
OPPORTUNITIES AND CHALLENGES IN AN EVER-EVOLVING COMMUNICATIONS LANDSCAPE

Representative Henry A. Waxman[†]

The articles published for this edition of *CommLaw Conspectus: Journal of Communications Law and Policy* are both timely and important—addressing topics such as spectrum allocation policies, the Comcast-NBC Universal transaction, privacy rights in a digital world, and cybersecurity. As communications technology rapidly progresses and consumers use information in new and exciting ways, we are presented with novel and pressing questions of law and policy. New broadband-based platforms hold significant promise for advancing the Nation’s economy, critical infrastructure, public safety, and homeland security, while improving our quality of life. Although these opportunities can present a number of challenges, and even risks, we have the ability to avoid or minimize adverse consequences with careful attention and action.

As the Chairman of the House Energy and Commerce Committee in the 111th Congress, I worked to promote bipartisan policies focused on protecting consumers, creating jobs, and fostering technical innovation. The Committee addressed a range of critical communications issues, such as privacy, preserving an open Internet, spectrum allocation, the Universal Service Fund, and creating a nationwide broadband network for our first responders.

We also passed into law important communications related legislation, in-

[†] Henry Waxman represents California’s 30th Congressional District, which includes the cities of Santa Monica, Beverly Hills, Agoura Hills, Calabasas, Hidden Hills, Malibu, Westlake Village, and West Hollywood, as well as such areas of Los Angeles as Beverly-Fairfax, Pacific Palisades, Brentwood, Beverlywood, Topanga, Agoura, Chatsworth, West Hills, Canoga Park, and Westwood. In January 2009, Rep. Waxman became the Chairman of the House Energy and Commerce Committee. The Energy and Commerce Committee has principal responsibility for legislation and oversight in the areas of public health, consumer protection, food and drug safety, air quality, the environment, energy, telecommunications, and interstate and foreign commerce.

cluding the 21st Century Communications and Video Accessibility Act of 2010,¹ the broadband provisions in the American Recovery and Reinvestment Act,² the DTV Delay Act,³ the Truth in Caller ID Act,⁴ the Commercial Advertisement Loudness Mitigation Act (CALM Act),⁵ the Local Community Radio Act,⁶ and the Satellite Television Extension and Localism Act.⁷ Except for the DTV Delay Act and the Recovery Act, all of these measures had overwhelming bipartisan support in both the House of Representatives and the United States Senate.

Clearly, we are in a transformational period in communications technology. IP and broadband based services, devices, and applications are changing the nature of how we share information—whether for everyday communications among friends and family, accessing video, music, news, and education, serving energy and other critical infrastructure industries, or transmitting public safety and first responder communications, including the 9-1-1 system. These new technologies also help to bridge communications gaps, whether due to distance, disability, or language barriers.

As the 112th Congress begins its work, I am hopeful that my Republican colleagues will build upon our record of bipartisan cooperation, particularly in the area of communications technology. It is in the best interests of Democrats and Republicans alike to ensure that the United States remains the global leader for Internet-based innovation and the IP networks of the 21st Century. It is only through this kind of leadership that we can ensure that all Americans have access to the incredible social and economic opportunities created by modern communications networks and innovation. In order to safeguard our leadership in this area, I believe the 112th Congress should begin to address the following issues:

PROTECTING AND PRESERVING AN OPEN INTERNET

Like President Obama, I believe that preserving an open Internet is the best way to promote the economic growth made possible by the Internet. Particularly in the wake of the U.S. Court of Appeals for the District of Columbia's

¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 275.

² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 118-119, 128, 512-516.

³ DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

⁴ Truth in Caller ID Act of 2009, Pub. L. No. 111-331, 124 Stat. 3572 (2010).

⁵ Commercial Advertisement Loudness Mitigation Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010).

⁶ Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072.

⁷ Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218.

ruling in *Comcast Corp. v. FCC*,⁸ clear rules to preserve Internet openness will benefit industry by providing the necessary clarity, consistency, and predictability for network investment and innovation.

