THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

NINTH EDITION

Editor
John P Janka

THE LAWREVIEWS

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PREFACE

This fully updated ninth edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 26 jurisdictions around the world. It is intended as a business-focused framework rather than a legal treatise, and provides a general overview for those interested in evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity (regardless of the technology used) continues to drive law and policy in this sector. Next-generation wireless connectivity will be provided by a network of networks, with multiple technologies – both wired and wireless, using licensed and unlicensed spectrum – playing an integral role in delivering service to the end user. By way of example, free WiFi service in homes and businesses today carries the majority of the data that is transmitted to smartphones and wireless tablets that also rely on paid service from a wireless carrier. And wireless carriers otherwise rely on a variety of technologies to ultimately connect the customer to the internet or someone on the other end of the phone.

The disruptive effect of new technologies and new ways of connecting people and devices creates challenges around the world as regulators both seek to facilitate digital inclusion by encouraging the deployment of state-of-the-art communications infrastructure to all citizens, and also seek to use the limited radio spectrum more intensively than before. At the same time, technological innovation makes it commercially practical to use large segments of 'higher' parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies requires them to engage on these issues in different ways than before.

A host of new demands, such as the developing internet of things, the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, all create pressures on the existing spectrum environment. Regulators are being forced to both 'refarm' existing spectrum bands and rewrite their licensing rules, so that new services and technologies can access spectrum previously set aside for other purposes that either never developed or no longer have the same spectrum needs. Regulators also are being forced to seek means for coexistence in the same spectrum between different services in ways previously not contemplated.

Many important issues are being studied as part of the preparation for the next World Radio-communication Conference (WRC) of the International Telecommunication Union (ITU), to be held in 2019. No doubt, this conference will lead to changes in some long-standing radio spectrum allocations. And the conference also may include some political spectrum allocations that are based on pressures brought by well-heeled industries, rather than logic or sound policy. Indeed, these pressures already exist around the world in decisions being made by national regulators outside of and before the WRC.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow. As a result, many governments

are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. However, many policymakers still have not solved the problem caused when their incumbent service providers fail to extend service to all of their citizens for business reasons – because those businesses deem 'unprofitable' those who are the hardest to serve. Curiously, policymakers sometimes exacerbate this failure by resorting to spectrum auctions to award the right to provide service in a given frequency band to the highest bidder, failing to require service availability to everyone in the auctioned area, and then making the auction winner the gatekeeper for anyone else who wants to use the same spectrum. Too often, decisions are based (explicitly or implicitly) on expected auction revenues, which consumers end up paying for in the end through higher costs of service. Far too infrequently do policymakers factor in the benefits of ensuring ubiquitous connectivity: new jobs, economic growth, security, social inclusion, and improvements in healthcare, education and food production, to name a few. Indeed, treating spectrum as a property right rather than as the valuable public resource it is often leads to perverse results in the marketplace.

Convergence, vertical integration and consolidation can also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly, many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as network neutrality: the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus may be laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I thank all of the contributors for their insightful contributions to this publication, and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka
Latham & Watkins LLP
Washington, DC
November 2018

Chapter 26

UNITED STATES

John P Janka, Matthew T Murchison and Michael H Herman[1]

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.

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 (FCC) is an independent US regulatory agency established by the US Congress pursuant to the Communications Act of 1934, as amended (Communications Act). The FCC is charged with regulating all non-federal government use of the RF 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 Policy, the FCC participates in international spectrum negotiations and related matters at the International Telecommunication Union.

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. The NTIA has primary responsibility for regulating all use of the RF spectrum by federal government users, and works with the FCC to coordinate spectrum use between federal and non-federal users.

1 John P Janka and Matthew T Murchison are partners and Michael H Herman is a law clerk awaiting bar admission at Latham & Watkins LLP.

The Department of Commerce

The United States Department of Commerce (DOC) has oversight of remote sensing satellites and certain export issues related to space technology. The DOC is developing an increased role with respect to facilitating the commercialisation of space, including spectrum-related matters.

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 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 the case of a conflict between the FCC and state or local regulations, the state or local regulation is typically pre-empted 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 owing to the interstate and international nature of the internet.

