
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

THIRD EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THIRD EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in
The Technology, Media and Telecommunications Review, 3rd edition
(published in October 2012 – editor John P Janka).

For further information please email
Adam.Sargent@lbresearch.com

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

THIRD EDITION

Editor
JOHN P JANKA

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska, Alexandra Wan

PUBLISHING ASSISTANT
Lucy Brewer

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Joanne Morley

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2012 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors
No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2012, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-50-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

BAKER & MCKENZIE, WONG & LEOW

BING HODNELAND ADVOKATSELSKAP DA

CASTRO, BARROS, SOBRAL, GOMES ADVOGADOS

CLEARY GOTTlieb STEEN & HAMILTON LLP

DESCHAMPS Y ASOCIADOS SC

ELVINGER, HOSS & PRUSSEN

ENS (EDWARD NATHAN SONNENBERGS)

JONES DAY

LATHAM & WATKINS

LATHAM & WATKINS LLP

LATHAM & WATKINS GAIKOKUHO JOINT ENTERPRISE

MCCARTHY TÉTRAULT LLP

MEHMET GÜN & PARTNERS

MINTER ELLISON

ROSCHIER ADVOKATBYRÅ AB

ROSCHIER, ATTORNEYS LTD

SAID AL SHAHRY & PARTNERS

SETH DUA & ASSOCIATES

SHALAKANY LAW OFFICE

SHAY & PARTNERS

SNR DENTON & CO

URÍA MENÉNDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

WENGER PLATTNER

YOON & YANG LLC

CONTENTS

| | |
|---------------------------------------------------------------------------------------------|-----|
| Editor's Preface | vii |
| <i>John P Janka</i> | |
| List of Abbreviations | ix |
| | |
| Chapter 1 AUSTRALIA | 1 |
| <i>Anthony Lloyd, Paul Kallenbach and Paul Schoff</i> | |
| Chapter 2 BRAZIL | 17 |
| <i>André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes</i> | |
| Chapter 3 CANADA | 28 |
| <i>Hank Intven and Grant Buchanan</i> | |
| Chapter 4 EGYPT | 42 |
| <i>Aly El Shalakany and Omar Sherif</i> | |
| Chapter 5 EUROPEAN UNION | 53 |
| <i>Maurits J F M Dolmans, Francesco Maria Salerno and Malik Dhanani</i> | |
| Chapter 6 FINLAND | 83 |
| <i>Mikko Manner, Anna Haapanen and Vilhelm Schröder</i> | |
| Chapter 7 FRANCE | 94 |
| <i>Myria Saarinen and Jean-Luc Juban</i> | |
| Chapter 8 GERMANY | 107 |
| <i>Laura Johanna Reinlein and Gabriele Wunsch</i> | |
| Chapter 9 HONG KONG | 122 |
| <i>Simon Berry and Viola Jing</i> | |
| Chapter 10 INDIA | 136 |
| <i>Atul Dua, Rahul Goel and Anu Monga</i> | |

| | |
|-------------------|------------------------------------------------------------------------------------------------|
| Chapter 11 | ITALY 148 <i>Stefano Macchi di Cellere</i> |
| Chapter 12 | JAPAN 160 <i>Hiroki Kobayashi, Richard Fleming, Saori Kawakami and Chiyo Toda</i> |
| Chapter 13 | KOREA..... 175 <i>Wonil Kim and Kwang-Wook Lee</i> |
| Chapter 14 | LEBANON..... 187 <i>Souraya Machnouk, Rania Khoury and Ziad Maatouk</i> |
| Chapter 15 | LUXEMBOURG..... 198 <i>Franz Fayot and Linda Funck</i> |
| Chapter 16 | MEXICO..... 216 <i>Jaime Deschamps</i> |
| Chapter 17 | NORWAY 227 <i>Olav Torvund, Jon Wessel-Aas and Magnus Ødegaard</i> |
| Chapter 18 | OMAN 235 <i>Syed Ali Naveed Arshad and Stephen T Sayer</i> |
| Chapter 19 | PORTUGAL 245 <i>Joana Torres Ereio, Joana Mota and Raquel Maurício</i> |
| Chapter 20 | SINGAPORE 258 <i>Ken Chia and Koh See Khiang</i> |
| Chapter 21 | SOUTH AFRICA..... 280 <i>Zaid Gardner</i> |
| Chapter 22 | SPAIN..... 292 <i>Pablo González-Espejo and Leticia López-Lapuente</i> |
| Chapter 23 | SWEDEN 307 <i>Erik Ficks and Björn Johansson</i> |
| Chapter 24 | SWITZERLAND 318 <i>Michael Isler</i> |

| | | |
|-------------------|----------------------------------------------------------------------------------------|-----|
| Chapter 25 | TAIWAN | 332 |
| | <i>Arthur Shay and David Yeh</i> | |
| Chapter 26 | TURKEY | 343 |
| | <i>Serra Başoğlu Gürkaynak, Begum Yavuzdoğan, M Onur Sumer and Bentley J Yaffe</i> | |
| Chapter 27 | UNITED ARAB EMIRATES | 356 |
| | <i>Joby Beretta</i> | |
| Chapter 28 | UNITED KINGDOM..... | 369 |
| | <i>Omar Shah and Gail Crawford</i> | |
| Chapter 29 | UNITED STATES | 388 |
| | <i>John P Janka and Jarrett S Taubman</i> | |
| Appendix 1 | ABOUT THE AUTHORS | 405 |
| Appendix 2 | CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... | 426 |

EDITOR'S PREFACE

The digital revolution continues to alter both local culture and the world in ways that few could have imagined when the seeds of the Internet were sown more than 40 years ago. The Internet allows ideas, news and other information to flow more freely than ever before, making it increasingly difficult for nations to control this flow at their geographical borders. Moreover, the Internet is forcing changes in many long-standing business models. It now serves for many as the preferred means of communication and media delivery, displacing or supplementing other means, such as traditional copper phone service, print media, subscription TV services and broadcast networks, in the process. The Internet now also serves as a new marketplace for goods and services, as well as a primary research tool for many.

New technologies place into our hands more computing power than was used by astronauts when the Internet was in its infancy. The proliferation of these mobile devices – smartphones and tablet computers – leads many to employ texting, e-mail and blogging instead of communicating by the spoken word. We expect to have constant access to the networks that we use in this manner to stay in contact with our social circles and the rest of the world. And our most intimate thoughts are often now memorialised for the long term, in ways that can be potentially used by third parties for purposes we have not truly anticipated.

