



# ICLG

The International Comparative Legal Guide to:

## **Telecoms, Media & Internet Laws & Regulations 2016**

**9th Edition**

A practical cross-border insight into telecoms, media and internet laws and regulations

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Andreas Neocleous & Co LLC

Bagus Enrico & Partners

Bello, Gallardo, Bonequi y García, S.C.

Borenus Attorneys Ltd

Bowman Gilfillan

Chajec, Don-Siemion & Zyto

Legal Advisors

Coulson Harney

Davies Ward Phillips & Vineberg LLP

Dr. Norbert Wiesinger, Law Offices

Gün + Partners

Heuking Kühn Lüer Wojtek

Hogan Lovells (CIS)

John W Fooks & Co

King & Wood Mallesons

Kromann Reumert

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**Group Publisher**  
Richard Firth

**Published by**  
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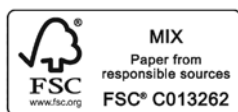
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**General Chapter:**

1	<b>An Overview of the EU Regulatory Framework</b> – Purvi Parekh & John Enser, Olswang LLP	1
---	--	---

**Country Question and Answer Chapters:**

2	<b>Angola</b>	Sociedade Rebelo de Sousa & Advogados Associados, RL: Octávio Castelo Paulo & Luís Neto Galvão	11
3	<b>Argentina</b>	Sanchez Elia & Associates: Juan Sanchez Elia & Alejandro Sigfrido Pérez	18
4	<b>Australia</b>	King & Wood Mallesons: Renae Lattey & Neil Carabine	24
5	<b>Austria</b>	Dr. Norbert Wiesinger, Law Offices: Dr. Norbert Wiesinger	34
6	<b>Belgium</b>	Linklaters LLP: Tanguy Van Overstraeten & Guillaume Couneson	41
7	<b>Brazil</b>	Melchior, Micheletti & Amendoeira Advogados: Sílvia Regina Barbuy Melchior	49
8	<b>Canada</b>	Davies Ward Phillips & Vineberg LLP: George Addy & Elisa Kearney	62
9	<b>China</b>	King & Wood Mallesons: Rui Wang	69
10	<b>Croatia</b>	The Law Office Krehić: Tarja Krehić	78
11	<b>Cyprus</b>	Andreas Neocleous & Co LLC: Andrea Kallis Parparinou	85
12	<b>Denmark</b>	Kromann Reumert: Torben Waage & Julie Bak-Larsen	92
13	<b>Finland</b>	Borenus Attorneys Ltd: Jukka Airaksinen & Henriikka Piekkala	99
14	<b>Gabon</b>	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Lydia Rasoanirina & Hantamalala Rabarijaona	106
15	<b>Germany</b>	Heuking Kühn Lüer Wojtek: Dr. Dirk Stolz & Dr. Lutz Martin Keppeler	112
16	<b>Hong Kong</b>	King & Wood Mallesons: Joshua Cole	120
17	<b>Indonesia</b>	Bagus Enrico & Partners: Enrico Iskandar & Stephen Sim	128
18	<b>Ivory Coast</b>	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Fenosa Rajomarison & Claudia Randrianavory	136
19	<b>Japan</b>	Mori Hamada & Matsumoto: Hiromi Hayashi & Akira Marumo	142
20	<b>Kenya</b>	Coulson Harney, member of the Bowman Gilfillan Africa Group: Edwina Warambo-Ogallo & Richard Harney	151
21	<b>Mexico</b>	Bello, Gallardo, Bonequi y García, S.C.: Carlos Arturo Bello Hernández & Quitzé Alejandra Espetia Mendoza	159
22	<b>Netherlands</b>	NautaDutilh N.V.: Paul M. Waszink & Piet Sippens Groenewegen	167
23	<b>New Zealand</b>	Wigley & Company: Michael Wigley	175
24	<b>Nigeria</b>	Udo Udoma & Belo-Osagie: Olajumoke Lambo & Godson Oghenechuko	181
25	<b>Poland</b>	Chajec, Don-Siemion & Zyto Legal Advisors: Andrzej Abramczuk & Mariusz Busiło	188
26	<b>Portugal</b>	Sociedade Rebelo de Sousa & Advogados Associados, RL: Octávio Castelo Paulo & Luís Neto Galvão	196
27	<b>Romania</b>	Pachiu & Associates: Remus Ene & Ioana Iovanesc	204
28	<b>Russia</b>	Hogan Lovells (CIS): Natalia Gulyaeva & Julia Gurieva	213
29	<b>Senegal</b>	John W Ffooks & Co, member of the Bowman Gilfillan Africa Group: Fenosa Rajomarison & Francky Rakotondrina	221

Continued Overleaf →

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## Country Question and Answer Chapters:

30	<b>Serbia</b>	Živković Samardžić: Slobodan Kremenjak & Miloš Stojković	227
31	<b>Singapore</b>	Webb Henderson: Angus Henderson & Daryl Cox	235
32	<b>South Africa</b>	Bowman Gilfillan, member of the Bowman Gilfillan Africa Group: Dominique Saayman & Livia Dyer	244
33	<b>Switzerland</b>	Pestalozzi: Clara-Ann Gordon & Phillip Schmidt	254
34	<b>Taiwan</b>	Shay & Partners: Arthur Shay & David Yeh	261
35	<b>Thailand</b>	Tilleke & Gibbins: Weerawat Distapinyo & Ahmet Yesilkaya	268
36	<b>Turkey</b>	Gün + Partners: Uğur Aktekin & Begüm Yavuzdoğan Okumuş	276
37	<b>United Kingdom</b>	Olswang LLP: Purvi Parekh & Tomos Jones	286
38	<b>USA</b>	Wilkinson Barker Knauer, LLP: Natalie G. Roisman & Brian W. Murray	295

## EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU Regulatory Framework for electronic communications and services in the EU Member States.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 37 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

*The International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

Alan Falach LL.M.  
Group Consulting Editor  
Global Legal Group  
[Alan.Falach@glgroup.co.uk](mailto:Alan.Falach@glgroup.co.uk)

# USA

Wilkinson Barker Knauer, LLP

Natalie G. Roisman



Brian W. Murray



## 1 Overview

**1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in the USA, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

Telecommunications is the largest communications sector in the United States, with total revenue in 2013 of almost \$570 billion. AT&T and Verizon are the largest and most diversified telecommunications companies in the United States. Each provides to residential and business customers local, long-distance, and international voice and data services, wireless services, broadband and internet access, and multichannel video programming. Although wireline services continue to experience contraction, the rapid growth of wireless services, and in particular wireless data services, have ensured that the aggregate telecommunications sector continues to grow. The telecommunications sector is not subject to significant regulatory barriers to entry, and generally is open to foreign investment.

The Wireless Telecommunications subsector had total revenue of \$240 billion in 2014, an increase of 6.3% from 2013 (U.S. Census Bureau 2013 Annual Services Report, released November 2014). The number of mobile subscriptions has grown to 197 million as of June 2013, an increase of 16% from December 2012 (FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Internet Access Services: Status as of December 31, 2013, at 1-4 (October 2014), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-329973A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-329973A1.pdf)).

The largest wireless carriers are Verizon Wireless (133 million subscribers, retail and wholesale combined), AT&T (121 million), T-Mobile USA (56.8 million), and Sprint (56.7 million), as of March 2015. Special regulatory requirements apply for foreign entities seeking a greater than 25% interest in a U.S. wireless carrier.

With around \$132 billion in revenue in 2012, the audio-visual media distribution sector includes internet broadcasting and publishing, while non-internet broadcasting accounted for an additional \$125 billion. Cable operator Comcast (around 22.4 million subscribers) is the largest provider, followed closely by satellite provider DirecTV (over 20.4 million subscribers). Notwithstanding substantial competition in the markets that comprise this sector, there are substantial regulatory barriers to new entry. New broadcast and

satellite licences are seldom issued, and obtaining a franchise for cable overbuilding to compete with an incumbent cable provider is relatively uncommon. However, with some loosening of local cable franchising requirements, telecommunications carriers are offering multichannel video services that compete with cable. There are no significant barriers to foreign investment for cable operators. For satellite, broadcast TV, and radio companies, special regulatory requirements apply for foreign entities seeking a greater than 25% interest. The FCC recently loosened its policy under which broadcast TV and radio companies could not be more than 25% foreign-owned.

The rapidly growing internet infrastructure sector generated nearly \$96 billion in revenue in 2013. It is generally dominated by cable companies' and the largest telecommunications providers' retail internet access offerings. Comcast, the largest internet access provider, has over 22.4 million subscribers, while AT&T has over 16 million. Time Warner Cable serves approximately 12.6 million, and Verizon around 9.2 million.

Internet connections are growing rapidly, with the number of connections over 200 kbps in at least one direction increasing in 2013 by 12% year-over-year to 293 million. In addition, connection speeds continue to rapidly increase. For instance, the number of connections with downstream speeds of at least 10 Mbps increased by 104% over December 2012, to 122 million connections as of December 31, 2013.

Moreover, the number of fixed connections with download speeds at or above 3 Mbps and upload speeds at or above 768 kbps increased to 72.5 million in 2013, and the corresponding number for mobile connections increased to 107.4 million during the same period.

Generally speaking, the internet sector is subject to less regulation than telecommunications or video, and it is not subject to foreign ownership limitations. However, internet access services and voice services provided using the internet are becoming subject to more regulation than historically applied to them.

**1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in the USA.**

The Communications Act of 1934, as amended (Communications Act), codified as Title 47 of the U.S. Code, is the primary statute governing regulation of the telecommunications and media industries, including governance of the Federal Communications Commission (FCC), an independent (*i.e.*, non-executive) federal agency. Most new telecommunications and media laws are adopted by Congress as amendments to the Communications Act, including the Cable Act of 1992 and the Telecommunications Act of 1996.

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### 1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in the USA.

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Traditional intrastate wireline telecommunications providers primarily are regulated by a public utility commission (PUC) in each state, and some PUCs also lightly regulate wireless companies and/or interconnected Voice Over Internet Protocol (VoIP) providers. Cable operators are licensed and regulated by local or state-level cable franchising authorities.

In addition to any state or local regulation, interstate telecommunications providers, wireless companies, interconnected VoIP providers, internet service providers (ISPs, which may be telephone companies, cable companies, or other types of providers), radio and TV broadcasters, cable providers, and satellite companies primarily are regulated by the FCC. The FCC is an independent agency that is directed by five Commissioners who are appointed by the U.S. President and confirmed by the Senate. No more than three of the Commissioners can be from the same political party, and one of the Commissioners of the majority party is appointed by the President to serve as Chairman.

Federal government use of radio spectrum is supervised and coordinated by the National Telecommunications and Information Administration (NTIA), an executive branch agency within the Department of Commerce. The head of the NTIA, the NTIA Administrator, is nominated by the U.S. President and approved by the Senate.

