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**A SPECIAL CLIENT ALERT<sup>1</sup>**

**THE 2012 PRESIDENTIAL ELECTION:**  
**Politics and Telecommunications<sup>2</sup>**

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

In 2008 and in 2010, we published special client alerts on the presidential and mid-term elections. On the eve of the 2012 elections, we do so again, anticipating the impact that the elections will have on U.S. telecom - or more appropriately in today's world - on U.S. broadband policies.<sup>3</sup> We begin with what President Obama and his opponent, Governor Mitt Romney, have said and done.

**A. What the Candidates Say (or don't)**

The campaigns are vitriolic. Partisan rancor is at an all time high, bi-partisanship at an all time low. Every election somehow seems to be the most important ever. This one, according to the *Economist*, perhaps really is.<sup>4</sup> With so much at stake, broadband policies pale somewhat in importance to healthcare, taxation, financial service regulation, the European debt crises, the fiscal "cliff," foreign policy, the devastating impact of Hurricane Sandy, and so much else.

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<sup>1</sup> THIS SPECIAL CLIENT ALERT, PREPARED IN ANTICIPATION OF NEXT WEEK'S PRESIDENTIAL ELECTION, IS PROVIDED 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 OR AT [info@wstelecomlaw.com](mailto:info@wstelecomlaw.com) IF YOU HAVE SPECIFIC QUESTIONS ABOUT THIS ALERT – OR IF YOU WISH TO BE REMOVED FROM OUR MAILING LIST.

<sup>2</sup>This 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.

<sup>3</sup> See Sapronov & Associates, P.C. Special Client Alerts, "*The 2010 Midterm Election: Politics and Telecommunications*," originally distributed November 8, 2010; "*The 2008 Presidential Election: Politics and Telecommunications*," originally distributed October 23, 2008, available upon request.

<sup>4</sup> *Everything to Play For*, THE ECONOMIST, Oct. 6, 2012, at 15.

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But they are important nonetheless. So much so that, according to a (perhaps apocryphal) press report, Governor Romney, during the first presidential debate, had prepared, but left unspoken, some remarks on broadband policies that would be taken by his administration.<sup>5</sup>

The remarks suggest that a Romney administration would take a *laissez faire* approach to Internet regulation, oppose “net neutrality,”<sup>6</sup> lighten Federal Communications Commission (“FCC”) common carrier regulation, conduct spectrum auctions, relax federal antitrust merger review standards, and replace Internet privacy protections imposed piecemeal by the Federal Trade Commission (“FTC”) through consent decrees with Google, *et. al.* with private disclosure. No surprise there. This classically Republican, deregulatory stance is of course squarely at odds with the current Democratic one - labeled somewhat sarcastically in that same press report as a “trickle down government” approach to broadband. (For a quick synopsis of how the two differ on specific issues, see Section III below.)

Yet most of the Republican candidate’s vehemence was directed not at the current administration’s domestic Internet policy, but rather at its international one. (Again, we are just repeating Governor Romney’s unsaid remarks allegedly left on his lectern). Reference was made to much publicized threats of a U.N. led grab of Internet control by foreign governments, presumably alluding to the upcoming World Conference on International Telecommunications (“WCIT”) in Dubai, UA and a possible renegotiation of the International Telecommunications Union (“ITU”) treaty. The current administration’s flawed approach to such threats, from the Republican perspective, is doing nothing about them.

We now turn to what the Obama administration has said - or more importantly - has done by way of broadband policy implementation. One would expect the Republican candidate, if elected, to turn much of this the other way. But please take this speculation with a grain of salt. Candidate Romney presided as governor of Massachusetts, home of the storied architect of Congressional telecom policies, Rep. Ed Markey (D. Mass.), and its long term, Democratic Chairman of the U.S. House of Representatives’ telecom subcommittee. Strange bedfellows indeed. So would a Romney administration approach to U.S. broadband policies follow the Republican Party line - or would it perhaps err, compromise a bit? Who knows - but think Massachusetts health care.

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<sup>5</sup> L.G. Crovitz, ‘Trickle Down Government’ and Internet Freedom, WALL ST. J., Oct. 8, 2012, at A15.

