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A SPECIAL POLITICAL ALERT¹

THE 2020 PRESIDENTIAL ELECTION:
Politics and Telecommunications²

October 16, 2020

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

In prior election years, we had published special alerts summarizing the implications of the presidential and mid-term elections for U.S. telecommunications and broadband policies.³ We do so again, anticipating as before how the candidates' views could shape key policies such as "net neutrality," privacy, universal service, and others.

But this time around, the uncertainty surrounding the election in November, especially as both the executive and legislative branches are at stake, makes this year's assessment especially challenging. The dynamics of a change in the Presidency, but not in the control of Congress, or vice versa, or a complete change of control of both, are so complex as to defy prediction. We thus limit this year's alert to the contrasting views of the Presidential candidates on selective issues, leaving aside the important role that

¹ PREPARED IN ANTICIPATION OF NEXT MONTH'S PRESIDENTIAL ELECTION, THIS ALERT 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, 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.

³ Sapronov & Associates, P.C. Special Client Alerts, "*The 2018 Midterm Elections: How The Could Influence U.S. Telecom Policy*," originally distributed April 20, 2019; "*The 2012 Presidential Election: Politics and Telecommunications*," originally distributed November 1, 2012; "*The 2010 Midterm Election: Politics and Telecommunications*," originally distributed November 8, 2010; "*The 2008 Presidential Election: Politics and Telecommunications*," originally distributed October 23, 2008, all available at our website at <http://wstelecomlaw.com/client-alerts/>.

Congress will play in possible legislative action (e.g., privacy reform, data protection, cybersecurity).⁴

A. The FCC

Importantly, we also note that administrative decisions of the Federal Communications Commission (“FCC”), the agency charged with adopting and regulating telecommunications laws, are often challenged on appeal (typically to the U.S. Court of Appeal for the District of Columbia Circuit). Important FCC decisions heard on appeal before the D.C. Circuit Court are typically further appealed to the U.S. Supreme Court, whose increasingly conservative majority may well decide the outcome of controversial FCC decisions, regardless of which party wins the presidency.⁵

Currently, the Republican controlled FCC is headed by Chairman Ajit Pai, who has already announced his departure. By law, only three (3) of the five (5) FCC commissioners may be from the same party, thus giving the minority at least some say in the decisions. Given the fractious nature of today’s partisanship, FCC decisions in recent years have largely followed party lines. Some of the more contentious issues are discussed below.

II. The Candidates’ Stand on Some Key Telecommunications Issues

A. “Net Neutrality”

“Net neutrality” is a label for a policy that began (ironically) with a Republican controlled FCC over a dispute between Comcast and Bit Torrent.⁶ It has generally been understood to establish a “neutral” or “open” public Internet 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 also forbid discrimination, whether in pricing, or access, to the type, quantity, sites or applications that can be interconnected to or transported over the Internet.

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 telecoms and other

⁴ A discussion of future FCC spectrum allocation policies, deployment of “5-G” and wireless infrastructure, and rumored 5-G nationalization, is beyond the scope of this alert – but will be the topic of future ones once the election results are known. For an overview of 5-G, its superstitious ties to Covid-19, and other aspects of this important technology, we invite you to listen to our discussion at <https://www.youtube.com/watch?v=WBamix6mM9Q>.

⁵ Saprionov & Associates, P.C. Special Client Alerts, “Justice Brett Kavanaugh: The Supreme Court & Telecommunications, Part II, How Justice Kavanaugh’s Appointment Could Influence U.S. Telecom Policies: Merger Review,” originally distributed November 13, 2018; “The Nomination of Judge Brett Kavanaugh: The Supreme Court and Telecommunications,” originally distributed September 5, 2018 (available upon request).

⁶ For a brief discussion of net neutrality’s tortured history, see Saprionov & Associates, P.C., “A Short History of Net Neutrality,” available upon request at info@wstelecomlaw.com.

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.

The Republican view of net neutrality is that it imposes utility regulation on Internet access; the Democratic view is that net neutrality protects consumers from unregulated control of Internet access by dominant carriers such as AT&T, Verizon and others ("trolls under the bridge") – although major "edge providers" such as Netflix, Google and others get a pass. Under the Obama administration, the then-Democratic controlled FCC, led by Chairman Wheeler, codified net neutrality regulations⁷ - which were promptly dismantled following the Republican victory in 2016. So the presidential candidates' stand on this issue is of course predicable.

President Trump is avidly against net neutrality, praising the U.S. Court of Appeals for the D.C. Circuit's decision finding that current FCC Chair Ajit Pai did not overstep his authority in repealing net neutrality rules. The repeal eliminated rules preventing broadband providers from blocking or slowing down access to websites or charging companies extra to deliver content faster. Further, Trump supported a decision to deregulate Obama-era open Internet rules, stating that the regulation of the Internet stifled investment and economic growth.

Candidate Biden will likely follow in Obama's shoes and attempt to bring back common carrier (so-called "Title II") style regulation of broadband Internet access.

