any changes to the FCC's current Antenna Structure Registration rules and procedures will likely lengthen the approval process for new towers and collocated facilities and slow down the deployment of new wireless services.

On April 14, 2009, the American Bird Conservancy, Defenders of Wildlife and National Audubon Society petitioned the FCC to adopt new rules for registering communications towers and evaluating bird impacts. The proceeding is the outgrowth of a D.C. Circuit decision in *American Bird Conservancy, Inc. v. FCC* (Case No. 06-1165) directing the FCC to conduct the requisite environmental analyses to determine the environmental impact of towers in the Gulf Coast Region on migratory birds.

The petition urges the FCC to: (1) amend its rules in compliance with the National Environmental Policy Act (NEPA) to ensure that only towers with no significant environmental effects individually or cumulatively are categorically excluded from review under NEPA; (2) prepare a programmatic environmental impact statement addressing the impacts of communications towers on migratory birds, their habitats and the environment; (3) promulgate rules to clarify the roles, responsibilities and obligations of the FCC, applicants and non-federal representatives in complying with the Endangered Species Act; (4) consult with the U.S. Fish and Wildlife Service regarding the effects of towers on endangered and threatened species; and (5) adopt measures to reduce migratory bird deaths in compliance with the Migratory Bird Treaty Act. The FCC solicited comments on the petition but has yet to release an order.

Wireless Tower Siting Shot Clock

FCC. With deadlines looming at the FCC, NTIA and Rural Utilities Service (RUS) for build out of wireless spectrum and use of broadband stimulus funds, deployment of more towers will be needed. On November 18, 2009, the FCC released a declaratory ruling establishing a "shot clock" for tower siting applications that are pending before local zoning officials -- 90 days for collocated facilities and 150 days for new towers. Presuming the ruling survives appeal, the shot clock can reasonably be expected to facilitate quicker wireless tower local zoning approval. Interested parties have until **January 20, 2010** to ask the FCC to reconsider the ruling or until **February 19, 2010** to seek review with any U.S. Court of Appeals. A group of localities already asked the FCC to stay its ruling based on the need to make changes to their procedures in order to comply with the FCC's order. Oppositions are due **January 22, 2010**, and replies are due **February 8, 2010**. Another group of associations has asked the FCC to modify the shot clock so localities may talk to applicants if an application error is discovered more than 30 days after a tower application is filed. Additional petitions for reconsideration and court appeals are expected to be filed.

Broadband Stimulus

Although RUS and NTIA originally planned to complete the announcement of Round 1 awards by the end of 2009, the agencies reported, in a third quarter report to Congress, that awards will slip into February 2010. All broadband stimulus funds that are not rewarded as a result of Round 1 applications will be awarded as part of one additional funding round that will be conducted in 2010. After soliciting comments on key issues that arose with respect to Round 1, the Round 2 Notice of Funds Availability, which will describe the rules of the road for Round 2, is expected to be released February 1, 2010. We expect the Round 2 application window will open around March 15th and close around the end of April 2010.

First Round Awards. On December 17th, Vice President Joe Biden announced the first broadband stimulus awards issued by NTIA and RUS totaling \$182 million in funding for 18 broadband projects in 17 states. These

awards, which were made to a very small number of applicants whose applications were unopposed and could be granted quickly, account for only 9 percent of the funds to be awarded during Round 1 and only 2.5 percent of the total funds available from the Stimulus Act for broadband expansion. We believe significant numbers of Round 1 broadband stimulus applications still have not moved to Phase 2 due diligence. We expect RUS and NTIA to notify more applicants about moving to Phase 2 due diligence by the middle of January.

Of the \$182 million announced, RUS awards account for \$53.8 million to fund eight last mile and middle mile projects. NTIA awards total \$129 million to fund 10 projects for middle mile, sustainable broadband adoption and public computer centers. NTIA has not yet made any last mile awards. RUS still has approximately \$2.446 billion out of a total of \$2.5 billion to award, and NTIA has \$4.571 billion out of a total of \$4.7 billion to award.

Below is a brief description of the initial Round 1 awards.

