

# SAPRONOV & ASSOCIATES, P.C.

ATTORNEYS AT LAW

[info@wstelecomlaw.com](mailto:info@wstelecomlaw.com)

[www.wstelecomlaw.com](http://www.wstelecomlaw.com)

1300 I STREET, NW, SUITE 400  
WASHINGTON, D.C. 20005  
TEL. 770.309.0462

5555 GLENRIDGE CONNECTOR SUITE 200  
ATLANTA, GEORGIA 30342  
TEL. 770.399.9100

## A SPECIAL POLITICAL ALERT<sup>1</sup>

### **The 2024 Elections: How They Could Influence U.S. Telecom Policy**

December 5, 2024

#### **1. The Telecom Landscape in 2025.**

In prior election years, we've published special alerts on the impact of federal elections on U.S. telecommunications and broadband policies. Since Republicans now control both the White House and Congress, there is little need to examine the different partisan viewpoints. So, this year we simply assess the Republican imprimatur on "net neutrality," universal service, spectrum management, privacy, and other key policies relevant to the telecommunications industry. With a few additions (*e.g.*, online content "censorship" regulation), these are largely a reinstatement of Republican policies following their 2016 election victories. History has repeated itself.

There is another dynamic: the pending judicial reviews of *Consumers' Research v. FCC* and the FCC's reinstated "Obama era" Internet rules in the Fifth and Sixth Circuit Courts of Appeal, respectively. These and other cases are now intersecting with the expected conservative shift in U.S. telecom and other policies following the Republican victories.

First, the U.S. Supreme Court (SCOTUS) has agreed to review *Consumers' Research*, a case that has unsettled the administration of the long-standing universal service fund (USF). With a conservative SCOTUS majority largely unsympathetic to broad agency powers, a

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decision in favor of the Fifth Circuit is possible - with all the attendant disruption to USF contribution procedures and recipients. This follows the demise of “Chevron deference”<sup>2</sup> and the rise of the “major questions” doctrine, collectively moving telecommunications policy authority from the Federal Communications Commission (FCC) back to Congress.

Second, although the majorities are slim, Congress may perhaps now take the helm in determining (changing?) the direction of U.S. broadband development, universal service funding, privacy, content regulation (a/k/a “censorship”), and the perceived over-reach of the administrative state. We will see. But with Republican control of executive agencies and both houses of Congress, legislative reform of these controversial policies is now a realistic possibility.

## **2. FCC Leadership and Spectrum Management.**

As expected, Republican Commissioner Brendan Carr will be the new FCC Chairman. By law, only three out of five FCC commissioners can belong to the ruling party. As he was approved by the Senate in 2017 (and again in 2019), he needs no further Senate approval and will assume the Chairmanship immediately upon the Inauguration, January 20, 2025. As is customary following Presidential changes, FCC Chairwoman Jessica Rosenworcel has announced her resignation.

Soon-to-be Chairman Carr’s strongly held conservative views are well known. His appointment will likely lead to a reversal of Democratic priorities such as net neutrality and broadband equity, along with conservative reform of social media content moderation (which he views as political censorship). Expect most future FCC decisions to be decided by a 3-2 vote in favor of a Republican agenda. Commissioner Carr’s policy views are in lockstep with those of President-elect Trump. With a Republican congress also largely in alignment, the logjam that effectively halted U.S. telecommunications policy making may soon be over.

Importantly, Commissioner Carr has vocally emphasized the importance of spectrum management for economic growth and national security, with emphasis on domestic 5G deployment, an area he has criticized as lagging foreign jurisdictions. He has also called for dismantling federal, state and local entry barriers to 5G roll-out, both to streamline the deployment of small cells and macro towers and to encourage investment.

As for national security, Commissioner Carr is a proponent of “rip and replace”, the (somewhat stalled) policy of subsidizing the removal of equipment manufactured by Huawei, a company owned by the Peoples Republic of China.