Last fall, I brought together representatives from phone and cable companies, technology companies, and consumer and open-Internet groups to find a bipartisan legislative compromise on this matter. Despite naysayers on both the left and the right, we were able to reach significant agreement on draft legislation that would protect and promote an open Internet. The resulting proposal contained four key consumer protections that would:

- Restore the FCC's authority to prevent blocking of Internet content, applications, and services, which was struck down by the court in the Comcast decision;
- Prevent phone and cable companies from unjustly or unreasonably discriminating against any lawful Internet traffic, and otherwise permit network practices that preserve innovation;
- Prohibit wireless broadband providers—who have relatively unique network capacity challenges—from blocking websites, as well as applications that compete with voice or video conferencing, while preserving the FCC's authority to adopt additional safeguards under its existing authorities; and
- Direct the FCC to issue transparency regulations so consumers know the price, performance, and network management practices of their broadband providers.

The proposed approach also would have removed the possibility of the FCC reclassifying Internet services under Title II of the Communications Act for two years.

This proposal received broad support because both sides would emerge as winners. Consumers would win protections that preserve the openness of the Internet, while the Internet service providers would receive relief from their fears of reclassification. Ultimately, however, we were unable to achieve the bipartisan support that we strove for throughout the entire process.

On December 21, 2010, the FCC's Democratic majority adopted a regulatory framework to preserve Internet freedom and openness. While I would have preferred enactment of our legislative solution, I support and commend the FCC for the actions it took late last year. Technology companies, Internet service providers, the investment community, and, most importantly, American consumers, stand to benefit from the clarity and consistency that the FCC's action provides in preserving the open Internet.

⁸ *Comcast Corp. v. Federal Commc'ns Comm'n*, 600 F.3d 642 (D.C. Cir. 2010).

ADDRESSING ESCALATING DEMAND FOR SPECTRUM

Ongoing developments in wireless broadband technology—along with increased consumer demand—have raised questions about the sufficiency of current spectrum allocations for wireless communications services.

According to the FCC, the wireless industry in the United States needs additional spectrum to simply keep up with the explosion in wireless data usage and to remain competitive with other nations.⁹ To remain competitive, to create jobs, and to foster innovation, our nation needs a comprehensive spectrum policy that encompasses both commercial and government spectrum. One important step is to inject transparency into the spectrum allocation process and obtain an inventory of current federal and non-federal spectrum. This was the reason the bipartisan leaders of the Energy and Commerce Committee wrote H.R. 3125, the Radio Spectrum Inventory Act, which was reported out of the Energy and Commerce Committee and passed with significant support in the House last year. Although this measure also had bipartisan support in the Senate, the bill was blocked by the budget-related objections of one Senator. In light of a roadblock in the Senate, the FCC has initiated its own effort to create a spectrum inventory.¹⁰

Beyond the need to conduct a full inventory, the FCC also has taken innovative steps late last year by focusing on revising its experimental licensing rules and accelerating opportunistic use of both licensed and unlicensed spectrum.¹¹

On the federal side, I was pleased to see the Obama Administration direct the National Telecommunications and Information Administration (NTIA) to conduct a review of the federal government's spectrum use. NTIA consequently set an aggressive goal of identifying 500 MHz of spectrum—including 115 MHz that can be transitioned for mobile broadband use by the wireless industry.¹²

Finding and reallocating federal spectrum is a difficult undertaking that of-

⁹ See Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Prepared Remarks at the FCC Spectrum Summit: Unleashing America's Invisible Infrastructure (Oct. 21, 2010), available at http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1021/DOC-302331A1.pdf.

¹⁰ See Letter from Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, to Henry A. Waxman, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 29, 2010).

¹¹ See generally *In re Promoting Expanded Opportunities for Radio Experimentation and Market Trials under Part 5 of the Commission's Rules and Streamlining Other Related Rules*, Notice of Proposed Rulemaking, FCC 10-197, ET Docket No. 10-236 (Nov. 30, 2010); *In re Promoting More Efficient Use of Spectrum Through Dynamic Spectrum Use Technologies*, Notice of Inquiry, FCC 10-198, ET Docket No. 10-237 (Nov. 30, 2010).

