

SAPRONOV & ASSOCIATES, P.C.

ATTORNEYS AT LAW

TEL. (770) 399-9100

FACSIMILE (770) 395-0505

EMAIL: info@wstelecomlaw.com

400 NORTHRIDGE ROAD
SUITE 515
ATLANTA, GEORGIA 30350
TEL. (770) 399-9100

1776 K STREET, NW
WASHINGTON, D.C. 20006
TEL. (202) 223-0646

A SPECIAL CLIENT ALERT¹

**THE 2008 PRESIDENTIAL ELECTION:
Politics And Telecommunications²**

I. How the Presidential Race Will Influence U.S. Telecom Policies

Verily will the upcoming presidential election, widely viewed as the most important in recent U.S. history, have profound impact on all domestic industries, telecommunications being no exception. Regardless of its outcome, the telecommunications and related Internet policies associated with the Bush administration will change. How and to what extent will depend, *in part*, upon which candidate will occupy the White House.

A. The Candidates' Views Matter – But So Will Others'

But only in part. Policy change – whether one “believes in it” or not – will happen, regardless of whether Barack Obama or John McCain wins. Other factors, not least the Wall Street turmoil, caused, some think, by excessive deregulation, will play a role. U.S. regulators, all now cognizant of how regulation (or its absence) has seismically and unexpectedly changed the financial markets, will find plenty of parallels with the telecommunications industry, one having undergone its own bout with deregulation and market failure. (Remember the “Internet bubble?”)

¹ THIS SPECIAL CLIENT ALERT, PREPARED IN ANTICIPATION OF NEXT MONTH'S PRESIDENTIAL ELECTION, IS PROVIDED COMPLIMENTARY TO CLIENTS AND FRIENDS OF SAPRONOV & ASSOCIATES, P.C. FOR TUTORIAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS A LEGAL OPINION OR LEGAL ADVICE. PLEASE CONTACT US AT (770) 399-9100, (202) 223-0646, OR AT info@wstelecomlaw.com IF YOU HAVE SPECIFIC QUESTIONS ABOUT THIS ALERT – OR IF YOU WISH TO BE REMOVED FROM OUR MAILING LIST.

²This Alert relies upon publicly available information issued by each of the presidential campaign organizations, along with a wide variety of press reports and other sources (including those cited herein) describing the candidates' positions on the issues discussed below.

No less important will be the composition of the next Congress, whose Democratic Party control will almost certainly continue. But it may go further, as press reports suggest the possibility of a filibuster-proof majority. With key Republican leaders (notably perhaps Ted Stevens, Alaska's Republican Senator) leaving or losing re-election bids, the stage may be set for a paradigm shift back to more traditional utility regulation, abandoning what some view as a misplaced reliance on competition for price and market stability. If so, entry, rate and other so-called economic regulations may well return to an industry long left (much like the financial markets) to the free hand of the marketplace.

Notable as well will be the departure of FCC Chairman Kevin Martin. Like the candidate of his party, he too has been a maverick of sorts, not hesitating throughout his tenure to pursue controversial agenda: among these were Bell Company mega-mergers; Internet access deregulation, video franchise reform, the demise of "UNE-P," á la carte cable pricing, stepped up (and perhaps somewhat punitive) enforcement of regulatory fees and universal service contributions, and new VOIP "social regulations."³ Even as his term nears its end, Chairman Martin has now introduced perhaps his most ambitious proposal to date: comprehensive reform of inter-carrier compensation and universal service funding.⁴ How much of this will survive in the new administration is anyone's guess – and for his successor to decide. And that successor will be selected, of course, by whoever wins in November.

B. So Does Experience

Of the two candidates, McCain has far more experience in telecom policy making, having been a senior member of the Senate Commerce, Science, and Transportation Committee for years. Obama, having less experience, may well rely on veterans from the Clinton administration, including former FCC Chairmen Reed Hundt and Bill Kennard. That could lead to a resurrection of the managed competition (managed that is, by the FCC) that we saw following passage of the 1996 Telecom Act. But will this let a hundred flowers (competitors) bloom? In the current state of the capital markets, perhaps not. Still, a shift to more rigorous federal telecommunications - and to a lesser extent Internet - regulation is all but inevitable.

As of this writing, Barack Obama has a significant lead in the polls. If elected, he will be in a position to appoint "by and with the advice and consent of the Senate"⁵ a Democratic FCC Chairman. This appointment will be supported by a Democratic-controlled Congress – support that might not be readily given to John McCain.

