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A SPECIAL POLITICAL ALERT¹

**The 2018 Midterm Elections:
How They Could Influence U.S. Telecom Policy²**

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I. Few Prospects for Telecom Legislation

Following last year's heated 2018 midterm elections, what (if any) are the prospects for telecommunications legislation in the 116th Congress? This alert discusses how lawmakers might approach telecom legislative initiatives – especially the more controversial ones such as net neutrality.³

One approach would be to do nothing: the legislators have their plates full with many contentious matters, some obviously of more public concern than telecom. Still, with unprecedented partisan disagreement over just about every major policy initiative, telecom legislation just may prove to be one of the few areas of bipartisan compromise – as it was in 1996 when the Clinton administration and a Republican controlled congress still managed to enact monumental telecommunications reform legislation. Could history repeat itself?

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² We thank Taylor Cressler, research assistant for Sapronov Government Affairs, Inc., for his substantial contributions in the preparation of this alert.

³ “Net Neutrality” generally refers to the “open Internet” rules applicable to broadband Internet access providers: transparency (disclosure of commercial and technical service details), no-blocking of lawful content, and no unreasonable discrimination. See, e.g., <https://www.govinfo.gov/app/details/FR-2011-09-23/2011-24259>. These rules, adopted during the Obama administration, were largely vacated (except for transparency) by the Republican controlled FCC in 2018. See *Restoring Internet Freedom*, 83 F.R. 7852-7922 (Feb. 22, 2018). See generally, Sapronov & Associates, P.C. Brochure, “A Short History of Net Neutrality,” available upon request at info@wstelecomlaw.com. Oral argument on appeal of the Restoring Internet Freedom Order was recently heard by the D.C. Circuit Court of Appeals. See our client alert on the argument at <http://wstelecomlaw.com/2019/03/mozilla-v-fcc-a-net-neutrality-alert/>.

Perhaps – but not likely. By all indications, with some exceptions discussed below, the partisan divisions are probably too wide. Either way, here is some background on the new Congress, the telecom legislative debate as it stands today, and what next to expect.

II. New Faces (and Old Issues) Will Shape the Telecom Debates

First, there are new members in the House and Senate telecom subcommittees: with few exceptions, all toe their party lines on whatever votes come before them. Second, the parties fundamentally disagree over issues such as net neutrality with little likelihood of compromise before the next (2020) election. Third, however, there is some consensus over rural broadband expansion needs (and to a lesser extent, privacy ones), leaving only those legislative initiatives with any hope of passage in this session.

On the Senate side, telecom legislation usually begins with the Committee on Commerce, Science, and Transportation, specifically in the subcommittee on Communications, Technology, Innovation, and the Internet. Almost half of the newly elected senators are on this subcommittee: Rick Scott [R-FL], Marsha Blackburn [R-TN], Jacky Rosen [D-NV] and Kyrsten Sinema [D-AZ]. Among the veterans, Senator Jon Tester [D-MT] is a new addition to the Committee.

Among the Committee membership, Republican Senator Blackburn’s track record on telecom issues is the most extensive as she formerly chaired the House subcommittee on Communications and Technology. In the last Congress, she introduced bills supporting privacy regulation, rural broadband infrastructure development and, in a departure from Republican orthodoxy - supported at least some Open Internet regulations (albeit not “Title II” regulation) of broadband Internet access providers.⁴

On the House side, two subcommittees of the House Committee on Energy and Commerce work on telecom legislation: (i) the subcommittee on Communications and Technology and, (ii) to a lesser extent, the subcommittee on Consumer Protection and Commerce. Newly elected representatives are on the House telecom subcommittees, but with the new Democratic majority, many representatives who were not previously assigned in the last Congress to these subcommittees are there now: Kathy Castor [D-FL], Marc Veasey [D-TX], Robin Kelly [D-IL], Tom O’Halloran [D-AZ], Lisa Blunt Rochester [D-DE], Darren Soto [D-FL], Donald McEachin [D-VA], Kurt Schrader [D-OR], Cathy McMorris Rodgers [R-WA], Richard Hudson [R-NC], Buddy Carter [R-GA], Greg Gianforte [R-MT], and Tim Walberg [R-MI].

III. Telecom Bills in the 116th Congress

Here is the current picture of pending telecom legislation.

A. Rural Broadband

There are two bills pending in the Senate and one in the House.⁵ Still, broadband infrastructure legislation faces a partisan divide, not just a “rural” one. The Accelerating Broadband Development by Empowering Local Communities Act of 2019, co-sponsored by twenty-six Democrats and no Republicans, would reverse the FCC’s “Accelerating Wireless and Wireline Broadband Deployment by

⁴ See BROWSER Act of 2017, H.R. 2520, 115th Cong. (2017); Precision Agriculture Connectivity Act of 2018, H.R. 4881, 115th Cong. (2018); Open Internet Preservation Act, H.R. 4682, 115th Cong. (2017). See also <https://www.congress.gov/bill/115th-congress/house-bill/4682> and discussion below.