¹² DEP'T OF COMMERCE, AN ASSESSMENT OF THE NEAR-TERM VIABILITY OF ACCOMMODATING WIRELESS BROADBAND SYSTEMS IN THE 1675-1710 MHz, 1755-1780 MHz, 3500-3650 MHz, AND 4200-4220 MHz, 4380-4400 MHz BANDS 1-8 (2010).

ten implicates matters of national security. I appreciate and support the need to preserve sensitive military and national security uses for spectrum and any efforts by Congress or the Administration will certainly need to remain cognizant of this challenge.

Further, in November 2009, Representative Rick Boucher, Chairman of the Subcommittee on Communications, Technology, and the Internet and I asked the Government Accountability Office to study federal and commercial spectrum use, and the prospects of spectrum sharing opportunities. This study is in progress and I look forward to the results, which I expect will be of benefit to the Committee.

In addition to these efforts, I am encouraged by the FCC's National Broadband Plan recommendation to provide the Commission with authority to conduct voluntary incentive auctions to free up additional spectrum. By providing incentives for commercial licensees, such as broadcasters, to return their spectrum for next generation uses, we should be able to make progress in addressing the country's future spectrum needs. Much of the broadcast spectrum that has been identified is considered "beach-front" spectrum, with propagation characteristics ideal for wireless broadband services.

If designed correctly, incentive auctions will reimburse incumbent licensees appropriately and provide additional funds to be utilized for other important public policy purposes such as funding a nationwide public safety broadband network or reducing the federal deficit. Notwithstanding the potential benefits of incentive auctions, policymakers should ensure that free, over-the-air broadcasting remains a viable medium for millions of Americans, providing local news and educational programming.

During the 111th Congress, legislation was introduced by Senator Rockefeller to provide the FCC with incentive auction authority. I am committed to working on a bipartisan and bicameral basis to provide the Commission with this important tool.

MODERNIZING AND IMPROVING UNIVERSAL SERVICE

Congress and the FCC must reform the Universal Service Fund, which is designed to enhance access to communications networks. Unlike its historical focus on telephone connectivity, however, universal service reform must be repurposed to promote access to broadband networks, including in rural areas. Although it should be repurposed, the FCC must ensure that funds are collected fairly, used wisely and efficiently, and provide broadband service to all Americans. Since the program is funded by consumers, recipients must be subject to full accountability and transparency requirements. Simply put, we cannot tolerate waste, abuse, or fraud from entities that receive public funds, and

the FCC or Congress should take steps to eliminate opportunities for regulatory arbitrage.

Before we can undertake such fundamental reform, it is important to have a thorough understanding of where universal service dollars currently are going. Although this information is public, it is rarely provided in a user-friendly format that allows members of the public to understand precisely which companies benefit.

Towards that end, the bipartisan leadership of the Energy and Commerce Committee initiated an annual practice of requesting specific data from the FCC to assist the Committee's work and the public's understanding of the universal service high-cost program. The Committee requested information concerning the top recipients, disbursements, and per-line subsidies, and the study areas with the most eligible telecommunications carriers. Through increased levels of transparency and accountability, it is my hope that Congress and the FCC can ensure that the fiscal burdens of universal service are borne in an equitable manner, that subsidies are efficiently targeted, and that public funds are not spent in wasteful or duplicative ways.

I applaud the extraordinary leadership of Representative Boucher as the Chairman of the Subcommittee on Communications, Technology, and the Internet. As he departs Congress, Chairman Boucher's command of communications policy will be sorely missed by Republicans and Democrats alike. His universal service reform legislation—coauthored with Representative Terry—proposed numerous positive steps towards reform, such as better targeting of subsidies, a reduction of duplicative wireless subsidies, and empowering the FCC to create a contribution methodology that best reflects the communications marketplace. I am sure the 112th Congress will benefit from his work.