³ For a perspective on some of these social regulations, see Saponov, W., *Creeping "Socialism": How VOIP is Regulated Today*, June 6, 2008, available at <http://www.techlinks.net/CommunityPublishing/tabid/92/articleType/ArticleView/articleId/4005/Creeping-Socialism-How-VOIP-is-Regulated-Today.aspx>. Also available upon request at info@wstelecomlaw.com.

⁴ See FCC Notice announcing tentative agenda for November 4, 2008 Open Meeting (including a discussion of Intercarrier Compensation and Universal Service Program Reform) (Rel. Oct. 15, 2008).

⁵ 47 USC 154(a).

The new FCC will report in any event to a Congress whose Democratic leaders have much to say about the agency's policies. Senator Daniel Innoye now heads the Senate Science and Technology Committee, while Representatives John Dingell and Ed Markey will presumably head up, respectively, the House Energy and Commerce Committee and the House Telecommunications Subcommittee. All are seasoned telecom policy makers with decades' long experience in telecom legislative initiatives. Clearly Congress, for now, has more worrisome matters on its plate, but eventually its members will turn their attention to the telecommunications industry, one both critical to Obama's call for infrastructure development and surprisingly resilient (thus far) to the economic downturn.

II. The Candidates' Stand on the Issues

Against this backdrop, the next President will set the telecommunications and Internet agenda for the next four years - and if comparisons to the New Deal prove true, perhaps much longer. The candidates' positions on the major issues, briefly summarized as follows, are discussed in more detail below.⁶

Broadly stated and not surprisingly, John McCain's policy views reflect a lighter approach to Internet and telecom regulation, while Barack Obama relies more on governmental intervention. Thus, on pain of oversimplifying some of the key issues, Obama is for "net neutrality," McCain is against it. While Obama views the Universal Service Fund ("USF") as a source of funding for broadband rural development, McCain has historically opposed USF expansion and believes private (not public) sector funding should be used for broadband rural expansion. Both candidates, however, support a permanent Internet tax moratorium. As for the rest, here is a brief glimpse of what to expect.

A. "Net Neutrality"

"Net neutrality" is a broad, somewhat vague term. In its most common use, as a principle applicable to public broadband communications networks (the "Internet"), it is generally understood to mean a "neutral" and "open" public network imposing no restrictions on the kinds of equipment that can be attached to it, or the modes of communication allowed through it. Net neutrality principles do not permit discrimination, whether in pricing or access, of the type, quantity, content, sites or applications that can be interconnected to or transported over the Internet.

⁶ For a more detailed discussion of the candidates' respective positions on these issues, *see generally*, Hammond, B., (2008). McCain v. Obama: Impacting the Future of Telecommunications. [electronic version]. Telecommunications Reports (Wolters Kluwer Law & Business); Atkinson, R and Ezell, S. (2008, October 15). "Comparing the Presidential Candidates' Technology and Innovation Policies." The Information Technology & Innovation Foundation. Retrieved October 17, 2008 from <http://www.itif.org/files/2008-CampaignTechAgenda.pdf>; and "Comparing the Presidential Candidates' Technology and Innovation Policies." The Information Technology & Innovation Foundation. Retrieved October 17, 2008 from <http://www.itif.org/files/2008-CampaignTechAgenda.pdf>.

Net neutrality is also a code word for competitors seeking unlimited access to the Internet and denying large telephone companies, cable or other broadband providers the right to restrict or charge them for doing so. Whether or not telcos and other broadband network operators have the right to restrict, differentiate, or variously charge for their customers' (or other providers') use of the Internet has long been up for debate. So has the issue of whether the government has, or should have, the authority to oversee or prohibit broadband operators from engaging in such practices. So where do the two presidential candidates stand on this issue?

Obama supports net neutrality. He agrees with the Internet freedoms adopted by the FCC⁷ and believes broadband users should be free to access content, use applications and attach personal devices to the Internet. He disagrees that network operators should charge additional fees to application providers in order to get faster delivery. Finally, he supports the proposed Internet Freedom Preservation Act⁸ that, among other things, would prohibit discrimination by broadband network providers against any Internet applications or services that are used in a "lawful manner."