In addition, the Federal Trade Commission (FTC), another independent agency, has jurisdiction over certain consumer protection laws that are applicable to telecommunications, media, and internet companies. In addition to FCC review, the FTC and the Department of Justice (DOJ) have authority to review proposed mergers and acquisitions of such entities under the antitrust laws.

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### 1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in the USA?

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Wireline providers generally are not subject to any foreign ownership restrictions beyond the FCC's general obligations and qualifications for ownership in such providers.

Common carrier wireless licensees may have no more than 25% foreign ownership without prior FCC approval, which generally is freely granted. Non-common carrier wireless licensees, including most satellite licensees, are not subject to foreign ownership restrictions.

Radio and TV broadcast licensees also may have no more than 25% foreign ownership without prior FCC approval. In 2013, the FCC revisited its prior *de facto* policy against waiving this 25% limitation and indicated that it may grant approval for foreign ownership greater than 25% depending on the circumstances. In 2015, the FCC granted the first such request by a broadcaster by permitting the broadcaster to have foreign ownership up to 49.9% subject to various conditions.

The internet sector is not subject to any foreign ownership restrictions.

## 2 Telecoms

### General

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#### 2.1 Is the USA a member of the World Trade Organisation? Has the USA made commitments under the GATS regarding telecommunications and has the USA adopted and implemented the telecoms reference paper?

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The United States has been a WTO member since the WTO's inception. The United States has undertaken specific commitments under the GATS to provide market access and national treatment for a broad range of telecommunications services, with certain limited exceptions, as well as additional commitments to the procompetitive regulatory principles set forth in the "Reference Paper". The United States implemented these commitments through two companion orders issued by the FCC in November 1997. These orders collectively established a framework for facilitating entry into the U.S. market by foreign (or foreign-licensed) entities for the provision of telecommunications services.

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#### 2.2 How is the provision of telecoms (or electronic communications) networks and services regulated?

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The regulatory framework applicable to communications networks and services varies greatly depending on the technology utilised by the service provider, the type of service, and the regulatory classification of the provider. Historically, wireline common carriers have been subject to the highest level of regulation, although the trend primarily is deregulatory. Nevertheless, incumbent local exchange carriers (ILECs), which enjoyed local monopoly status prior to the deregulation of local markets, remain highly regulated at the federal and state level. Competitive carriers are subject to lighter regulatory requirements at the federal level and varying degrees of regulation by the individual states.

Although non-voice broadband providers, including data transport providers and ISPs, traditionally were much more lightly regulated at the federal and state levels, the FCC recently changed the legal classification of broadband ISPs. As a result, ISPs are now subject to some – though not all – of the same rules that apply to wireline common carriers. In that same ruling, the FCC imposed certain "Open Internet" or "network neutrality" requirement on ISPs. (See question 6.4 below.)

Wireless carriers are primarily regulated by the FCC. The states are precluded from regulating the entry of, or rates charged by, wireless carriers, although they frequently impose consumer protection requirements on wireless carriers.

VoIP providers are subject to substantially less regulation than traditional wireline carriers. However, federal regulation of VoIP providers has increased as they have gained market share. In addition, although state regulation of VoIP providers initially was largely preempted by the FCC, the FCC recently has been permitting increased state regulation.

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#### 2.3 Who are the regulatory and competition law authorities in the USA? How are their roles differentiated? Are they independent from the government?

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The FCC has broad "public interest" authority to regulate the telecommunications marketplaces. The DOJ and the FTC hold more limited jurisdiction over antitrust, competition, and consumer protection



issues, and, in addition to the FCC, one of these entities typically reviews larger mergers and acquisitions of telecommunications carriers to determine whether the effect of a proposed transaction would substantially lessen competition. State PUCs also play a significant role in regulating intrastate telecommunications, including the review of mergers of intrastate providers.

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#### **2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?**

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FCC staff-level decisions may be appealed to the FCC Commissioners, and decisions of the FCC Commissioners may be appealed to the federal courts. The U.S. Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of final orders and decisions of the FCC. Generally, judicial appeals of FCC decisions assert that the decisions are inconsistent with the U.S. Constitution or with underlying federal statutes, or are arbitrary and capricious.

### **Licences and Authorisations**

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#### **2.5 What types of general and individual authorisations are used in the USA?**

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U.S. telecommunications service providers may be required to obtain regulatory authorisations depending on the nature of the services that they provide. Carriers providing only domestic interstate services generally need not seek an individualised authorisation. To provide international common carrier services, U.S. carriers must apply for and receive individualised authorisations under the Communications Act. The authorisations required to provide local exchange and intrastate long-distance services are established by state PUCs and vary by state.

Parties seeking to use radio spectrum to provide service are generally required to obtain a radio spectrum licence from the FCC, and most such licences are awarded by auction. However, no licence is required for the use of certain “unlicensed” spectrum bands.

VoIP providers generally are not required to seek federal authorisation to provide service, although they are required to seek federal permission to discontinue service. In other respects, FCC regulation of interconnected VoIP services has increased. In addition, some states require VoIP providers to register as local exchange carriers (LECs) in order to offer interconnected VoIP services to the public, and some VoIP providers elect to obtain state authorisations in light of particular regulatory considerations.

Following the FCC’s recent ruling reclassifying ISPs, ISPs are now subject to many of the rules that traditionally applied to wireline common carriers. As a result, some state PUCs may explore the possibility of regulating ISPs.

