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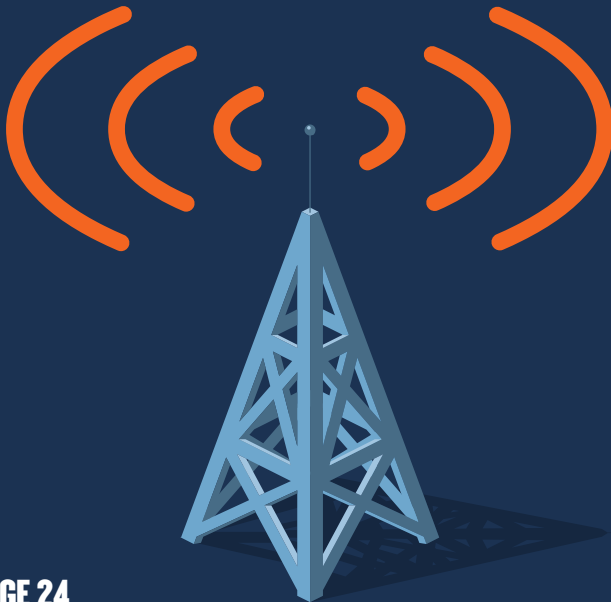
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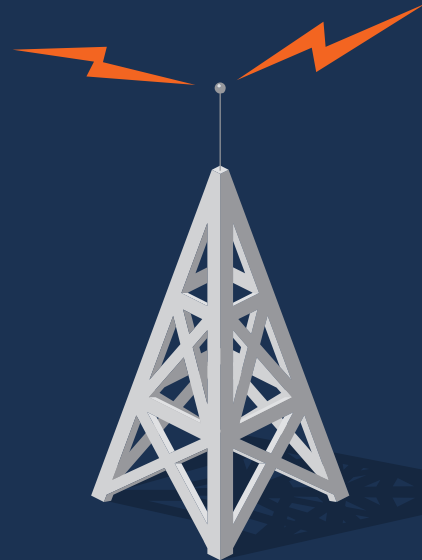
CH-CH-CH-CHANGES!

With new leadership on the way at the FCC and the FTC, tech, media and telecom companies scramble to prepare.

An MCC interview with Akin Gump's Tom Davidson and Greg Guice



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It Could Be Time to Buckle Up — Turbulence Ahead for TMT

Profound changes could include a bumpy ride for net neutrality

MCC INTERVIEW: Tom W. Davidson & Gregory W. Guice / Akin Gump Strauss Hauer & Feld LLP

It's not so much a question of whether there will be changes to the regulatory environment in the Technology, Media and Telecommunications (TMT) sector under the newly installed Republican administration, but how far and how fast change will proceed. We asked two keen TMT observers from Akin Gump, Tom W. Davidson and Gregory W. Guice, for their outlook. Their remarks below have been edited for length and style.

MCC: You each represent a broad range of domestic and international clients across the media, telecommunications and high-tech sectors. Recognizing that it varies across sectors and subsectors, what issues have been top of mind for your clients since the election?

Davidson: Not surprisingly, net neutrality and broadband privacy are two key issues that clients care about. In the media space, the potential for deregulation of the multiple ownership rules, which would include changes to the joint sales agreement attribution rules, rescission of the Federal Communication Commission's (FCC) recent decision to eliminate the Ultra High Frequency discount, and other media ownership rules are on top of the shortlist of agenda items for broadcasters. The imminent close of the broadcast incentive auction is also a

Congress could enact legislation to override the net neutrality rules, which may be the most expedient means to prompt change in the event Congress is interested in doing something on net neutrality quickly.

— Tom Davidson

high-level priority for both wireless companies and broadcasters for a variety of reasons, including the ability to re-engage in M&A activity once the auction is over and the anti-collusion rule is no longer applicable. In general, clients are also very interested in the FCC's approach to its review of proposed acquisitions under its public interest standard under an Ajit Pai FCC chairmanship.

Guice: As folks settle into an FCC with Ajit Pai as Chairman and what appears to be a new direction, companies certainly are focused on broadband privacy and net neutrality, but also broadband deployment to unserved rural and tribal areas and new business opportunities with respect to the allocation and additional spectrum to realize such opportunities. That's front and center. Given the noise around the election, cybersecurity is also an area of interest for a number of clients.

MCC: FCC chairman Tom Wheeler used his last public address to defend net neutrality, the signature issue of his tenure. He also looked ahead at Republicans' anticipated efforts to undo the FCC Open

Internet Order, which he suggested may not be all that easy to accomplish. How is this likely to play out? How are you advising clients?