The Federal Trade Commission

The Federal Trade Commission (FTC) protects consumer interests in such areas as online marketing and telemarketing. Both the FTC and the FCC have oversight over certain telemarketing matters. Both the FTC and the US Department of Justice (DOJ) antitrust division police market concentration by examining mergers and other major transactions in the sector, along with the attorneys general of the 50 US states.

Other executive branch agencies

Other executive branch agencies play an important but less direct role in the regulation of traditional telecommunications, broadband internet access and media. First, these agencies often provide input as the FCC explores substantive issues and implements regulations through its rulemaking and licensing processes, occasionally engaging in public disagreements with the FCC over such matters. In addition, executive branch agencies with national security and law enforcement responsibilities typically are consulted (or may otherwise provide input) in connection with proposed transactions that would result in legally cognisable non-US ownership of FCC-regulated businesses. Notably, Team Telecom, an informal group made up of staff from the DOJ, the Federal Bureau of Investigation, the Department of Homeland Security and the Department of Defense, routinely participates in FCC proceedings, reviewing such transactions and often gathering additional information from the parties. Because the FCC typically will not consent to such transactions until Team Telecom has signed off, Team Telecom effectively has the power to delay, if not block, a transaction until its concerns are addressed. Transactions involving FCC-regulated businesses (like other US businesses) are also subject to potential review by the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review proposed investments in US businesses from non-US sources. Because CFIUS can

recommend that the President block or impose significant conditions on such transactions even after they have closed if they have not been cleared by CFIUS, parties often file with CFIUS on a voluntary basis prior to closing.

ii Sources of federal telecommunications and media law and policy

In the US, 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 traditional 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 the US domestic market 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 a number of instances, the FCC has attempted to use this ancillary authority to regulate subject matter outside the traditional scope of its jurisdiction (e.g., VoIP services).

Forbearance authority

Section 10(a) of the Communications Act enables the FCC to forbear from applying any provision of the Act to a Title II telecommunications carrier or service (but not other types of services or providers) if the FCC determines that enforcement of this provision is not necessary to ensure just, reasonable and non-discriminatory rates, terms and conditions of service; enforcement of such provision is not necessary for the protection of consumers; and 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 sector is competitive. The FCC also used this authority in early 2015 in connection with its reclassification of broadband internet access service as a telecommunications service (discussed in greater detail below).

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 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 party with a legally cognisable interest in the matter 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.

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 suborganisation 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 applications (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 general need for wireless service providers to obtain separate spectrum licences, as discussed below) and, in certain cases, has eliminated the requirement to obtain authority before constructing radio facilities. The FCC has also 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 sections 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, the 20 per cent limit effectively increases to 25 per cent, and the FCC may allow foreign ownership in excess of 25 per cent at or above the US parent company level where it determines that allowing such ownership would serve the public interest. In addition, as the result of a forbearance order issued in 2012 (which effectively overrides certain arcane language in the text of the Communications Act), the FCC will now permit higher levels of indirect foreign ownership in common carriers 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.

Historically, the FCC generally has not waived the 25 per cent limit with respect to broadcast licensees. However, in late 2013, the FCC indicated that in order to facilitate foreign investment, it would consider such waivers on a case-by-case basis, taking into account any concerns raised by other executive branch agencies with respect to national security, trade policy and law enforcement. In May 2015, the FCC granted such a waiver to Pandora Radio LLC to allow Pandora to buy a radio station, and sustained that waiver against a legal challenge that was resolved in September 2015. In late 2016, the FCC extended to broadcast licensees the same standardised, streamlined rules and procedures that common carrier wireless licensees have been using to seek approval for foreign ownership, with appropriate broadcast-specific modifications. The FCC also established a methodology through which a publicly traded common carrier or broadcast licensee or controlling US parent could reliably ascertain its foreign ownership levels. The FCC has granted several requests seeking approval of foreign ownership in excess of the 25 per cent statutory limit.

Even transactions that are consistent with the foreign ownership limits described above may be scrutinised, and effectively blocked, as a result of a review by Team Telecom or CFIUS (described above).