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#### **2.6 Please summarise the main requirements of the USA’s general authorisation.**

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The United States does not issue a general telecommunications authorisation. Instead, specific state and federal authorisations are required to be obtained to provide certain types of telecommunications. (See questions 2.5 and 2.7.)

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#### **2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.**

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Intrastate wireline services generally are licensed by individual state PUCs, and the rules for obtaining such licences, as well as the rules

to which the licensees are subject, vary widely among the states. Interstate services generally fall under a blanket licence issued by the FCC that does not expire. Individual Section 214 licences are issued by the FCC to providers of international services and also do not expire.

Radio spectrum licences are issued by the FCC to cover particular radio spectrum frequencies and geographic areas. Although their term varies depending on the type of licence, many last for 8-10 years and are subject to a renewal expectancy. Satellite authorisations (covering spectrum access and launch and operation of satellites) are granted by the FCC for a period of 15 years and also, generally, are subject to a renewal expectancy.

The transfer of the foregoing authorisations generally is permitted upon the prior approval of the FCC and/or the relevant state PUC, and the process for securing these approvals varies significantly depending on the type of licence and the type of transfer. Certain transfers of simple wireless licences are subject to immediate approval, while approval of large wireless transactions can take six months or considerably longer if opposed. For wireless licences, the FCC permits carriers to engage in the secondary market, with opportunities to sublease, partition, or disaggregate spectrum.

### **Public and Private Works**

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#### **2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?**

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The ability to site telecommunications facilities historically has been governed primarily by state and local land use law. Zoning regulations often limited the areas in which towers could be constructed and the terms on which collocations could occur. The FCC has undertaken several efforts aimed at expediting siting timeframes. First, the FCC created a “Shot Clock” to expedite siting of new towers and collocations by establishing concrete deadlines by which municipalities must act on zoning requests for telecommunications facilities or be subject to judicial action. Second, the FCC interpreted the Communications Act to require timely, non-discriminatory access to utility poles for wireless attachers. Third, the FCC has announced that it will initiate additional rulemakings aimed at streamlining the siting process for new towers and new collocations.

Congress, states, and a multi-agency group have also sought to decrease tower siting timelines. Congress passed nationwide collocation-by-right legislation that requires local jurisdictions to approve certain wireless antenna collocations, and last year the FCC adopted rules implementing that legislation and taking other steps to streamline wireless facility siting. Several states also have enacted legislation that establishes a state-based collocation-by-right. In addition, a multi-federal agency effort is underway to propose concrete reforms to the process for tower siting on federal lands.

### **Access and Interconnection**

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#### **2.9 How is network-to-network interconnection and access mandated?**

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All telecommunications carriers are required to interconnect with each other, either directly or through other carriers’ facilities. Interconnection agreements may be regulated at the state and federal levels. The Communications Act places more stringent requirements on ILECs, which must provide interconnection to other carriers at any technically feasible point on their network and

at regulated rates. The FCC is now considering whether to mandate interconnection between Internet Protocol networks. In addition, in connection with its ruling reclassifying ISPs, the FCC stated that it would begin to monitor ISPs' interconnection arrangements.

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#### **2.10 How are interconnection or access disputes resolved?**

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Generally, state PUCs are charged with resolving disputes over interconnection and collocation. The decisions of state PUCs are reviewable by the federal courts. Where a state PUC declines to resolve an intercarrier connection dispute, the FCC may adjudicate. In addition, parties to a dispute regarding internet interconnection may now file complaints with the FCC.

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#### **2.11 Which operators are required to publish their standard interconnection contracts and/or prices?**

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State PUCs must approve interconnection agreements entered into by ILECs and certain other carriers. These agreements must be made publicly available, and other similarly situated carriers have the right to "opt-in" to any current interconnection agreement.

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#### **2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and if so, how?**

---

ILECs are permitted to charge certain carriers regulated rates for traffic originated and terminated on local exchange networks. State PUCs establish the rates associated with the origination and termination of local and intrastate traffic, and the FCC establishes the rates associated with interstate traffic. Wireless carriers lack the ability to require long-distance carriers to pay them for the origination and termination of traffic on their networks, and thus most such traffic is settled pursuant to privately negotiated agreements. The FCC is transitioning, on a phased-in basis ending in 2020, to a "bill and keep" market structure pursuant to which all carriers recover their costs directly from their customers rather than from other carriers.

In addition, ILECs are required to provide interconnection and network access to other carriers at rates, terms, and conditions that are just, reasonable, and non-discriminatory. ILECs are also required to offer other carriers access to network elements on an unbundled basis at cost-based rates, although the FCC has discretion to refrain from applying this requirement in markets deemed to be competitive.

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#### **2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?**

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Due to existing and expired regulatory requirements, the Bell Operating Companies (BOCs) often utilise separate business entities for the provision of different services, with such separations maintained through a combination of structural, transactional, and accounting safeguards. (Seven BOCs were created by the judicial breakup of AT&T in 1984, but they have since merged into the three remaining BOCs: AT&T; Verizon; and CenturyLink.) In addition, other ILECs subject to rate regulation are also subject to accounting rules to allocate costs between local, intrastate, and interstate services and thereby enable relevant regulatory authorities to establish just, reasonable, and non-discriminatory rates.

