

Republican Sweep Could Open Path To Telecom Legislation

By Jenna Ebersole

Law360, Washington (November 10, 2016, 3:34 PM EST) -- President-elect Donald Trump's upset win and congressional Republicans' success in retaining majorities in the U.S. Senate and House of Representatives may open a narrow path for new telecom legislation that could address questions of Federal Communications Commission authority.

Trump remains a wild card who could be more of a populist than a traditional Republican, but is also seen as a pro-business figure who telecom attorneys say may chart a more expected deregulatory course. The effect of Republican control of the White House and both chambers of Congress could be a renewed look at the 1996 Telecommunications Act and how to adjust or update it.

It will depend on which Republicans are making decisions, Laura Phillips of Drinker Biddle & Reath LLP said. Legislative action also may vary with the agenda and tactics of a new FCC.

"You could definitely see the prospect of legislation being more of a real possibility," she said.

The Federal Communications Commission's decision in 2015 to reclassify broadband service as a telecommunications service subject to more stringent regulation under Title II of the Communications Act came over the protest of Republicans at the FCC and on Capitol Hill.

The decision, which the agency used to enact bright-line rules to prevent throttling, blocking and paid prioritization of internet content, survived before a D.C. Circuit panel in June and is pending in a petition for full court rehearing.

Trump's victory lends deep uncertainty to the future of the reclassification and could put the rules in danger, experts said. The best road to replacing the rules might be found in turning to compromise legislation that reinstates them without the other burdens of reclassification under Title II, former Republican FCC Commissioner Robert M. McDowell of Cooley LLP told Law360.

"A big question will be whether there will be just outright repeals of some initiatives or a repeal and replace in other cases," he said.

McDowell was appointed to a seat on the commission by President George W. Bush and unanimously confirmed by the Senate in 2006. When he was reappointed to the commission in June 2009, McDowell became the first Republican to be appointed to an independent agency by President Barack Obama.

For advocates, McDowell said, Trump's win is a major surprise that could lead them to look to another avenue to put the rules in place if his FCC overturns the broader reclassification. That could be pressing for compromise legislation that enacts net neutrality rules but doesn't apply Title II regulation.

"This changes everything in Washington," he said. "Very few, if any, advocacy groups and businesses have made plans for a Trump White House and a Republican Congress. So the phone lines are burning up today as Wall Street and consumer groups and everybody tries to figure out what this means and as they try to predict what the policies of a Trump administration will look like."

Although narrower pieces of legislation have a better chance of passage, the "political law of physics" also says it's hard to pass legislation, he said, and easier to pass something broad that can involve some compromise.

There was push two years ago for new telecom legislation, which could be renewed, but it's unclear if the votes would be there for passage, McDowell added.

Phillips said she could see tweaks that would clarify where the FCC has authority rather than a rewrite of the law.

In one example, the FCC's newly passed privacy rules for broadband providers, an outgrowth of the Open Internet Order, could be reversed with legislation clarifying and limiting FCC authority. Congress could also define the lanes on the issue for the FCC and Federal Trade Commission.

"I think just clarifying what the FCC's got authority to do and what they should keep out of," she said.

Nathaniel Hardy of Marshalian & Donahue PLLC, who represents broadcasters, projected a traditionally Republican relaxation of regulation under Trump, affecting net neutrality, privacy and the media ownership rules. Trump is unpredictable but may leave Congress "to its own devices," he said.

Hardy said it will take some time for the new administration to fully find its footing — and for observers to get a read on what to expect.

"There's going to be quite a lot of instability for the first year I think as Trump gets into his position and Congress gets used to dealing with him," he said. "He's never held political office before. We don't know how he's going to interact with Congress."

Trump has shown interest in issues such as limiting the First Amendment, Hardy said, and a lack of interest in the internet but "there's not a lot of telecom policy to be gleaned from his statements."

But McDowell said Jeffrey Eisenach of the American Enterprise Institute is involved in the Trump transition on telecom, which indicates a move to light-touch regulation and deregulation. Trump's FCC appointments could still be a surprise, but transition team leaders help shape both policy and personnel.

"There's always a surprise or two, but having said that, thus far from what little information we have, it appears that the Trump administration would be more pro-business, pro-growth and less focused on trying to engineer markets through regulation," McDowell said.

A shift from the Obama years also could come in the form of less focus on tech companies' interests and a boosting of network operators that have claimed Google and others have been unfairly advantaged.

McDowell said they are also converging, and a deregulatory push would “lift all boats.”

At the FCC, Democratic Commissioner Jessica Rosenworcel continues to wait to be confirmed by the Senate so that she can continue serving past December. Phillips said there could be a trade still that brings her back but the sweep can't have “enhanced her chances.”

It will take time to get a new chairman in place at the FCC, experts also said, so the agency and telecom policy may be in limbo for several months. In any case though, the legacy of Chairman Tom Wheeler looks to be in as a tenuous state as Obama's with the broad Republican win, Phillips said.

“Early days here, very early days,” she said. “It's going to be a brave new world.”

--Editing by Katherine Rautenberg and Brian Baresch.