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# USA

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## 1 Overview

- 1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in your jurisdiction, 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.**

The U.S. telecommunications market generated a total revenue of \$496.89 billion in 2014. Traditional wireline telephone is offered by the incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”). AT&T and Verizon are two of the largest providers of telecoms in the United States, offering a full array of services including traditional voice and data, wireless, broadband and internet access and multichannel video programming. The telecommunications industry in the United States is liberalised and open to competition and foreign investment. An FCC report with statistical data on U.S. voice telephone service is available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-338629A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-338629A1.pdf).

U.S. providers of mobile wireless services offer an array of mobile voice and data offerings, including interconnected voice services, text and multimedia messaging, and broadband internet access services. The four largest facilities-based mobile wireless service providers in the United States are: AT&T; Verizon Wireless; T-Mobile US; and Sprint. The U.S. market also includes multiple, local or regional providers such as: US Cellular; C Spire; and nTelos. The U.S. wireless communications marketplace also includes resellers and mobile virtual network operators (“MVNOs”), such as TracFone, which purchase mobile wireless services wholesale from facilities-based providers and resell them to consumers. The FCC reviews foreign ownership of 25% or greater in U.S. wireless carriers. According to the FCC’s annual wireless competition report, total wireless service revenue in 2014 was \$187.8 billion, with the four nationwide service providers accounted for approximately 98%. The Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Eighteenth Report, DA 15-1487 (rel. Dec. 23, 2015) is available at <https://www.fcc.gov/document/18th-mobile-wireless-competition-report>.

The audio-visual market is comprised of multichannel video programming distributors (“MVPDs”), broadcast television stations, and online video distributors (“OVDs”). MVPD service is provided by many regional and local cable providers, with Comcast,

Charter and Cox as key companies. AT&T-DIRECTV and DISH are MVPDs that provide satellite-delivered service, called Direct Broadcast Satellite or Direct-to-Home. From 2013 to 2014, cable video revenue increased from \$61.5 billion to \$62.3 billion, and DBS video revenue increased from \$38.6 billion to \$40.6 billion. The OVD market, which includes Netflix, Apple and Google, is growing as internet-delivered technology develops and consumers prefer to time-shift their audio-visual consumption. Over-the-air broadcasters are benefiting from digital broadcasting technology and offered improved service to 11.4 million households in 2014. There is a broad distribution of broadcast programming by MVPDs as well. MVPDs must obtain regulatory authority before providing video services and comply with several operational rules, such as must-carry, retransmission consent and various other obligations depending on whether the entity is a cable MVPD or a non-cable MVPD. Currently, there is a freeze on the issuance of new DBS licences. The cable market has been liberalised without any significant barriers to entry; however, a local franchise is required and competition is minimal except for OVDs. There are no federal restrictions on foreign ownership of cable systems. In addition, the FCC recently decided to liberalise its waiver policy on permitting more than 25% foreign ownership in broadcast television and radio companies. The FCC produces an annual report on competition in the audio-visual market, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-16-510A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-16-510A1.pdf).

The deployment of “advanced telecommunications capability” to all Americans in a reasonable and timely fashion is a policy goal of the United States. Advanced telecommunications capability is the availability of high-speed, switched, broadband telecommunications that enables users to originate and receive high-quality voice, data, graphics, and video using any technology. Key providers of internet access service in the U.S. are the traditional telecommunications companies and cable providers. The total number of internet connections in the United States increased by 9% between December 2013 and December 2014 to 321 million. The median downstream speed of fixed connections reported to the FCC was 18 Mbps and the median upstream speed was 3 Mbps. An FCC report summarising this information and providing additional data on connections and speeds for Internet Access Services in the United States is available at <https://www.fcc.gov/document/wcb-releases-data-internet-access-services-december-2014>. U.S. law is evolving with respect to the regulation of the internet sector. Currently, it is subject to less regulation than the telecoms, wireless and audio-visual industries and there are no restrictions on foreign ownership. However, there are several rulemaking proceedings and court cases considering the application of additional regulatory requirements to broadband internet access service providers.

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

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The most comprehensive legislation related to telecoms and audio-visual media distribution in the United States is the Communications Act of 1934, as amended (the “Communications Act”). It is codified at Title 47 of the U.S. Code. The Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996), was the first major overhaul of U.S. communications law in almost 62 years. Other communications industry laws adopted by the U.S. Congress include: the Cable Act of 1992; and the Open-Market Reorganization for the Betterment of International Telecommunications Act (“the ORBIT Act”).

