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# The International Comparative Legal Guide to:

# Telecommunication Laws and Regulations 2010

## A practical insight to cross-border Telecommunication Laws and Regulations


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## 1 Framework

**1.1 What are the overall policies and objectives for the electronic communications industry and have these been published in draft or final form? What legislation is relevant to telecommunications and radio frequencies?**

Section 1 of the federal Communications Act of 1934, as amended (Communications Act), provides that it is the policy of the U.S. "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . ." The U.S. generally looks, at both the federal and state level, to competitive market forces to ensure the quality and variety of telecommunications services and regulates where those forces cannot or have not promoted these objectives of the Communications Act.

**1.2 Is the USA a member of the World Trade Organisation? Has the USA made commitments under the GATS/GATT regarding telecommunications and has the USA adopted the WTO Basic Telecommunications Agreement?**

The U.S. is a member of the World Trade Organisation (WTO). The U.S. has made commitments and adopted the WTO Basic Telecommunications Agreement.

**1.3 How is the provision of electronic communications networks or services regulated? Is the provision of electronic communications networks or services open to competition in the USA?**

The regulation of telecommunications services in the United States is divided on both a geopolitical and conceptual basis. The Federal Communications Commission (FCC) regulates the provision of interstate and international communications. Local exchange and intrastate long distance services are regulated by the individual states. In general, the provision of electronic communications services is open to competition, although entry into some rural areas may be regulated. Non-dominant telecommunications providers are not subject to any significant regulation. At least on the national level, private carriage is unregulated. *See* also question 4.4.

The provision of "enhanced" or "information" services - services which include data processing service, including most Internet services - is basically unregulated, although Voice over Internet Protocol (VoIP) is subject to some regulations. *See* question 10.5. The only companies which remain subject to extensive regulation, and then only with respect to their local telephone operations over which the enhanced services ride, are the incumbent local exchange carriers (ILECs) - generally the Bell Operating Companies (BOCs) and their successors. While most states have relaxed regulation of telecommunications, a number have not gone as far as the FCC.

**1.4 Which are the regulatory and competition law authorities? How are their roles differentiated? Are they independent from the government?**

The FCC is the principal regulatory authority with respect to the provision of telecommunications services. State public utility or service commissions (PUCs) have regulatory authority over the provision of local exchange and intrastate long distance services. Their regulatory authority over entry is very limited, but they have extensive authority over at least the ILECs' pricing and terms and conditions of service. The Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (FTC) have jurisdiction under the antitrust laws over competition issues, including review of mergers and acquisitions among telecommunications providers.

**1.5 Are decisions of the national regulatory authority able to be appealed? To which court or body?**

Decisions of the FCC can be appealed to one of the twelve United States Courts of Appeal. Decisions of state PUCs can be appealed to the courts of the relevant state.

## 2 Licensing

**2.1 If a licence or other authorisation is required to install or operate electronic communications networks or provide services over them, please briefly describe the process, timescales and costs.**

The FCC has different procedures for the issuance of licences to use the radio spectrum, to provide international and domestic telecommunications services, and to construct, or acquire an interest in, a submarine cable. The amount of time required to obtain a licence varies depending on the service and the procedures used to award the licence. The FCC is not required to act on an application in a specified period of time.

With the exception of certain services, such as WiFi and remote controls, which use unlicensed spectrum, a licence from the FCC is required to use the radio spectrum. Spectrum licences are awarded either by auction or through the filing of an application specifying the precise spectrum and facilities to be used. Due to the many

details requiring resolution, the auction process - from deciding how the spectrum will be licensed to the grant of a licence - can take several years. The actual licensing process, from the date the FCC issues a notice that an auction will be held to the grant of a licence can take close to a year or more. Radio spectrum licences not awarded by auction typically are granted within 75 to 90 days after the filing of the application, assuming no opposition is filed.

U.S. companies seeking to provide domestic interstate telecommunications services are not required to obtain a licence. Companies in which foreign entities hold an indirect 25% interest are required to seek a ruling from the FCC that the ownership of the entity comports with the FCC's foreign ownership rules. *See* Section 12.

Some state PUCs continue to require authorisations before an entity can provide local exchange or intrastate long distance service, although a PUC's ability to deny the request is severely limited. The filing requirements, time to act and processing procedures vary from state to state.

Requests for authority to provide international telecommunications services, whether resale or facilities-based, require filing a Section 214 application with the FCC and are subject to public comment. Section 214 applications are entitled to streamlined processing, and applicants may commence service 15 days after the FCC releases a public notice of the filing, unless (a) the applicant is affiliated with a dominant landline provider in the destination country and cannot satisfy one of six specified conditions, (b) the applicant is proposing service to a non-WTO country and the applicant is affiliated with a foreign carrier, or (c) the FCC decides to review the application more carefully. Applications not entitled to streamlined treatment or removed from the expedited treatment line take substantially longer to process.