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#### **2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?**

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ILECs are required to provide competitors with access to copper loops for the provision of voice services where copper loops are available. If an ILEC retires its copper loop facilities and replaces them with fibre, it must provide non-discriminatory unbundled access to the fibre for competitors to use to provide voice services. Incumbents building out fibre in previously unserved areas are not required to provide access to such networks on an unbundled basis. Cable TV operators generally are not subject to facilities unbundling requirements.

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#### **2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?**

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Broadband facilities generally are not required to be unbundled. ILECs generally are not required to provide competitors with access to fibre, except when access to copper loops is no longer available, and then only for voice service and only in areas that were not previously unserved. Other carriers generally are not subject to unbundling requirements. A primary objective of the FCC and the Executive Branch has been to spur the deployment of additional broadband facilities through regulatory streamlining and the provision of grants and financing, including the awarding of over \$7 billion in broadband stimulus funds in 2009-10. However, the FCC has conditioned some merger approvals on requirements to deploy broadband. Even absent unbundling requirements, optical and packetised special access offerings are subject to price caps in many areas (*i.e.*, those where there has not been forbearance).

The Communications Act requires the FCC to ensure that the rates, terms and conditions applicable to pole attachments used for any purpose are just and reasonable. The rules governing pole attachments can vary based on state and the type of service provider (*e.g.*, telephone versus cable TV). In addition, carriers are provided with guaranteed access to some types of rights of ways. The FCC is examining carriers' transitions to new communications technologies (*e.g.*, from copper networks using legacy technologies to networks that use Internet Protocol-based technologies) and has proposed some updates to its rules.

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### **Price and Consumer Regulation**

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#### **2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?**

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Wireline ILECs generally are subject to retail rate regulation. Rates charged by competitive wireline and wireless carriers are not regulated, but are subject to requirements that they be just, reasonable, and non-discriminatory. ISPs' rates are not regulated, although the FCC's recent reclassification of ISPs has triggered speculation that the FCC could begin to regulate ISPs' rates.

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### 2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

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In addition to widely applicable federal and state consumer protection laws, communications services are subject to substantial state and federal regulation. As an initial matter, common carriers must provide telecommunications services on a non-discriminatory basis at just and reasonable rates and terms. In addition, wireline and wireless common carriers are subject to the FCC's truth-in-billing requirements that loosely govern the presentation and the level of disclosure required in invoices. Further, wireline, wireless, and VoIP providers are required to establish sophisticated protections of customer information known as customer proprietary network information (CPNI). They are restricted with respect to the purposes for which they can use such information without customer consent. As a result of the FCC's reclassification ruling, ISPs are now subject to statutory provisions concerning CPNI but not the FCC's existing implementing rules; the FCC has announced its intention to commence a CPNI rulemaking specific to ISPs. The FCC and FTC also administer a variety of marketing regulations, such as the Do Not Call list, which limit the use of certain telecommunications for solicitations without prior consumer consent. The FCC reached a voluntary accord with wireless providers pursuant to which they agreed to provide certain billing and usage alerts. Many state PUCs also apply similar state consumer telecommunications protections to intrastate telecommunications providers.

## Numbering

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### 2.18 How are telephone numbers and network identifying codes allocated and by whom?

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The FCC has plenary jurisdiction over U.S. telephone numbers in Country Code 1 and has delegated day-to-day administrative duties to a private company, subject to the FCC's extensive numbering rules and oversight. In 2015, the FCC reassigned that contract from Neustar, Inc. (which had held that position since 1997) to Telcordia Technologies Inc.

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### 2.19 Are there any special rules which govern the use of telephone numbers?

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Only regulated telecommunications carriers are allowed to obtain telephone numbers from the numbering administrator, and only based on needs showings. Carriers holding numbers must report semi-annually on their use. Unused numbers in carrier inventories are subject to reclamation. Historically, interconnected VoIP providers could not obtain numbering resources directly but did so through intermediaries. However, the FCC has granted waivers to a number of interconnected VoIP providers allowing them to obtain direct access to limited amounts of numbering resources. Recently, the FCC established a process to allow interconnected VoIP providers direct access to numbering resources.

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### 2.20 Are there any obligations requiring number portability?

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All wireline carriers that hold telephone numbers are required to allow customers to port their numbers to another carrier, provided

that the customers remain in the same geographic region. Porting between wireless and wireline carriers is also required at the customer's election. In addition, VoIP providers are subject to porting requirements but are not bound by geographic restrictions. The FCC has developed specific processes and timelines for various types of intramodal and intermodal porting.

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## 3 Radio Spectrum

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### 3.1 What authority regulates spectrum use?

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Radio spectrum licensed to private/commercial entities and to state and local governments is regulated by the FCC, and the use of radio spectrum by the federal government, including all federal agencies, is coordinated by NTIA.

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### 3.2 How is the use of radio spectrum authorised in the USA? What procedures are used to allocate spectrum between candidates – i.e. spectrum auctions, comparative 'beauty parades', etc.?

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Congress first authorised the award of commercial spectrum licences through a competitive bidding (*i.e.*, auction) process in 1993, based on the concept that awarding licences to the bidders who value them most highly will result in spectrum being put to its most efficient use in the marketplace. Since that time, the FCC has used auctions to assign most such licences.

As an initial matter, the FCC must determine the type of use for which it is allocating a particular band of spectrum. In the case of the upcoming broadcast incentive auction, the FCC intends to reallocate portions of the current TV band for use by commercial wireless services.