The legal frameworks in many jurisdictions are now straining under these disruptive changes. The old adage that technology outpaces the law is more true today than ever. No doubt, the 'hands-off' approach to the Internet that many lawmakers and regulators once took has facilitated many of these developments. At the same time, policymakers are now struggling with new types of concerns, as broadband Internet access service becomes more and more essential to our lives. Is the marketplace responding to the needs of consumers? Are broadband networks being deployed everywhere that they are needed? Are the capabilities of those networks adequate? If not, how should government ensure that none of its citizens is left behind? Is it appropriate for government to invest in broadband infrastructure in a manner similar to its historical investment in roads,

bridges, and other critical infrastructure? Is it fair to liken broadband service to a utility, or does the state of competition make that an unfair analogy? Can government provide the best overall solution, or should it just fill in any infrastructure 'gaps' not closed by commercial providers? Should government establish 'ground rules' upfront, or should it intervene when it perceives that abuses of market power exist? How does government avoid skewing the competitive marketplace by (inadvertently or otherwise) preferring one type of technology over another and thus effectively picking the winners and losers who otherwise might emerge in the marketplace, and challenge the incumbents? Who are the new 'gatekeepers' in the Internet broadband distribution chain, and is it enough to focus on regulating the network operators when others further up the chain, such as application service and equipment providers, have more influence than ever before on what information we access and how we access it?

This expectation of instant and continuous mobile connectivity, and the development of bandwidth-intensive 'apps', create an increasing demand on the limited radio frequency spectrum asset. While digital technologies allow more efficient use of spectrum than ever before, the laws of physics still render some spectrum bands more valuable than others for mobile communications. The demand for wireless spectrum outstrips the supply in many markets, and regulators are increasingly being forced to 'refarm' spectrum bands that were designated for other purposes before the mobile broadband revolution was a glimmer in anyone's eye.

This third edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 29 jurisdictions around the world. Although the authors cannot fully address each of these topics in the following articles, we hope this book provides a helpful framework for starting your analysis.

John P Janka

Latham & Watkins LLP

Washington, DC

September 2012

LIST OF ABBREVIATIONS

| | |
|-------|-------------------------------------------|
| 3G | Third-generation (technology) |
| 4G | Fourth-generation (technology) |
| ADSL | Asymmetric digital subscriber line |
| ARPU | Average revenue per user |
| BIAP | Broadband Internet access provider |
| BWA | Broadband wireless access |
| CATV | Cable TV |
| CDMA | Code division multiple access |
| CMTS | Cellular mobile telephone system |
| DAB | Digital audio broadcasting |
| DDoS | Distributed denial-of-service |
| DoS | Denial-of-service |
| DSL | Digital subscriber line |
| DTH | Direct-to-home |
| DTTV | Digital terrestrial TV |
| DVB | Digital video broadcast |
| DVB-H | Digital video broadcast – handheld |
| DVB-T | Digital video broadcast – terrestrial |
| ECN | Electronic communications network |
| ECS | Electronic communications service |
| EDGE | Enhanced data rates for GSM evolution |
| FAC | Full allocated historical cost |
| FBO | Facilities-based operator |
| FCL | Fixed carrier licence |
| FTNS | Fixed telecommunications network services |
| FTTC | Fibre to the curb |
| FTTH | Fibre to the home |
| FTTN | Fibre to the node |

List of Abbreviations

| | |
|------------------|------------------------------------------------------------------------------------------------------|
| FTT _x | Fibre to the <i>x</i> |
| FWA | Fixed wireless access |
| Gb/s | Gigabits per second |
| GB/s | Gigabytes per second |
| GSM | Global system for mobile communications |
| HDTV | High-definition TV |
| HITS | Headend in the sky |
| HSPA | High-speed packet access |
| IaaS | Infrastructure as a service |
| IAC | Internet access provider |
| ICP | Internet content provider |
| ICT | Information and communications technology |
| IPTV | Internet protocol TV |
| ISP | Internet service provider |
| kb/s | Kilobits per second |
| kB/s | Kilobytes per second |
| LAN | Local area network |
| LRIC | Long-run incremental cost |
| LTE | Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers) |
| Mb/s | Megabits per second |
| MB/s | Megabytes per second |
| MMDS | Multichannel multipoint distribution service |
| MMS | Multimedia messaging service |
| MSO | Multi-system operators |
| MVNO | Mobile virtual network operator |
| MWA | Mobile wireless access |
| NFC | Near field communication |
| NGA | Next-generation access |
| NIC | Network information centre |
| NRA | National regulatory authority |
| OTT | Over-the-top (providers) |
| PaaS | Platform as a service |
| PNETS | Public non-exclusive telecommunications service |
| PSTN | Public switched telephone network |
| RF | Radio frequency |
| SaaS | Software as a service |
| SBO | Services-based operator |
| SMS | Short message service |
| STD-PCOs | Subscriber trunk dialling-public call offices |
| UAS | Unified access services |
| UASL | Unified access services licence |
| UCL | Unified carrier licence |
| UHF | Ultra-high frequency |
| UMTS | Universal mobile telecommunications service |
| USO | Universal service obligation |

List of Abbreviations

| | |
|-------|-------------------------------------------------|
| UWB | Ultra-wideband |
| VDSL | Very high speed digital subscriber line |
| VHF | Very high frequency |
| VOD | Video on demand |
| VoB | Voice over broadband |
| VoIP | Voice over Internet protocol |
| WiMAX | Worldwide interoperability for microwave access |

Chapter 29

UNITED STATES

John P Janka and Jarrett S Taubman¹

I OVERVIEW

This chapter provides an overview of telecommunications, broadband Internet access and media regulation in the United States. Given the complexity of such regulation – which is constantly evolving in response to technological advances, market shifts, and political dynamics – this chapter is not intended to be comprehensive. Rather, it is intended to demonstrate the nature and scope of such regulation, and to identify some of the more significant legal and policy developments of the past year – including attempts by the federal government to subject Internet access services to increased regulation.

II REGULATION

i The regulators

Regulation of telecommunications, broadband Internet access, and media in the United States is governed primarily by the following authorities, within parameters established under federal and state statutes and constitutions.

The Federal Communications Commission

The Federal Communications Commission (‘the FCC’) is an independent US regulatory agency established by the US Congress pursuant to the Communications Act of 1934, as amended (‘the Communications Act’). The FCC is charged with regulating all non-federal government use of the radiofrequency spectrum, all interstate telecommunications, and all international telecommunications involving an end-point in the United States. Together with the US State Department Office of Communications and Information

¹ John P Janka is a partner and Jarrett S Taubman is counsel at Latham & Watkins LLP.

Policy, the FCC participates in international spectrum negotiations and related matters at the International Telecommunication Union ('the ITU').

The National Telecommunications and Information Administration

The National Telecommunications and Information Administration ('NTIA') is an executive agency of the federal government within the US Department of Commerce. NTIA has primary responsibility for regulating all use of the radiofrequency spectrum by federal government users, and works with the FCC to coordinate spectrum use between federal and non-federal users.