However, the states will play a role as well. The D.C. Circuit Court found that the FCC did not have the authority to prohibit states from drafting their own net neutrality regulations.⁸ And states have responded. For example, California Gov. Jerry Brown signed into law SB 822, the "California Internet Consumer Protection and Net Neutrality Act of 2018," which enacted net neutrality rules similar to those in the 2015 Order. Regardless of who wins, both a Trump and a Biden administration will have to contend with federal preemption of state internet policies that may conflict with a national one.

B. Universal Service

In 2017, FCC Chairman Pai suspended the Universal Service Fund's Lifeline expansion and proposed decreasing the assessment on revenue all telecommunications providers must contribute. As Vice President, Biden, under the Obama administration, expanded the Lifeline Program and the Connect America Fund, established to help rural and low-income residents obtain telephone service. Overall, a Trump administration

⁷ The Open Internet Rules were codified in Section 8 of the Code of Federal Regulations (47 C.F.R. §8) before being dismantled in 2017 by the new, Republican controlled FCC (*See, Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("Title II Order").

⁸ *Mozilla Corp. v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2019) (prior and subsequent history omitted).

would likely spend less on universal service funding whereas a Biden administration would likely continue its expansion.

C. Broadband Deployment

As for broadband deployment for unserved or underserved areas, the Trump campaign has again made promises similar to the \$1.5 trillion infrastructure bill that went nowhere in 2018. The campaign promises to allocate over \$20 billion for rural broadband deployment.⁹ The bill will reportedly also include money for 5-G deployment, but the details remain unclear.

Biden's campaign holds a similar position. He has promised to "expand broadband access to every American," also announcing a bill promising \$20 billion in funding for rural broadband services.¹⁰ This Rural Revitalization Plan includes efforts to triple the Community Connect broadband grants, including the opportunity to partner with municipalities and electrical cooperatives to provide broadband to residents.¹¹ As with the Trump proposal, however, the details remain unclear.

That said, the former Vice President has extensive experience with broadband stimulus, as he was a herald of the Obama administration's American Recovery and Reinvestment Act of 2009¹² and, in particular, with its Broadband Technologies Opportunity Program (BTOP), implemented by the Commerce Department's National Telecommunications and Information Administration (NTIA).¹³ A Biden presidency would likely reinstate the NTIA initiatives of the Obama administration.

D. Merger Review

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.

As to the near future, mergers and acquisition (M&A) activity seems to be less of an issue than in previous years. M&A deals are generally easier to get through under Republican administrations, albeit both candidates share a dislike of monopolies, especially among "Big Tech," such as Facebook and Amazon. While the Trump

⁹ <https://www.politico.com/story/2018/02/11/trump-infrastructure-plan-transportation-trillion-403248>.

¹⁰ <https://joebiden.com/rural/#>.

¹¹ <https://joebiden.com/rural-plan/>.

¹² 111 P.L. 5, 123 Stat. 115, 111 P.L. 5, 123 Stat. 115.

¹³ <https://www.ntia.doc.gov/category/broadband-technology-opportunities-program>.

administration has stepped up its scrutiny of big tech, conducting wide-ranging probes and increasing merger reviews, candidate Biden would go even further, contending that Internet giants such as Facebook might need to be split up. Expect a Biden administration to implement an aggressive antitrust policy, cracking down on mergers that have resulted in market power concentration.

E. Public Safety Networks

As Vice President, Biden was a proponent for a national public safety network. As early as 2012, the Obama administration claimed “[w]ireless broadband has a vital role to play in improving the ability of emergency personnel to communicate efficiently and to obtain necessary information quickly, including real-time videos, images, and other data.”¹⁴ Biden supported a nationwide public safety broadband network included in the Payroll Tax Extension legislation.¹⁵

Similarly, in 2017, the Trump administration awarded AT&T a contract to develop a country-wide broadband network dedicated to first responders. The First Responder Network Authority, FirstNet for short, is an independent agency within the Commerce Department that was authorized by Congress in 2012.¹⁶ Whoever wins, that will not likely change.

F. Privacy and Security

Although neither candidate has been entirely clear on how, both candidates want strengthened privacy protections. Most of the concern stem from online advertising and personal information theft. During his years in the Senate, and as chairman of the Senate Judiciary Committee in the 1990s, Biden introduced and co-sponsored several pieces of legislation to make it easier for the FBI and law enforcement to monitor communications, including the Communications Assistance for Law Enforcement Act, which allowed law enforcement to surveil communications over the Internet, including voice over IP calls and other Internet traffic.¹⁷

As one of the architects of the California Consumer Privacy Act of 2018 (“CCPA”), vice presidential candidate Kamala Harris is no stranger to privacy enforcement. The stated legislative purpose of the CCPA is to give consumers more control over their personal information collected by businesses, allowing them to know which personal information is collected; how it is used and shared; gives them the right to delete information collected; allows them to opt out of the sale of personal information; and provides for the right to non-discrimination in exercising their CCPA rights. The CCPA’s reach extends far beyond California and compliance with it (and with other

¹⁴https://obamawhitehouse.archives.gov/sites/default/files/cea_spectrum_report_2-21-2012.pdf.