BIP Last Mile and Middle Mile Awards:

- Rivada Sea Lion, an Alaska Native Corporation: \$25.3 million last mile award to construct a 4th generation wireless and satellite network in Anchorage and southwest Alaska to cover 90,000 square miles and bring service to 30,000 residents in 53 unserved, subsistence-level communities in southwestern Alaska – the first broadband services for these Native Alaskans - as well as connect homes, businesses and anchor institutions, including health clinics, schools and tribal government facilities.
- Big Island Broadband/Aloha Broadband, Inc.: \$106,503 loan with \$87,405 in matching funds to bring broadband services to an unserved area in the northern part of the Hawaiian Islands where there are nearly 600 residents and businesses.
- Peetz Cooperative Telephone Co.: \$1.5 million grant to expand existing infrastructure utilizing a combination of technologies. This project will make broadband service available to as many as 550 locations in Colorado and Nebraska.
- The Chatham Telephone Company: \$8.6 million grant to bring high speed DSL broadband service to remote, unserved businesses and households within rural Michigan.
- Bretton Woods Telephone Company: \$985,000 last-mile grant for a fiber-to-the-home project in Bretton Woods, New Hampshire, which will pass 386 households, 19 businesses and 6 community anchor institutions, and will allow two-way broadband of up to 20 Megabits per second (Mbps) to encourage tourism and economic development.
- Consolidated Electric Cooperative: \$2.4 million grant/loan awarded to construct a 166-mile middle-mile network in North Central Ohio. CEC plans to sell fiber, offer last mile service and use the network to connect 16 electric substations in order to support its smart grid technology initiative.
- The Pine Telephone Company: \$9.5 grant with an additional \$4.6 million in private funds to provide services to an entirely remote, rural, unserved and severely economically disadvantaged community in southeastern Oklahoma.

BTOP Middle Mile Awards:

- North Georgia Network Cooperative: \$33.5 million award to deploy a 260-mile fiber optic ring in northern Georgia and North Carolina with 2,600 interconnection points connecting eight counties and 245 community institutions, including 146 county government facilities, four hospitals and more than 80 public schools, colleges and universities, and the delivery of last mile service to 24,000 households in previously inaccessible and unaffordable areas.
- Biddelford Internet Corporation (public-private partnership between the University of Maine and Internet service providers): \$25.4 million award for construction of an 1,100 mile, 3 fiber optic ring network across Maine from the most rural and disadvantaged areas of the state, to the coast, and through the mountainous regions of western Maine. The network will connect more than 100 communities with 110,000 households, 600 anchor institutions and a number of last mile providers. The project will connect 10 University of Maine campuses and outreach centers, three community colleges and 38 government facilities, and be used by the New England TeleHealth Consortium and the Franklin County Healthcare Network to implement advanced health care networks to improve delivery of rural health care services. Interestingly, bills have been introduced in the Maine legislature to bar the University from using its funds, including tuition receipts, to compete in the provision of broadband.

- ION and the Development Authority of North Country (public-private partnership): \$39.7 million award for rural upstate New York and parts of Pennsylvania and Vermont to connect more than 100 community institutions, including libraries, state and community colleges, and health clinics and to enable last mile connections to 250,000 households and 38,000 businesses.
- South Dakota Network, LLC: \$20.6 million grant to add 140 miles of backbone network and 219 miles of middle mile spurs to existing network, enabling the delivery of at least 10 Mbps service to more than 220 existing anchor institution customers in rural and underserved areas of the state.

BTOP Public Computer Center Awards:

- Arizona State Library Archives and Public Records: \$1.3 million grant to permit 84 libraries to improve their computing facilities that serve more than 75,000 users per week and more than 450,000 residents in total.
- City of Boston: \$1.9 million grant to expand computer and Internet capacity at the city's main library and 25 branches, 16 community centers and 11 public housing sites.
- Regents of the University of Minnesota: \$2.9 million grant to enhance broadband awareness and use for residents in four federally-designated poverty zones in Minneapolis and St. Paul.
- The Inland Northwest Community Access Network (Tincan): \$1.3 million grant to establish three new public computer centers and expand 14 existing centers throughout Spokane, Washington's poorest neighborhoods to serve more than 5,000 additional users per week.

BTOP Sustainable Broadband Adoption Awards:

- New Mexico State Library: \$1.5 million grant to increase broadband adoption and promote computer literacy and Internet use among vulnerable populations, Hispanic and Native American users, small businesses and entrepreneurs through training and outreach statewide.
- The Inland Northwest Community Access Network (Tincan): \$981,000 grant to increase broadband adoption through basic and advanced computer skill training, as well as community-based outreach campaigns to highlight the benefits of broadband for vulnerable populations in Spokane, Washington.