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<sup>2</sup> *Loper Bright Enterprises et al. v. Raimondo*, 141 S. Ct. 2879 (2021) (overruling the Chevron deference doctrine, which required courts to defer to agency interpretations of ambiguous statutes).

### 3. Net Neutrality.

The FCC's Open Internet Order, largely reinstating the Obama-era "Open Internet" (a/k/a net neutrality) rules,<sup>3</sup> has been stayed in the 6<sup>th</sup> Circuit Court of Appeals.<sup>4</sup> Broadly speaking, the debate is whether broadband Internet access should be regulated as a utility, with Democrats and Republicans saying yes and no, respectively. Last year, as a first order of business following Chairman Rosenworcel's appointment, the Democratic FCC adopted most of the net neutrality rules adopted under her 2015 Democratic predecessor, FCC Chairman Wheeler. These were dismantled following President Trump's 2016 election and the appointment of Republican Commissioner Ajit Pai.

Importantly, the 2023 order reclassified Broadband Internet Access Services (BIAS) as a regulated common carrier service and imposed a host of sweeping Open Internet regulations.

Even if the rules survive the Sixth Circuit Court review (by no means certain as the court believes that the FCC's arguments for reinstatement will not succeed on the merits), they are likely dead-on-arrival once the new administration takes over. The Republican Congress could conceivably dismantle it through Congressional Review Act (as the Republican Congress did in the first Trump administration). Eventually, if the Order is remanded back to the FCC, the new Republican FCC could reverse it through a new proceeding – as then Republican Chairman Pai did in 2016. One way or another, the pendulum has swung and sooner or later, BIAS will once again be an unregulated information service without the baggage of utility-style regulations.

But there are a few caveats.

First, the so-called "transparency rule",<sup>5</sup> essentially a disclosure obligation, has endured throughout the various changes in Administration. Expect that it will do so again. Originally adopted in 2010, the rule requires providers to disclose technical and commercial terms and conditions of BIAS services on their websites. The required disclosure can be excruciatingly detailed with serious penalties if deemed inadequate (as currently in effect under the lame duck Democratic FCC) or much less detailed (as it was under the "light touch" of the prior, Republican FCC). It remains to be seen what transparency rules will be in effect once the new Republican majority takes over the agency.

Second, common carrier privacy, so-called "customer proprietary network information" (CPNI), is a statutory obligation (47 USC 222) supplemented by extensive FCC rules.<sup>6</sup>

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<sup>3</sup> For details on the tortured history of net neutrality, <https://wstecomlaw.com/practice-areas/net-neutrality/>

<sup>4</sup> In re FCC Open Internet Order, MCP No. 185, (6th Cir. Aug. 1, 2024) (order granting stay).

<sup>5</sup> 48 C.F.R. § 8.1 (requiring internet service providers to disclose information about their broadband services, network management practices, performance characteristics, and commercial terms). <sup>6</sup> 47 C.F.R. § 64.2001 *et. seq.* See <https://www.fcc.gov/enforcement/areas/privacy>

Their application under the Open Internet Order to broadband access connections provided by AT&T and other carriers was confusing at best. As indicated, these rules are now stayed. Even so, CPNI violations, as well as data breaches, carry very heavy financial and other penalties – the most recent example being that of T-Mobile.<sup>3</sup> These will likely continue regardless of future net neutrality treatment.

Third, states may pursue their own net neutrality regulations. An example is the California Public Utility Commission’s regulation of certain Voice-over-Internet Protocol (VOIP) providers.

#### **4. Universal Service.**

The Universal Service Fund (USF) and initiatives to expand broadband access are expected to remain a priority. The new administration has indicated plans to bolster funding for broadband in rural and underserved areas. However, both President Elect Trump and the FCC Commissioner Carr are skeptical of government grants and other funding aimed at closing the “digital divide”. An alternative may be the use of satellite broadband to reach subscribers in hard-to-reach rural areas, one expected to carry considerable weight as SpaceX Chairman Elon Musk, is an unofficial member of the President Elect’s cabinet.<sup>4</sup>

But the future of the USF is murky at best. As of this writing, the Fifth Circuit Court of Appeals, having ruled in *Consumers’ Research* that the USF program is an unconstitutional “tax”, has stayed the effectiveness (mandate) of its decision. SCOTUS has agreed to review the case. A decision is expected sometime in June or July 2025.