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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 your jurisdiction.**

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The Federal Communications Commission is the U.S. regulatory agency with primary jurisdiction over the communications industry. It is an independent agency within the Executive Branch. The FCC is led by five commissioners who are appointed by the U.S. President of the United States and confirmed by the U.S. Senate. The U.S. President also selects one of the commissioners, typically from the majority political party, to serve as Chairman. Only three commissioners can be of the same political party at any given time and none can have a financial interest in any Commission-related business. All commissioners, including the Chairman, have five-year terms, except when filling an unexpired term.

Local and state-level regulation of telecommunications and cable companies is handled by local public utility commissions (“PUCs”). PUCs typically regulate intra-state communications, with interstate and international communications falling under the purview of the FCC.

The National Telecommunications and Information Administration (“NTIA”) regulates the use of spectrum by the United States Government. NTIA is an executive agency within the Department of Commerce.

The Federal Trade Commission (“FTC”) is the U.S. regulatory agency that implements federal consumer protection laws that apply to telecoms, media and internet companies. The FTC, together with the FCC and U.S. Department of Justice (“DOJ”), implements anti-trust laws and has oversight of mergers and acquisitions involving U.S. communications companies.

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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 your jurisdiction?**

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Section 310 of the Communications Act sets forth foreign ownership restrictions on U.S. radio licences. Under Section 310(a), U.S. radio licences may not be held by a foreign government or its representative. Section 310(b) contains foreign ownership restrictions on U.S. broadcast, common carrier, and aeronautical radio station licensees that require the FCC to make an affirmative public interest finding to allow foreign ownership in excess of 25%. In addition, common carrier applications from companies with reportable foreign ownership or a transfer of control or assignment application in which foreign ownership is an issue is reviewed by the Executive Branch, including the Department of Justice, the Federal

Bureau of Investigation, and the Department of Homeland Security, for potential national security, law enforcement and public safety issues. The U.S. Department of Treasury’s Committee on Foreign Investment in the United States (“CFIUS”) also reviews national security implications of foreign acquisitions of U.S. companies, under the authority of the Exon-Florio Amendment to the Defense Production Act of 1950.

## 2 Telecoms

### General

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

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The United States is a member of the World Trade Organisation and was one of the original signatories to the 4th Protocol of the General Agreement on Trade in Services (“GATS”), commonly known as the Basic Telecommunications Agreement. The U.S. has also signed on to the telecoms reference paper. Through these treaty obligations, the United States applies the principles of “most favoured nation” and “national treatment” to the communications industry. The pro-competitive commitments of the reference paper were implemented by the FCC in 1997 through two rulemaking proceedings: (1) Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd 23891 (1997); and (2) Amendment of the Commission’s Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 12 FCC Rcd 24094 (1997).

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

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Communications services are regulated differently based on the nature of the technology used to provide the service and its classification under federal statute. Fixed, wireline communications are classified as “common carrier” services under the Communications Act of 1934 and therefore highly regulated at both the federal and state level. Radio, television, satellite, and cable services are each regulated by a separate set of rules. Broadband internet access service, previously regulated as an “information” service, is now also classified as common carrier service following the FCC’s decision in the 2015 Open Internet Order. That order, however, also stated that the FCC would forbear from applying certain common carrier rules to broadband internet access service at this time.

Although federal law provides the Federal Communications Commission with jurisdiction over interstate and international telecommunications, state regulatory authorities have jurisdiction over intrastate telecommunications. This dual system of federal and state telecommunications regulations is designed to foster a cohesive nationwide system while respecting state authority over local matters.

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

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The Federal Communications Commission, an independent U.S. government agency overseen by Congress, is the primary authority

for communications laws, regulation, and technology innovation. It has jurisdiction over interstate and international communications. The Department of Justice and the Federal Trade Commission have overlapping jurisdiction in matters including antitrust, competition, and consumer protection. Particularly in large mergers and acquisitions of telecom carriers, one of these two entities will conduct its own parallel review under U.S. antitrust laws to determine whether the proposed transaction would substantially lessen competition. State telecom regulators, in addition to governing intrastate communications, have increasingly become more involved in merger reviews as well.