Market access

Generally, the FCC does not authorise facilities located entirely outside the United States to serve the US market. An exception arises with respect to non-US-licensed satellites, which may serve the US if the satellite is licensed by a non-US jurisdiction that permits US satellites to serve that jurisdiction without undue restrictions (such access is presumed where the non-US jurisdiction is a WTO Member State); the satellite complies with the same FCC technical and service requirements that apply to US satellites; and the satellite's operation would not give rise to any national security, spectrum policy or other policy concerns. In reviewing requests for US market access, the FCC increasingly considers the extent to which the relevant non-US-licensed satellite enjoys priority to the spectrum in question as a result of filings made by its licensing administration with the International Telecommunications Union (ITU).

Multiple or 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 initiated a proceeding to re-examine its use and definition of such spectrum screens. The FCC has also imposed certain limitations on the ability of authorised parties 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 incumbent local exchange carrier serving 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. Historically, the FCC limited cross-ownership of radio and television stations, as well as the cross-ownership of broadcast stations and newspapers. In November 2017, the FCC eliminated these restrictions. A legal challenge to that decision is currently pending in the United States Court of Appeals for the Third Circuit.

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 RF-based licences, permits or authorisations from one party to another, or transferring control of a holder of such RF 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 are often processed in a shorter period, but there can be no assurance that the FCC will act by any deadline.

Since late 2017 the FCC has completed its review of several major telecommunications and media transactions. Most notably:

a In October 2017, the FCC approved a series of applications seeking consent to transfer control of various licences and authorisations held by operating subsidiaries of Level 3 Communications, Inc (a provider of fibre-based services to business customers) to CenturyLink, Inc (an incumbent local exchange carrier that provides communications

services to consumers and businesses in all 50 states). As a result of the deal, Level 3 Communications and its operating subsidiaries, which together own or control over 209,000 route miles of fibre, will become wholly owned subsidiaries of CenturyLink.

b In November 2017, the FCC's Media Bureau approved a series of applications seeking consent for the merger of CBS Radio, Inc, a wholly owned subsidiary of CBS Corp, with Entercom Communications Corp. Under the proposed transaction, CBS Radio would survive as a wholly owned subsidiary of Entercom and control more than 200 radio stations across the United States, making it the country's second-largest local radio platform. To comply with FCC ownership rules, Entercom would ultimately divest more than two dozen licences in various markets.

The FCC has also initiated, but not yet completed, its review of applications seeking approval to transfer control of various licences and authorisations held by Sprint Corp (the nation's fourth-largest wireless carrier) and its wholly owned and controlled subsidiaries to T-Mobile US, Inc (the nation's third-largest wireless carrier). The combined entity would serve approximately 30 per cent of US wireless subscribers.

Several other transactions that are not currently subject to FCC review are also significant:

a The acquisition of Time Warner Inc (a large media and entertainment conglomerate in the United States) by AT&T Inc (a provider of video, broadband, and voice services), while not subject to FCC review owing to Time Warner's pre-merger divestment of its FCC authorisations, remained subject to approval by the DOJ, and in November 2017, the DOJ sued to block the transaction on antitrust grounds. However, after a multi-week trial held in June 2018, a district court ruled against the DOJ and allowed the acquisition to proceed. Days later, the companies consummated the transaction but agreed to operate their combined media arm as a distinct entity pending the DOJ's appeal, which was filed in July 2018 in the US Court of Appeals for the DC Circuit.

b In August 2018, Sinclair Broadcast Group, Inc (one of the largest television broadcast companies in the US) withdrew its application to merge with Tribune Media Company (an American television conglomerate). The combined entity would have held over 200 broadcast television station licences in over 100 markets, reaching approximately 72 per cent of all television households in the US. Although questions were initially raised in 2018 regarding Sinclair Broadcast Group's lack of candour during the proceeding, a hearing to consider such issues has not yet been scheduled. However, following termination of the transaction, Tribune Media filed a breach of contract suit in Delaware Chancery Court.

c In July 2018, the New York State Public Service Commission voted to revoke its approval of Charter Communications, Inc's acquisition of Time Warner Cable, Inc. Although the transaction received FCC approval in May 2016, New York's regulators allege that Charter Communications failed to comply with conditions on which the state's approval was based. Following the vote, the parties reportedly entered into negotiations that would allow Charter Communications to continue operating in New York as long as certain requirements are met.

vi Enforcement

Violations of the Communications Act, the FCC's implementing rules, orders and policies, and specific licence terms and conditions can result in enforcement proceedings before the FCC, and potentially before the DOJ. The FCC has explained that it intends to investigate and respond quickly to potential unlawful conduct to ensure, among other things:

a that consumers are protected;
b robust competition;
c responsible use of the public airwaves; and
d strict compliance with public safety-related rules.