<sup>6</sup> See Saprnov & Associates, “The Federal Communications Commission’s Network Neutrality Order: From ‘Third Way’ to ‘Preserving the Open Internet’” originally distributed January 12, 2011; Saprnov & Associates, P.C. “Update on Net Neutrality,” originally distributed on September 20, 2010; Saprnov & Associates, “FCC’s Net Neutrality Proceeding,” originally distributed November 5, 2009 (all available upon request).

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**B. What the Current Administration Has Done (so far)**

As noted in our year end alert,<sup>7</sup> for better or worse, the FCC, under the leadership of Chairman Julius Genechowski, an Obama appointee, has pushed through a number of watershed policy prescriptions that had been stalled for decades. Highlights include the FCC's (i) net neutrality rules (on appeal in the D.C. Circuit Court of Appeals), (ii) a soon-to-be released universal service reform order, and (iii) carrier access and compensation reform rules (released by the FCC in late 2011 with consolidated appeals pending at the 10th Circuit Court of Appeals). All of these are comprehensive rulemakings that, the appeals notwithstanding, will leave their mark on broadband providers for years to come.

On a lesser scale, the current FCC has supported various domestic broadband development initiatives - largely outlined in the National Broadband Plan<sup>8</sup> - implemented thus far sporadically through broadband infrastructure grants,<sup>9</sup> the creation of a new Connect America Fund (to eventually replace the current universal service fund ("USF")), and at least vocal support for broadband wireless implementation.

On the international front, in anticipation of the WCIT 2012 conference, the administration has expressed its opposition to any expanded international regulation of the Internet. As stated in the United States of America, Proposals for the Work of the Conference, authored by the U.S. WCIT Head of Delegation, led by Ambassador Terry Kramer, the U.S. position regarding the ITR treaty can perhaps be summarized as "it's not broken – don't fix it," and thus strongly opposing any substantial amendments to the treaty or to any expansion of foreign regulatory authority. One exception is Article 6 (International Telecommunication Service Arrangements Charging and Accounting), which governs the exchange of international traffic. The U.S. has submitted substantial revisions to Article 6 that not only reflect today's communications industry, but are flexible enough to accommodate future technology improvements and market changes.<sup>10</sup>

Also worth noting is what the Genechowski FCC has not done. The IP Enabled Notice of Proposed Rulemaking, a proceeding commenced in 2004 promising a comprehensive revision of the common carrier regulatory framework under so-called "Title II" of the Communications Act as applied to VoIP and other IP technologies, remains dormant. Pending release of the USF reform decision (expected sometime this

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<sup>7</sup> Sapronov & Associates, P.C. Client Alert, "*Broadband 2011-2012: The Year in Review and the One Ahead*" originally distributed January 20, 2012 and available upon request.

<sup>8</sup> Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support, FCC 11-161, 76 FR 73830 (Nov. 29, 2011), *appeal docketed sub nom.* Direct Commc'ns Cedar Valley, LLC v. FCC, No. 11-9900 (10th Cir. Dec. 16, 2011).

<sup>9</sup>See e.g., DEPARTMENT OF AGRICULTURE, Rural Utilities Service, RIN 0572-ZA01, Broadband Initiatives Program; DEPARTMENT OF COMMERCE, National Telecommunications and Information Administration, RIN 0660-ZA28, Broadband Technology Opportunities Program.

<sup>10</sup> See United States of America, Proposals for the Work of the Conference, World Conference on International Telecommunications (WCIT-12), Documents #-E and A1-E, submitted August 3, 2012.

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ATTORNEYS AT LAW

year), the “social regulations” applicable to universal service, emergency, law enforcement, and disability access first espoused (ironically) by then Chairman Kevin Martin (a staunch Republican) in the IP Rulemaking have all remained largely unchanged.<sup>11</sup> So has VoIP regulation, comprised thus far piecemeal through a series of FCC decisions subjecting “interconnected” VoIP providers (but not others) to universal service, law enforcement assistance (CALEA), emergency calling (E-911) and disability access obligations. As for other advanced IP technologies such as multiprotocol label switching, IP VPN, and the like, the FCC admits that their regulatory status is muddled.<sup>12</sup>

**C. What Would a Romney Administration Do?**

A Romney administration would presumably oppose some of these current FCC policies in principle. Notably, some in Congress have already threatened to overturn the FCC’s net neutrality rules, styled by some conservatives as government regulation of the Internet. Nor would the Connect America Fund or other expansion of broadband infrastructure through federal stimulus likely be welcome in the Romney camp. Even so, as the key decisions on net neutrality, universal service and intercarrier compensation reform have been, or soon will be, adopted, even a newly appointed FCC<sup>13</sup> could do little to reverse such policies *sua sponte* in the near term. At a minimum, this would require new proceedings, legislative action, or revisions following a reversal or remand in the federal courts. None of this is likely to happen anytime soon.