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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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The Administrative Procedure Act sets forth procedures for agency rulemaking and adjudication, as well as provides recourse for aggrieved parties seeking review. Final decisions made by an office or bureau of the FCC may be appealed to the full Commission for reconsideration. Final FCC decisions may thereafter be appealed to a federal court. The U.S. Courts of Appeals have exclusive jurisdiction to review final orders and decisions of the FCC. Because the Commission is considered an expert in the field and therefore entitled to some deference, the courts will generally consider whether the agency has the statutory authority for its decision, whether the decision is arbitrary and capricious (reasonableness standard), and whether the decision violates the U.S. Constitution.

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## Licences and Authorisations

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**2.5 What types of general and individual authorisations are used in your jurisdiction?**

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Telecommunications service providers in the United States may receive regulatory authorisations at both the federal and state level. The type of authorisation sought and obtained by telecommunication service providers depends on the type of telecommunications service offered.

At the federal level, common carriers are generally not required to obtain authorisations before providing interstate domestic services, but common carriers must obtain authorisations from the FCC pursuant to the Communications Act before providing international services. A common carrier offering only domestic services is only required to obtain authorisation from the FCC before discontinuing, reducing, or impairing the telecommunications service. A common carrier that receives an international authorisation must also obtain approval prior to a transfer of control or assignment of the authorisation. (See question 2.7.) At the state level, common carriers must obtain authorisation from state PUCs before providing local and long-distance service.

Radio spectrum is licensed to individuals, commercial entities, and state and local governments by the FCC. The FCC awards most radio spectrum licences to users by conducting spectrum auctions. Users of radio spectrum may operate unlicensed spectrum so long as they comply with certain conditions set by the FCC.

VoIP providers are only required to receive a federal authorisation when discontinuing their service. The FCC regulates interconnected VoIP providers like traditional phone services with respect to 911 services, portability, calling records, accessibility, and contributions to the Universal Service Fund. VoIP providers are also regulated at the state level. States with regulations typically require that VoIP providers register with the state PUCs.

In March 2015, the FCC reclassified ISPs as common carriers, thus subjecting ISPs to some FCC's requirements applicable to common carriers.

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**2.6 Please summarise the main requirements of your jurisdiction's general authorisation.**

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There is no general telecommunications authorisation in the United States. Telecommunications services in the United States are authorised by the Federal Communications Commission, pursuant to the Communications Act of 1934, and by state entities, like PUCs. The various FCC and state telecommunications authorisations required depend on the type of telecommunications service provided.

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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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The FCC issues radio spectrum licences to commercial and non-commercial users by frequency range, geographic area, and the type of radio service provided. (See questions 3.1–3.6). These licences may last up to 10 years and may be renewed. The FCC also issues satellite licences for launching and operating space station and earth stations. These satellite authorisations may last up to 15 years and may be renewed.

FCC approval for transfers of radio spectrum licences vary based on the type of licence. (See question 3.5.) Some wireless licences are immediately approved by the FCC. Transfers for more complicated wireless licences, such as those that are part of a large transaction, can take up to six months or longer. The FCC facilitates a secondary market for spectrum usage rights where spectrum users may enter into different types of spectrum leasing arrangements.

Domestic interstate wireline services are generally authorised by state PUCs and the FCC. The state PUCs' requirements for obtaining authorisations vary. The FCC generally issues a blanket licence for interstate wireline services. International wireline services are authorised by the FCC. To receive an international authorisation, the service provider must obtain a Section 214 licence from the FCC. Section 214 licences do not expire and are transferable upon FCC approval.

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## 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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Although the installation of telecommunications infrastructure is generally a matter of local concern, the Communications Act limits state and local authority in this area for the purpose of removing barriers to entry and encouraging the deployment of facilities. In particular, local authorities may not unreasonably discriminate among providers of equivalent services, nor may local authorities act in ways that effectively prohibit telecommunications service. Local authorities are also prohibited from regulating the placement of infrastructure based on the environmental effects of radio frequency emissions. Finally, local authorities must follow federal requirements and timelines when reviewing applications to place wireless infrastructure. With respect to federal lands, Congress has taken action to streamline the process for siting facilities, though implementation remains ongoing.

## Access and Interconnection

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

Common carriers are required by statute to permit interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers. All local exchange carriers must allow resale, support numbering portability and dialling parity, provide access to rights of way, and pay reciprocal compensation. ILECs must provide interconnection, access to unbundled network elements, offer resale at wholesale rates, provide notice of network changes, and permit collocation.