Applications for submarine cable landing licences are filed with the FCC and are subject to public comment. The FCC consults with the Department of State, the Department of Defense, and the National Telecommunications and Information Administration (NTIA). Submarine cable applications which meet certain criteria - principally related to whether they are not affiliated with dominant carriers at the foreign terminating points - are granted 45 days after the FCC releases a public notice seeking comment on the application. Applications not entitled to this streamlined process take several months and may take a year, or longer, to be acted on.

Unlicensed services that employ radio-frequency emitting equipment, either intentionally or unintentionally, are subject to technical requirements and, in some cases, filings with the FCC assuring compliance with those requirements.

**2.2 What other requirements, permits or approvals must be met or obtained before networks may be installed or operated and services provided?**

Companies proposing to provide facilities-based telecommunications service must obtain authority to use rights of way (ROW) from local or state governments and to construct radio towers. Securing ROW or zoning approval for towers can be difficult and time-consuming. Capacity can be leased from existing holders of ROW or towers and is less burdensome as it generally does not require governmental approval. Facilities-based providers also must comply with local building codes, environmental regulations, and other rules of general applicability.

**2.3 May licences or other authorisations be transferred and if so under what conditions?**

Prior FCC consent is required to transfer control of any entity holding or controlling, directly or indirectly, an FCC spectrum licence, a Section 214 authorisation to provide interstate or international telecommunications services, or a submarine cable licence. Prior FCC consent is also required to assign any spectrum licence or any authorisation to provide interstate or international telecommunications services or to assign customers or lines. The FCC will review applications for transfer of control or assignment of a licence or authorisation to determine whether the transaction is consistent with its rules and policies and whether conditions should be imposed to ensure that the transfer or assignment serves the public interest - the touchstone of its regulatory authority. Mergers or acquisitions of companies with assets in excess of a specified amount, which is adjusted for inflation, are required to file information with the DoJ and the FTC to permit either agency to determine whether the transaction complies with the antitrust laws.

**2.4 What is the usual or typical stated duration of licences or other authorisations?**

The duration of radio spectrum licences varies depending on the nature of the service. Radio spectrum licences used for telecommunications services are typically granted for a term of ten years and are renewable, although, in some cases, showings as to usage or build-out are required. Satellite authorisations are for a period of fifteen years and permission to continue operating thereafter can be obtained if the satellite is still functional. Authorisations to provide landline telecommunications services, whether domestic or international, are perpetual. Submarine cable landing licences are for the duration of the life of the cable system.

## 3 Public and Private Works

**3.1 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?**

Regulation of land use is generally a matter for local or state governments. Local or state governments control the use of land they themselves own. Most local governments have zoning laws which restrict the manner in which private property may be used, and those laws apply to telecommunications infrastructure. Subject to limited exceptions, local or state environmental rules and other requirements applicable to business in general may apply to network infrastructure. Access to federal lands is subject to regulation by the Department of the Interior or by the government department owning the property; these regulations vary by department.

The Communications Act limits the ability of local municipalities to restrict the placement of towers for commercial wireless service. However, the limits are vague and often require litigation to enforce. Local governments are precluded from considering the effect of RF radiation, which is subject to FCC regulation, in resolving zoning questions. There are also limits on the ability of local governments and building owners to preclude the installation of small satellite receive/transmit antennas. Some states may have additional provisions that telecommunications providers may use to gain such access, but they are scattered and unique in each situation.

**3.2 Is there a specific planning or zoning regime that applies to the installation of telecommunications infrastructure?**

There is no national planning or zoning regime applicable to network infrastructure. Some states or municipalities may have such regimes.

**3.3 Are there any rules requiring established operators to share their infrastructure, e.g. masts, sites, ducts or cables (i.e. dark fibre)? Are there any proposals to mandate 'passive access' to such basic infrastructure?**

There are no requirements that carriers share radio towers, although local zoning officials encourage wireless carriers to share tower space. Owners of conduits, rights of way and utility poles are required to give telecommunications providers access to the conduits, space on the poles and rights of way at reasonable rates, assuming there is capacity. ILECs are required to allow competitors to collocate in their central offices, subject to nondiscriminatory rates, terms and conditions. Wireless carriers are required to enter into automatic "roaming" agreements which permit customers to use their wireless devices for voice ? but not data ? service in areas in which the customer's carrier does not have a spectrum licence. This obligation to offer roaming does not apply where the two carriers are both licensed to provide service in the same geographic area. The FCC is examining whether to extend the roaming rules to apply to data services.

## 4 Access and Interconnection

**4.1 Is network-to-network interconnection and access mandated, and what are the criteria for qualifying for the benefits of interconnection?**

All telecommunications carriers are required to interconnect with each other under reasonable terms and conditions and may not discriminate between and among carriers. ILECs are required to provide long distance, international and wireless carriers with access to the local exchange at regulated rates.

