

Telecom Cases To Watch In The 2nd Half Of 2015

By **Margaret Harding**

Law360, Washington (June 8, 2015, 2:10 PM ET) -- From showdowns with the Federal Communications Commission over its authority to regulate and enforce Internet-related policy to the agency's lack of movement on issues related to the Telephone Consumer Protection Act, the second half of 2015 is loaded with big telecommunications cases attorneys in the industry will want to watch.

Net Neutrality Challenges

It seems nearly every day this spring a new suit challenging the FCC's Open Internet Order has sprung. The wide-ranging suits first filed in the D.C. Circuit and Third Circuit accuse the FCC of both over-reaching with its regulations and failing to go far enough.

The June 12 effective date of the Open Internet Order is quickly approaching, but the suits are not likely to be resolved anytime soon, attorneys said.

"There's almost no doubt in my mind, no matter how this case comes out of the D.C. Circuit, it's headed for the Supreme Court," said Andrew McBride, head of the communications litigation practice at Wiley Rein LLP.

The petitioners fighting the FCC order include the major cable and Internet trade associations and some of the larger broadband providers, including AT&T Inc., CenturyLink, United States Telecom Association and the National Cable & Telecommunications Association, among others.

The D.C. Circuit ordered the 10 petitions filed in the court be consolidated on May 8.

Meanwhile, a growing number of tech startups and other companies are asking the D.C. Circuit for permission to intervene in support of the FCC.

The lawsuits challenge the FCC's decision to reclassify broadband Internet as a telecommunications service under Title II of the Communications Act. The FCC order gives the agency more authority to force broadband providers to treat all Web traffic equally, as it bars so-called common carriers from "unreasonable practices."

The FCC included three bright-line rules in the order: banning ISPs from striking deals to allot faster access, a practice known as paid prioritization; forbidding them from blocking access to legal content; and prohibiting the throttling or degradation of data speeds for lawful content and services.

While the petitioners are quick to say that they don't disagree with the three bright-line rules, they recently asked the appeals court for a partial stay of the broadband reclassification and the FCC's Internet conduct standard, which they argue is vague, pending the result of their appeal to the D.C. Circuit.

Whatever happens, the outcome of the lawsuits has huge implications for the future of the industry, attorneys agree.

"It will probably have the biggest impact on the American communications regulatory scheme, certainly for wireline and wireless data services, for any case you can think of," said Earl W. Comstock of Eckert Seamans Cherin & Mellott LLC.

Comstock represents a number of telecom companies in a challenge first filed in the Third Circuit, which argues that the FCC was right to reclassify broadband but should have left in place more of the regulatory provisions Congress adopted to open local communication markets to competition.

Full Service Network, TruConnect Mobile, Sage Telecommunications LLC and Telescape Communications Inc. are challenging the FCC's decision to refrain from enforcing provisions such as one that allowed for the unbundling of services.

"If we are successful, then American consumers would benefit from lower prices, better services, more innovation, more broadband deployment and more choices of providers," Comstock said.

The FCC moved to transfer the Full Service suit to the D.C. Circuit, saying it challenges the same net neutrality order as the batch of petitions already filed in that court. Full Service said in a filing May 14 that it does not oppose the transfer and the Third Circuit granted the motion May 20, court records show.

The case is now consolidated with the other challenges in the DC Circuit.

The case is *United States Telecom Assoc. v. FCC et al.*, case number 15-1063, in the U.S. Court of Appeals for the District of Columbia Circuit.

Municipal Broadband Battle

In another challenge to the FCC's powers, Tennessee filed a petition for review with the Sixth Circuit over the FCC's move to override a state law that restricts cities and towns from expanding their municipal broadband service.

The city of Chattanooga, Tennessee, petitioned the FCC in July to preempt a state law it said restricted it from expanding its municipal-run network to neighboring communities that were underserved by private providers.

The FCC granted Chattanooga's petition and a similar one from Wilson, North Carolina, in February, saying that under Section 706 of the Telecommunications Act of 1996, the agency finds that the state laws are "barriers to broadband infrastructure investment and thwart competition."

The decision only applied to those cities, but states across the country have enacted similar restrictions

on municipal broadband that have come under fire by FCC Chairman Tom Wheeler and others. Critics say the rules are the product of state-level lobbying by incumbent broadband providers who don't want competition. States that pass them say they're designed to prevent taxpayers from paying for failed projects, and that government-run networks amount to unfair, subsidized competition that stifles private-sector investment.

If upheld by the Sixth Circuit, the legal theory articulated by the FCC in preempting the law could imply that the agency has broad authority to override state laws that don't align with the agency's goals for broadband deployment, attorneys say.