Once a particular frequency band is allocated for a particular use, the FCC adopts technical and service rules to govern the use of that band, including a "band plan" that sets forth the bandwidth of each licence and the geographic area it will cover, which, in turn, determines how many licences will be awarded. The FCC then schedules an auction and settles on the auction procedures to be employed, which can vary among auctions. The FCC may apply certain bidding or eligibility restrictions on potential auction participants.

FCC spectrum auctions usually involve multiple rounds of bidding and can take weeks (and sometimes months) to complete. In order to encourage entry by smaller businesses, the FCC typically enables bidders below a certain size to take advantage of bidding credits, making it easier for them to outbid larger entities. Relatedly, the FCC recently adopted a new rural business bidding credit for that purpose.

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### 3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

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The FCC reserves certain spectrum bands for unlicensed uses, such as WiFi. Any entity may utilise unlicensed spectrum, provided that the user's equipment is certified by the FCC and operated in conformity with the FCC's rules. Users of unlicensed spectrum are not afforded the types of interference protections available to holders of licensed spectrum, although the FCC's rules are designed to minimise the potential for interference.



### 3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?

As the FCC awards most spectrum licences through competitive bidding and participation in spectrum auctions requires a payment before the licence is awarded, there is currently no requirement that licensees pay ongoing fees to the U.S. government. In recent years, federal legislation has been introduced that would impose spectrum user fees.

### 3.5 What happens to spectrum licences if there is a change of control of the licensee?

Transfers of control of spectrum licensees generally are treated the same as assignments of spectrum licences, and both are permitted with prior FCC approval (in some cases, *pro forma* transactions can be consummated with FCC notification after the fact). The FCC has established procedures that provide for immediate processing of most non-controversial transactions – those that involve insignificant foreign ownership, require no rule waivers, and raise no competitive or other public policy concerns. Conversely, applications that do not meet these streamlining criteria are subject to the FCC’s general approval procedures, which include a public comment period and greater scrutiny by the FCC.

The FCC uses a “spectrum screen”, or aggregate per-market threshold, to determine the potential competitive impact – and therefore the amount of scrutiny required – of a proposed spectrum transaction, with the aggregation of spectrum below 1 GHz considered an “enhanced factor” because of the favourable propagation characteristics of that spectrum. The spectrum screen periodically is updated to consider all spectrum that is suitable and available for the provision of mobile telephony/mobile broadband services. Recently, the FCC modified its approach to evaluating spectrum aggregation in the spectrum auction context, opting to replace its post-auction, case-by-case analysis with a pre-auction determination of whether band-specific mobile spectrum holding limits are necessary.

### 3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so, on what conditions?

In general, the FCC has encouraged the development of a robust secondary market for spectrum leasing, including for “partitioned” and “disaggregated” portions of spectrum licences. In addition, spectrum licence transfers and assignments are permitted with prior FCC approval, and subject to a spectrum screen, as discussed in question 3.5 above.

## 4 Cyber-security, Interception, Encryption and Data Retention

### 4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications.

Compelled governmental access to private communications, whether in the course of transmission of those communications or from electronic storage, is governed at the federal level by the Electronic Communications Privacy Act (ECPA) and the Foreign Intelligence Surveillance Act (FISA). Those statutes also define

the circumstances and means by which federal law enforcement agencies may compel access to subscriber information and information concerning the time, place, addressing and routing of communications. Most U.S. states also have enacted statutes that define the circumstances under which state law enforcement agencies may require access to private communications.

### 4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities. Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?

Under ECPA and FISA, telecommunications carriers, providers of wire and electronic communication services, and remote computing services are required to cooperate with wiretap requests and requests for access to stored call data and subscriber information. In order to facilitate cooperation with such requests, the Communications Assistance for Law Enforcement Act (CALEA) requires telecommunications carriers to ensure that their equipment, facilities, or services are capable of expeditiously isolating and delivering wire and electronic communications and call-identifying information to the government pursuant to lawful authorisation. CALEA requirements do not apply to information services or to private networks and interconnection services and facilities. However, the FCC has found that interconnected VoIP services, and the underlying switching and transport components of facilities-based broadband internet access services, are not information services for purposes of CALEA and therefore are subject to CALEA requirements.

Email service continues to be classified as an information service not subject to CALEA assistance capability requirements, but providers of email service are electronic communication service providers and are required to comply with subpoenas and other process requesting access to their customers’ email messages.

### 4.3 How does the state intercept communications for a particular individual?

Law enforcement agencies obtain compelled, real-time access to individuals’ communications by serving wiretap orders or other legal process on the individuals’ service providers. The technical methods by which interception is accomplished vary: for a wiretap on a voice telephone line, the law enforcement agency may arrange with the service provider for a physical access line, attached to the individual subscriber’s telephone line, that effectively makes the law enforcement agency a party to the individual’s telephone conversations. For emails and other non-voice electronic communications, interception capabilities may be implemented by routing an individual’s communications to a server that is controlled by or accessible to the law enforcement agency.

### 4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state.

Individuals are permitted to encrypt their communications, and service providers are permitted to make encryption available to their customers. CALEA does not require telecommunications carriers to facilitate decryption of customers’ communications for the benefit of law enforcement unless the telecommunications carrier provided the encryption capability. The legal obligation of non-telecommunications carriers to provide encryption keys to the government is currently a subject of some uncertainty and debate; as

is the ability of law enforcement, under the Fifth Amendment to the United States Constitution and its prohibition against compelled self-incrimination, to require individuals to decrypt their communications or provide law enforcement with the means to do so.