On this point, the tortured history of net neutrality is particularly instructive. Litigation over FCC net neutrality policies, first introduced during the tenure of the former Republican Chairman Kevin Martin, has spanned several administrations. The FCC’s net neutrality rules have gone through several iterations, some reversed on appeal, then codified in their present form effective November 20, 2011. The adopted rules were challenged on appeal by Verizon before the D.C. Circuit Court,<sup>14</sup> but the remainder of the briefing schedule has been suspended pending further order of the Court. A judicial decision on the current net neutrality rules is thus on hold. Furthermore, a central issue in the net neutrality litigation has been whether the FCC has jurisdiction to adopt such rules in the first place. Irrespective of administration, the agency would not lightly relinquish

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<sup>11</sup> See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004); see generally, Sapronov & Associates, P.C. Client Alert, “*Creeping Socialism: Disability Access, Fee Payments and Other New VoIP Regulations*,” August 14, 2007 (available upon request at info@wstelecomlaw.com).

<sup>12</sup> *In re: Universal Service Contribution Methodology, A National Broadband Plan for Our Future* Further Notice of Proposed Rulemaking, WC Docket No. 06-122, GN Docket No. 09-51 (Rel. April 30, 2012), at 26 (describing unresolved USF treatment of MPLS and other IP-enabled technology) (citing, e.g., *Masergy Communications Inc. Petition for Clarification*, WC Docket No. 06-122 *et al.*, at 1 (filed Mar. 27, 2009)).

<sup>13</sup> FCC Commissioners, including the agency’s chairman, must be appointed by the President and approved by Congress. 47 U.S.C. §154(a). No more than three Commissioners may belong to the same party. 47 U.S.C. § 154(b)(5).

<sup>14</sup> *Preserving the Open Internet*, et al., GN Docket No. 09-191, et. al, Report and Order, FCC 10-210, 76 FR 59191 (Sept. 23, 2011), *appeal docketed sub nom. Verizon v. FCC*, No. 11-1344 (D.C. Cir. Sept. 30, 2011).

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ATTORNEYS AT LAW

such jurisdiction. Thus, even if the current rules are reversed or remanded by the D.C. Circuit, the FCC - whether headed up by a Republican or Democratic chairman - will likely be faced with the prospect of defending its jurisdiction and authority to adopt them, whether it happens to like net neutrality or not.

As to what a Romney administration would do with universal service reform, broadband initiatives, IP regulation, and other leftovers from the current FCC, it's a bit early to tell. Certainly it would be opposed (again in principle) to government subsidies of broadband development (or of anything else for that matter). Still, how that would translate into policy initiatives or administrative rulemakings is far from clear. There will be differences to be sure - especially in areas such as merger enforcement and privacy regulation. But at least some of the major FCC policy prescriptions of the current administration are likely to stay in place for some time, regardless of who wins this November.

**II. The Other Dynamic: Congressional Elections**

As of this writing, the elections, both the Presidential one and those for seats in the U.S. Senate and House of Representatives, are too close to call. As Congressional House and Senate committees draft, introduce - and as Congress votes - on telecommunications related legislation, these elections too will shape future telecommunications and broadband policies. Here is the current Congressional leadership that oversees these legislative efforts.

On the Senate Committee on Commerce, Science and Transportation, Republican leadership is set to experience major change. Both Ranking Member Kay Bailey Hutchison (R-TX) and three-term Senator Olympia J. Snowe (R-ME) are retiring from Senate service. Jim DeMint (R-SC), often regarded as one of the most conservative Senators, will thus likely become either the chairman or ranking member in the next Congress. When first elected in 2004, Senator DeMint introduced the Digital Age Communications Act of 2005 (ultimately not enacted) that (1) aimed to reduce FCC regulatory authority and (2) championed market competition as “the most effective and efficient means for protecting consumers and enhancing consumer welfare.”<sup>15</sup> Regardless of whether Republicans pick up the three seats necessary to regain Senate control, Senator DeMint's anti-regulatory track record will make consensus on telecommunications or other legislation difficult at best.