Violations of FCC requirements can result in a variety of sanctions, ranging from fines and forfeitures to consent decrees designed to ensure corrective action; in egregious cases, criminal enforcement is possible. In recent years, the FCC has issued several multimillion-dollar fines, as well as a number of fines of several hundred thousand dollars each. The cited infractions include deceptive consumer practices, unauthorised operation of radio facilities, selling of illegal equipment, violation of the FCC's ownership rules and the provision of materially incorrect information to the FCC.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol transmission

Before 2015, the United States 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 contributed to the rapid growth of the US internet-based sector. Subsequent activity at the FCC – including, in particular, the agency's imposition of net neutrality regulations and reclassification of retail broadband internet access services – suggested that it would play a more active role in the regulation of internet-based services. However, more recently the pendulum has swung in the other direction, with the FCC returning to a lighter touch with respect to internet access services (e.g., with respect to net neutrality regulation).

ii Universal service

The Communications Act directs the FCC to take steps to facilitate the universal availability of essential telecommunications services through, *inter alia*, 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 healthcare facilities. The USF is funded through revenue-based contributions from providers of interstate and international telecommunications and interconnected VoIP services, as well as certain other providers of telecommunications. The contribution factor (essentially, that rate at which interstate and international revenues are assessed for USF contribution purposes) fluctuates during the course of the year, but has been around 18 to 20 per cent of covered revenues for most of 2018. Universal service programmes and contribution obligations are administered by the Universal Service Administrative Company, 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 (CAF) 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, certain wireline incumbents called price cap carriers enjoy significant funding preferences through, *inter alia*, a right of first refusal in connection with available funding. As a result, a much smaller pool of support is available to competitive providers. The FCC, which is currently implementing Phase II of the CAF programme, held a reverse-auction in July and August 2018 to distribute funding in areas where price-cap incumbents declined preferential funding. In the auction, more than 103 bidders were awarded more than US$1.49 billion of support to offer services to more than 700,000 locations in 45 states over the next decade. In addition, the FCC is implementing CAF rules for rate of return incumbent carriers. 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 still must develop another mechanism and find billions more in funding to extend broadband services to the most remote and hardest-to-serve locations in the United States.

The FCC also has a Lifeline programme, which uses a portion of the USF to subsidise the costs of certain supported telecommunications services so that they can be purchased by individuals who otherwise would be unable to afford them. Broadband is included in the list of supported services, providing low-income consumers a means of obtaining internet access at reduced rates. Minimum standards exist for supported voice and broadband services in order for a service to qualify for the Lifeline subsidy. In November 2017, the FCC proposed modifications to Lifeline that would, among other changes, limit the ability of resellers (service providers that lease, rather than own, network capacity) to participate in the programme. Opponents challenged the new rules in the United States Court of Appeals for the District of Columbia Circuit, and the Court stayed their implementation in anticipation of oral arguments in the case, which took place in October 2018.

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. Traditional 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 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, *inter alia*, 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).

The classification of broadband internet access service has remained an area of significant regulatory interest. In February 2015, the FCC reclassified retail broadband internet access service as a telecommunications service as part of the FCC's net neutrality proceeding. This action was taken for the stated purpose of creating a clearer jurisdictional basis for the imposition of net neutrality rules on BIAPs, although it also automatically subjected BIAPs to various common carrier provisions appearing in Title II of the Communications Act, including privacy-related obligations. However, in January 2018, the FCC restored its prior classification of broadband internet access service as an information service, in conjunction with the FCC's repeal of certain of those net neutrality rules, and in doing so also relieved BIAPs of Title II's privacy obligations and other common carrier requirements. Appeals of the FCC's 2015 decision accordingly became moot, although appeals of the 2018 order are ongoing, with oral arguments in the DC Circuit scheduled for February 2019.

