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Potential Update to the Communications Act of 1934 Presents Opportunities for Industry and Trade Groups

Pending “Modernization” of the Communications Act

The House Committee on Energy and Commerce has initiated a project to develop legislation to modernize the Communications Act of 1934, which was last updated comprehensively in 1996. There is a website for easy access to the relevant materials: <http://energycommerce.house.gov/commactupdate>. It is not merely the passage of time that warrants revisiting the law. The telecommunications world is vastly different from 1996: then Internet access was achieved through dial-up modems (at 56 kbps) and AOL ruled the roost, the concern was that the “Baby Bells” would be dominant, and wireless penetration was under 20% in the United States.

Recent Developments Highlight the Importance of Modernization

The recent decision of the U.S. Court of Appeals for the District of Columbia to throw out most of the FCC’s Open Internet rules (http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0115/DOC-325150A1.pdf) graphically demonstrates how out-of-date the Communications Act is. The Court found that Congress did provide the FCC with some additional authority in the 1996 Act when it directed the Commission (in Section 706(b)) to “take immediate action to accelerate deployment of [advanced services] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” The FCC’s authority is not unbounded, however, and the Court found that the FCC overstepped those bounds when it imposed common carrier regulations – no discrimination and no blocking – on Internet access services, which the FCC had classified as “information services.” The 1996 Act codified what had previously been a FCC-adopted policy of not imposing common carrier regulations on information services (formerly referred to as “enhanced services”). Although the Court vacated the antidiscrimination and no blocking rules, the Court did allow the FCC’s Open Internet disclosure requirements to remain in effect. The FCC is still determining what steps it will take to resurrect the Open Internet Rules, which could include appealing the Court’s decision to the Supreme Court or revisiting its earlier decisions to classify Internet access as an “information service.” Presumably this will also be a focus of the House’s Communications Act modernization efforts.

Issues Likely to be Addressed in Modernization

A fundamental review of the Communications Act will have to address a number of significant issues, such as

1. the disparate treatment of copyright holders/re-transmission rights as programming is carried on multiple screens and streamed over the Internet;
2. “ownership rights” in spectrum acquired at FCC-run auctions;
3. the possibility of assessing fees for use of unlicensed spectrum;

4. elimination of the old “silos” of telecommunications, cable TV, broadcast and information services in an era when those lines are well past blurred;
5. reforms of FCC subsidy programs that have grown almost exponentially while being funded by a shrinking portion of the communications marketplace; and
6. how or if the FCC should regulate Internet service providers.

Given the significant and wide-ranging impacts that the legislative re-write could have on communications corporations and others that rely on spectrum or the Internet, companies should think about ways they or their trade associations can monitor and influence these legislative activities.

If you have questions regarding the Communications Act of 1934 and the issues outlined in this Client Alert, please contact your regular Butzel Long attorney, a member of the Butzel Long Media group, or the authors of this Client Alert.

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