Davidson: It's too early to tell exactly what will happen, but there are a variety of approaches that might be used.

As a result of a decision in June of last year from the U.S. Court of Appeals for the D.C. Circuit, the net neutrality rules are in effect at the FCC. For the agency to overturn or scale back the rules, it is likely it would move forward to do so by initiating a notice and comment rule-making proceeding to develop a record demonstrating that the rules should be overturned. Any action would have to be adequately supported by the record because judicial appeals of any decision to rescind or modify the rules are virtually certain and the existing rules were upheld by the D.C. Circuit. The net neutrality rules did not go away when Trump took office so this process would take time. It also is possible that a Republican-controlled FCC would elect not to enforce the rules, or any outgrowth of the rules, during the pendency of any action.



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Another approach would be to initiate a rulemaking proceeding or take some action to undercut the prior net neutrality decision by reclassifying broadband as a telecom service independent of net neutrality or by flip-flopping on the definitional issue. The FCC could effectively vacate the net neutrality rules through a definitional change of broadband, but this would have to be done in a manner consistent with the D.C. Circuit's decision.

At the same time, Congress could enact legislation to override the net neutrality rules, which seems to be the most pragmatic approach to prompt change quickly. However, Congress has a pretty full agenda on three or four issues that are more far-reaching than net neutrality, so it's not clear that net neutrality would be an item that would be taken up immediately by Congress. But if Congress is inclined to move forward on net neutrality, it could do so quickly.

Guice: There are some indications of bipartisan interest in Congress in figuring out what a net neutrality framework should look like if legislation moves forward. Given some of the hurdles that the agency has to go through, there might be some desire in Congress to push that out a bit further. There might be congressional action before there's agency action.



Gregory W. Guice, a former Director of Legislative Affairs at the Federal Communications Commission, is Senior Counsel with Akin Gump. He focuses on legislative and regulatory matters that affect the full spectrum of communications and information technology markets. He can be reached at gguice@akingump.com.

MCC: Right before the election, the FCC adopted rules requiring broadband internet service providers to protect the privacy of their customers, including requiring them to obtain opt-in consent to use and share sensitive consumer information. Tell us about these rules and whether they will survive the transition to a new administration.

Guice: The broadband privacy rules were adopted on November 2 following a yearlong proceeding to develop the regulatory framework that would apply to broadband providers. The rules require affirmative opt-in consent from customers for sensitive information, which includes financial, health, children's and geo-location information; Social Security numbers; web browsing and app usage history; and content of communications.

All other individually identifiable customer information is considered non-sensitive information, and consumers can be required to opt-out of such consent.

There are transparency rules, which require broadband providers to provide customers with clear, conspicuous and persistent notice about the information they collect, how it may be used and with whom it may be shared, as well as how customers can change their privacy preferences.

The order also provides that broadband providers should engage in reasonable data security practices and adopted data breach notification requirements to encourage broadband providers to protect the confidentiality of

customer data, and to give consumers and law enforcement notice of failures to protect such information.

One thing pointed out during the proceeding is that the rules clearly say that the FCC's jurisdiction would not cover internet-based companies, only the providers of a residential consumer broadband connection.

There's been clear interest in the proceeding as demonstrated by the number of companies that have filed petitions for reconsideration of the FCC's decision. During the process of adopting the rule, the FCC also heard from Congress about the framework that it proposed and testified at a number of hearings on the subject. It seems that this is an area where the FCC, under new leadership, may decide to walk back some of the requirements. Under the Congressional Review Act, Congress may decide to eliminate the requirements. It's clear that the issue of privacy is far from settled despite the order the FCC adopted.

Davidson: Unlike the net neutrality rules, which would require the FCC to initiate a proceeding to overturn the existing rule, there are petitions for reconsideration of the privacy rules pending before the FCC. The Republican-controlled controlled FCC would be in a position to overturn the privacy rules pretty quickly because the FCC has an existing pending proceeding in which it could overturn the rules. The time frame for acting on these reconsideration petitions correlates pretty closely with when a new administration will be fully transitioned and in place.