McCain opposes (albeit not as aggressively) net neutrality. While he appears to agree with the FCC's Internet Freedoms, he has opposed net neutrality legislation, stating through his senior policy advisor Douglas Holtz-Eakin that "aggressive and proscriptive legislation on "net neutrality" is not desirable at this time." McCain believes action should be taken to prevent abusive behavior, but remains non-committal on broader governmental oversight. McCain appears to be leaning more towards FCC Chairman Kevin Martin's approach of dealing with the "network abuse" issues on a case-by-case basis. His initial policy would be to encourage the industry to develop best-practice standards, and if that fails, consider giving authority to the FCC to set and enforce reasonable network management standards. McCain also looks to Justice Department enforcement of existing antitrust laws as a means of addressing actual abuses. Within this framework, McCain has expressed sympathy for the proposition that broadband network services providers should be allowed a reasonable degree of latitude to prioritize the Internet traffic traversing their networks, and to charge different rates for service, based upon how much bandwidth or network capacity is actually consumed.

⁷ Internet freedoms adopted by the FCC were used as the basis for enforcement actions against Madison River Telephone Company for allegedly blocking VoIP traffic and against Comcast Corp. for allegedly throttling connections of heavy users of peer-to-peer services. See *In Re: Madison River Communications, LLC and Affiliated Companies*, Order, EB-05-IH-0110 (Rel. Mar. 3, 2008) and *In re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications and Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, EB-08-IH-1518, WC Docket No. 07-52 (Rel. Aug. 20, 2008). ("Internet Freedoms")

⁸ H.R. 5353. 110th Congress (2008)

B. Universal Service

As mentioned, Obama pledges to “overhaul” the USF in order to deliver broadband to underserved areas via a multi-year plan – but there appear to be no specifics. He also promises changes for a more efficient administration of the USF.

McCain has been openly critical of the USF, citing accusations of waste, fraud and abuse of the system. While he too has been less than specific on exactly how he plans to change or “fix” the USF program, McCain clearly does not support its further expansion. Rather, he has recently urged the FCC to take “bold” action in reforming the USF, including capping its size on an expedited basis.

C. Broadband Deployment

Both candidates have stressed the importance of broadband deployment, although their views on how it should be fostered, not surprisingly, are different. Obama prefers the government to take a hands-on approach, while McCain would rely on marketplace forces to get the job done.

Obama looks to the USF mechanism as the means to support deployment of broadband in lieu of subsidizing traditional landline voice service, promising to establish a multi-year USF transition plan to accomplish this result. Under current USF rules, all telecommunications providers and carriers must contribute to the USF (approximately 10 – 11 percent of their interstate and intrastate revenues). Proceeds from the fund are made available to providers serving rural or high cost areas.

Obama would increase the speed required for a connection to be considered broadband for funding purposes. He would ensure that all schools, libraries and hospitals not only have high-speed connections (under the USF supported “E-rate program”), but that training is made available to enable users to take full advantage of such benefits. Obama would also make wireless spectrum available to deliver broadband to rural areas, and encourages public/private partnerships to deliver broadband to underserved communities.

McCain supports municipally owned broadband networks and states he will establish a “People Connect Program,” one giving tax breaks to providers that offer high-speed Internet to low-income consumers. Like Obama, he supports private/public partnerships and encourages them to jointly develop ways to ensure that rural areas enjoy the benefits of broadband service. McCain goes a bit further than Obama in proposing that such rural build-outs be supported by government backed loans or low interest bonds. McCain also vows to ensure that spectrum is made available as a matter of public policy for widespread broadband deployment and promises to support research on new technologies that could assist in getting the job done.

D. Merger Reviews

When telecommunications carriers or information service providers merge, are acquired, or form a joint venture, their proposed transactions are subject to (i) antitrust review by the Department of Justice or the Federal Trade Commission (which agency is involved depends on the companies' primary line(s) of business), and (ii) FCC approval of the accompanying carrier control transfers and any radio license transfer(s). The FCC review and approval process is a broader one, considering not just the classical antitrust effect on competition, but also a "public interest" analysis. Traditionally, the FCC has taken a stricter stance in such reviews, often attaching "merger conditions" to its approval.

While Obama (to our knowledge) has not specifically addressed the FCC merger review process, he has been critical of the "deregulatory approach" taken by the agency, thus implying a stricter review process for future mergers. McCain, in contrast, has proposed legislation that would remove the FCC from telecom merger reviews altogether, due in large part to the Commission's record of attaching merger conditions in addition to those imposed by the antitrust agencies.