⁵ S. 161, 116th Cong. (2019); Office of Rural Broadband Act, S. 454, 116th Cong. (2019); ACCESS BROADBAND Act, H.R. 1328, 116th Cong. (2019).

Removing Barriers to Infrastructure Investment” order.⁶ In that order, the FCC had preempted local and state regulatory authority, ostensibly to remove barriers to the deployment of 5G and small cell wireless infrastructure: the new legislation would undo that preemption effort.

That said, legislative compromise here is possible. The representatives and senators on the telecom subcommittees also disproportionately represent rural areas. In the Senate, a third of the telecom subcommittee members are from the most rural states. In the House, over two-thirds of the Communications and Technology subcommittee representatives are from districts with rural constituents. Rural broadband thus has bipartisan appeal, and the Trump Administration has echoed some support for this expansion as it coincides with its nationalist support for 5G expansion.

B. Privacy⁷

Here too there appears to be possibility for compromise – albeit perhaps less so than with rural broadband. Following much ado in 2018, only two privacy bills are now before Senate and House subcommittees.

In the Senate, Senators Klobuchar [D-MN] and Kennedy [R-LA] have reintroduced their Social Media Privacy Protection and Consumer Rights Act,⁸ which requires data collection companies to be more transparent in what and how they collect and distribute customers’ private data. The bill also requires affirmative (“opt-in”) consent before collecting customers’ data. In the House, Representatives Rush [D-IL], Blunt Rochester [D-DE], and Clarke [D-NY] reintroduced the Data Accountability and Trust Act.⁹ The key difference between the bipartisan Senate bill and the one sponsored by the Democrat-controlled House is that the latter creates a more extensive privacy framework, with new rules and strict oversight on data collection companies, not just the “more of the same” privacy enforcement measures. For now, the House bill does not appear likely to become law.

While there is some Republican support for privacy protections such as those in the Browser Act, there is much less so for Democrats’ support of federal legislation that mirrors either the European Data Protection Regulation (GDPR) or the California Consumer Privacy Act.¹⁰

IV. Net Neutrality –a *Casus Belli*

Unsurprisingly, the most contentious telecom issue facing the 116th Congress remains net neutrality.

A. The Democratic Record

In 2017, following the FCC’s “Restoring Internet Freedom” Order, two bills were introduced supporting a return to Obama-era Title II regulation of broadband Internet access. The Restoring Internet

⁶ Accelerating Broadband Development by Empowering Local Communities Act of 2019, H.R. 530, 116th Cong. (2019); Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 83 Fed. Reg. 51,867 (Oct. 15, 2018) (to be codified at 47 C.F.R. pt. 1).

⁷ Our privacy alerts are available upon request from info@wstecomlaw.com.

⁸ Social Media Privacy Protection and Consumer Rights Act of 2019, S. 189, 116th Cong. (2019).

⁹ Data Accountability and Trust Act, H.R. 1282, 116th Cong. (2019).

¹⁰ John Eggerton, *Senate Judiciary Vets Privacy Protection Legislation Contours*, Multichannel (Mar. 12, 2019), <https://www.multichannel.com/news/senate-judiciary-vets-privacy-protection-legislation-Contours>. See generally, Sapronov & Associates, P.C. Presentation for Thomson Reuters, “*Privacy in the New World Order, Part II, (Globalization)*” at https://westlegaledcenter.com/program_guide/course_detail.jsf?videoCourseId=100244221&ADMIN_PREVIEW=true.

Freedom Act in the Senate was sponsored by twelve Republicans and no Democrats.¹¹ Senate Joint Resolution 52, which disapproved of the FCC’s dismantling order, was sponsored by all forty-nine members of the Democratic caucus, and no Republicans (although the Democrats were joined by Senators Susan Collins [R-ME], Lisa Murkowski [R-AK], and Kennedy [R-LA] when the resolution passed the Senate).¹² Meanwhile, the Save Net Neutrality Act was sponsored by thirty-six Democratic representatives and no Republicans.¹³

B. The Republican Record

Republicans have voiced their approval for some of the goals of net neutrality, the openness of the Internet through more transparency and banning blocking, throttling and paid prioritization, albeit without using the Title II regulation to achieve that goal. In the last Congress, 42 Republican representatives sponsored the Open Internet Preservation Act, which would disallow blocking, throttling and paid prioritization without making broadband regulated under Title II.¹⁴ Likewise, in the Senate, John Thune [R-SD] introduced bill 2853, a similar bill but one that would write in law that broadband is subject only to Title I.¹⁵ Additionally, three Republican Open Internet bills were introduced this legislative session before the Democrats introduced their bill to reverse the FCC’s reversal of the Obama-era net neutrality rules.