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 relied upon market competition (backed by a complaint mechanism) to ensure that rates are just and reasonable. As retail broadband internet access service is classified as common carriage (for now), it too is subject to these same general just and reasonable requirements that apply to traditional telecommunications services (although this may not last).

In other respects, the FCC has taken steps toward the re-regulation of certain services that are critical inputs to broadband services. In 2016, the FCC found that certain incumbents

were abusing their market power and charging unreasonably high rates for the broadband special access services necessary for business data service firms to function and serve their customers. The FCC subsequently proposed and adopted a new regulatory framework for such special access services in which individual geographic markets are classified as either competitive or non-competitive, with the former subject to relatively lower levels of new regulation, and the latter subject to more onerous requirements and oversight. The new rules went into effect in August 2017 and were upheld in nearly all respects by the Eighth Circuit Court of Appeals in a ruling issued in August 2018.

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 a 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. All subject to a service provider's right to engage in reasonable network management, the FCC stated that consumers are entitled to:

a gain access to the lawful internet content of their choice;
b run applications and use services of their choice, subject to the needs of law enforcement;
c connect their choice of legal devices that do not harm the network; and
d benefit from competition among network providers, application and service providers, and content providers.

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, *inter alia*, 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.

The FCC then adopted new rules on broadband internet access services, applicable only to mass-market retail services. Those rules required all broadband internet access service providers to disclose the network management practices, performance characteristics, and terms and conditions of their services;

a prohibited fixed broadband internet access providers from blocking lawful content, applications, services or non-harmful devices;
b prohibited mobile wireless broadband internet access providers from blocking lawful websites, or applications that compete with their voice or video telephony services; and
c prohibited fixed BIAPs from unreasonably discriminating in transmitting lawful network traffic.

In 2014, the US Court of Appeals for the District of Columbia Circuit vacated the FCC's anti-discrimination and anti-blocking rules, finding that they amounted to impermissible common-carrier regulation of internet access services, since the FCC had classified those services as information services not subject to Title II of the Communications Act (the Court upheld the FCC's disclosure requirements). However, the Court also suggested that the FCC could adopt modified versions of these rules under Section 706 of the Telecommunications Act of 1996, which potentially grants the FCC relatively broad authority to promote the 'virtuous circle' of internet-related innovation.

In May 2014, the FCC launched a new rulemaking to explore whether new net neutrality rules could be adopted pursuant to Section 706, or whether the FCC instead should regulate BIAPs as 'Title II' common carriers. In 2015, the FCC opted for the latter approach, reclassifying retail broadband internet access service as a telecommunications service subject to Title II. At the same time, the FCC exercised its forbearance authority to free BIAPs from much of the regulation that otherwise would apply under Title II (such as tariffing obligations and mandatory federal universal service contributions). Notably, several core common carrier regulations continue to apply notwithstanding such forbearance, including statutory requirements that charges and practices be just, reasonable and not unreasonably discriminatory, requirements to maintain the privacy of customer information, and the right of consumers to seek damages and pursue complaints in courts for claimed violations by common carriers.

Soon after the FCC's ruling, a broad coalition of BIAPs and trade associations filed an appeal in the US Court of Appeals for the District of Columbia Circuit. That Court upheld the FCC in a ruling issued in June 2016, and the US Supreme Court ultimately denied further review in November 2018.

In January 2018, the FCC revisited these issues yet again, this time restoring the classification of broadband internet access service as an information service and repealing its 2015 bans on blocking, throttling and paid prioritisation as well as its general internet conduct standard. In place of these prophylactic rules, the FCC adopted a revised transparency rule requiring BIAPs to disclose any blocking, throttling or paid prioritisation on their networks. The FCC also entrusted the FTC with the task of bringing enforcement actions for unfair and deceptive practices if BIAPs violate their own stated commitments not to engage in such conduct, and for unfair methods of competition if BIAPs otherwise engage in anticompetitive conduct. An appeal of this order brought by a group of public advocacy organisations, ICPs and state attorneys general is currently pending in the US Court of Appeals for the District of Columbia Circuit.