State and local regulators

Telecommunications within a single US state are governed by individual state regulatory agencies, typically having jurisdiction over telephone companies and other 'public utilities' providing services within the state, as well as over many consumer protection matters. State or local authorities typically also issue franchises to operators of CATV systems whose service lines cross locally-controlled, public rights-of-way. Such authorities also have jurisdiction over the siting of telecommunications facilities. The jurisdiction of state public utility commissions ('PUCs') and of other state and local authorities over these types of matters is limited by state constitutions and statutes as well as by federal supremacy. For example, in case of a conflict between the FCC and state or local regulations, the state or local regulation typically is preempted, unless the US Congress or the FCC expressly permits state or local authorities to enforce their own regulations. The FCC has effectively exercised exclusive jurisdiction over most matters involving Internet access services, due to the interstate and international nature of the Internet.

The Federal Trade Commission

The Federal Trade Commission ('the FTC') protects consumer interests in such areas as online marketing and telemarketing, among other things. Both the FTC and the FCC have oversight over certain telemarketing matters. Both the FTC and the US Department of Justice ('the DoJ') Antitrust Division police market concentration by examining mergers and other major transactions in the sector, along with the attorneys general of the states.

ii Sources of federal telecommunications and media law and policy

In the United States, federal telecommunications law is derived principally from statutes enacted by Congress (and signed by the President) as well as administrative regulations, orders, and policies adopted by the FCC.

The Communications Act

The FCC's governing statute, codified in Title 47 of the United States Code, establishes the framework for federal regulation of telecommunications, broadband Internet access and media in the United States. The Communications Act consists of seven major sections, or 'Titles'. The most significant of these are Title I (establishing the FCC and defining the scope of its authority), Title II (governing the activities of telecommunications carriers), Title III (governing the use of radio spectrum, including by wireless carriers and mass

media broadcasters) and Title VI (governing the provision of cable television services). The Communications Act was substantially amended by the Telecommunications Act of 1996, which opened communications markets to greater competition in many respects.

Ancillary authority

Section 4(i) of the Communications Act provides that the FCC ‘may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions’. In recent years, the FCC has attempted to use this ‘ancillary authority’ to regulate subject matter outside of the traditional scope of its jurisdiction (e.g., broadband Internet access services) although, as discussed below, these attempts have met with mixed results.

Forbearance authority

Section 10(a) of the Communications Act enables the FCC to ‘forbear’ from applying any provision of the Act to a ‘telecommunications’ carrier or service (but not other types of services or providers) if the FCC determines that: (1) enforcement of such provision is not necessary to ensure just, reasonable and non-discriminatory rates, terms and conditions of service; (2) enforcement of such provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision is consistent with the public interest. The FCC has used this authority to free telecommunications carriers from restrictive common carrier regulations, particularly where the relevant market is competitive.

FCC regulations and orders

In fulfilling its statutory mandate, the FCC plays a quasi-legislative role by promulgating administrative regulations, after providing notice to the public and an opportunity for public comment, as required by the Administrative Procedure Act. The FCC also plays a quasi-judicial role in interpreting existing law in evaluating any number of disputes and applications (e.g., licence applications or petitions for interpretation of the law). The resulting orders and regulations constitute an extensive body of administrative law governing telecommunications, broadband Internet access and media in the United States.

Judge-made law

The judicial branch of the US government also plays an important role in US lawmaking, at both the state and the federal level, reviewing administrative agency decisions for consistency with the governing statutes, and reviewing statutory law for compliance with the federal and state constitutions. Any interested party may seek review of an FCC action in a federal court of appeals. The courts review FCC decisions for consistency with its governing statutes and the US Constitution. In general, the FCC is entitled to deference in interpreting the Communications Act where it is ambiguous and capable of more than one reasonable interpretation. In addition, the courts review FCC decisions to ensure that they are not ‘arbitrary or capricious’ – for example, the FCC may not depart from its own precedent without a reasoned basis for doing so, and more generally must have a reasoned basis for its decisions.

The FCC's National Broadband Plan

The FCC's National Broadband Plan ('the Plan'), published in 2010, is intended as a comprehensive blueprint for US broadband policy, and includes a number of recommendations for expanded access to broadband services in areas deemed 'unserved' or 'under-served' by the FCC's standards. Initially, the Plan recommends that all Americans should have dedicated Internet access at speeds of at least 4Mb/s downstream and 1Mb/s upstream. The Plan also recommends that 100 million Americans should have access to 100Mb/s downstream and 50Mb/s upstream broadband transmission capability within 10 years, and seeks to facilitate the deployment of wireless broadband services in particular. The Plan makes only recommendations; the FCC must seek public comment before adopting any new rules to implement the Plan. The FCC has a number of proceedings pending regarding proposals that seek to achieve these goals.

iii Regulated activities

Among other things, the Communications Act requires a party to obtain authority from the FCC prior to constructing or operating an 'apparatus for the transmission of energy or communications or signals by radio' or engaging in the provision of interstate or international telecommunications services. The specific procedures for obtaining such authority vary based on a number of factors, including the nature of the underlying authorisation, the nature of the proposed service, and the subdivision of the FCC with primary responsibility for that service.

In most cases in which an applicant must file an application to obtain authority from the FCC, that application must be placed on 'public notice', giving interested parties an opportunity to comment during a specified period (e.g., 30 days). Certain types of application (e.g., many non-common carrier wireless applications, requests for short-term authority or experimental licences) are subject to more streamlined processing, which may circumvent the need for public notice and comment in the first instance. Notably, the FCC now permits most applications to be filed electronically, and also allows the public to track the status of such applications through electronic filing systems (databases) accessible over the Internet.

The FCC has granted certain types of operating authority by rule, obviating the need for individual users to seek and obtain separate authority from the FCC. For instance, the FCC has authorised by rule all common carriers to provide domestic interstate telecommunications services (this does not obviate the need for wireless service providers generally to obtain separate spectrum licences, as discussed below) and, in certain cases, also has eliminated the requirement to obtain authority before constructing radio facilities. The FCC also has permitted certain wireless operations to proceed on an 'unlicensed' basis, provided that the equipment used in such operations has been evaluated and authorised in accordance with the FCC's procedures.

iv Ownership and market access restrictions

Foreign ownership restrictions

Sections 310(a) and (b) of the Communications Act restrict foreign ownership of common carrier, aeronautical and broadcast spectrum licences, and of US entities holding those licences. These statutory provisions provide that foreign individuals and

entities may not directly hold more than 20 per cent of the equity or voting interests in an entity that holds one of these types of FCC licences. Higher levels of indirect foreign ownership of a licensee are permissible where such ownership is held through US entities. More specifically, where the FCC licensee is owned and controlled directly by another US company: (i) the 20 per cent limit effectively increases to 25 per cent, and (ii) the FCC may allow foreign ownership in excess of 25 per cent at or above the US parent company level, where the FCC determines that allowing such ownership would serve the 'public interest'. In addition, as the result of a forbearance order issued earlier this year (which effectively allows the FCC to avoid the application of certain arcane language in the text of the Communications Act), the FCC now will also permit higher levels of indirect foreign ownership in a common carrier entity that is held through a non-controlling US company where the FCC concludes that such ownership would serve the 'public interest'. Often, the FCC has permitted up to 100 per cent foreign ownership of common carriers. The FCC has found that higher levels of foreign ownership from WTO member states presumptively serve the 'public interest'. The FCC generally will not waive the 25 per cent limit with respect to broadcast licensees.