#### 4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?

Obligations to retain call data and other subscriber information apply to telecommunications carriers, providers of wire or electronic communication services, and providers of remote computing services. These categories encompass wireline and wireless telephone companies, ISPs, and providers of email and other internet-based services. Carriers that provide toll services are required to retain certain billing-related records for 18 months. In addition, various state PUCs require carriers to retain certain call records for up to three years.

Further, under ECPA, a governmental entity may require a provider of wire or electronic communication service to preserve records and other evidence in its possession for up to 180 days pending the issuance of a court order or other process requiring disclosure to the governmental entity. Also, pursuant to a court order or subpoena obtained in accordance with ECPA, a service provider may be required to retain a back-up copy of the contents of electronic communications in order to preserve those communications.

Finally, under the FCC's CPNI rules, telecommunications carriers must maintain records of certain disclosures of customer information, and of customers' permissions for such disclosures, for a minimum of one year. As a result of the FCC's recent reclassification decision, ISPs are now subject to statutory provisions concerning CPNI but not the FCC's existing implementing rules. The FCC intends to commence a new rulemaking proceeding to determine what CPNI rules should apply to ISPs.

## 5 Distribution of Audio-Visual Media

### 5.1 How is the distribution of audio-visual media regulated in the USA?

The basic regulatory framework rests on the identity of the programming provider's technology, rather than on the content itself. Television broadcasters operate under a licence issued by the FCC pursuant to Title III of the Communications Act, and are subject to fairly extensive regulatory obligations at the federal level. Cable operators are regulated under Title VI of the Communications Act, and face a different array of FCC obligations. Cable operators also are regulated by local community or state regulators with respect to certain rights and obligations. Like broadcasters, satellite TV providers, also called direct broadcast satellite (DBS) providers, operate pursuant to an FCC licence under Title III of the Act, but DBS licences differ from broadcast licences in that they are subject to certain obligations applicable to all "multichannel video programming distributors" (MVPDs), including cable providers, as well as a few mandates unique to DBS. Wireline telephony providers that provide a subscription multichannel video service via fibre or hybrid fibre/copper networks are generally subject to most Title VI regulations applicable to cable operators. The FCC has commenced an inquiry into whether certain online video providers should be regulated as MVPDs as well.

### 5.2 Is content regulation (including advertising, as well as editorial) different for content broadcast via traditional distribution platforms as opposed to content delivered over the internet or other platforms? Please describe the main differences.

Content regulation can differ depending on the type of distribution technology and the type of content at issue. As a general matter, broadcasters are subject to greater content regulation than other platforms (e.g., cable operators and DBS operators). For instance, only broadcasters are subject to FCC guidelines concerning educational/informational children's programming. Similarly, the FCC's sponsorship identification rules apply to broadcasters and cable operators (at least to a limited extent) but not to DBS operators and online video providers. However, the FTC has guidelines for endorsements and testimonials that apply to any service. And broadcasters, cable operators, and DBS operators are all subject to the same commercial limits in children's programming. Online video providers generally are not subject to content regulation (or other rules), although the FCC currently is examining the extent to which such providers should be regulated.

### 5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

There are three different sets of regulatory and licensing requirements imposed on providers of video programming. First, TV broadcasters are licensed by the FCC with the right to use a particular frequency in a specific community to transmit a free, over-the-air video service, subject to various technical requirements. TV broadcasters face the most regulatory obligations of any type of FCC licensee, including requirements to air political candidate advertising, educational programming for children, emergency alerts, and programming that serves the "needs and interests" of the broadcasters' community. The FCC also has adopted a variety of restrictions on the ability of TV licensees to own multiple media outlets (i.e., TV and radio stations and daily local newspapers) in a market.

Second, although cable operators hold some FCC licences and are subject to FCC regulations, their authorisations come from state and local cable franchising authorities. These franchising authorities generally impose certain territorial coverage obligations, as well as require the cable operators to reserve certain channels for public, educational or governmental programming and/or local programmers. The FCC requires cable operators to carry every local TV station's main programming signal if the station has opted for guaranteed carriage. In addition, federal regulations require cable operators that also own cable programming networks to sell their programming to rival MVPDs on non-discriminatory terms and to avoid favouring their own programme networks over unaffiliated networks seeking carriage.

Third, DBS operators are licensed by the FCC with the rights to use particular satellite frequencies to transmit video programming on a nationwide basis. DBS licensees must devote 4% of their capacity to non-commercial "educational or informational" programming. They also are required to use their spot-beam capabilities to retransmit local TV signals into the broadcasters' local markets.

### 5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

Transfers of control of spectrum licensees, as well as assignment of spectrum licences, are permitted with prior FCC approval. This

includes over-the-air broadcast licences, satellite licences, and wireless licences utilised by cable providers and other MVPDs. The FCC has established procedures that provide for immediate processing of most non-controversial transactions – those that involve insignificant foreign ownership, require no rule waivers, and raise no competitive or other public policy concerns. Conversely, applications that do not meet these streamlining criteria are subject to the FCC’s general approval procedures, which include a public comment period and greater scrutiny by the FCC.

## 6 Internet Infrastructure

### 6.1 How have the courts interpreted and applied any defences (e.g. ‘mere conduit’ or ‘common carrier’) available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

Telecommunications common carriers and ISPs are generally immune from liability arising from the content of the communications that they transport on behalf of their customers. However, ISPs may be required to comply with certain safe harbour provisions set forth in the Digital Millennium Copyright Act (DMCA) to ensure such immunity against copyright infringement by their customers.

