

Communications: 2016 Could Be Defining Year for Net Neutrality, Spectrum Auction

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Last year, the Federal Communications Commission (FCC) closed in on two historic accomplishments. After years of laying the groundwork, the FCC issued its net neutrality regulations as well as final rules and opening bid prices for the upcoming broadcast television incentive spectrum auction. While both items could put the FCC on a path to significantly expand its regulatory reach and role in U.S. technology development, each could encounter serious setbacks early in the year.

Net Neutrality

The 10-year debate over network neutrality — a policy that would prohibit telecommunications providers from blocking, degrading or discriminating against legal content flowing through their networks — culminated in early 2015 when the FCC issued its long-awaited net neutrality regulations. Forced to revisit the issue after federal appeals courts overturned its two prior attempts, the FCC adopted sweeping regulations that, if allowed to stand, will have far-reaching implications for the media, content, broadband and Internet industries.

The new regulations include a number of specific rules applicable to providers of broadband Internet access services, including strict prohibitions on blocking or degrading lawful traffic and restrictions against paid prioritization of lawful traffic. In addition, the regulations include a catch-all conduct rule that prohibits broadband providers from unreasonably interfering with or disadvantaging end users or “edge providers” (e.g., certain online service providers) with respect to Internet content, traffic or applications.

The most contentious aspect of the FCC’s net neutrality proceeding, however, was the reclassification of broadband services as “telecommunications services” under the Communications Act of 1934 (known as Title II). Reclassification under Title II is significant, as it expands the FCC’s authority to broadband services not previously subject to its jurisdiction, including Internet edge providers, streaming services, and “Internet of Things” devices and services.

The upcoming spectrum auction will be **one of the most complicated undertakings the FCC has ever attempted.**

Challengers quickly appealed the regulations to federal court, claiming that the FCC lacked the statutory authority to issue the rules and reclassify broadband services under Title II. They also argued that the FCC failed to provide sufficient advance notice of the sweeping regulations it ultimately enacted. The Court of Appeals for the District of Columbia Circuit heard oral arguments in December 2015, during which the three-judge panel vigorously questioned the FCC’s regulations, particularly the

extension of Title II requirements to broadband services. The panel also debated the FCC’s prohibitions on blocking or degrading lawful Internet traffic. The panel could approve the regulations or overturn them in whole or in part and remand the issue to the FCC for further review. A final ruling is not likely for several months and could be subject to further judicial review, including by the U.S. Supreme Court.

Broadcast Incentive Spectrum Auction

While the broadcast incentive spectrum auction did not garner the same headlines as net neutrality, the FCC took important steps last year to prepare for the March 2016 auction,

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which could be one of the most influential actions in the FCC's history. In the auction, the FCC will attempt to recover spectrum from broadcasters in exchange for incentive payments and then auction any recovered spectrum for wireless services. A successful auction could reap upward of \$60 billion to \$80 billion in proceeds and shape the wireless and broadcast industries for decades by providing carriers with the spectrum necessary to deploy next-generation networks with greater capacity and speeds. Well-funded new entrants also may view it as an opportunity to acquire spectrum to offer innovative wireless broadband services. The broadcast TV industry could be similarly reshaped, as widespread participation by station owners could lead to the transition of many free over-the-air broadcast services to narrower digital channels (or, conversely, to their demise).

In October 2015, the FCC released the opening bid prices for the spectrum, which in top markets generally range between \$100 million and \$400 million for each TV station's spectrum, with the highest opening bid of \$900 million offered for one broadcaster's

spectrum in New York City. On the issue of whether to reserve a certain amount of spectrum for bidders other than AT&T and Verizon Wireless, the FCC opted to set aside up to 30 MHz in certain markets exclusively for smaller carriers in order to promote competition. While some of these carriers, including T-Mobile, had asked the FCC to reserve more spectrum, the fact that the FCC decided to create a reserve at all has been viewed by many as a significant victory for smaller carriers.

The FCC has been preparing for the auction, which will be one of the most complicated undertakings it has ever attempted, for nearly four years. FCC Chairman Tom Wheeler has acknowledged that the auction could fail to generate the anticipated proceeds; broadcasters could ultimately decide not to part with their spectrum; or wireless carriers could view the costs as excessive in light of the brutal competition now playing out in the marketplace. Whatever the outcome, the auction will be one of the most closely watched FCC actions in history.