Even transactions that are consistent with the foreign ownership limits described above may be scrutinised by the Executive Branch's Committee on Foreign Investment in the United States, an interagency group that reviews significant foreign investments to ensure that they do not raise national security or law enforcement concerns. Transactions also may be reviewed by 'Team Telecom', an informal group made up of staff from the DoJ, the Federal Bureau of Investigation, and the Department of Homeland Security, which is active in FCC proceedings involving significant foreign ownership.

Market access

Generally, the FCC does not authorise facilities located entirely outside of the United States to serve the US market. An exception arises with respect to foreign satellites, which may serve the United States if (1) the satellite is licensed by a foreign jurisdiction that permits US satellites to serve that jurisdiction without undue restrictions (such access is presumed where the foreign jurisdiction is a WTO member), (2) the satellite complies with the same FCC technical and service requirements that apply to US satellites, and (3) the satellite's operation would not give rise to any national security, spectrum policy or other policy concerns.

Multiple and cross-ownership

With the exception of its broadcast licences, the FCC generally does not limit the number of spectrum licences that may be held by or 'attributed' to (i.e., deemed to be held by) a single individual or entity. However, in evaluating the likely competitive effects of significant wireless transactions, the FCC has utilised a 'spectrum screen' to identify local markets that merit closer scrutiny by looking at the total amount of spectrum that would be controlled by one individual or entity, and the FCC has indicated that it will soon initiate a proceeding to re-examine its use and definition of such spectrum screens. The FCC also has imposed certain limitations on the ability of parties that hold licences or authorisations of one type to hold licences or authorisations of another type. For example, the FCC's rules prohibit cable service providers from holding an attributable interest in the local exchange carrier that has historically served the same market, and

vice versa. The FCC has explicit limits on the number of broadcast stations (radio and TV) an individual or entity can own in a given local market, as well as the percentage of households nationwide that can be covered by television stations attributable to a single individual or entity. The FCC also has adopted rules limiting the cross-ownership of radio and television stations, as well as the cross-ownership of broadcast stations and newspapers. Several of these rules are under review by the FCC and the courts.

v Transfers of control and assignments

Under Section 310(d) of the Communications Act, FCC approval must be obtained prior to assigning most types of radiofrequency-based licences, permits or authorisations from one party to another, or transferring ‘control’ of a holder of such radiofrequency authority from one party to another. Exceptions exist for certain *pro forma* transactions, and certain types of licences. Similarly, under Section 214 of the Communications Act, FCC approval is required prior to assigning interstate or international telecommunications authorisations or transferring control of a US carrier that provides interstate or international telecommunications services. In reviewing such applications, the FCC typically attempts to gauge whether the application will serve the ‘public interest, convenience, and necessity’ by weighing the expected benefits of the proposed transaction against its expected harms, including the effects on competition and consumers. Most states have similar requirements applicable with respect to intrastate activities, and some require prior approval or notice regarding the issuance of debt by, or changes in the debt structure of, entities that are subject to their jurisdiction. State statutes sometimes require that other factors be considered as well, such as the expected effect on jobs in the state.

The time frames for obtaining FCC approvals in connection with mergers, acquisitions or other major transactions can vary widely. The FCC’s non-binding goal is to process combined applications for major transactions within six months. The FCC has exceeded this time frame on many occasions, typically when a transaction poses competitive concerns, or is contested by third parties, in which case approval can take nine to 12 months, or possibly longer. More routine transactions often are processed in a shorter period, but there can be no assurance that the FCC will act by any deadline.

Within the past year, the FCC has completed its review of several major telecommunications and media transactions. Most notably:

- a* In September 2011, the FCC approved the acquisition of Citadel Broadcasting by Cumulus Media. The deal combined the two largest radio broadcasters in the United States, which together own AM and FM stations across the country.
- b* Also in September 2011, the FCC approved the acquisition of Global Crossing by Level 3 Communications. Both parties are major providers of wireline communications services and Internet ‘backbone’ connectivity.
- c* In November 2011, AT&T and Deutsche Telecom withdrew applications they had filed to seek FCC consent for AT&T to acquire T-Mobile USA from Deutsche Telekom. The proposed transaction – which would have combined the second and fourth-largest wireless telecommunications services providers in the United States – had met with stiff opposition on multiple fronts. In fact, the US DoJ had filed suit in federal court to block the proposed transaction on antitrust

grounds. Immediately prior to the withdrawal of the applications, the FCC had been ready to initiate its own hearings in the matter.

- d* In March 2012, the FCC approved applications filed by DISH Network Corp (an affiliate of EchoStar) seeking consent to acquire DBSD North America (formerly ICO North America) and TerreStar Networks. Both DBSD and TerreStar hold valuable spectrum assets in the 2GHz MSS band, which DISH wishes to use for terrestrial mobile broadband services, and which the FCC has proposed to reallocate for that purpose.
- e* In August 2012, the FCC approved a number of related applications seeking consent to assign Advanced Wireless Service (AWS) spectrum licences from cable interests – including those held by SpectrumCo, a cable industry joint venture – to Verizon Wireless.

The FCC also has initiated but not yet completed its review of several other major transactions. For example:

- a* In July 2012, BC Partners (a European private equity group) and the Canada Pension Plan Investment Board filed applications seeking FCC consent to acquire Suddenlink Communications, the seventh-largest cable operator in the United States.
- b* In August 2012, the FCC resumed its consideration of applications filed by Tribune Company in 2010, which sought FCC consent to various licence assignments and transfers of control in connection with Tribune's emergence from bankruptcy.
- c* In August 2012, Digital Globe and GeoEye – both US-based providers of satellite imaging services – filed applications seeking FCC consent for the companies to merge. Although remote sensing itself not subject to the FCC's jurisdiction, the radiofrequency communications necessary to operate the satellites and download imagery from the satellites are licensed by the FCC.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and Internet protocol transmission regulation

Thus far, the United States has used a relatively light touch with respect to the regulation of ISPs and BIAPs, relying largely on market forces instead of prescriptive regulation. By many accounts, this 'hands-off' approach has contributed to the rapid growth of the US Internet-based sector over the past 15 years. Nevertheless, recent activity at the FCC suggests that it may soon be playing a more active role in the regulation of Internet-based services.

ii Universal service

The Communications Act directs the FCC to take steps to facilitate the universal availability of essential telecommunications services through, among other things, the use of a federal universal service fund ('USF'). The USF supports various programmes that seek to promote the availability of quality telecommunications services at just, reasonable and affordable rates on a nationwide basis to high-cost areas, low-income individuals, schools, libraries and rural health-care facilities. The USF is funded through revenue-based

contributions from all providers of interstate and international telecommunications and interconnected VoIP services, as well as certain other providers of ‘telecommunications’. The contribution factor fluctuates during the course of the year, but recently has hovered at around 15 per cent of covered revenues. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company (‘USAC’) – an independent legal entity that is subject to the FCC’s oversight.