E. Public Safety Networks

Both candidates agree that public safety networks must be improved. McCain promises to deploy a nationwide public safety network by the end of his first term. Obama envisions creation and appointment of a cabinet level national Chief Technology Officer, responsible for (among other things) coordinating technological interoperability of government functions. He or she would also be charged with developing a state of the art wireless network for federal, state and local first responders.

F. Wireless Billing & Fees

The wireless industry has been in the spotlight lately, with the focus largely on consumer protection issues (such as early termination fees). Currently, the major debate is whether regulation of wireless should be handled on more of a state or federal level. McCain believes in a program of close oversight of the wireless industry by the federal government, and while Obama has not addressed this topic in great depth, it is widely expected that an Obama FCC would be even more focused on consumer protection issues such as limiting early termination fees, and "Carterphone"-like requirements for interconnection and interoperability of wireless devices.

G. Taxes

McCain strongly supports reducing taxes on telecommunications services in an effort he believes will help support the growth of the economy and technological development. He is pushing to eliminate discriminatory (excessively high and multi-layered) taxes and fees on wireless service. Obama is believed to support similar measures, but has not been as outspoken with respect to his telecom tax policies. Both

candidates support a permanent tax credit for research and development of telecommunications technology. Both also favor making permanent the current moratorium on state taxation of Internet services charges.

H. Privacy

While neither candidate has been very specific, both agree that steps should be taken to strengthen privacy policies. This concern appears to stem largely from several Internet service providers' apparent plans to monitor their customers' online habits for the announced purpose of targeted advertising. The FCC has recently expanded its privacy restrictions on the use of subscribers' network information by carriers and VOIP providers,⁹ so it remains to be seen what additional curbs will follow.

I. Foreign Trade

Free trade agreements and whether or not they benefit American workers have long been debatable. Telecommunications equipment manufacturers, for instance, are watching closely, as the next President's policies could affect their fortunes. McCain is a strong backer of free trade agreements, stating that foreign trade "greatly benefits the American worker." Obama, on the other hand, has taken a more cautious stance, questioning, for example, whether certain trade agreements have really been "beneficial" to American workers. Historically, the FCC has encouraged foreign countries to open their telecommunications markets to U.S. entry, sometimes taking reciprocal measures against those that refuse to do so. How this will all play out in the new administration remains to be seen.

J. Treatment of Carriers – both Large and Small

The significant role played by the largest carriers, notably AT&T and Verizon, in the McCain camp is well documented.¹⁰ A McCain victory will spell "good news" for these larger carriers. In contrast, it is believed that an Obama FCC will be more favorably disposed to the interests of smaller, independent, competitive carriers in telecom and Internet markets. By comparison, a less aggressively "interventionist" form of regulation with a "lighter touch" is expected to characterize a McCain FCC.

III. CONCLUSION

The times indeed, are changing. Whoever wins, a new FCC and the accompanying policy shifts will affect carriers and customers alike. The degree of

⁹ 47 U.S.C. 222 (restricting carrier use of "customer proprietary network information"). For more information, please see our Client Alert: *The FCC's Privacy Rules (What they say and why they matter)* (published May 14, 2007) (available upon request at info@wstecomlaw.com).

¹⁰ At least one publication has questioned McCain's public opposition to lobbying efforts, reporting that key members of the McCain staff have long standing ties to AT&T, Verizon and other large incumbents. Kelly, M. (2008, March 24). "Telecom lobbyists tied to McCain." *USA Today*. Retrieved October 20, 2008, from http://www.usatoday.com/news/politics/election2008/2008-03-23-mccainlobbyists_N.htm?POE=click-refer

change will depend on who wins in November but, if the tea leaves are correct, a Democratic agenda may be all but inevitable. With it may well come increased regulation of both telecommunications and perhaps Internet providers, a farewell to “laissez faire”, and increased universal service mandates and funding. A return to a Clinton-era FCC with “command and control” over competition is a distinct possibility, as is the resurrection of more traditional utility regulation (with much less reliance on free markets and competition). Given what’s happened of late in the financial industry, such a pendulum shift should surprise no one.

Regardless of who wins – and we wish both candidates well – we stand ready to assist clients and friends in making sense, as the political sands shift, of the inevitable policy and regulatory changes. See you at the polls – and God Bless America!

For questions or comments on this alert, please do not hesitate to call Walt Sapronov, Bob Butler, Mark DelBianco, Bruce Renard, or Nicole Bilodeau. For contact info, please visit www.wstelecomlaw.com.