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

Interconnection and collocation disputes are handled at the state level. Carriers negotiating such agreements may ask the state telecom regulatory agency to participate in the negotiation and mediate any disputes. Should mediation fail, the state commission may step in to arbitrate unresolved issues. Final state commission decisions are reviewable in an appropriate federal district court. In the event a state commission fails to act, the FCC may preempt the state's jurisdiction and assume responsibility for the proceeding.

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

Any interconnection agreement adopted by negotiation or arbitration is subject to approval by the applicable state commission. These decisions, as well as the underlying interconnection agreement, are made publicly available. Similarly situated carriers thereafter have the right to opt-in to an agreement under the same terms and conditions.

### 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?

Inter-carrier compensation rates vary based on several factors, including: call origination and termination (local or long distance, interstate or intrastate); the carriers involved (ILECs, CLECs, long-distance carriers, wireless carriers); and the traffic type (wireline voice, wireless voice, data). Historically, interstate access charge rates are regulated at the federal level and intrastate access charge rates are regulated at the state level.

As a general matter, ILECs are required to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. They must also offer unbundled access to network elements at cost-based rates, unless the Commission determines the market at issue is competitive and waives the requirement. The FCC is presently transitioning toward a "bill-and-keep" system for all telecommunications traffic exchanged with LECs where carriers fund the costs of terminating inbound traffic from other carriers through charges to their own end users. Bill-and-keep is also the default methodology for all non-access wireless traffic. Wireless traffic, however, that originates and terminates in the same major trading area (intraMTA) is subject to reciprocal compensation rates – requiring the originating carrier to compensate all carriers that assisted in call completion. Calls exchanged between LECs and other carriers in normal PSTN format, even if they originate

in IP format (i.e. VoIP), are also subject to compensation. IP-IP interconnection agreements are formed through private negotiations between carriers.

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

ILECs are often subject to additional accounting, functional, or legal separation requirements. For example, the Bell Operating Companies created by the breakup of the Bell Telephone Company monopoly in the early 1980s presently rely on a network of business entities utilising various structural, transactional, and accounting safeguards to provide local, intrastate, and interstate services. Separation rules, as a matter of public policy, are thought to benefit the public interest by promoting competition.

### 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?

ILECs must provide access to its existing copper loop facilities for voice services. In the event that legacy copper facilities are retired and replaced by fibre, ILECs are similarly required to offer unbundled access to its fibre facilities on a non-discriminatory basis for voice service. However, competitors are not entitled to unbundled access of fibre facilities deployed in unserved areas. Cable operators are normally not required to offer unbundled access to their networks.

### 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?

Unlike wireline providers with legacy copper networks, providers with fibre-based networks are not typically required to provide unbundled access to their facilities. Where an ILEC retires its copper facilities and replaces them with fibre, however, the carrier must offer its competitors with access for voice (but not broadband) service.

The FCC has adopted several regulations concerning next-generation fibre services. To address the rapid transition from legacy copper to IP-based networks, for example, the FCC has established rules for copper retirement and standards to streamline transitions to an all-IP environment. Fibre networks used to support business data services (i.e. special access) are also highly regulated by the Commission, setting price caps in several markets for business data services.

The Federal Communications Commission continues to support efforts to promote broadband investment and deployment of advanced telecommunications networks nationwide. To help address deployment barriers, the FCC has undertaken several reforms to its existing Universal Service Fund: a system of telecommunications subsidies used to support deployment of voice and broadband services to high-cost areas, low-income customers, rural healthcare providers, and schools and libraries. The Commission also frequently conditions its approval for large telecom mergers on an agreement by the carrier to deploy broadband in unserved and underserved areas.

Although rules and regulations governing pole attachments vary by the type of service provider and state locality, the FCC is responsible by statute for ensuring that rates, terms, and conditions applicable to pole attachments are just and reasonable. Carriers are also provided certain right-of-way guarantees to facilitate fibre to the home (FTTH) or fibre to the premises (FTTP) buildout.

## Price and Consumer Regulation

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

Telecommunications service providers must charge retail prices that are just and reasonable and cannot unreasonably discriminate among customers. Price controls for mobile services have historically been less stringent because of competitive market conditions. Although internet access service is not subject to price controls at this time, the FCC is open to complaints alleging that prices are unjust or unreasonable.