Additionally, in the aftermath of the 2018 order, several states have attempted to establish their own net neutrality requirements for BIAPs, in the form of either direct regulation (e.g., California's SB-822) or conditions on government procurement contracts (e.g., Vermont's EO 2-18 and S-289). The federal government and BIAPs sued to block California's net neutrality law on pre-emption grounds in September 2018, leading to a concession by the state not to enforce the law while the appeal of the FCC's 2018 order remains pending. BIAPs brought a similar lawsuit in Vermont in October 2018.

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. Facilities-based telecommunications service providers 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 wireline 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. In addition, FCC rules require providers of fixed residential voice services (including interconnected VoIP) to offer customer premises equipment along with a backup power source.

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 that require network operators to notify the FCC of significant outages that may impact end user communications, and recently extended these rules to VoIP providers.

d The FCC has established rules governing the Emergency Alert System (EAS), a national public warning system that requires broadcasters, CATV operators, satellite broadcasters and others to provide communications capability to the President to address the American public during a national emergency. The system may also be used by state and local authorities to deliver important emergency information, such as AMBER alerts and weather information targeted to specific areas.

The FCC is also responsible for the emergency preparedness of US network operators, the RF 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.

Congress has authorised the creation of a nationwide, interoperable, high-speed network dedicated to public safety applications. This network is being managed by FirstNet, an independent entity within the NTIA that is overseen by a board including representation from the public safety community, wireless experts, and current and former federal, state and local government officials. Notably, a significant portion of FirstNet operations is funded by the proceeds of spectrum auctions.

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 interconnected VoIP providers as well as facilities-based BIAPs (consistent with the FCC's reclassification decision in the net neutrality context). 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:

a 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;

b enhance US counterintelligence capabilities and increase the security of the supply chain for key information technologies; and

c 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 advancing this objective, the FCC has focused on educating consumers and small businesses about the importance of cybersecurity, developing cybersecurity best practices in cooperation with industry leaders and facilitating the ability of small businesses to develop their own cybersecurity plans.

Online protections for children

The Children's Online Privacy Protection Act of 1998 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 because of 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, use or disclosure by a third party without a user's consent. 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'.

Notably, this legal framework is targeted at carriers and other private actors, as opposed to the government. However, in 2013 it was the policies and practices of the latter that

prompted the most significant privacy concerns, and added fuel to the ongoing debate over how much privacy should be sacrificed by individuals in the name of national security. The controversy erupted in June 2013 when the British newspaper *The Guardian* published a series of exposés containing information leaked to it by Edward Snowden, who had been employed as a contractor for the US National Security Agency (NSA). More specifically, Snowden disclosed classified information regarding NSA surveillance programmes, including NSA efforts to compile a database containing the metadata for hundreds of billions of telephone calls made through the largest US carriers and collect stored internet communications from large internet companies like Google. While some of these activities apparently were authorised by special courts established under the Federal Intelligence Surveillance Act, the activities of these courts are not subject to public scrutiny and have been criticised as little more than a rubber stamp for proposed executive branch activities.

The FCC has also tried to ensure that consumers can effectively block calls and text messages that they do not wish to receive, using authority provided by Congress in the Telephone Consumer Protection Act (TCPA). Among other things, in June 2015 the FCC attempted to strengthen restrictions on the practice of robocalling using automatic telephone dialling systems (i.e., autodiallers) by issuing a series of declaratory rulings. Among other things, the FCC ruled that a device is an impermissible autodialler if it had either the present ability or potential future ability to be used to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. Numerous parties sought review of this ruling in the US Court of Appeals for the District of Columbia Circuit, arguing, among other things, that the FCC's action actually obfuscates matters and unreasonably expands the reach of the TCPA, because, for example, a smartphone could be classified as an impermissible autodialler simply because it could use an autodialling application. In March 2018, the Court struck down the FCC's autodialler ruling and other aspects of the 2015 order, and in May 2018, the FCC opened a new proceeding to consider reforms to its implementation of the TCPA in light of the Court's ruling.

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 RF 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 has also 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, to facilitate the development of secondary markets in spectrum usage rights involving terrestrial RF-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 initial 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 has also 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; and has sought to facilitate the ability of unlicensed Wi-Fi networks to share portions of the 5GHz band that previously were designated for other purposes.

ii Broadband spectrum use

Federal law and policy has sought to encourage the growth of broadband networks, including through access to additional spectrum. More specifically, Congress has directed the FCC and the NTIA to make additional federal government spectrum available for commercial use.