C. Marsha Blackburn’s Compromise

While not seeking to bring back “Title II” utility-style regulation, Senator Blackburn’s well-thought position on net neutrality provides a template of sorts for a legislative middle-ground between the radical extremes. Recall that long before it became politicized, a net neutrality “policy” was first introduced and enforced by a Republican FCC Chairman.¹⁶ And one of the originally adopted Open Internet regulations – transparency (*i.e.*, detailed provider disclosure obligations) – is and has always remained on the books.¹⁷ Further, Representatives Rodgers, Latta [R-OH], and Walden [R-OR] have all separately introduced three different bills¹⁸ that prohibit broadband providers from blocking, throttling, and engaging in paid prioritization, as well as making provisions for increased transparency. In other words, there appears to be significant Republican support for codifying much of the Open Internet Order into the Communications Act while avoiding Title II (common carrier) regulation.

So could a balanced, well-drafted open Internet policy be codified into the Communications Act? Possibly. But all indications point to the opposite.

To date, all but one Democratic senator in the telecom subcommittee and seventeen out of twenty-one Democratic representatives co-sponsored identical legislation that would make broadband and Internet services subject to Title II regulation, resurrecting the Obama-era FCC “Open Internet Order”.¹⁹

¹¹ Restoring Internet Freedom Act, S. 993, 115th Cong. (2017).

¹² S.J. Res. 52, 115th Cong. (2018).

¹³ Save Net Neutrality Act of 2017, H.R. 4585, 115th Cong. (2017).

¹⁴ Open Internet Preservation Act, H.R. 4682, 115th Cong. (2017).

¹⁵ S. 2853, 115th Cong. (2018).

¹⁶ See, *In re: Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd 13, 28 (2008) (introduced by then FCC Chairman Kevin Martin). For details on its evolution, see “A Brief History of Net Neutrality,” available upon request at info@wstelecomlaw.com. 17 47 CFR § 8.1 (2011).

¹⁸ Promoting Internet Freedom and Innovation Act of 2019, H.R. 1096, 116th Cong. (2019); Open Internet Act of 2019, H.R. 1006, 116th Cong. (2019), H.R. 1101, 116th Cong. (2019).

¹⁹ H.R. 1644, 116th Cong. (2019); S. 682, 116th Cong. (2019).

On April 10, 2019, the House of Representatives voted to pass such legislation, aptly labelled as the “Save the Internet Act of 2019”. See <https://www.law360.com/articles/1148716/house-passes-bill-undoing-repeal-of-net-neutrality-rules>. Having passed the House, to become law, the Save the Internet Act would now have to go to the Senate.

That would be a fool’s errand. Senate Majority Leader Mitch McConnell has stated that it will not be brought to the Senate floor. Even if it were, then somehow was passed and sent to the President, the White House has already stated its intention to veto it. Nor would there be enough votes to override the veto: the competing visions of net neutrality by the two parties are mutually exclusive, the wedge being Title II regulation. The “Save the Internet Act” would impose Title II regulation on broadband Internet access; the Republican draft legislation would preclude it, leaving broadband unregulated, but subject to the FCC’s jurisdiction under Title I, the same framework as that of the FCC’s decades old “Computer Inquiry” orders separating “basic” (telecommunications) service from “enhanced” (information services). And while there have been some rumblings of bipartisan legislation,²⁰ the prospects for enacting net neutrality legislation in this Congress are near zero.

That leaves the safekeeping of the Internet to be decided by the Courts, with oral argument appeal of the FCC Restoring Internet Order recently heard before the D.C. Circuit Court of Appeals. For more on this proceeding and the fate of net neutrality, both in the courts and in Congress, please be on the lookout for an upcoming CLE, sponsored by Thomson Reuters, coming soon. And as we conclude all of our political alerts, may GOD BLESS AMERICA!

²⁰ Press Release, U.S. Senate Committee on Commerce, Science, and Transportation, Wicker and Sinema Announce Net Neutrality Working Group (Mar. 12, 2019), <https://www.commerce.senate.gov/public/index.cfm/2019/3/wicker-and-sinema-announce-net-neutrality-working-group>. Rep. Sinema was the only Democrat not to co-sponsor the Democrats’ net neutrality bill, and Roger Wicker [R-MS] is the committee chair of the Commerce, Science, and Technology committee.