The National Broadband Plan recommends that the FCC modify existing ‘universal service’ subsidy programmes to target broadband expansion into areas where the FCC asserts BIAPs would not find it economically viable to provide broadband service, in the absence of this type of financial support. Consistent with this recommendation, the FCC has established a new ‘Connect America Fund’ to support the deployment of broadband infrastructure to areas that are currently ‘unserved’, and to phase out legacy universal service support mechanisms in the process. Under the FCC’s implementing rules, wire-line incumbents will enjoy significant funding preferences through, among other things, a ‘right of first refusal’ in connection with available funding. At the same time, the level of support available to competitive providers will be reduced significantly, which could have a chilling effect on competition. Many details remain to be decided, including how incumbent support levels will be calculated and how support will be distributed in areas where the incumbent has declined funding. The FCC also must decide whether and how the requirement to contribute to the universal service fund should be extended to BIAPs – the principal subject of a proceeding begun by the FCC in April 2012. These changes are being coupled with changes to the existing – and exceedingly complex – ‘intercarrier compensation’ scheme by which local and long-distance service providers pay or receive compensation for traffic that is handed off to each other’s networks.

The FCC’s initial implementing rules on extending the reach of its universal service programme remain subject to administrative reconsideration and judicial appeals. Regardless of exactly how these questions are resolved, the FCC’s decision to subsidise broadband Internet access services may provide a foundation for the eventual regulation of such services – whether or not supported with universal service funds.

iii Restrictions on the provision of service

Common carriage

The Communications Act subjects all providers of ‘telecommunications services’ to common carrier regulation (e.g., the duty to provide service to all members of the public, including other carriers, without unreasonable discrimination). ‘Telecommunications services’ are defined to include the provision of ‘telecommunications’ to the public for a fee. ‘Telecommunications’, in turn, are defined to include the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. Notably, this definition does not encompass the creation or publication of mere ‘content’. Telecommunications carriers tend to be heavily regulated by both the FCC and the state PUCs.

In contrast, ‘information services’ are defined to include the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilising or making available information via telecommunications. These services typically involve what is called a ‘net protocol conversion’ – essentially, a change in the form, structure

or substance of the underlying communication. Providers of ‘information services’ are not subject to common carrier regulation and are traditionally have been lightly regulated at the federal level. State and local jurisdiction over Internet services is severely circumscribed, as the services are considered ‘interstate’ for most purposes.

As communications technologies have continued to evolve, the lines between ‘telecommunications services’ and ‘information services’ have blurred, and the FCC has been slow to classify new service offerings. The FCC thus far has declined to classify VoIP services, creating uncertainty as to which regulations apply at both the federal and state levels. This uncertainty has been exacerbated by the FCC’s attempted use of its ‘ancillary’ authority to extend a number of common carrier-type requirements to such otherwise unregulated services.

Because the classification of a service is of critical importance in determining the regulations applicable to that service, the reclassification of a service can have significant consequences. The FCC’s treatment of Internet access services provides a vivid illustration of this fact. Broadband Internet access services require, among other things, the transmission of data between an end user and an ISP, and any number of other individuals or entities. For years, the FCC viewed this transmission capability as a ‘telecommunications service’, and required BIAPs to offer it to competitors on a stand-alone, common carrier basis. However, in a series of orders issued during the 2000s, the FCC reclassified broadband Internet access services as ‘information services’ functionally integrated with a ‘telecommunications’ component, such that BIAPs are no longer required to make the transmission capability available to competitors (unless that capability is offered to the public voluntarily on a non-integrated, stand-alone basis).

More recently, the pendulum has begun to swing in the opposite direction. As noted above, the FCC has attempted to use its ‘ancillary’ authority to impose certain common carrier regulations (e.g., emergency calling (911) and outage reporting requirements, USF contribution obligations) on VoIP and Internet access services without reclassifying those services as ‘telecommunications services’. While some of these attempts (e.g., with respect to the FCC’s initial attempt at ‘net neutrality’ regulations) have been rejected by the courts, the scope of the FCC’s authority over ‘information services’ generally, and Internet access services specifically, remains unclear.

Price regulation

The Communications Act gives the FCC the authority to regulate the rates charged by common carriers in connection with the telecommunications services they provide, and ensure that those rates are ‘just and reasonable’. Prior to the passage of the Telecommunications Act in 1996, rate regulation was accomplished through the filing of tariffs with the FCC and state PUCs. More recently, the FCC has eliminated much of its tariffing regime and instead relies upon market competition (backed by a complaint mechanism) to ensure that rates are ‘just and reasonable’. Notably, the FCC’s authority to regulate rates does not extend to ‘information services’ – including broadband Internet access services.

Net neutrality

In recent years, one of the most significant policy debates at the FCC has focused on an ‘open Internet policy’ or ‘net neutrality’. Although the meaning of ‘net neutrality’ is

itself a subject of debate, net neutrality advocates generally aim to constrain the rights of broadband network providers to block, filter or prioritise lawful Internet applications, websites and content.

The FCC's direct involvement with net neutrality policy began in 2005 with the issuance of its Broadband Policy Statement. Although the FCC's authority under the Communications Act to regulate the Internet was not clearly articulated, the Broadband Policy Statement expressed four principles that the FCC indicated were intended to preserve the 'open' nature of the Internet for consumers, without discouraging broadband deployment by network operators. The FCC stated that consumers are entitled to (1) gain access to the lawful Internet content of their choice; (2) run applications and use services of their choice, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) benefit from competition among network providers, application and service providers, and content providers, all subject to a service provider's right to engage in 'reasonable network management'.

In 2008, the FCC ruled that Comcast, the largest US CATV company, had violated the Broadband Policy Statement by inhibiting users of its high-speed Internet service from using BitTorrent and other file-sharing software – a practice Comcast claimed was a type of 'reasonable network management' designed to block pirated content and alleviate network congestion. Comcast appealed this decision, arguing, among other things, that the FCC lacked the statutory authority to adopt or enforce net neutrality requirements. In early 2010, a US Court of Appeals agreed with Comcast and vacated the FCC's order. In doing so, the court rejected the FCC's attempt to rely on its 'ancillary' authority as a basis for its enforcement of the Broadband Policy Statement against Comcast, insofar as the FCC had failed to identify a source for such authority in the Communications Act.