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

The provision of telecommunications service is subject to extensive regulation under Title II of the Communications Act and FCC rules. Telecommunications carriers cannot charge retail prices that are unjust and unreasonable, engage in any practice that is unjust or unreasonable, or unreasonably discriminate among customers. Telecommunications carriers must comply with regulations governing the privacy of customer information, truth in billing, unwanted telephone calls, and other regulations applicable to common carriers.

## Numbering

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

The FCC has jurisdiction over telecommunications numbering but has delegated this responsibility to administrators, which must be impartial entities and make numbers available on an equitable basis. Neustar currently serves as both the North American Numbering Plan administrator, which oversees number allocation, and local number portability administrator, which oversees number portability between carriers. However, the FCC has selected Telcordia Technologies d/b/a iconectiv to assume the role of local number portability administrator.

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

The North American Numbering Plan administrator, currently Neustar, distributes telephone numbers on a neutral basis to telecommunications carriers and interconnected VoIP providers based on the carriers' and providers' needs. Carriers and providers must report semi-annually on their use of numbers, and unused numbers can be reclaimed by the administrator. Toll free numbers are subject to special rules, such as prohibitions on "warehousing" (or legally reserving a toll free number without having an actual toll free subscriber for whom the number is being reserved) and "hoarding" (or acquiring more toll free numbers than a subscriber intends to use).

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

Telecommunications carriers – both wireline and wireless – and interconnected VoIP providers are required to allow customers to port their telephone numbers when they switch to a new carrier or provider. The FCC's rules contain requirements for the process and timelines governing number portability.

## 3 Radio Spectrum

### 3.1 What authority regulates spectrum use?

In the United States, radio spectrum is regulated by the FCC and NTIA. The FCC regulates radio spectrum used by states, local governments, private entities, and personal uses. NTIA regulates radio spectrum used by the United States government. 3.2

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

Most new spectrum licences for commercial services are awarded using spectrum auctions. With spectrum auctions, the FCC assigns the right to transmit signals over particular bands of spectrum to the highest bidder under the assumption that the highest bidder will use the spectrum most efficiently and effectively.

To begin the spectrum auction process, the FCC must determine the intended use of the band of spectrum. Thereafter, it sets the rules for using the band, which includes establishing a "band plan" that details the band's block, frequencies, bandwidth, pairing, geographic area type, and number of licences.

Any individual or company may participate in a spectrum auction, so long as the FCC considers the individual or company to be a qualified bidder. To encourage minority, small, and rural businesses to participate in spectrum auctions, the FCC awards bidding credits.

A spectrum auction can be a very lengthy process. Most spectrum auctions consist of a number of rounds of bidding over the course of many weeks and even many months, as is the case with the Broadcast Incentive Auction, which will repurpose some television bands for wireless broadband use.

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

Users of spectrum that is designated as "unlicensed" or "licence-exempt" can operate without an FCC licence. However, to do so, users must use certified radio equipment and comply with the technical requirements. Frequency bands between 9kHz and 275 GHz are allocated for use. Because the spectrum is not licensed, users of unlicensed spectrum do not have exclusive use of the spectrum. Thus, users of unlicensed spectrum may be subject to interference.

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

The FCC does not require spectrum users to pay ongoing spectrum use fees, but, as required by Congress, the FCC collects annual regulatory fees. Spectrum users participating in spectrum auctions are required to pay a one-time payment for licences before the licences are awarded.

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

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The FCC generally approves transfers of control of spectrum licences, so long as the licence holder seeks approval prior to the transfer. Most transactions, however, are approved and processed immediately. Those transactions include those that do not require a waiver of the Commission rules and raise no public policy concerns. Other transactions, however, must undergo the FCC's formal approval process, in which the FCC uses a "spectrum screen" to determine whether there is a competitive impact associated with the proposed transaction.

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

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The FCC supports secondary markets for spectrum use, including spectrum leasing arrangements. Certain spectrum leasing, assignment, and transfer transactions are approved instantaneously, while others are subject to the FCC's formal approval process. (See question 3.5.)

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

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### 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.

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At the federal level, a governmental entity may access private communications pursuant to two statutes: the Electronic Communications Privacy Act (ECPA); and the Foreign Intelligence Surveillance Act ("FISA"). ECPA is divided into three titles: Title I – The Wiretap Act, which protects the transmission of wire, oral, and electronic communications; Title II – The Stored Communications Act, which protects electronically stored communications; and Title III – the Pen Register Act, which prohibits using pen registers and trap and trace devices to record information obtained during the transmission of wireless or electronic communications. Under FISA, a governmental entity may conduct electronic surveillance and physical searches and seizures of private communications when national security is at issue. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("Patriot Act"), which was enacted in response to the September 11, 2001 terrorist attacks, amends the ECPA and FISA by providing additional methods for intelligence surveillance.

