Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Telecommunications Policy Recap For The First Half Of 2017

By **Jenna Ebersole**

Law360, Washington (June 23, 2017, 4:15 PM EDT) -- President Donald Trump's victory last year turned telecommunications policy on its head, with Federal Communications Commission Chairman Ajit Pai leading an active first few months at the agency as he seeks to reverse course and undo actions taken during the Obama administration. Here are the top telecom policy developments so far this year.

Net Neutrality

The fate of net neutrality rules put in place by the previous FCC chairman, Tom Wheeler, over Pai's protest as a minority commissioner in 2015 was a key open question at the start of 2017. Trump elevated Pai to the top slot at the FCC after taking office, and the new chairman got to work quickly, experts said.

In April, Pai ended speculation over whether he or Congress might move first to unravel the Open Internet Order when he revealed the details of his plan to take aim at the rules and "finish the job" this year on reversing the reclassification of broadband as a common carrier service.

The FCC officially teed up the proposal weeks later at its May meeting to nix the reclassification and eliminate a general internet conduct standard. The proposal also raised questions about whether to keep, modify or cut net neutrality rules.

Pai said at an event later in May that he would "go where the facts and the law take us" but also that the reclassification of broadband under Title II was unnecessary, saying the internet is already being free and open and that investment is down since the 2015 order.

The chairman's views on the proposal are clear from its name — "Restoring Internet Freedom" — and his dissent on the 2015 order laid out his objections clearly, said Mitchell F. Brecher of Greenberg Traurig LLP.

"I don't think you have to get past the caption of the new docket to see where his philosophical bent is. ... It's pretty clear from that label where he's going," Brecher said, although the chairman has also committed to making a decision based on the record that develops.

Still, Brecher added, people can "look at the same evidentiary record and reach different conclusions."

ISP Privacy

While the net neutrality rules remain in place for now, Republicans in Congress voted in March to wipe from the books a second set of rules governing privacy practices for broadband providers that the Democratic-led FCC had approved in October. Lawmakers passed the resolution canning them under the Congressional Review Act, which lets Congress repeal agency rules through simple majority votes.

The rules, which largely had not yet gone into effect, required internet service providers to obtain opt-in consent to use and share information labeled as sensitive, including web browsing and app usage history. They were the culmination of the FCC's efforts to apply the Communications Act's privacy requirements to internet providers after the agency reclassified them in the 2015 order as common carriers, which are mostly exempt from Federal Trade Commission authority.

Opponents said the rules departed from the FTC's privacy approach that applies to other online providers, and Pai praised the move to invalidate them. He said in April that Congress and the president "have appropriately invalidated one part of the Obama-era plan for regulating the internet."

The question of overseeing ISP privacy practices remains open, as Pai weighs reversing the reclassification of broadband under Title II and a Republican lawmaker has floated legislation that would hand privacy jurisdiction over the providers to the Federal Trade Commission but reinstate the FCC's higher bar for obtaining consumer consent to use certain data, applying it to edge providers such as Google and Facebook.

The question of which agency might take on privacy going forward isn't settled, said Andrew D. Lipman of Morgan Lewis & Bockius LLP. "I think the tea leaves indicate that the Federal Trade Commission, as opposed to the FCC, may ultimately be the decisionmaker in privacy and in a way that treats multiple sectors in a similar fashion," Lipman said.

Business Data Services

In a third about-face from the Obama administration, the FCC voted in April to relax rate regulation in the market for business data services, a move Democratic Commissioner Mignon Clyburn called one of the worst orders in her nearly eight years at the agency. The vote was a turnaround from a plan by Wheeler, scrapped along with his plan to unlock competition for consumer set-top boxes.

Business data, or special access, services are dedicated network connections used by institutions such as banks and universities that need to transmit large amounts of data. Competitive providers often purchase business data service connections from the incumbent carriers and combine the purchased service with their own networks for clients.

Pai has said his approach sets out a competition test for counties that deems them competitive if half the locations with demand for the services have a competitive provider within half a mile or if 75 percent of the census blocks have a cable provider. If a county is found to be competitive, the agency will deregulate it.

Critics complained that the presence of just one potential and not actual competitive provider in an area isn't enough to create competition that lowers prices, and the FCC's order has now been challenged in court.

Pai’s move was a complete reversal from Wheeler’s plan, disappointing some who had long wanted the FCC to take action on rates, said Laura Phillips of Drinker Biddle & Reath LLP.

“So for those that were looking for an order on business data services, there was an order on business data services,” she said. “It just wasn’t the one that was expected. There’s a lot that came out of this election that has real consequences.”

UHF Discount

Pai had an opportunity to revisit the past once again with an April vote that brought back a long-standing break in TV ownership limits: the so-called UHF discount. The agency under Wheeler tossed the discount last year.

Under FCC ownership regulations, a company’s television stations may reach no more than 39 percent of households nationwide. But until it was eliminated in August, stations that broadcast on UHF bands were given a break that was not given to stations on VHF bands, in that only half the households in a UHF station’s designated market areas counted toward the overall cap.

The discount was originally designed to make up for the weakness of UHF signals compared with VHF signals, which limited a UHF station’s potential audience. But that inferiority has not continued with the transition from analog to digital broadcasting.

In his dissent from the vote in August, Pai acknowledged that the technical basis for the discount no longer existed but said the agency shouldn’t eliminate it without weighing the broader national audience reach cap.

Media advocacy groups have challenged the revival of the discount at the D.C. Circuit, although the court this month refused to prevent the change from taking effect in the meantime.

The theme in the first half of this year has been “whiplash” as decisions are undone, Phillips said, and the UHF discount reversal is important for merger activity. The break is key to Sinclair Broadcast Group’s proposed $3.9 billion deal to buy Tribune Media Co.

“When you have regulatory caps, it obviously will affect a merger or acquisition analysis if you’re close to the cap or exceed a cap. So that’s all important stuff,” she said.

--Additional reporting by Michael Macagnone. Editing by Brian Baresch and Jill Coffey.