¹⁵<https://obamawhitehouse.archives.gov/the-press-office/2012/02/21/vice-president-biden-thanks-first-responders-and-releases-report-economi>.

¹⁶<https://www.washingtonexaminer.com/trump-administration-picks-at-t-to-develop-broadband-network-for-first-responders>.

¹⁷<https://www.cnet.com/news/joe-biden-views-on-tech-democratic-presidential-nominee/>.

overlapping privacy laws) is not easy.¹⁸ Notably, the CCPA bears resemblance to the European Union (EU) privacy law, the General Data Protection Regulation (GDPR). Expect a Biden/Harris administration – especially if accompanied by a change of control in the U.S. Senate - to enact federal privacy legislation modeled on the CCPA/GDPR.

President Trump, on the other hand, is more concerned with national security than with privacy rights. A cornerstone of his national security policy is the perceived threat of Huawei, a Chinese owned equipment manufacturer that has been the target of executive orders barring its use (and subsidizing its replacement) in domestic telecommunications networks and creating a new executive agency, “Team Telecom” to review foreign threats to U.S. telecom infrastructure.¹⁹ Recently, the President signed the Secure and Trusted Communications Networks Act, which prohibits the use of Federal funds to purchase equipment from companies that pose a national security threat, creates a reimbursement program to remove and replace equipment (a/k/a Huawei) that was manufactured by entities posing an unacceptable national security risk and creates a critical information sharing route with the government.²⁰ Other executive actions include revocation of domestic telecom entry certification (47 U.S.C. Section 214) to China Telecom. A Republican White House victory would almost certainly see a continuation of “Huawei rip and replace” policies and other perceived threats to the digital supply chain from China.

Outside the U.S., however, many countries (including those of the EU) do not share the current administration’s view of Huawei (and of much else). To the extent a Biden administration would be more “EU friendly,” it may perhaps view Huawei – and its Chinese owners – with less hostility. Even so, such a change is by no means certain, and national security concerns may well override such a possible change.

G. Foreign Trade

Unlike prior conservative presidents, Trump has been more cautious in free trade, especially regarding telecommunications. As mentioned, in 2019, Trump signed an executive order mandating a national emergency posed by security threats of foreign-produced telecommunications products. As a result, his policies barred U.S. companies from purchasing technology by international firms posing a threat to U.S. privacy and security. Trump has also waged a tariff war with China impacting tech imports and, as

¹⁸ For more information on the CCPA, see our presentation by Kirk J. Nahra, Wilmer Hale, “California Privacy Legislation,” included in our podcast for Thomson Reuters, “*Privacy in the New World Order, Part II, Globalization*,” available for CLE credit at <https://westlegaledcenter.com/search/advancedCLESearchCriteriaForm.jsf> (key in “Nahra”).

¹⁹ See generally, Sapronov & Associates, P.C. Foreign Investment Alert, “*Negotiable Hostilities – Part II: Telecom Deals with Foreign Investors in the Current Administration*,” dated June 15, 2020). For more information on this topic, see our webinar for Thomson Reuters, available for CLE credit from West Legal Ed Center at <https://westlegaledcenter.com/search/advancedCLESearchCriteriaForm.jsf> (key in “Negotiable Hostilities”) with presentations on this topic by James K. Wholey, Partner, Phillips Lytle, LLP, Glen Gerstell, former General Counsel for U.S. National Security Agency, and Richard C. Sofield, Partner, Wiley Rein, LLP (former Chair of Team Telecom).

²⁰ <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-safeguarding-americas-vital-communications-networks-securing-5g-technology/>.

indicated, has sought to dislodge Huawei and other Chinese entrants from the U.S. telecommunications marketplace.

While candidate Biden has been critical of the Trump tariff war, it is unclear on how a Biden administration would handle foreign trade, vaguely stating for the most part only that the U.S. needs “new rules” and “new policies” to dictate trade relationships with foreign countries.

III. CONCLUSION – AND ANNOUNCEMENT

So as in elections past, net neutrality, privacy, broadband deployment and national security focus on U.S. telecom infrastructure will likely be the key telecom policies focused on by both candidates. Much else is uncertain and, as we end all of our political alerts, GOD BLESS AMERICA!

We also take this opportunity to announce that Attorney and Professor David Weiss²¹ has joined our firm as Of Counsel! David has more than 20 years experience in finance, real estate, structured transactions, cross-border corporate transactions, and governmental affairs. He is also an Assistant Professor in the Management Department at New Jersey City University School of Business and Founder of the University’s Institute for Dispute Resolution (IDR) and the “Connecting Bridges and Borders Program through Business.” David has extensive experience in U.S. and international government affairs: among many other accomplishments, he has drafted legislation for the State of New Jersey, served on the United Nations International Trade Law Committee, and serves on the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission for Data Protection). Please join us in welcoming him to the Firm

²¹ For more information, please see David’s bio at <http://wstelecomlaw.com/david-s-weiss>.