In the House, the 2012 election may yield smaller but also significant changes in telecommunications committees. The House Committee on Energy and Commerce has at least seven seats to fill with three Republican and four Democrat departures.<sup>16</sup> Assuming continued Republican control of the House, the current Committee leadership, Chairman Fred Upton (R-MI) and Henry A. Waxman (D-CA), will likely remain unchanged, as will

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<sup>15</sup> S. 2113, 109th Cong. § 101(a)(3) (2005).

<sup>16</sup> The departing congressmen are Cliff Stearns (R-FL), Sue Myrick (R-NC), John Sullivan (R-OK), Edolphus Towns (D-NY), Charlie Gonzalez (D-TX), Tammy Baldwin (D-WI), and Mike Ross (D-AR).

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Communications and Technology subcommittee Chairman Greg Walden (R-OR) and ranking member Anna G. Eshoo (D-CA).

Given the fractious state of both the House and the Senate, the likelihood of bi-partisan legislation on broadband/telecommunications issues would seem remote. Yet, history suggests that this is one area where consensus might be possible. The precedent, of course, is the landmark 1996 Telecommunications Act, the first major overhaul of the Communications Act of 1934 in sixty years. The 1996 Telecom Act was signed into law by President Clinton during a similar time of bitter partisanship and contentious dealings between the executive and the (then Republican controlled) Congress. Even so, the 1996 Act was passed with bi-partisan support. Could history repeat itself today with respect to, say, Internet privacy or Cyber security legislation?<sup>17</sup> Stranger things have happened.

**III. Lightning Round: the Candidates' Stand on the Issues (and what to expect if they win)**

Here is a thumbnail sketch - by no means comprehensive - of the candidates' likely respective positions on a few key broadband topics.

**A. "Net Neutrality"**

1. Obama: The Obama administration strongly supports net neutrality. The FCC has adopted net neutrality rules under FCC Chairman Genachowski's tenure. Predictably, these rules were appealed by Verizon and others. Currently, the briefing schedule before the D.C. Circuit Court of Appeals has been stayed by motion of the Court.

2. Romney: Republicans strongly oppose net neutrality, sometimes characterizing it as a form of government control of the Internet.

**B. Universal Service**

1. Obama: The FCC generally supports universal service principles, but has proposed replacing them with a "Connect America Fund". A comprehensive decision on "universal service reform" is expected this year or early next. Appeals will likely follow.

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<sup>17</sup> A number of cyber security bills were introduced during the 112<sup>th</sup> Congressional legislative session but failed to pass both houses. See Cyber Security Public Awareness Act of 2011, S. 813 (calling for cyber security reports from the Secretary of Homeland Security, the Securities and Exchange Commission, the Attorney General, and the Director of the Federal Bureau of Investigation); Cyber Security and American Cyber Competitiveness Act of 2011, S. 21 (promoting legislation to protect the United States against cyber attack); and Cyber Intelligence Sharing and Protection Act, H.R. 3523 (amending the National Security Act of 1947 to add a cyber threat intelligence and information sharing section).

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2. Romney: The Erskine Bowles Commission had proposed reducing universal service subsidies, a proposal criticized by the USTA, a large coalition of local exchange carriers.<sup>18</sup> As long-term Republican supporters, the carriers' views would likely carry considerable weight in a Romney administration. Expansion of universal service subsidies, whether through the Connect America Fund or otherwise, would like be opposed by a Republican administration.

**C. Carrier Compensation Reform**

1. Obama: As indicated, the Holy Grail of carrier access and compensation reform was one of the hallmark achievements of the FCC during Obama's administration. Appeals are pending in the 10th Circuit Court of Appeals.

2. Romney: How a Romney administration would address carrier compensation is uncertain, but it would perhaps oppose the mandatory bill-and-keep arrangements that the rules imposed (albeit gradually over a number of years) on incumbent local carriers. However, these new compensation arrangements have now been incorporated into countless carrier interconnection agreements. Barring an appellate reversal triggering "change of law" clauses in the contract(s), it is unclear how a Republican controlled FCC could unravel these arrangements.

**D. Broadband Deployment**

1. Obama: The administration's approach to broadband deployment largely tracks the FCC's National Broadband Plan, creates a broadband subsidization scheme under the new Connect America Fund, and sets aside preferential treatment for broadband wireless developments in Native American tribal areas.