ENSURING DEPLOYMENT OF A NATIONWIDE, INTEROPERABLE BROADBAND PUBLIC SAFETY NETWORK

Our nation's first responder and public safety agencies require a state-of-the-art, wireless broadband network with a nationwide level of operability and interoperability. This network must be made available as quickly as possible, in step with commercial fourth generation (4G) build-outs, cover as much of the country as possible, including areas not typically commercially feasible, and leverage to the fullest extent possible the assets of multiple service providers and manufacturers. The FCC's National Broadband Plan presented a sound, comprehensive set of recommendations to achieve these objectives. Once again the bipartisan leadership of the Committee worked together to develop a staff discussion draft to implement many of the FCC's public safety oriented recommendations. Significantly, the staff discussion draft was the first legisla-

tive proposal to include a funding mechanism to ensure nationwide coverage including to rural areas and localities facing budget challenges in this difficult economic climate. The draft proposed that funding would come from future auction proceeds, including from the adjacent 700 MHz D block. Debate continues unresolved, however, concerning the disposition of the D Block, and the issue of whether this key spectrum block should be reallocated from commercial to public safety use will have to be addressed in the 112th Congress.

In this regard, I am committed to pursuing a compromise that best achieves the goal of building this critical tool for first responders throughout the country. With the tenth anniversary of the attacks of September 11, 2001 approaching, we must accelerate our efforts to reconcile differing perspectives in the House of Representatives, work in a bicameral fashion with our Senate colleagues, and collaborate with the public safety community and industry to reach a compromise on this critical issue.

PROTECTING CONSUMER PRIVACY ON-LINE

Protecting consumer privacy over broadband networks has been a focus for lawmakers for a number of years, and I anticipate privacy will remain a priority for the 112th Congress. Protecting consumer privacy on the Internet requires an appropriate balance. On the one hand, users and companies appear to both derive significant benefits from the collection and use of consumers' information. One only has to look at Facebook, or other social-oriented mobile smartphone-based apps, to witness examples of consumer comfort with sharing private data, such as location information, and the success of innovative services providing consumers with more targeted applications and advertising. At the same time, we learn about intentional and unintentional breaches of private information that have led to real harm. Unclear or confusing privacy policies can also leave consumers at a loss in understanding who has access to their personal information, what that information is being used for, and the options that consumers have to better exert control over their information. Additionally, there are competing objectives, such as the potential need to use private information in the furtherance of law enforcement, cybersecurity, and the overall health of communications networks. Relevant laws are often outdated and can be confusing to apply to new communications technologies. The need for increased consumer protection in cyberspace is becoming increasingly apparent, because consumer trust is a prerequisite to the success of communications services.

I am glad to see industry efforts through self-regulation, standards, and best practices. Nevertheless, there may be a need for legislation to provide a baseline level of consumer protection in the area of privacy, especially with regard

to cloud computing and location-based services.

ADVANCING CYBERSECURITY

As with protecting consumer privacy, another ever-present concern is to ensure the security of communications. As more and more networks and applications become IP-based, powered by the many initiatives designed to increase the availability of broadband communications networks, the risk of a cyber-related attack grows, along with the potential adverse consequences. We of course already see many examples, including high-profile cases, of cyber attacks, and it's only a matter of time before such attacks become more ubiquitous with respect to mobile devices. The FCC's National Broadband Plan contained many excellent recommendations to improve cybersecurity, with some proceedings already underway and more to come. I am sure the 112th Congress will need to continue to pay special attention to this important and potentially dangerous concern.

CONCLUSION

In the 112th Congress I look forward to working on these issues of great importance to our country. I am hopeful that the Energy and Commerce Committee will continue to work on communications and technology issues in bipartisan fashion. If we do, I am confident we can accomplish a great deal.

I commend the staff of CommLaw Conspectus for their dedication to advancing the scholarly debate on communications legal and policy matters. The staff should be proud of their work, and I greatly appreciate the opportunity to open the first issue of 2011.