

# Communications: Significant Actions on the Horizon

Skadden

January 2015

This article is from Skadden's *2015 Insights* and is available at [skadden.com/insights](http://skadden.com/insights).

## Contributing Partner

**Ivan A. Schlager**  
Washington, D.C.

## Contributing Counsel

**John M. Beahn**  
Washington, D.C.

## Contributing Associates

**Joshua F. Gruenspecht**  
Washington, D.C.

**David H. Pawlik**  
Washington, D.C.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square  
New York, NY 10036  
212.735.3000

[skadden.com](http://skadden.com)

The Federal Communications Commission (FCC) addressed a number of longstanding issues in 2014, including reform of its E-rate program that provides federal subsidies for purchases of broadband services by schools and libraries and numerous improvements to the nation's emergency calling systems. Much of the FCC's time and effort, however, was dedicated to laying the groundwork for several significant regulatory actions it intends to undertake in the next year. These actions, including the broadcast television incentive auction and the issuance of net neutrality regulations, dominated the commission's debates in 2014 and led to significant disagreements between its Democratic and Republican commissioners. Congress also took note, with many Republicans stating that the Obama administration — and the FCC in particular — has overreached its regulatory authority in a number of communications-related areas. Now that Republicans control both houses of Congress, they likely will respond legislatively to rein in the commission's ability to implement some of its high-profile initiatives, including its upcoming action on net neutrality.

Aside from the specific issues described below, business leaders and those working in regulated sectors will need to pay close attention to communications-related issues in 2015, as the year is likely to bring a number of unforeseen developments in response to political, technical and marketplace developments.

## Broadcast Incentive Spectrum Auction — Recent Auction Successes a Harbinger?

The upcoming auction of broadcast television spectrum for mobile wireless services continues to be one of the most noteworthy actions on the FCC's agenda. The auction — originally scheduled for mid-2015 and now set to occur in early 2016 — will be one of the most complicated undertakings ever attempted by the FCC. Through the auction, spectrum will be recovered from television broadcasters, which voluntarily choose to give up some or all of their spectrum usage rights in exchange for incentive payments, and subsequently auctioned to wireless broadband services through a forward auction process.

Many analysts originally believed that the commission could raise between \$20 billion and \$25 billion in this auction; however, spectrum valuations recently skyrocketed because of the approximately \$45 billion raised in Auction 97, the so-called "AWS-3" spectrum auction completed in January 2015. In this auction, the FCC auctioned a total of 65 MHz of midband spectrum, some of which was recovered from federal agencies. As a result, analysts are significantly increasing their projections for the incentive auction proceeds, which could surpass the AWS-3 results because broadcast spectrum is highly desired by wireless carriers. Broadcaster participation, which is entirely voluntary, is uncertain at this point — though the wild success of the AWS-3 auction clearly will increase broadcaster interest.

The commission must still address a number of key issues in connection with the auction, including determining whether to cap the amount of spectrum AT&T and Verizon Wireless can procure during the auction. The FCC also needs to set the opening broadcaster bids for the reverse auction. These bids are critical because they will largely drive broadcaster

# Communications: Significant Actions on the Horizon

Continued

participation in the auction. In addition, the commission must finalize the repacking methodology through which it will consolidate the operations of remaining broadcasters into a much smaller swath of the television band, leaving a large contiguous band of spectrum available for the forward auction. The repacking methodology will govern the operations of broadcasters once the auctions have concluded and has come under intense scrutiny from broadcast groups, which sued the FCC in federal court over the issue in 2014. The repacking litigation is ongoing.

Resolution of the outstanding issues will need to occur by mid-2015 to provide sufficient lead time for broadcasters to make final decisions on submitting applications to participate in the reverse auction, to allow wireless carriers to plan their strategies for the forward auction, and to enable investors and other potential new entrants to decide whether to acquire broadcast properties and/or bid on newly available spectrum to offer new mobile services in the future.

## **Net Neutrality — The End of the Beginning**

The debate over network neutrality — a policy that would prohibit telecommunications providers from blocking, degrading or discriminating against legal content flowing through their networks — kept the FCC busy last year. Forced to revisit the issue after its prior network neutrality rules were overturned by an appeals court in January 2014, the commission analyzed overwhelming public feedback on the topic and proposed new rules. Interest in this issue culminated in November with President Obama's public (and unprecedented) endorsement of the reclassification of broadband Internet as a "telecommunications service" under Title II of the Communications Act of 1934.

Per the court's suggestion and the president's request, the FCC appears ready to reclassify broadband as a Title II service, with a vote tentatively planned for February. In voting on new rules, however, the commission is expected to decline to enforce (or forbear from applying) numerous aspects of Title II to broadband Internet access. The FCC must separately justify each decision to forbear, which likely will result in a series of case-by-case disputes, follow-on orders and clarifications at the commission and in the courts.

Those impacted by this ongoing debate will include:

- FCC-regulated entities, which may be reluctant to enter into transactions subject to commission review in the near term because the FCC may obligate them to voluntarily abide by the new regulatory framework, regardless of any subsequent reversals or revisions, as a condition of approval of any transaction;
- New entrants into the online services marketplace, which may see a greater opportunity to compete with established providers under the new rules;
- Companies with new content models, including those providing new Internet-based video streaming services, which may see a window of opportunity to debut their services.

# Communications: Significant Actions on the Horizon

Continued

---

## Legislative Reform — Republicans in Control

Reacting to the net neutrality debates and other recent controversial FCC decisions, Republicans on both the House and Senate Commerce Committees have indicated that telecommunications policy reform will be a top priority for the new Congress this year. Republicans have proposed a number of different solutions to net neutrality concerns, including passage of a new title of the Communications Act dedicated to broadband regulation and access. House Republicans in 2014 also proposed legislation to address the spectrum shortage. This legislation would create incentives for federal users to relinquish spectrum for commercial use, a topic that may receive more attention with the Republican takeover of the Senate.

While substantive legislative proposals will receive detailed scrutiny, an area that may receive less press but more legislative traction in the coming year could be administrative process reform. The two Republican FCC commissioners have recently argued that the chairman has departed significantly from precedent by addressing controversial issues through staff decisions on delegated authority. In doing so, they claim that the chairman has abandoned consensus-based decision-making at the commission. These complaints have added fuel to the Republicans' desire to rein in what they view as Obama administration regulatory excesses. The House acted on this issue in 2014, unanimously passing an act to reform the FCC's policymaking processes, but that effort faltered in the Senate. With the new Republican Senate majority, process reform will receive renewed attention and likely will pass both houses of Congress in some form in 2015.