In late 2011, new FCC rules on broadband Internet access services came into effect, applicable only to 'mass-market retail services', that:

- a* require all BIAPs to disclose the network management practices, performance characteristics, and terms and conditions of their services;
- b* prohibit *fixed* BIAPs from blocking lawful content, applications, services, or non-harmful devices;
- c* prohibit *mobile wireless* BIAPs from blocking lawful websites, or applications that compete with their voice or video telephony services; and
- d* prohibit *fixed* BIAPs from unreasonably discriminating in transmitting lawful network traffic.

As a result, mobile wireless operators appear to have greater latitude to block access to websites and applications, and to impose greater constraints on other network traffic and devices. These new rules are subject to pending judicial appeals that challenge, *inter alia*, the FCC's jurisdiction to regulate in this manner. In addition, many aspects of these new rules remain unclear. The FCC intentionally chose to adopt broad principles, and to allow the 'gaps' to be filled in through case-by-case determinations based on specific circumstances. Thus, it may take some time before the FCC (1) provides further guidance on how BIAPs may address network congestion, (2) addresses concerns about content providers who want to use the networks of others to deliver their services to consumers (but do not want to pay for the network capacity they consume), and (3) decides the extent to which BIAPs can prioritise some types of traffic to manage the overall provision

of service to the end user, including the extent to which BIAPs may negotiate agreements to offer ‘managed services’, ‘private IP networks’ and other ‘special arrangements’ that treat some types of traffic differently from others – or offer such arrangements to their own affiliates.

iv Security

US regulatory approach to emergency preparedness

Because US commercial communications networks are privately owned, the FCC’s role in ensuring emergency preparedness primarily is one of gathering and disseminating information and coordinating among different governmental agencies. For more than 15 years, the FCC also has required facilities-based telecommunications service providers to participate in industry-run working groups focused on developing best practices to ensure network reliability, to report network outages, and to be prepared to restore network services as rapidly as possible in the event of an outage. The recommendations of this group do not have the binding force of law, but have played an important role in shaping industry practice and have prompted some limited FCC rulemaking activity. For example:

- a* FCC rules now require all wire-line and wireless telecommunications service providers to maintain on site a back-up power source (typically, a generator) capable of keeping networks functioning for a minimum number of hours.
- b* Under the Telecommunications Service Priority (‘TSP’) programme, service providers must afford priority service to federal, state and local governments and other critical institutions.
- c* The FCC has adopted outage reporting rules, which require network operators to notify the FCC of significant outages that may affect end-user communications, and recently extended these rules to VoIP providers and BIAPs.
- d* The FCC has established rules governing the Emergency Alert System (‘EAS’), a national public warning system that requires broadcasters, cable operators, satellite broadcasters and others to provide communications capability to the President to address the American public during a national emergency. The system also may be used by state and local authorities to deliver important emergency information, such as AMBER alerts and weather information targeted to specific areas. In November 2011, the FCC, together with the US Department of Homeland Security and other federal agencies, successfully conducted the first nationwide test of the EAS.

The FCC also is responsible for the emergency preparedness of US network operators, the radiofrequency spectrum needs of non-federal ‘first responders’ (police, fire, ambulance and emergency medical teams), and coordination among network operators and various governmental organisations to address cybersecurity concerns. Much of this activity has focused on ensuring adequate spectrum for public safety users, and ensuring the interoperability of different public safety networks. The FCC has proposed to create a ‘nationwide interoperable public safety broadband wireless network’, funded in part through a national grant programme, to permit first responders to communicate with one another when other networks are inoperable.

The Communications Assistance for Law Enforcement Act

The Communications Assistance for Law Enforcement Act ('CALEA') requires 'telecommunications carriers' to implement specific capabilities in their networks to permit law enforcement agencies to intercept call identifying information and call content pursuant to a lawful authorisation. For this purpose, the term 'telecommunications carriers' is defined broadly to include facilities-based BIAPs and interconnected VoIP providers. CALEA establishes both minimum capacity requirements and capability requirements. CALEA does not specify the means by which providers must comply with these capability requirements, but creates a safe harbour for carriers that implement industry standards. CALEA does not grant law enforcement agencies any surveillance authority beyond what otherwise exists under US law.

Cybersecurity

US cybersecurity policy following the completion of the federal government's Cyberspace Policy Review has sought to create or enhance shared situational awareness of network vulnerabilities, threats, and events and the ability to act quickly to reduce current vulnerabilities and prevent intrusions; enhance US counterintelligence capabilities and increase the security of the supply chain for key information technologies; and strengthen the future cybersecurity environment by expanding cyber education, coordinating and redirecting research and development efforts, and working to define and develop strategies to deter hostile or malicious activity in cyberspace. Consistent with these goals, the FCC has explained that one of its core objectives is 'to strengthen the protection of critical communications infrastructure'.

In August 2010, the FCC proposed to develop a two-year plan to address 'vulnerabilities to communications networks or end-users and to develop countermeasures and solutions in preparation for, and response to, cyber threats and attacks' in coordination with other US federal agencies such as the Department of Homeland Security and the Federal Bureau of Investigation. Although more than two years have passed, the FCC has taken no further action to develop a concrete plan of this type, but the FCC has supported calls for Congress to increase the FCC's authority to regulate in this area. The FCC also has attempted to educate consumers and small businesses about the importance of cybersecurity. For example, in November 2011, the FCC launched the Small Biz Cyber Planner, an online resource to help small businesses create customised cybersecurity plans.

Online protections for children

The Children's Online Privacy Protection Act of 1998 ('COPPA') restricts the ability of website operators to collect personal information from children under 13 years of age. The type of 'verifiable parental consent' that is required before collecting and using information provided by children under 13 is based upon a 'sliding scale' set forth in an FTC regulation that takes into account the manner in which the information is being collected and the uses to which the information will be put. While children under 13 can legally give out personal information with their parents' permission, many websites disallow underage children from using their services due to the regulatory burdens involved.

Protection of personal data and privacy

The Communications Act protects the privacy of ‘customer proprietary network information’, which includes the date, time, duration and location of a call, type of service used, and other details derived from the use of a telecommunications service. US law also protects the contents of any telecommunications message from eavesdropping, recording, or unauthorised use or disclosure by a third party. Users of online services enjoy similar protection from eavesdropping or disclosure of their communications. Exceptions apply where access to, or use or disclosure of such information is necessary for law enforcement, which in most cases requires prior approval by a judge. In addition, the NTIA has formed an Internet Policy Task Force, which has recommended the adoption of voluntary codes of conduct by industry participants, and continues to examine ‘the nexus between privacy policy and innovation in the Internet economy’.