Congress. The House and Senate Commerce and Agriculture Committees held several hearings in 2009 on the broadband stimulus programs, seeking updates from agency officials on the progress of application reviews and anticipated award dates. We expect continued oversight of broadband and other Stimulus Act funding (e.g., smartgrid) by members of Congress who are interested in broadband awards that impact their states.

Privacy

FTC. In December 2009, the Federal Trade Commission ("FTC") launched a series of roundtable discussions to explore the privacy challenges posed by the vast array of 21st century technology. In its December roundtable, the FTC discussed online behavioral marketing, information brokers, retention of private consumer information and the corresponding impact on consumer privacy and consumer expectations about the use of private information. In 2010, the FTC will continue to explore privacy challenges resulting from new technologies and business practices that collect and use consumer data, such as social networking, location-based services, mobile technology and mobile marketing, online behavioral advertising and the collection and use of information by retailers, data brokers and third-party applications. The FTC's goal is to balance protecting consumer privacy with supporting beneficial uses of information and technological innovation.

The FTC will likely create guidelines on how best to conduct mobile commerce and protect consumers. The agency also will explore issues related to consumer-driven content, consumer rights and obligations associated with digital content products purchases, the protection of children online, the emergence of consumer-to-consumer e-commerce, dispute resolution and law enforcement cooperation.

Of particular import, the FTC stated, in a recent filing with the FCC, that it is currently investigating the privacy and security implications of cloud computing, which is the provision of Internet-based computer services allowing businesses and consumers to use software and hardware located on remote computer networks "in the cloud" operated by third parties. Cloud computing has the potential to reduce the need for businesses and consumers to

purchase, operate and maintain their own software and hardware, and is therefore a less costly way to manage, store and use data. However, the FTC fears that the storage of data on remote computers may also raise privacy and security concerns for consumers because of the increasing amounts of consumer data stored in one place and accessibility to that data. Parties caught up in the current FTC investigation likely include Google, Amazon, Microsoft and Rackspace. The FTC is considering cloud computing as part of its broader initiative to reexamine consumer privacy as technology advances.

Congress. Congress is also likely to focus on privacy issues, including weighing the benefits of targeted advertising on the web against consumer privacy concerns. Witnesses at a joint hearing held by the House Commerce, Trade and Consumer Protection and the TechNet Subcommittees last fall agreed that the Internet has vastly expanded the ability to gather detailed information on economic, social and medical status and other personal information. Business and privacy proponents also agreed that online consumers should be able to know what data is being collected and how it is used.

The Chair of the House TechNet Subcommittee, Representative Rick Boucher (D-VA), intends to set legislative guidelines for users and companies regarding targeted advertising. Boucher has said that users would need to expressly opt out of information gathering about their preferences and buying habits for targeted advertising. Except for the collection of more sensitive information, such as financial or medical information, a company would need express “opt-in” permission from a user. Privacy advocates want Congress to adopt a default position that all information gathering is subject to “opt-in” procedures.

Patent Reform Legislation

Congress. Patent reform is likely to garner congressional attention early in 2010. Senate Judiciary Chairman Patrick Leahy (D-VT) views this as a defining issue of his chairmanship. The White House also has a strong interest in seeing patent reform pass. As a result, the legislation may move to passage with minimal debate and revisions as quickly as this spring.

In April of 2009, a compromise was struck by Leahy and Senators Dianne Feinstein (D-CA) and Arlen Specter (D-PA) which resulted in reporting the Patent Law Reform Act of 2009 (S. 515, S. 610) out of the Judiciary Committee. However, some industry groups are reportedly dissatisfied with the compromise because they believe it does not go far enough to curb excessive damages in patent infringement lawsuits.

The Senate proposes the following changes to advance patent reform:

- Allowing a defendant to win with a good faith defense, if the defendant believed the patent was invalid and unenforceable when violating the patent.
- Creating stricter criteria for willful infringement. The patent owner would be required to present compelling evidence that the infringer acted with objective recklessness, intentionally copied a patented invention with knowledge it was patented and that the patentee gave the infringer written notice of the violations in a way that affords “objectively reasonable apprehension of a suit.”
- Moving to a first-to-file system that credits invention based on the filing date of the patent application, not the date of actual invention.
- Inventing a “specific contribution over the prior art” metric to determine damages.

The House patent reform bill, H.R. 1260, includes more robust language regarding damages and also remains pending.