### 6.2 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Telecommunications operators and/or ISPs are not under any general obligation to assist content owners in prosecuting copyright or other intellectual property claims. However, content owners may seek a court order under the DMCA for the identity of an alleged infringer. If the court grants such an order, the alleged infringer’s ISP must disclose the requested information to the copyright owner or person authorised by the copyright owner. This process may only be used to obtain the identity of alleged infringers who post content on an ISP-hosted server for access by others.

The DMCA also provides several safe harbours for ISPs, which insulate ISPs from liability for the infringing activities of their subscribers. ISPs must also terminate the accounts of repeat copyright infringers and inform all users of this policy. ISPs are not liable for the automatic transmission, routing, connecting, or temporarily storing infringing content at the direction of users.

### 6.3 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any ‘net neutrality’ requirements?

In 2015, the FCC adopted a new set of “net neutrality” or “Open Internet” rules applicable to ISPs, in response to a federal court

ruling that overturned certain aspects of the FCC’s previous effort to adopt such rules. The new rules are premised on the FCC’s reclassification of ISPs as common carriers under Title II of the Communications Act (Title II). Relying on the legal authority conferred by that classification decision, the FCC adopted rules that include: (i) bright-line prohibitions on blocking or throttling (i.e., impairing or degrading) lawful online traffic and on so-called “paid prioritisation” arrangements (i.e., those favouring certain traffic in exchange for compensation or some other benefit); (ii) a general “internet conduct standard”, by which the FCC will assess, on a case-by-case basis, whether ISP practices unreasonably interfere with or disadvantage the ability of consumers to conduct their activities online or of “edge providers” to make their services and content available; and (iii) “enhanced” transparency requirements that require ISPs to disclose additional information about their services. The FCC also stated that it would now review ISPs’ interconnection arrangements. The FCC’s order has been challenged in federal court, and that judicial review is pending.

### 6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?

No. To the contrary, under the Open Internet rules, telecommunications carriers are *prohibited* from blocking lawful traffic in most instances.

### 6.5 How are ‘voice over IP’ services regulated?

The FCC has avoided formally characterising interconnected VoIP services as Title II common carrier services under the Communications Act, and therefore interconnected VoIP services are not subject to common carrier regulation. However, noting the substitutability of traditional voice services and interconnected VoIP, the FCC increasingly has created a mirror body of regulations applicable to interconnected VoIP services that bear a striking resemblance to traditional common carrier regulation. For example, interconnected VoIP providers are subject to a variety of regulatory fund contribution requirements that previously only were applicable to common carriers, as well as CPNI (customer privacy), E911, CALEA (lawful surveillance assistance), number portability, accessibility, and certain interconnection requirements. The FCC recently also subjected interconnected VoIP traffic to its intercarrier compensation regime, although that regime will be phased out by July 1, 2020. By contrast, non-interconnected VoIP service, i.e., one-way VoIP service and VoIP service that is not interconnected to the public telephone system, generally currently is not regulated by the FCC. However, non-interconnected VoIP service is subject to certain accessibility requirements under federal law.

**Natalie G. Roisman**

Wilkinson Barker Knauer, LLP  
2300 N Street, NW, Suite 700  
Washington, D.C. 20037  
USA

*Tel:* +1 202 383 3398  
*Fax:* +1 202 783 5851  
*Email:* [nroisman@wbklaw.com](mailto:nroisman@wbklaw.com)  
*URL:* [www.wbklaw.com](http://www.wbklaw.com)

**Natalie G. Roisman** has been a partner with Wilkinson Barker Knauer, LLP since 2008 and advises clients on a wide variety of policy and regulatory issues related to the media and telecommunications fields. She works with broadcast, cable, satellite, motion picture studio, telecommunications, wireless carrier, and equipment manufacturer clients to develop and execute FCC advocacy strategies with respect to industry-wide rulemakings, adjudicatory proceedings, regulatory compliance, transactions, and enforcement actions. In addition, Ms. Roisman advises investors and the financial community regarding media and telecommunications acquisitions and the impact of Congressional, FCC and FTC policy actions on relevant industries. Prior to joining the firm, Ms. Roisman worked in private practice and served as an attorney-advisor in the policy division of the FCC's Media Bureau. She is an adjunct faculty member of the George Washington University Law School and a member of the Federal Communications Bar Association Executive Committee.

**Brian W. Murray**

Wilkinson Barker Knauer, LLP  
2300 N Street, NW, Suite 700  
Washington, D.C. 20037  
USA

*Tel:* +1 202 383 3349  
*Fax:* +1 202 783 5851  
*Email:* [bmurray@wbklaw.com](mailto:bmurray@wbklaw.com)  
*URL:* [www.wbklaw.com](http://www.wbklaw.com)

**Brian W. Murray** joined Wilkinson Barker Knauer, LLP as a partner in 2014. He has experience with a range of traditional and cutting-edge issues in communications law, with a particular focus on the regulation of cable companies and broadband-based services. His clients include cable operators, traditional telecommunications providers and internet-based competitors. Mr. Murray's practice includes participation in rulemaking and adjudicatory proceedings before the FCC, and counselling on transactions and regulatory compliance. He has also represented clients at all levels of the federal courts and before a number of state public service commissions. Prior to joining Wilkinson, Mr. Murray worked for 12 years in private practice. Following law school, he clerked for Judge Frank Mays Hull (U.S. Court of Appeals for the Eleventh Circuit) and Judge Louis F. Oberdorfer (U.S. District Court for the District of Columbia).

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59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)