IV SPECTRUM POLICY

i Flexible spectrum use

In recent decades, the FCC increasingly has adopted a flexible approach to defining the uses to which a particular radiofrequency band may be put, or the optimal scope of licences that an entity can use to meet its business needs. For example, the FCC has granted many licensees (but not broadcasters) flexibility to redefine their own service territory, dividing or combining geographically bounded licences, and to subdivide their assigned spectrum and sell or lease a portion to another user. The FCC also has adopted more fluid service definitions, for example, permitting fixed and mobile operations, or terrestrial and satellite operations, in the same band.

The FCC has been examining ways to increase flexibility and efficiency in the use of available spectrum resources. It has recognised that one key failing of its spectrum policy is that administrative rigidities historically have prevented more efficient use of the spectrum resource. As a result, the FCC’s spectrum policy has evolved towards more flexible and market-oriented regulatory models.

For example, in order to facilitate the development of secondary markets in spectrum usage rights involving terrestrial radiofrequency-based services, the FCC has adopted rules to facilitate two types of leasing arrangements: a ‘spectrum manager’ lease, in which a lessee is permitted to use spectrum subject to the oversight and control of the licensee; and a ‘*de facto* transfer’ lease, in which the lessee assumes many of the obligations of a licensee, and exercises control over its own spectrum operations. The FCC also has examined ways to facilitate unlicensed use of certain spectrum bands, provided that such use does not interfere with licensed operations (if any) in those bands. Among other things, the FCC has adopted rules permitting certain devices to operate on a secondary, unlicensed basis in unused broadcast television spectrum, also known as ‘white spaces’.

ii Broadband and next-generation mobile spectrum use

A significant focus of the National Broadband Plan is encouraging the growth of mobile broadband networks, including through access to additional spectrum. The plan recommends allocation of at least 500MHz of spectrum for this purpose. Some of this need will be met as the FCC and NTIA make additional federal government spectrum

available for commercial use. For example, the US Congress has directed the FCC to auction for commercial use at least 15MHz of spectrum in the 1,675–1,710MHz band that has been used by the federal government. Moreover, NTIA currently is examining whether and how to make spectrum in the 1,755–1,850MHz band available for similar commercial purposes.

The FCC also has identified commercial spectrum that could be reallocated and thus used more efficiently in support of mobile broadband services. Because of its propagation characteristics, some of the most desirable spectrum for wireless communications consists of the portion currently being used by many broadcast television stations. As a result, the FCC has recognised that 120MHz of spectrum could be reallocated from broadcast television to mobile broadband use. To this end, and as discussed further below, Congress in 2012 enacted legislation that will allow television broadcasters to ‘turn in’ some of the spectrum they use for their television channels, in return for a portion of the proceeds when the spectrum is re-auctioned by the government for mobile broadband use. Because today’s digital signals do not require a broadcaster to use all of its spectrum, a TV station could still continue to provide service, largely as it does today. Alternatively, a TV station could stop broadcasting traditionally, and opt to deliver its programming through a cable system, a phone company, a satellite company or over the Internet. It remains to be seen how many broadcasters will choose to take advantage of this opportunity.

Similarly, the FCC has recognised the value of the approximately 40MHz of spectrum that is currently allocated to mobile satellite service operations in the 2GHz band but is not being fully utilised by satellite operators, and it will likely take action to free some or all of that spectrum for terrestrial mobile broadband purposes by the end of 2012.

iii Spectrum auctions and fees

Where spectrum is to be assigned to an individual licensee, and more than one party is eligible to use such spectrum (i.e., mutually exclusive applications are received by the FCC), the FCC may choose from several mechanisms under the Communications Act by which to designate the ‘winning’ licensee. Most new spectrum assigned since 1993 has been licensed through the use of competitive bidding (i.e., spectrum auctions). The statute excludes certain specific types of spectrum licences (international satellite, public safety, non-commercial broadcast, etc.) from the scope of the FCC’s auction authority. The FCC has completed or scheduled over 90 radiofrequency spectrum auctions to date.

Historically, proceeds from all spectrum auctions have gone to the US Treasury. In February 2012, the US Congress authorised a new type of auction, known as the ‘incentive auction’. Under this auction model, current licensees have the option to contribute spectrum in exchange for a portion of the proceeds from the auction of that spectrum.

V MEDIA

i Regulation of media distribution outlets generally

The regulation of media distribution outlets and content varies depending on the business model and technology being used. As previously noted, Internet-based content delivery

is very lightly regulated in the United States. Traditional media outlets historically have been regulated more heavily by the FCC.

Regulation of content and content providers

The First Amendment to the US Constitution guarantees the freedom of speech, and limits the ability of the government to regulate the content of a broadcaster's programming, or content providers directly. Several decades ago, the courts recognised the FCC's authority to prohibit 'indecent' programming by terrestrial broadcasters, based on the government's interest in ensuring that scarce spectrum rights are used in manner that serves the public interest, and the unique pervasiveness of broadcast media in lives of Americans and their children. It is unclear whether the FCC's rules remain constitutional in today's media-rich market where many different media outlets serve the same household.

In recent years, the FCC has fined stations that aired 'fleeting expletives' (incidental words or gestures that are broadcast despite the reasonable precautions taken by the licensee to avoid indecent broadcasting). For example, in 2006 the FCC fined affiliates of the ABC and Fox networks millions of dollars for airing such material during their programming. Both networks subsequently challenged these fines in the courts. In June 2012, the US Supreme Court invalidated the fines on due process grounds, finding that the FCC had not fully articulated its rule against fleeting expletives until after the programmes in question had been aired. In taking this approach, the court left open broader questions as to whether the FCC's 'fleeting expletives' policy violates the First Amendment or is otherwise unconstitutional.

Terrestrial broadcasting

Television and radio stations broadcasting content for free to listeners and viewers via terrestrial radiofrequency spectrum are subject to extensive regulation by the FCC, which has exclusive licensing authority for such stations in the United States. Among other things, the FCC has adopted detailed technical rules governing this type of broadcaster, restricted their ability to air 'indecent' or 'obscene' programming, imposed political broadcasting and other 'public interest' obligations on them, and adopted multiple ownership restrictions. These regulations are largely premised on the idea that radiofrequency spectrum is a scarce resource, and thus the FCC should promote localism, diversity of ownership, and service in the public interest. The FCC also tends to apply the foreign ownership restrictions discussed above most rigidly to over-the-air broadcast services.

