

Telecom Cases To Watch In 2017

By Jenna Ebersole

Law360, Washington (January 2, 2017, 1:03 PM EST) -- The presidential transition has shifted the telecom spotlight from court fights against regulatory actions to a new Federal Communications Commission that could unwind them, but key cases on net neutrality and the jurisdictional lines between agencies remain unresolved. Here are the top cases to watch in 2017 in telecom.

U.S. Telecom Association v. FCC et al.

A panel of the D.C. Circuit handed FCC Chairman Tom Wheeler likely his biggest win in 2016 in June by upholding the FCC's 2015 Open Internet Order that set net neutrality rules and reclassified broadband as a service regulated more stringently under Title II of the Communications Act.

The battle from the industry isn't over yet, with opponents pressing their case for rehearing by the full D.C. Circuit. USTelecom, AT&T Inc., CenturyLink Inc. and others said the panel's decision ignored "core deficiencies" in the agency's reasoning in reclassifying broadband, including statutory language that would prohibit such a classification.

The challengers, including the National Cable and Telecommunications Association, argued that the agency's party-line move stepped beyond the "arbitrary and capricious" standard under the Administrative Procedures Act. Netflix Inc., Dish Network Corp. and others fired back in October, blasting the push, which could also continue with a petition to the U.S. Supreme Court.

Leading up to the election, telecom attorneys said they believed the chances that the case will be reheard at the D.C. Circuit or that the Supreme Court would take the case were slim. After the election, experts say the odds may be even slimmer as the heart of the fight returns to the FCC or potentially Congress with legislation.

Judges "read the papers," Andrew D. Lipman of Morgan Lewis & Bockius LLP said. "I think a number of judges would feel that this would be an issue that should be rightfully decided by Congress."

Paul A. Werner of Sheppard Mullin Richter & Hampton LLP agreed that President-elect Donald Trump's victory may have decreased the odds for further review of the 2015 order and said the challenge may be approaching a "judicial dead end," although the policy has significant ramifications for the country and communications.

"This is probably not a case that the Supreme Court is likely to take, and I think that the chances have

probably gone down given that the policy may well be subject to further review and possible changes by the next administration,” he said.

George Foote of Dorsey & Whitney LLP said he believes broadly that the GOP FCC would have trouble overturning the move entirely, especially given public support in comments, and there may be space for bipartisan compromise. The attention moves now to the FCC from the courts, he said.

“My sense is that the energy for pursuing the case and getting a judicial resolution is going to have to be diverted back to the commission on a policy level,” he said.

Federal Trade Commission v. AT&T Mobility LLC

In another major case also awaiting resolution on rehearing, the Federal Trade Commission is challenging a Ninth Circuit decision tossing a suit in which the agency accused AT&T of illegally slowing internet service to unlimited-data customers. The court concluded that the company is a common carrier exempted under the FTC Act.

The case raises questions about the FTC’s jurisdiction versus the FCC, with the court finding that the plain language of the common carrier exemption shows it is based on a company’s status and not the conduct at issue. But it’s unclear how a company that isn’t a traditional telco but provides broadband may be treated given ISPs’ reclassification as common carriers by the FCC.

The FTC is challenging the decision and a dozen consumer groups have asked for full-court rehearing, saying the ruling creates a circuit split and a “regulatory vacuum” for companies that are designated common carriers.

The Ninth Circuit could agree to rehearing, Lipman said, though that’s always “an uphill battle.” But the case and broader question also depends on the fate of net neutrality and the Title II reclassification.

“To the extent that it’s no longer going forward with Title II, if Congress in fact moves in that direction, it could in fact impact the likelihood or the proclivity of the Ninth Circuit to [rehear the case],” he said.

Werner said he believes the case has better prospects for rehearing and Supreme Court review than the net neutrality case amid the importance of the holding with the FCC’s reclassification.

“The jury’s out, but the implications are there that if you have status as a common carrier then you’re exempt from FTC regulation even for non-common carrier activities,”

Robert H. Jackson of Marshlian & Donahue LLC agreed that the FCC’s Title II reclassification has changed the facts.

“There’s a good argument that the FTC doesn’t have jurisdiction any more,” he said.

News Media Alliance v. FCC et al.

In a litigation loss in 2016, the FCC had sought to tighten its media ownership rules to limit TV stations’ ability to make joint sales agreements and avoid a ban on owning more than one station in a local market. The Third Circuit ruled the commission should have completed a statutorily mandated review of the underlying rules first, and the FCC reinstated the so-called JSA rule after doing so and refused to relax its broader restrictions.

Petitioners Prometheus Radio Project and Media Mobilizing Project, along with several trade associations, are fighting the rules, which tightened bans on owning more than two television stations in one market and cross-ownership of television and newspapers or radio stations.

The National Association of Broadcasters had also challenged the FCC's move to tighten restrictions but dropped the D.C. Circuit petition to file for reconsideration at the FCC instead, according to an NAB spokesman.

Republican FCC Commissioners Ajit Pai and Michael O'Rielly, both of whom are set to continue at the FCC next year as part of the new GOP majority, have been deeply critical of keeping the restrictions.

"I think that some of it could be moot because I would think you're going to have a very different orientation on these issues by the commission," Lipman said.

Securus Technologies Inc. v. FCC et al.

The fight over the FCC's attempts to bring down the costs of inmates calling their families continued to run into judicial roadblocks late in 2016. The D.C. Circuit paused the new rates again in November after a call service company argued that it would be harmed without a stay of the FCC's latest order.

Securus, similar to other companies and states challenging inmate calling rates in related cases, had contended that latest rates — like previous ones — exceed the FCC's authority and were not low enough to ensure carriers a profit. The latest rules, which were approved in an August party-line vote, had been billed as an effort to put the agency on sound legal footing in an ongoing court challenge in a related case.

FCC Commissioner Mignon Clyburn, the lone Democrat set to remain next year, has continued her push for changes. She told Law360 late in 2016 that she was hoping by then to be "celebrating with just, reasonable and fair rates" but the work continues.

She also slammed providers in mid-December in a blog post accusing them of continuing to bilk inmates in city and county jails and their families. Pai and O'Rielly have been critical of the FCC's actions, saying the agency continues to refuse to adopt reforms that would survive scrutiny.

Jackson said he doesn't expect the issue to go away, but there will likely be more willingness to consider the actual cost for operators by Republicans. Excessive rates though still "might not fly," he added.

"The courts might let the commission sort it out," he said.

--Additional reporting by Brandon Lowrey, Natalie Olivo and Jeannie O'Sullivan. Editing by Brian Baresch.