The FCC and the NTIA are also exploring ways that commercial users might share federal government spectrum.

The FCC has also identified existing commercial spectrum that could be reallocated and thus used more efficiently in support of broadband services. After Congress enacted legislation that allowed television broadcasters to turn in some of the spectrum they use for their television channels in return for a portion of auction proceeds, the FCC conducted its first incentive auction. The auction of the voluntarily returned broadcast channels for new mobile broadband use yielded US$19.8 billion in revenue, including more than US$7 billion for the government.

In addition, the FCC has continued work in its spectrum frontiers proceeding, which seeks to make additional spectrum above 24GHz available for 5G wireless mobile and other broadband services. In a second phase of this proceeding, the FCC made available 1,700MHz of millimetre wave spectrum for flexible wireless use in the 24.25–24.45 and 24.75–25.25 GHz band (24 GHz band) and the 47.2–48.2 GHz band. This is in addition to the 27.5–28.35 GHz, 37–38.6 GHz, 38.6–40 GHz, and 64-71 GHz bands that the Commission previously made available for flexible wireless use. The FCC also enabled the millimetre wave bands to be used for a variety of other uses, including satellite, fixed and federal government uses. The FCC targeted the 40–42 GHz and 48.2–50.2 GHz bands for expansion of the fixed satellite service, and adjusted previously adopted earth station requirements in the 28 GHz and 39 GHz bands to permit greater flexibility in the deployment of earth stations. This expanded on a prior FCC decision that allowed the deployment of over 9,000 individually licensed earth stations on an interference-protected basis in the 27.5–28.35 GHz band, and committed to consider allowing ubiquitously deployed satellite user terminals access to 27.5–28.35 GHz in light of 'the evolving nature of technology and deployment' in this band segment. The FCC also provides for expanded unlicensed use of the 57–71 GHz band on board aircraft.

With respect to broadband services on aircraft, as well as on as ships and vehicles, the FCC adopted new rules to better enable satellite-delivered connectivity to passengers and crew. The FCC has allowed 'earth stations in motion' to operate in more satellite frequencies than before in an effort to connect even larger numbers of consumers in this fast-growing segment of the marketplace, and has provided more certainty by adopting a simplified,

regulatory framework for licensing these spectrum uses. Pending before the FCC is also an inquiry into potential ways to facilitate more intensive use of the frequencies between 3.7GHz and 24GHz.

There also have been a number of other new developments with respect to satellite spectrum policy. The DOC has outlined plans to simplify aspects of the existing commercial licensing regime and also to develop radio spectrum policies to serve the needs of the commercial industry. In addition, the President has issued a number of space policy directives, which require, among other things, that the DOC and the Director of the Office of Science and Technology Policy at the White House provide him with a report on improving the global competitiveness of the US space sector through RF spectrum policies, regulation, and US activities at the ITU and other multilateral fora.

iii Spectrum auctions and fees

Where spectrum is to be assigned to an individual licensee, and more than one party applies 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 almost 100 RF spectrum auctions to date.

Historically, proceeds from all spectrum auctions have gone to the US Treasury. Under the recently used incentive auction (described above), current licensees have the option to contribute spectrum rights 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 US. 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 free, over-the-air broadcasters, based on the government's interest in ensuring that scarce spectrum rights are used in a manner that serves the public interest, and the unique pervasiveness of broadcast media in the lives of Americans and their children. As discussed below, those rules do not apply to the CATV and satellite video and audio service providers whose coverage extends throughout the US. 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 otherwise is unconstitutional.

Terrestrial broadcasting

Television and radio stations broadcasting video content for free to listeners and viewers via terrestrial RF 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 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 RF spectrum is a scarce resource, and thus the FCC should promote localism, diversity of ownership and service in the public interest.

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 (MVPDs), such as DBS and CATV providers, remain subject to FCC regulation with respect to their use of RF spectrum and certain other matters. Moreover, terrestrial CATV operators are also subject to franchising by state or local authorities for the use of public rights of way.