Subscription media

Entities providing electronic media services by subscription – CATV, direct-broadcast satellite ('DBS') service, subscription radio, or even subscription over-the-air TV stations – generally are subject to less restrictive content regulation than terrestrial 'free over-the-air' broadcasters ('obscene' material is prohibited, but not material that is merely 'indecent'). Because subscribers pay for their service, by definition, arguments that they must be protected from unwittingly accessing 'indecent' content are less convincing. Subscription satellite radio providers and multichannel video programming distributors, such as DBS and cable TV providers, remain subject to FCC regulation with respect to

their use of radio frequency spectrum and certain other matters. Moreover, terrestrial CATV operators also are subject to franchising by state or local authorities for the use of public rights-of-way.

ii Digital switchover

In 1996, Congress authorised the distribution of an additional terrestrial broadcast channel to each terrestrial broadcast TV station licensee for digital broadcasting, with the understanding that existing analogue broadcasting channels would be surrendered and reallocated for other users following a reasonable transition. Congress subsequently established 12 June 2009 as the last day for full-power TV stations in the United States to broadcast in analogue. Since that date, all full-power TV stations have been transmitting in digital only.

The reallocation of the spectrum thus recaptured from the analogue broadcast service remains a high priority of the FCC, which has stated its intention to maximise the availability of spectrum for broadband communications (such as Internet access) as well as to set aside a band of spectrum for public safety use. Notably, the compression facilitated by digital transmission allows broadcasters to transmit in multiple streams, or repurpose a portion of their allocated spectrum for non-broadcast use. As noted above, the FCC currently is considering how to reclaim some of this spectrum for mobile broadband use, through ‘incentive auctions’ or other mechanisms.

iii Internet-delivered video content

The regulatory status of Internet-delivered video content turns in part on whether it can be considered ‘video programming’ under the Communications Act. This term encompasses ‘programming provided by, or generally considered comparable to programming provided by, a television broadcast station’. Much online video content does not fall into this category, and as such lies outside of the FCC’s jurisdiction.

Also significant is the manner and form in which ‘video programming’ is delivered to the viewer. ‘Video programming’ may be subject to minimal regulation if it is incorporated into an ‘information service’ by virtue of the use of the Internet or other broadband technologies as a delivery mechanisms. Moreover, the FCC has identified a category of ‘interactive television’ services – defined as ‘a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams’ – but it has not decided what requirements, if any, should apply to such services. The manner in which these classification issues are resolved can have significant implications in other regulatory areas. For example, IP-delivered video programming in the form of a traditional cable service arguably falls outside the scope of the FCC’s net-neutrality rules. Notwithstanding general uncertainty with respect to the regulatory status of Internet-delivered video content, IPTV services delivered by telecommunications companies have been subject to franchising as ‘cable’ systems under some state and local requirements. In order to expedite competitive entry into the IPTV market, to facilitate competition to entrenched cable TV operators, several states have adopted state-wide franchising, and have preempted separate approval requirements in individual municipalities. The FCC encourages rapid approval of competitive franchising requests and has indicated that it may preempt states that do not promptly act on such requests.

iv Mobile services

Consumer demand for access to audio and video programming through mobile platforms is one of the primary drivers of increased demand for mobile broadband access generally. As noted above, the National Broadband Plan aims to free additional spectrum resources for such services. The advent of these services, many of which would not use ‘broadcast’ spectrum, reflects increasing convergence in the communications industry, and could lead to increased pressure to reconcile regulatory frameworks that treat similar services differently.

VI CONCLUSIONS AND OUTLOOK

As it has been in the past few years, the implementation of the National Broadband Plan will continue to be the driving force in US communications regulation for the foreseeable future. The FCC is likely to continue its efforts to repurpose certain spectrum for mobile broadband use. These efforts should accelerate in light of the FCC’s new authority to conduct incentive auctions. At the same time, the FCC is likely to continue to explore other sources of potential spectrum. This approach is likely to generate conflict between wireless service providers and incumbent spectrum users. The FCC will need to reconcile these competing interests, while deciding whether and how to ensure that incumbents are compensated for the value of their lost spectrum assets.

The FCC also will be required to expend significant energy completing the implementation of its new universal service and intercarrier compensation regimes. Many of the details of these regimes have yet to be resolved, and the FCC’s efforts may be complicated somewhat by pending challenges to its new rules. As it moves forward, the FCC will need to continue its efforts to balance competing policy interests within a heavily politicised environment. Because there will be some winners and some losers no matter what the FCC does, and given the amount of money at stake, these issues almost inevitably will occupy the courts for years to come.

Looming over the horizon, the possibility remains that Congress will substantially modify the FCC’s authority with respect to broadband services through a significant amendment (or even a rewrite) of the Communications Act. Such action could provide the FCC with the authority that it needs to regulate the provision of Internet access services, while shoring up the unsure foundation of existing regulations (e.g., of net neutrality and VoIP services). Even in the absence of such action, the FCC is likely to attempt to expand the scope of its authority to regulate such services – at least until that attempt is affirmatively checked by Congress or the courts.

Appendix 1

ABOUT THE AUTHORS

JOHN P JANKA

Latham & Watkins LLP

John P Janka is a partner in the Washington, DC office of Latham & Watkins LLP, where he is chair of the communications law practice group. For almost 25 years, Mr Janka has counselled international telecommunications operators and ISPs, content providers, investors and banks on a variety of regulatory, transactional and controversy matters. His experience includes the purchase, sale and financing of communications companies, the procurement and deployment of communications facilities, global spectrum strategies and dispute resolution, the provision of communications capacity, content distribution, strategic planning, and effecting changes in legal and regulatory frameworks. His clients include satellite, wireless and other terrestrial communications companies, video programming suppliers, information service providers, television and radio broadcast stations, and firms that invest in and finance these types of entities.

Mr Janka has served as a United States delegate to an ITU World Radio-communication Conference in Geneva, and as a law clerk to the Honorable Cynthia Holcomb Hall, United States Court of Appeals for the Ninth Circuit. Mr Janka holds a JD degree from the University of California at Los Angeles School of Law, where he graduated as a member of the Order of the Coif, and an AB degree from Duke University, where he graduated *magna cum laude*.

JARRETT S TAUBMAN

Latham & Watkins LLP

Jarrett S Taubman is counsel in the Washington, DC, office of Latham & Watkins LLP, where he represents providers of telecommunications, media, Internet and other communications services (and their investors) before the Federal Communications Commission (FCC), state public utilities commissions and various courts. Mr Taubman assists clients in implementing strategies to facilitate the development of favourable regulatory policy, structuring transactions and securing required regulatory consents,

and ensuring ongoing compliance with complex regulatory requirements. Much of his practice involves the navigation of the complex legal and policy issues raised by the advent of broadband services. Mr Taubman also represents both communications and non-communications clients before the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review and block proposed investments in critical US infrastructure from non-US sources.

Mr Taubman received his JD from New York University School of Law, a master's degree in public policy from Harvard University's Kennedy School of Government, and a BS from Cornell University's School of Industrial and Labor Relations.

LATHAM & WATKINS LLP

555 Eleventh St, NW
Washington, DC 20004
United States
Tel: +1 202 637 2200
Fax: +1 202 637 2201
john.janka@lw.com
jarrett.taubman@lw.com
www.lw.com