

Top Telecom Developments To Watch In 2021

By **Kelcee Griffis**

Law360 (January 3, 2021, 12:02 PM EST) -- The new year brings a new presidential administration and a new Federal Communications Commission. This means telecom practitioners have a lot to look forward to — and a lot of unanswered questions — about how 2021 will shape up.

Here's a look at what to expect, and what we still don't know, about the Biden administration's first moves in 2021 and beyond.

Spectrum Sharing

The FCC will begin its year with a deadlocked 2-2 partisan split once Republican FCC Chairman Ajit Pai steps down as promised on President-elect Joe Biden's inauguration day. This means issues with strong bipartisan support will likely carry the day, leaving many Democratic priorities to linger until a third Democrat is appointed as a tie breaker.

Jennifer Johnson, a Covington & Burling LLP partner, said spectrum reorganization efforts are a prime area for cooperation in an evenly split FCC.

In contrast to the Trump administration's chaotic and often fragmented approach, she predicted the Biden administration will be able to get feuding government agencies on the same page about commercial spectrum-sharing efforts, particularly when it comes to alleviating the Pentagon's reservations about sharing frequencies allocated to the military with private-sector users.

"The expectation going forward under a Biden administration would be that there would be more coordination, and we'd be less likely to see those interagency disputes," she said. "There's bipartisan interest in making more spectrum available, so I think that's an area where progress can be made even if there's not agreement on every detail."

On many fronts, the Biden FCC will pick up where the Trump FCC left off, including executing airwaves auctions Pai teed up during his chairmanship. For example, the Biden administration will take up the torch on the 3.4 GHz band, which the U.S. Department of Defense agreed to auction to the commercial sector.

Even before a new member joins, the FCC also will be tasked with finding other adjacent midband spectrum to allocate for commercial use, said Howard Waltzman, a Mayer Brown attorney who

previously served as chief telecommunications and internet counsel for the House Energy and Commerce Committee.

"That's still going to be the single biggest priority for the commission, and the commission's going to need to work with the administration on identifying additional spectrum below 3.45 GHz," Waltzman said.

Broadband Mapping and Expansion

The FCC enters 2021 with a big task on its hands: implementing a new broadband mapping methodology designed to end reliance on ISP-reported data that tends to overstate internet service in poor, rural and minority communities and help the commission more evenly distribute subsidies for deployment in those areas.

The results of the mapping initiative will guide future decisions on how to grant subsidies, including the Rural Digital Opportunity Fund's second phase, which over the next decade will dole out over \$4 billion to areas that still lack home broadband.

FCC Democrat Jessica Rosenworcel, who is expected to serve as interim FCC chair based on seniority, has been vocal about the need to improve broadband mapping, and she'll apply a critical eye to the program, said Ari Fitzgerald, a Hogan Lovells partner and former FCC legal adviser.

"I'm expecting Rosenworcel to be a lot more exacting and much more on top of mapping," he said. "She's really been outspoken about the need to know where subsidies are needed [and] to have a much better idea of where broadband networks do not exist."

Under Democratic leadership, it's also likely that the FCC will quickly decree that educational broadband subsidies in the E-Rate program may be applied to connect students at home, instead of maintaining the status quo of funding on-campus learning only.

"I'm thinking the new FCC will end up looking to more aggressively use its E-Rate authority to support remote learning," Fitzgerald said.

Other Democratic Priorities

Once Biden appoints and confirms a third FCC Democrat, the agency will be freer to pursue more aggressively Democratic priorities, such as reinstating net neutrality rules and tightening media ownership restrictions.

FCC and Congressional Democrats staunchly opposed the 2017 repeal of rules that barred internet service providers from interfering with or prioritizing web traffic based on corporate deals or preferences.

As Congress has yet to offer concrete guidance on the proper regulatory classification for ISPs, Martin said the FCC could yet again prohibit providers from interfering with network traffic by flipping the internet's classification from an information service under Title I of the Communications Act as it is now to a Title II utility as it was prior to the 2017 switch.

"The Biden campaign did indicate they were opposed to the repeal and would want it restored," Martin

said.

However, if the administration is weary of the political back-and-forth on the issue, it could put pressure on Congress to pass a law dictating that the proper regulatory classification for internet service is as a Title II utility.

"It'd be unfortunate to have another game of regulatory ping pong. Congress really needs to step in and enact legislation to settle this issue once and for all," Waltzman said.

However, he noted, "it's not clear yet whether there will be enough momentum" for Capitol Hill to act.

Separately, the administration is expected to take a hardline stance against media consolidation, abandoning the Republican FCC's attempts to overturn a Third Circuit panel decision that ordered the agency to redo certain 2017 deregulatory attempts.

This could mean a renewed focus on studying and defining how media industry consolidation affects the ability of women and people of color to own TV and radio stations, an examination both FCC Democrats have vocally supported.

But the outcome of a broadcast industry-backed Supreme Court challenge to the underlying Third Circuit ruling may spell out just how much the Biden FCC can do. On Jan. 19, the FCC and the National Association of Broadcasters are set to argue that the circuit's latest decision striking down 2017's slate of looser media ownership rules was arbitrary and capricious.

Finally, the Biden FCC will be likely to dial back the Trump administration's steamroller approach to 5G deployment, Martin said. In contrast to the last four years, which were marked by policies that aggressively asserted the FCC's authority to trump local infrastructure regulations when it had the effect of delaying 5G rollout, a Biden FCC is likely to give more credence to local input.

"A lot of times, those local concerns are based on environmental issues or historical issues, maybe the interests of indigenous people," Martin said. "I could see where a Biden administration might be a little more hospitable to [those reservations]."

--Editing by Alyssa Miller.