Satellite TV Legislation

Congress. Congress appended a two-month extension until February 2010 of the Satellite Home Viewer Improvement Act to the 2010 Defense Appropriations bill signed by the President on December 19th. The Satellite Home Viewer Act, first enacted in 1999, governs the transmission of signals from over-the-air television broadcasts to cable customers. Failure to extend the law would have cut off at least 1.5 million viewers from broadcast TV signals as the nation gears up for the football playoffs and the Super Bowl. Such a failure would no doubt upset constituents in rural areas who cannot receive over-the-air broadcasts, making them eligible for so-called “distant network signals” delivered via satellite under licensing terms specified by the law.

Congress had spent much of 2009 trying to reach a compromise on a five-year extension of the law. The consensus bill would have blended legislation passed by the House with versions approved by the Senate Commerce Committee and Senate Judiciary Committee. Congress will now have to revisit the issue in 2010.

Indecency

FCC. In a series of rulings over the last few years relating to indecency on over-the-air broadcasts, the FCC changed its fleeting expletive policy from one in which it would not prosecute a single fleeting expletive to a full ban on all fleeting expletives. The policy was changed as a result of multiple rulings in response to indecency complaints about expletives during television award show broadcasts.

Courts. *Fox Television Stations, Inc. v. FCC* (Case No: 06-1760-AG) is pending in the 2nd Circuit Court of Appeals. The petitioners seek review of portions of the FCC's new fleeting expletive policy. They raise a first amendment constitutional challenge to the FCC's indecency rules arguing that a complete ban on fleeting expletives may, in some circumstances, violate the Constitution. The decision will impact future FCC indecency policies and the measures broadcasters must take to prevent the inadvertent broadcast of an expletive.

Designated Entity Eligibility Rules

FCC. In most spectrum auctions, the FCC affords a bidding credit to successful bidders who qualify as "designated entities," such as small businesses. In conjunction with the FCC's 2008 Advanced Wireless Services auction, the FCC tightened its designated entity rules in an effort to restrain arrangements which, the FCC believed, allowed large carriers to benefit from bidding credits that they would not otherwise be entitled to by partnering with or creating small businesses to participate in the auctions. Opponents believe that the tightened rules have stifled designated entity participation in spectrum auctions, leading to auctions largely dominated by large carriers and forcing smaller entities to try to obtain additional spectrum in the secondary market.

Courts. *Council Tree Communications, Inc. v. FCC* (Case No. 08-2036) is pending in the 3rd Circuit Court of Appeals. Council Tree challenges the more restrictive designated entity eligibility rules and the application of those rules to the FCC's Advanced Wireless Service auction. Oral arguments have been completed and a decision is expected in 2010. Since the AWS auction concluded in 2008, if the court vacates the FCC's rules, it must also decide whether to nullify the results of the auction. Auction nullification is unlikely because at this late date, it will be nearly impossible to nullify the auction results. Many licensees have constructed systems and are providing service to the public in reliance on the auction results. Therefore, it is more likely that any rule changes will largely benefit participants in future auctions rather than undo any completed auctions.

Media Ownership

FCC. In 2006, the FCC made changes to its rules relating to the concentration of media ownership that were then challenged in court. The FCC recently began its 2010 Quadrennial Review of its media ownership rules and is folding into that review a court-ordered review of its revised newspaper-broadcast cross-ownership rule and local television and radio ownership rules. With increased media consolidation and increasing financial difficulties facing broadcasters, active participation in the FCC's 2010 Quadrennial Review is expected.

Court. *Prometheus Radio Project v. FCC* (Case Nos. 08-3078 et al.) is pending in the 3rd Circuit Court of Appeals. Prometheus challenges the FCC's 2006 changes to its media ownership rules as arbitrary and capricious. The FCC requested the court hold this case in abeyance or, in the alternative, remand it to the FCC, so the issues can be resolved in the context of the FCC's 2010 Quadrennial Review in order to avoid "unwarranted duplication of effort and fragmented policymaking." The court responded by ordering the FCC to provide additional support for why the court should maintain its stay of the FCC's rules and not set a briefing schedule. This may be an indication of the court's willingness to lift its stay and allow the FCC's rules to become effective. The FCC's response is due later this month and a court order may be released shortly thereafter.

INDUSTRY CALENDAR - <http://www.pattonboggstechcomm.com/industrycalendar/>

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