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The Telecom Developments That Defined 2023

By Christopher Cole

Law360 (December 21, 2023, 6:53 PM EST) -- The Federal Communications Commission advanced several new pro-consumer rules under a new Democratic majority in 2023, but was held back in its efforts to deploy more broadband by a lapse in spectrum auction authority and a looming depletion of a major broadband subsidy.

FCC Chair Jessica Rosenworcel — newly empowered following the U.S. Senate's confirmation of Anna Gomez in September, which gave Democrats a 3-2 edge for the first time in Joe Biden's presidency — led the FCC to propose a revival of net neutrality rules, adopt a digital equity order, and craft new customer protections across the telecom industry.

But, complicating any plans to open more airwaves for exclusive wireless licenses, Congress allowed the FCC's spectrum auction powers to expire, and Rosenworcel also faced fiercer partisan opposition at the agency and a U.S. House of Representatives majority largely hostile to her agenda.

Here's a snapshot of some of the year's top developments at the FCC and across the telecom industry.

Spectrum Auctions on Ice

Congress allowed the FCC's spectrum auction powers to sunset in March and has not substantially moved a bill to reestablish the authority, despite months of pressure from Rosenworcel and efforts from lawmakers closely tuned into the issue.

Spectrum auctions are popular with both parties, because they not only let the FCC make exclusive licenses available to the private sector for wireless advances, but often bring billions of dollars into the treasury without requiring tax hikes.

But the auctions have grown more contentious over the years, as spectrum supply dwindles. Lawmakers' failure to renew the FCC's authority stems from an ongoing tug-of-war for spectrum rights between the U.S. Department of Defense and the wireless industry that appears no closer to resolution by the end of the year.

In one bright spot for the private sector, Congress passed a narrow bill allowing the FCC to issue licenses to the winners of a 2.5 gigahertz auction last year that is projected to accelerate 5G growth. Biden signed the measure into law Tuesday.

Ari Fitzgerald, partner at Hogan Lovells, told Law360 that last winter's lapse in authority was one of the central issues facing the industry this year.

"I think we can't take our eyes off the ball. If the U.S. is going to continue to be the leader in wireless technology, we need to get more spectrum out into the marketplace, get it into the hands of commercial operators. And without FCC auction authority, we can't really do that effectively," he said.

While the agency increasingly examines shared use of certain bands, such techniques are "not yet at the point where they can guarantee the quality of service that can be achieved with exclusive-use licenses," Fitzgerald said. "And every network operator understands that. So auction authority is really important, and restoring that authority is critical."

As it awaits action on Capitol Hill, the agency has floated possible ways to increase spectrum use without leaning on auctions, including a plan to expand use of the 12 GHz band.

Attorneys say it should be relatively easy even in a fractured Congress to re-up the statute by writing the necessary carveouts for the Department of Defense into the bill.

"If there's a specific issue, it seems to me that you could put some conditions around that specific spectrum, or just say no action ... and lay that out, but otherwise grant auction authority," said Marc Martin, firmwide chair of the communications industry group at Perkins Coie LLP. "You don't have to hold up the entirety of it over one spectrum band where there's a dispute with DOD."

Broadband Subsidy Nears End

Another subject that's been top of mind for telecom experts this year is the Affordable Connectivity Program running out of money. Unless lawmakers act soon to extend it, the initially \$14 billion fund is expected to run dry next year, resulting in millions of households losing federal subsidies to help pay for broadband service.

Biden has sought an outlay for the ACP to carry it through December 2024 as an initial step toward longer-term funding, and other legislation could be considered early next year.

But questions about the program's effectiveness could also hamper efforts to fund it again, even though it gained wide support early on.

"That money is currently scheduled to run out in April, and there is a strong desire in the Biden administration to re-appropriate that," said Andrew Lipman, partner at Morgan Lewis & Bockius LLP, but he also noted "concerns by some of the Republicans on waste, fraud and abuse."

Lipman pointed out that the FCC's Universal Service Fund is also at a turning point as policymakers try to iron out its future funding model. This year saw several legal challenges to the fund that are still playing out alongside the debate over revenue.

"Another priority is going to be universal service, both in terms of setting up higher qualifying speeds and also possibly looking at a broader contribution base to afford USF," he said.

Controversial Rules on Tap

Rosenworcel's long-stated plan to resurrect net neutrality rules, requiring the open flow of web traffic by classifying internet service as a common carrier under Title II of the Communications Act, finally advanced this year after Democrats secured their 3-2 FCC majority.

October's proposal was staunchly opposed by the commission's two Republicans, marking the year's first major break from consensus on new FCC rules that were often adopted 4-0.

Rosenworcel put forward a host of reasons for reversing the FCC's 2017 decision under previous FCC Chair Ajit Pai to repeal the open internet order that first established a net neutrality regime. Among them, she cited national security and public safety needs.

"I do agree with the premise that Title II does give the FCC more authority to regulate in the realm of national security, or address national security and law enforcement, but I think the FCC was probably looking for new justifications," said Fitzgerald, who sees the commission acting "relatively quickly" to adopt a final order next year.

"I'm not optimistic that Congress is going to solve this problem by passing reasonable net neutrality protections, because I don't think there's a consensus in Congress about what to require," he said, adding that lawmakers have "gotten used to the pendulum swinging back and forth, depending on who was in the White House" on net neutrality.

"It's a very depressing situation, though, because businesses need to be able to plan effectively," he said.

Fitzgerald said the U.S. Supreme Court's upcoming decisions on the longstanding Chevron doctrine, which gives agencies wide deference to interpret ambiguous statutes, will affect how tough a challenge the commission faces.

"And I think if Chevron is eroded or eliminated, it will make it more difficult. The FCC is going to have to do a much better job of explaining why, under the Communications Act, it should be allowed to regulate broadband internet access as a telecommunications service," he said.

Another big-ticket item that cleared the commission this year was an order creating rules to prevent discrimination in broadband deployment, known as digital redlining.

Congress directed the FCC in the 2021 infrastructure law to craft the rules, but they still ended up passing in only a partisan 3-2 vote in November, because Republicans contended the agency overreached with new standards.

Like the net neutrality plan, the discrimination order is likely to face strong legal opposition, particularly because it uses a broad "disparate impact" standard to determine if practices are discriminatory and also extends the FCC's reach into several new areas, neither of which opponents say the commission has authority to do.

"I think it will be challenged — a number of the trade associations have expressed concerns about it," Lipman said.

One of the grounds will be the use of disparate impact, and that "allegedly it's an over-read by the commission on a fairly innocuous sentence or two in the infrastructure bill," he said. "And there's also

concern that the rules could impact not just carriers and broadband providers themselves, but also contractors, construction companies, and so forth."

When it comes to a legal challenge to the digital equity order, he said the courts are "going to look at the clarity of the delegation by Congress to the FCC."

"On one hand, you could argue that it was fairly ambiguous, vague language, that the commission, at least according to broadband providers, over-read," Lipman added. "I think the commission's view is, 'we have discretion on how to define digital discrimination. And we're doing just that.'"

--Editing by Nicole Bleier.

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