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### 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?

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ECPA and FISA require that telecommunications service providers that offer wireless and electronic communication services comply with law enforcement agencies' requests to conduct electronic surveillance of private communication. The Communications Assistance for Law Enforcement Act ("CALEA") amended ECPA and FISA to require that telecommunications carriers ensure that the hardware and software used to provide its telecommunications services allow law enforcement agencies to conduct real-time

electronic surveillance pursuant to requests to access private information. CALEA requirements apply to traditional telephone calls, and providers of facilities-based broadband internet access and VoIP services must also comply with CALEA requirements because these providers are not considered information services under the Act. On the other hand, email services are classified as information services and, as such, are not required to comply with CALEA requirements. Providers of email services, however, must comply with court orders and subpoenas requesting access to an email service subscriber's email communications.

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

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State law enforcement agencies may intercept an individual's private communication after showing probable cause, requesting and receiving a court order pursuant to ECPA or FISA, and subsequently serving that order on a telecommunications provider. The methods by which a state may intercept the private communication vary, but some methods include re-routing communications to a law enforcement controlled server and gaining access to a cellular telephone line. States often limit the period of law enforcement surveillance to 30 days.

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

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Currently, there is no law prohibiting users of telecommunications devices from encrypting information on their devices, nor a law prohibiting a telecommunications service provider from making encryption technology available to its users. Recent events have brought the encryption of mobile phone and other telecommunications devices into the United States' national spotlight. In February 2016, a federal court issued an order pursuant to the All Writs Act of 1789 compelling Apple to write new software that would allow the Federal Bureau of Investigation to unlock an iPhone to gather communications information for a criminal investigation. Under CALEA, however, telecommunications service providers and manufacturers are not required to decrypt its customers' communications unless the telecommunications service provider or manufacturer supplied the encryption technology and can decrypt the communications without undergoing a design change or reconfiguration of the technology.

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

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The period for which telecommunications providers and infrastructure operators must retain information varies. Telecommunications carriers providing toll services must retain records that provide billing information about the telephone toll calls for 18 months. A state PUC may require telecommunication carriers to retain call records for up to three years.

ECPA provides that a governmental entity may require that a telecommunications service provider maintain the contents of wire or electronic communications for a period of 180 days, and, in some instances, a back-up copy of the communications, so long as the governmental entity receives a court order or subpoena requiring disclosure.

The FCC's Customer Proprietary Network Information ("CPNI") rules require that telecommunications carriers maintain records of disclosures of and third party access to customers' CPNI for at least one year.

## 5 Distribution of Audio-Visual Media

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

Audio-visual media services are regulated differently based on the nature of the technology used to distribute the content. Broadcast television services are heavily regulated under Title III of the Communications Act of 1934 and Parts 73, 74, and 79 of the FCC's rules. By comparison, cable service providers are more lightly regulated by Title VI of the Communications Act and Parts 76 and 78 of the Commission's rules and satellite providers by Title III and Part 25. Cable operators, in addition to federal regulations, are subject to regulations at the state and local level by franchising authorities. The FCC is considering whether to regulate audio-visual media services delivered over the internet (i.e. over-the-top ("OTT")) similar to other subscription-based, multichannel video programming distributors ("MVPDs").

### 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.

Like distribution of audio-visual media, content is regulated differently based on the technology used to deliver it. Content delivered by over-the-air broadcast is more strictly regulated than cable, satellite television (referred to as direct broadcast satellite or DBS), or OTT, because it is free and readily available on a non-subscription basis. Federal law for example prohibits broadcast of obscene content altogether and prohibits broadcast of indecent and profane content between the hours of 6:00 am and 10:00 pm local time. Although obscene content is not protected by the First Amendment of the U.S. Constitution and therefore prohibited across all audio-visual media platforms, broadcast indecency and profanity rules do not apply to cable, DBS, or OTT services. Broadcast television stations are required to air at least three hours of educational and informational (E/I) children's television programming every week, and stations can air no more than 12 minutes of advertisements each hour on weekdays and 10 ½ minutes per hour on weekends while airing children's programming. Local franchising authorities may require cable operators to set aside channels for public, educational, or governmental ("PEG") use, and both cable and DBS operators are subject to advertising restrictions during children's programming. Broadcast providers must also comply with sponsorship identification rules. Guidelines concerning endorsements and testimonial released by the Federal Trade Commission, however, apply universally across all platforms.