**4.2 How are interconnection or access disputes resolved? Does the national regulatory authority have jurisdiction to adjudicate and impose a legally binding solution?**

The FCC has jurisdiction to resolve disputes over interconnection and collocation. However, principal responsibility for facilitating these agreements has been delegated to the state PUCs. Interconnection agreements must be approved by state PUCs, subject to review in federal district court.

**4.3 Are any operators required to publish their standard interconnection contracts and/or prices?**

Certain operators must publish interconnection contracts with the appropriate state PUC and/or the FCC.

**4.4 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 required to provide interconnection and network access to competitors on rates, terms and conditions that are just, reasonable and nondiscriminatory. Dominant carriers are subject to price regulation and the advance filing of tariffs for certain interstate telecommunications services. The larger ILECs have been granted forbearance from price-cap regulations for certain elements of their networks and in certain places. Other elements of the ILECs' networks have been granted pricing flexibility in a number of areas. For still other elements or places, ILECs face either price-cap or rate-of-return regulation. The regulation of special access services is the subject of an ongoing FCC rulemaking proceeding, in which the FCC is examining, among other things, whether to adopt pricing rules for such services.

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

Section 272 of the Telecommunications Act of 1996 required the BOCs to provide in-region, interstate, long-distance services through structural, transactional and accounting separations. The majority of these restrictions sunset at the end of 2006. The FCC recently adopted a new regulatory framework to replace the structural separation requirements with certain targeted safeguards to enable the FCC to monitor BOC provisioning of these services. ILECs are subject to accounting rules at both the federal and state levels, including requirements for allocating costs between interstate and intrastate services, which bear on interconnection charges.

**4.6 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks?**

Providers of IP-based services are not required to interconnect or to provide access to their networks. ILECs must offer certain network elements, unbundled and priced at substantially reduced costs, in certain circumstances.

**4.7 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?**

Upon request from a telecommunications carrier, an ILEC is required to provide access to the copper local loop on just, reasonable, and nondiscriminatory terms. Cable TV operators are not required to provide access to their infrastructure.

**4.8 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?**

ILECs building out a fibre to the home (FTTH) or fibre to the curb (FTTC) in previously unserved areas are not required to provide access to such networks on an unbundled basis. In areas previously served, if an ILEC retires the copper loop and replaces it with FTTH or FTTC, it must provide nondiscriminatory access to the next-generation network for voice grade service on an unbundled basis. If an ILEC maintains the copper loop along with the new fibre, the ILEC must keep the copper loop connected to the customer premises and make available access to the copper loop on an unbundled, nondiscriminatory basis.

## 5 Price and Consumer Regulation

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

Retail rates for mobile services are not regulated.

Rates charged by ILECs for residential service and some small businesses are generally regulated. Some state PUCs regulate the

rates ILECs charge to residential and small business customers for intrastate long distance service. Retail rates for larger businesses typically are not regulated or, if regulated, are subject to a more flexible regulatory regime than rates for residential and small business customers. Rates charged by Competitive Local Exchange Carriers (CLECs) typically are not regulated, nor are the interstate rates of long distance carriers, although all these carriers may be required to file tariffs with the state PUC or provide customers with information on their websites.

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

Telecommunications providers are prohibited from changing a customer's service provider without the customer's specific authorisation ("slamming"). There are detailed rules concerning the manner in which a carrier may obtain a new customer from an existing carrier. Similarly, carriers are prohibited from adding new services to an existing customer - such as voice mail or caller identification - without the customer's express approval ("cramming"). Both the FCC and state PUCs have procedures for enforcing these prohibitions. The FCC has truth in billing rules regulating some billing practices. Many states have consumer protection rules which apply to telecommunications providers. In some states, these rules are enforced by the state PUC; in others, they are enforced by the state attorney general's office or a consumer protection agency.

## 6 Numbering

**6.1 How are telephone numbers and network identifying codes allocated and by whom?**

The FCC has plenary jurisdiction over the allocation and assignment of telephone numbers. Telephone numbers are assigned pursuant to the North American Numbering Plan (NANP). NANP numbers consist of ten digits, NXX-NXX-XXXX. The FCC has delegated administration of the NANP to an independent contractor pursuant to a competitively bid five-year contract. The NANP Administrator assigns local exchange area codes and the central office codes - the two sets of three numbers in the NANP - to specific geographic areas and central offices in accordance with FCC rules and policies. Telephone numbers are assigned to carriers by the local ILEC in blocks of 1,000 numbers. Each carrier assigns telephone numbers to its customers.