Carriage of broadcast television programming by MVPDs and other parties

When Congress imposed a variety of obligations on cable operators with respect to their carriage of local broadcast television signals in 1992, it was concerned that the MVPD industry posed a threat to broadcast TV stations (given better transmission quality, greater choice of programming, etc.). Congress was also concerned that MVPDs would become the predominant means of distributing video programming to consumers, and then could use that market position to preclude local broadcasters from reaching those consumers effectively. To address this concern, Congress established a statutory framework allowing each over-the-air TV station, on a local-MVPD-by-MVPD basis, to elect either must-carry status (ensuring mandatory carriage on an MVPD serving the local market of that station) or retransmission consent (requiring an MVPD to obtain the station's consent before carrying its signal). This new right supplemented the compulsory copyright licence established in the Copyright Act, under which content owners receive a statutory fee from MVPDs in connection with their retransmission of broadcast signals, but MVPDs do not need the consent of those content owners.

Initially, most local broadcasters were unable to negotiate cash compensation in exchange for granting retransmission consent to MVPDs; at best, they typically were able to

negotiate in-kind deals, such as commitments from MVPDs to purchase advertising time. More recently, local broadcasters have begun to demand cash compensation, and many have indicated they would withhold retransmission consent from an MVPD unless they are paid for the carriage of their signal. For example, in 2013, the CBS network declined to extend its grant on retransmission consent on existing terms, and carriage of that network on a major MVPD was disrupted in a number of major US markets for several weeks. However, in March 2014 the FCC took action that increased MVPDs' bargaining position somewhat; specifically, the FCC revised its rules to preclude the joint negotiation of retransmission consent agreements by multiple broadcast television stations that are ranked among the top four stations in a local market and not commonly owned. The FCC explained that such action was necessary to ensure that broadcasters did not enjoy undue leverage in such negotiations. Nevertheless, disputes between MVPDs and broadcasters continue, and the FCC occasionally is called upon to adjudicate claims of bad faith retransmission consent negotiations.

In addition to the retransmission consent requirements described above, any party that retransmits broadcast programming must comply with US copyright law. Federal law creates compulsory licences allowing cable systems and other MVPDs to retransmit such programming without obtaining specific licences from every relevant copyright holder in the programming stream. Other types of services do not benefit from this compulsory licence and must respect relevant copyright, as the US Supreme Court confirmed in June 2014 when it released its decision in *American Broadcasting Cos v. Aereo, Inc*, which involved a service that leased each subscriber an individual remote antenna that allowed that subscriber to receive broadcast signals and retransmit that signal over the internet for near-live viewing. The Court concluded that Aereo's retransmission of these signals constituted a public performance of programming material that infringed on the rights of the copyright holders. The *Aereo* decision does not address how US copyright law could apply to other retransmission services going forward, and in particular does not fully resolve whether modest changes to the structure of an Aereo-like service (e.g., recording programming for later viewing instead of engaging in near-live retransmission) would change the outcome.

ii 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 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 mechanism. 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. To expedite competitive entry into the IPTV market, to facilitate competition to entrenched CATV operators, several states have adopted state-wide franchising, and have pre-empted separate approval requirements in individual municipalities. The FCC encourages rapid approval of competitive franchising requests and has indicated that it may pre-empt states that do not promptly act on such requests.

iii 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

The FCC continues to focus its regulatory efforts on broadband-related matters, and developments in 2018 have carried on the recent trend toward deregulation of BIAPs. The FCC has continued its efforts to free additional spectrum for wireless broadband operations, both on a licensed and unlicensed basis, to facilitate continued growth in broadband markets. At the same time, the FCC has continued to explore ways to make broadband more accessible, including in areas of the country the FCC deems underserved and to individuals who otherwise would lack the resources to pay for such access.

The FCC's previous efforts to impose substantive regulations on broadband internet access services remain controversial, and have been rescinded in large part by the FCC itself. Attention has increasingly turned to federal legislative proposals to establish net neutrality requirements in some form, although such requirements may well turn out to be less stringent than those adopted by the FCC in 2015. In any event, it is possible that important details of those rules will need to be resolved through case-by-case adjudication or further FCC policy statements.

Appendix 1

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