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

Both broadcast television and satellite television providers operate pursuant to a licence issued by the Federal Communications Commission. The licensee is authorised to operate on specified radio frequencies and must adhere to certain service terms, conditions, and technical requirements. Television broadcasters must comply with several service rules, including obligations to air educational and informational (E/I) programming, advertising for political candidates, emergency alerts, and community interest programming, as well as adhere to media ownership restrictions.

DBS operators have retransmission, programme carriage, and emergency alert obligations, and must dedicate 4% of their capacity to non-commercial, educational programming.

Cable operators are authorised by local franchising authorities, which typically grant one or more franchises within their jurisdiction access to public rights-of-way and easements to deploy the cable system. The local franchising authority also regulates cable service and equipment rates. Several key obligations of cable providers include setting aside channels for PEG use and complying with signal carriage requirements, coverage obligations, and system ownership rules. In the event that a cable operator owns or controls a programming network, it must make its affiliated programming available to competing MVPDs on non-discriminatory rates, terms, and conditions, as well as avoid favouring affiliated networks over those unaffiliated. There is no licensing requirement for provision of OTT service.

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

A licensee may transfer or assign control of its spectrum licence with prior approval from the Federal Communications Commission. The agency first reviews all transfer and assignment applications to determine whether the public interest, convenience, and necessity would be served. As part of that review, the FCC typically releases a public notice seeking comment from the public. Non-controversial applications – those not involving issues of foreign ownership, requests for rule waivers, or materially affecting marketplace competition or other public policy concerns – face a lesser degree of scrutiny.

## 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?

Internet service providers are not considered the publisher or speaker of content provided by third parties, and they are generally immune from liability for restricting access to obscenity and other objectionable content on the internet. Courts have ruled that telecommunications operators and internet service providers are neutral conduits for the transmission of others' speech.

### 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?

Internet service providers must comply with the safe harbour provisions of the Digital Millennium Copyright Act to guarantee their immunity from copyright infringement for actions taken by their customers. Internet service providers may be required by a court to disclose the identities of customers who are alleged to have infringed copyright and to disconnect customers who are repeat copyright infringers.

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**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?**

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The FCC adopted new net neutrality regulations in 2015 after a federal court partially invalidated the FCC's 2010 net neutrality regulations. The rules prohibit internet service providers from blocking or throttling lawful internet traffic and from entering into paid prioritisation arrangements with content providers. Conduct that does not fall within these bright line rules is reviewed under an "internet conduct" standard that prohibits internet service providers from unreasonably interfering with internet traffic. Differential pricing in the form of sponsored data and zero rating is permissible under the net neutrality rules, although the FCC is currently examining these practices. A federal court sustained the FCC's 2015 net neutrality rules.

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**6.4 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content? Are consumer VPN services regulated or blocked?**

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Internet service providers are prohibited from blocking access to certain sites or content, including VPN services, although they are permitted to engage in reasonable network management, which may include blocking of unwanted or harmful content.

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**6.5 How are 'voice over IP' services regulated?**

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The FCC has declined to classify voice over IP services as either telecommunications services, which are subject to common carrier regulation, or information services, which are not. Nevertheless, the FCC has imposed a host of regulatory requirements on VoIP providers that are interconnected with the Public Switched Telephone Network. These obligations track many of the obligations historically imposed on telecommunications carriers, such as the prohibition on blocking calls. In addition, interconnected VoIP providers are subject to the following regulatory obligations: E911 requirements; CPNI compliance; access to persons with disabilities; discontinuance notification; outage reporting; CALEA; intercarrier compensation; federal Universal Service Fund contribution requirements; contributions to other funds regulated by the FCC; and payment of FCC regulatory fees. Non-interconnected VoIP providers are subject to much more limited regulatory obligations, currently including only accessibility rules, TRS fund contribution obligations, and the prohibition against call blocking. While the FCC proposed in 2012 to require non-interconnected VoIP providers to contribute to the federal Universal Service Fund, it has yet to decide on that proposal.

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