While the conservative SCOTUS majority may well be sympathetic to the petitioners’ arguments against reading broad agency taxing authority into the USF statute, it will also be cognizant of the economic and administrative disruption that could follow if *Consumers’ Research* is upheld. A possible “off ramp” for the High Court would be to strike down the decision on procedural grounds and not have to reach the merits. Alternatively, the Republican controlled FCC may prefer to let the decision stand, leaving Congress to deal with much-needed USF reform.

If *Consumers’ Research* paves the way for Congressional USF reform, then much else could change. Commissioner Carr and many others have expressed concern over “Big Tech” market dominance. Note that Google, Amazon, and other so-called “Edge providers” are not subject to Open Internet (net neutrality) even though their market power far exceeds traditional telephone carriers – whose alleged market “dominance” is an anachronism. Nor does Big Tech contribute to USF. As Big Tech providers have been

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<sup>3</sup> <https://www.fcc.gov/document/fcc-fines-t-mobile-80m-location-data-violations> (FCC assessing \$80 Million fine on T-Mobile for privacy (CPNI) violations).

<sup>4</sup> <https://www.politico.com/live-updates/2024/11/12/congress/elon-musk-vivek-ramaswamy-trump-00189209> (announcing Elon Musk’s appointment to head up a newly created “Department of Government Efficiency”).

big Democratic supporters, cynics view their privileged status as favoritism. All of that may change through Congressional USF reform, through a SCOTUS decision affirming *Consumers' Research* (and thus remanding the case to the FCC), through the replacement of USAC with a private contractor, or a combination of all of the above.

## 5. Privacy and Content “Moderation”

In addition to the CPNI regulations, there are other “hot” privacy topics circulating in the new administration. Unlike other countries, the U.S. does not have a single uniform privacy law – although common law does support actions for personal privacy violations. Instead, privacy laws are a patchwork of state and industry specific regulations. In a rare bi-partisan consensus, there appears to be support for national privacy legislation similar to the California Consumer Privacy Act (CCPA) or the European Union’s General Data Protection Regulation (GDPR), giving consumers more control over personal data.<sup>9</sup>

We end this alert with a preview of one of the most controversial topics that will arise under the new administration: media content regulation. Stated another way, one man’s “content moderation” is another’s “censorship”. At the heart this debate is the immunity enjoyed by media providers over actions to control or suppress political and other content.

The immunity arises under “Section 230” of the Communications Act, one that FCC Commissioner Carr (and other Republicans) have long sought to remove.<sup>10</sup> The complicated history of Section 230 began with a lobbying effort during the 1996 telecom reform legislation to protect an online service provider, Prodigy Services Company, from publisher liability. The potential repeal or other modification of Section 230 will likely be the subject of future policymaking and almost certain litigation, whether before the FCC, Congress, or the Courts.

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We wish you all a festive Holiday Season, Merry Christmas, Happy Hanukkah, and a safe and prosperous New Year. And as we always end our political alerts, GOD BLESS AMERICA.

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For a detailed discussion of the GDPR, please see our publication, “Privacy in the New World Order”, [https://wstecomlaw.com/wp-content/uploads/2023/12/Privacy-In-the-New-World-Order\\_Redacted.pdf](https://wstecomlaw.com/wp-content/uploads/2023/12/Privacy-In-the-New-World-Order_Redacted.pdf). This is a reference to 47 USC §230. For a detailed discussion of this controversial statute, see our alert, “Content Regulation in the Age of Misinformation” at <https://wstecomlaw.com/2023/06/part-i-of-our-new-online-contentregulation-series-is-now-available/>