2. Romney: In lieu of government broadband subsidies, Republican proponents have expressed their preference for spectrum auctions as a tool for broadband deployment. But again, how a Republican controlled FCC would unscramble the Connect America fund, as it is interwoven with the new inter-carrier compensation sand universal service reform structure, is uncertain.

**E. Merger Reviews**

1. Obama: The Obama administration has vigorously enforced merger enforcement, as illustrated by the failed AT&T-T-Mobile merger.<sup>19</sup> Conventional

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<sup>18</sup> Letter from Walter B. McCormick, Jr., President & CEO, U.S. Telecom to Hon. Erskine Bowles and Hon. Alan Simpson, Co-Chairmen, National Commission on Fiscal Responsibility and Reform (November 22, 2012).

<sup>19</sup> For a detailed assessment of the would-be AT&T T-Mobile merger, see "The AT&T / T-Mobile Merger (Maybe?)," Walt Saprnov, Esq., Law Seminars International (September, 2011) and "Wireless Partnering After T-Mobile," Walt Saprnov, Esq. & Tony Thompson, Esq., Law Seminars International (March 2012).

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wisdom, however, suggests that the market concentration and anti-competitive effects allegedly resulting from that transaction would not necessarily follow either the pending T-Mobile/MetroPCS or the Softbank/Sprint transaction - thus making both easier to pass regulatory approval and anti-trust merger review.

2. Romney: Historically, Republican administrations have taken a less stringent approach to merger enforcement than their Democratic counterparts. Thus, the T-Mobile/MetroPCS and the Softbank/Sprint mergers - both anticipated to close sometime next year - would perhaps see fewer conditions (*e.g.*, spectrum/customer divestitures) under a Romney administration.

**G. Taxes**

1. Obama: Obama administrative agencies have actively enforced agency regulations including, in the case of the FCC, USF enforcement. The current USF contribution factor is 17.4%. How that will change under the new USF reform proceedings is yet uncertain. However, the FCC has proposed a "broadband" regulatory surcharge, one strongly opposed as excessive and duplicative by telephone and cable carriers.<sup>20</sup>

2. Romney: Historically, one would expect Republican administrations to shy away from taxation, whether on broadband or other things. Still, USF enforcement was also a priority under the Republican controlled FCC headed by Chairman Martin. The Debt Collection Improvement Act of 1996, along with FCC rules implementing that legislation, provides for referral of unpaid USF obligations and other amounts owed to the FCC to the U.S. Treasury Department for collection. Whether a Romney appointed FCC would relax USF or regulatory surcharge enforcement (or would wish to do so) is at least questionable.

**H. Privacy**

1. Obama: Under the Obama Administration, the Federal Trade Commission (FTC) has taken the lead on privacy regulation, with consent decrees imposed on Google and others the tool of choice. Expect these to continue in a second Obama term.

2. Romney: Republicans have criticized what they perceive to be the FTC's heavy handed approach to privacy regulation, proposing that privacy protection be

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<sup>20</sup> J. Eggerton, *ISPs: Don't Send Us A Broadband Bill*; NCTA, Verizon, CTIA Advise FCC On Proposed Fee Structure, MULTICHANNEL NEWS (Oct. 29, 2012), <http://www.multichannel.com/cable-operators/isps-don%E2%80%99t-send-us-broadband-bill/140018>.

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addressed through private agreements.<sup>21</sup> Both sides of the aisle, however, may well see the need for Internet privacy legislation, possibly a rare area of bi-partisan consensus.

**IV. CONCLUSION**

In 2008, our special alert on the Presidential elections anticipated the coming Obama juggernaut, predicting the following:

"...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."

Today, we anticipate a much lesser swing of the pendulum. For reasons indicated, many of the FCC policies pushed through by Chairman Genachowski are now law of the land. Whoever wins, the polarized Congress will have difficulty legislating them away - and perhaps may not want to. As for the Presidential election, there will of course be different policy directions - but again, perhaps not as much as one would think. And as always, we wish both candidates well – and stand ready to assist clients and friends in wading through policy and regulatory changes, regardless of the outcome. See you at the polls – and God Bless America!

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<sup>21</sup> For a practical discussion on how to address privacy protection in telecom transactions, see “Drafting Privacy Clauses in Technology Contracts”, Walt Sapronov, Law Seminars International (August 2012).