"This theory would say anytime you have something inconsistent with our policy, the FCC can preempt it," Comstock said.

Tennessee's petition for review to the Sixth Circuit in March says that the agency unlawfully inserted itself between the state and its political subdivisions. North Carolina filed a similar challenge in the Fourth Circuit in May. But the controversy may not end there, according to McBride.

"The argument that might attract the attention of the Supreme Court is the constitutional argument," McBride said. "Under the 10th Amendment and general principles of federalism, a federal agency cannot tell the state what powers they can and cannot give to their political subdivisions."

The cases are *State of Tennessee v. FCC, et al*, case number 15-3291, in the U.S. Court of Appeals for the Sixth Circuit and *State of North Carolina v. Federal Communications Commission et al.*, case number 15-1506, in the U.S. Court of Appeals for the Fourth Circuit.

Phone Routing Contract Fight

Neustar Inc. took its fight to hold onto a phone-routing contract last worth \$460 million to the D.C. Circuit this spring, a move that could have implications for Telcordia Technologies Inc.'s transition plan.

The FCC recommended Ericsson-owned Telcordia become the new local number portability administrator, which oversees the system allowing consumers and businesses to hold on to phone numbers after switching service providers. Neustar has held the contract for more than 15 years, and challenged the impartiality of Telcordia throughout the process.

If the court finds that Telcordia is not neutral, there is a question on how the transition could proceed, said James C. Falvey of Eckert Seamans Cherin & Mellott LLC

"The transition has to be run in such a way that if the court determines that Telcordia is not neutral, then there's a Plan B," Falvey said. "That means either a pathway for Telcordia to become neutral, but then you have the financing issue, they're wholly financed by Ericsson. Or a pathway where Neustar remains the LNPA and they go back and rebid the contract."

The FCC's order, approved in late March, does not award the contract to Telcordia, but instead authorizes negotiations between the company and North American Portability Management LLC, an industry consortium, with the final contract subject to commission review. The order, however, does deny Neustar the opportunity to negotiate an extended renewal of the contract.

The current contract with Neustar cost about \$460 million in 2014, while Telcordia bid less than \$1

billion for a seven-year term, or less than \$143 million a year, the FCC has said.

But Neustar has said Telcordia has “substantial commercial arrangements with certain telecommunications carriers” in violation of the requirement that the LNPA be an impartial or neutral entity. The company is wholly owned by Ericsson, a Swedish company that makes communications equipment, software and provides managed network service.

The FCC rejected Neustar’s argument that Ericsson’s manufacturing activities disqualify Telcordia from being the LNPA.

The FCC said in its order that it found Telcordia has shown it is not a telecommunications service provider. The agency said safeguards including a proposal that Telcordia’s board of directors have a majority of independent directors — to prevent control by Ericsson-appointed directors — and a biannual neutrality audit are enough to ensure Telcordia will not be subject to undue influence by Ericsson or other outside parties.

The case is *Neustar, Inc. v. FCC & USA*, case number 15-1080, In the U.S. Court of Appeals for the District of Columbia Circuit.

TCPA Tiffs

In contrast to suits alleging over-action by the FCC, companies involved in litigation stemming from alleged violations of the Telephone Consumer Protection Act would like to see more movement from the agency to address the impact of new technology on the law.

Several companies were sued through various class actions, some seeking \$1 billion in liability, for sending faxes without the required opt-out notice to people who had consented to receive the faxes.

In response to a petition from some of the companies facing the suits, including Forest Pharmaceuticals Inc., Masimo Corporation Inc., Gilead Sciences Inc. and others, the FCC granted retroactive waivers of the opt-out notice requirement, thereby waiving their liability in the private causes of action.

TCPA class action plaintiffs challenged the FCC’s decision in a petition for review with the D.C. Circuit. Several of the companies also challenged the FCC’s order, arguing the agency should have granted declaratory relief rather than just the retroactive waiver.

“The fax case is important because, number one, it will potentially resolve or help resolve some significant questions regarding liability in cases that can sometimes impose tens of millions of dollars on alleged wrongdoers,” said Yaron Dori, co-chair of the communications and media practice group at Covington & Burling LLP. “The other reason it’s important is because it really will speak to the extent to which the FCC can go outside the boundaries of its statutory authority to promulgate rules that it doesn’t otherwise have the authority to prescribe.”

The case is *Bais Yaakov of Spring Valley, et al v. FCC, et al*, case number 14-1234, in the U.S. Court of Appeals for the District of Columbia Circuit.

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