MCC: *The Federal Trade Commission (FTC) chair, Edith Ramirez, a champion of vigorous regulation, is stepping down. There has been speculation that a GOP-controlled Congress might go after the common carrier exception to the FTC Act. The FTC, rather than the FCC, would then oversee unfair trade practices by tech and telecom companies. How realistic is this and what impact would it have on your clients and the TMT sector generally?*

Davidson: It would take an act of Congress to provide the FTC with jurisdiction over unfair trade practices by telecom companies. That's because the common carrier exception has a statutory limitation on the FTC's authority. A Republican controlled FCC could not simply decide to prevent the FCC from taking action in this area, though it could, as a matter of policy, refrain from further attempts to expand its jurisdiction beyond traditional telecom companies. I don't think congressional action on the common carrier exception is going to be a high priority, but it's certainly something that could be integrated into overall telecom deregulation, which is something I think we'll see in the next couple of years. The majority of the members of the FCC transition team are vocal opponents of the expansion of FCC authority in this area. Instead, they support deregulation and reportedly have been pushing a plan to restructure the FCC to ensure it acts within the scope of its statutory authority. Part of this restructuring could result in the FTC being tasked with protecting consumers in the privacy area through case-by-case enforcement actions. By providing the FTC with jurisdiction over unfair trade practices, regardless of the nature of the company, a Republican-controlled administration could provide the industry with clear guidance on the rules of the road by eliminating the possibility of duel – thus conflicting – regulation. With respect to the common carrier exception, that would have to be congressionally enacted. That's not likely to happen in the first 100 days of the new administration.

MCC: *Deloitte Global recently predicted a revolution in the evolution for 5G in 2017, including 200 mobile networks with elements of 5G network architecture. Where do you see 5G headed in the next five years?*

Guice: Unlike the previous two topics, this one has obtained broad, bipartisan support. For example, in the recent confirmation hearing for Wilbur Ross as U.S. Secretary of Commerce, Democrats and Republicans were asking questions about 5G spectrum opportunities and the importance of ensuring those opportunities are realized.

The FCC is likely to take additional action to promote access to spectrum for 5G services. Commissioners O'Reilly, Pai and Clyburn have demonstrated their fervent support for 5G service. They have also worked to develop ways to incentivize U.S. companies to develop technology systems for the deployment of 5G services. There is ongoing work on an industry standard that's paving the way for further actions to facilitate 5G services in the United States. Certainly, our competitors in Europe and in Asia are pushing the envelope on 5G services. America led on deploying 4G, and there is bipartisan support to make certain that we lead on 5G.

Davidson: I agree. This is a bipartisan effort. You might see even faster action from a Trump-led FCC than under the Wheeler-led FCC as part of his "Make America Great Again" effort. I see proceedings to authorize spectrum for 5G moving quicker now, but we can only move as far and as fast as the administrative process lets us. In the end, American consumers and industry will benefit by where the administration is headed on 5G.

MCC: *What else came out of the Ross confirmation hearings that might provide some guidance for TMT companies?*

Guice: Two things come to mind that are worth noting. In the context of discussion around an infrastructure bill, the question arose as to whether broadband should be considered infrastructure. Wilbur Ross made it clear that, in his mind, broadband is the 21st century infrastructure and, therefore, any infrastructure bill should include broadband. That's important because broadband is not always thought of as infrastructure in the same way that more traditional forms such as transportation are.

Ross also noted the importance of continuing to build out broadband networks so that all Americans have access to them. That crosses over to the FCC's jurisdiction. A continued focus on unserved rural and tribal areas is going to be critical to how we address communities that lag way behind others in broadband deployment. This will be a significant area of interest in the coming year.

MCC: *Much of the coverage of this area tends toward a good guy (the consumer) and bad guy (corporate telecom) dynamic. The TMT sector clearly is more complex than that. If Republicans succeed in ratcheting regulation down, do you see that benefiting consumers, hurting consumers, or something in between?*

Davidson: Most likely it is something in between. It will depend on the specific regulation.

Secretary of Commerce designee Wilbur Ross made it fairly clear that broadband is the 21st century infrastructure and, therefore, any infrastructure bill should cover that.

– Gregory Guice

For example, elimination of regulations that could conflict with other agencies, such as the broadband privacy rules, would not harm consumers. Elimination of regulations where there is no duplication, such as long-standing truth and billing regulations, could conceivably have a negative effect.

Notably, Republican administrations typically are deregulatory in nature compared to Democratic administrations. Ratcheting down regulation is not new. Even regulations enacted in the name of consumer protection do not always have that effect. Regulations can, for example, increase costs or be so complicated that they cause consumer confusion.

Guice: Even in the privacy area there is bipartisan support for some sort of framework recognizing that consumers expect privacy protection. How you go about doing that and who's doing it, that's where some of that bipartisanship tends to break down. As you move forward, some of the same approaches that appear to be partisan, if implemented in a different way may garner some bipartisan support.

Davidson: Whether it's a Republican or Democratic administration, there are stakeholders with very different positions on particular issues. Those stakeholders have some impact on what gets adopted. That tends to push things toward the middle as opposed to the right or left. That's going to be no different in this administration than in any of the others we have seen.