**6.2 Are there any special rules which govern the use of telephone numbers?**

Telephone numbers must comply with the NANP. Certain Numbering Plan Areas (NPAs), such as 800, 866, etc., are allocated for toll-free calling, *i.e.*, the receiving party pays, and some three digit calling numbers are assigned for other specific purposes, such as 911, which is reserved for emergency public safety, 711, which is reserved for Telephone Relay Services for the hearing- and speech-impaired and 411, which is dedicated to directory assistance.

**6.3 How are telephone numbers made available for network use and how are such numbers activated for use by customers?**

Carriers may request numbers from the NANP Administrator or the local ILEC, as appropriate. Toll-free numbers are assigned by entities designated by the FCC, typically providers of toll-free service.

**6.4 What are the basic rules applicable to the 'porting' (i.e. transfer) of telephone numbers (fixed and mobile).**

Telephone numbers are portable without regard to service type. Landline and mobile numbers, including interconnected VoIP numbers, can be ported from one carrier to another; mobile numbers can be ported to a landline carrier and vice versa. Carriers are not required to port numbers where a customer moves from one geographic area to another. Carriers may impose reasonable fees to port a number but may not refuse to port because the customer has not paid the porting fee. The FCC recently adopted new rules to require processing of porting requests within one business day. These time limits will not take effect until 2010.

## 7 Submarine Cables

**7.1 What are the main rules governing the bringing into the USA's territorial waters, and the landing, of submarine cables? Are there any special authorisations required or fees to be paid with respect to submarine cables?**

Companies proposing to construct submarine cables between the U.S. and other countries must obtain a cable landing licence from the FCC. The application is coordinated with the Department of State, which must approve any grant, Departments of Homeland Security and Defense and NTIA. There are no limits on foreign ownership of the underwater or "wet" portion of the cable, but a U.S.-owned and controlled entity must own and control the cable segment from the beach joint to the cable landing station. Applicants for cable licences must agree to maintain certain records in the U.S. and permit the Department of Homeland Security and DoJ to gain access, pursuant to lawful process, to those records and to the cable for national security purposes. The U.S. portion of the cable must comply with the Communications Assistance for Law Enforcement Act (CALEA). A filing fee is required in connection with any application for a cable landing licence.

## 8 Radio Frequency Spectrum

**8.1 Is the use of radio frequency spectrum specifically regulated and if so, by which authority?**

The use of the radio frequency spectrum by entities other than the U.S. government is regulated by the FCC. Most uses of that spectrum require a licence, but some devices may operate on unlicensed frequencies subject to technical rules.

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

The FCC awards most newly licensed spectrum through an auction process. The FCC decides in advance of an auction the technical rules for the spectrum, any limitations on the use of the spectrum, the amount of spectrum to be awarded with each licence, the geographic area covered by each licence, the rules governing the bidding process, and similar matters. Auctions often involve multiple different licences for several different geographic areas.

Auctions typically are conducted electronically over a period ranging from a few days to more than a month. Entities interested in participating in an auction are required to file an application in advance of the auction. Once the auction is completed, the "provisional" winner for a licence files another application providing information concerning the entity and, where required, the proposed service. After opportunity for public comment, the FCC will award a licence upon concluding that the applicant is qualified.

**8.3 Are distinctions made between mobile, fixed and satellite usage in the grant of spectrum rights?**

Historically, the permissible uses of the spectrum were specified by the FCC, and certain spectrum bands could be used only for specified uses. Those rules distinguished among mobile, fixed and satellite uses. Recently, the FCC basically has allowed licencees to decide how to use newly licensed spectrum for terrestrial services, although it has adopted rules to avoid interference between adjacent spectrum bands and between satellite and terrestrial uses. Historical limitations on the use of spectrum bands have been retained, unless the spectrum has been reallocated for other purposes.

**8.4 How is the installation of satellite earth stations and their use for up-linking and down-linking regulated?**

Satellite uplink earth stations are licensed facilities. C-band uplink stations must be licensed for specific locations since the band is shared with terrestrial users. Very small aperture earth stations (VSATs) operating in the Ku and Ka bands can be licensed in bulk, *i.e.* a licence can authorise the use of a number of uplink stations. Uplink stations can be authorised to communicate with one or multiple satellites, and a licencee may request authority to communicate with additional satellites after its initial authorisation. Receive-only earth stations are not licensed, except C-band receive-only stations may be registered with the FCC to protect them from terrestrial interference. *See* question 3.1.

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

Certain spectrum has been set aside for unlicensed use. This spectrum is subject to technical rules concerning the permissible power, the emission characteristics, and similar matters. It is also permissible, subject to technical parameters, for unlicensed devices to operate in some licensed spectrum. These devices must not cause interference to licensed services and must accept interference from licencees operating in the band, as long as the licencees are complying with the technical rules.

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

Licence fees are not imposed specifically on the use of the radio spectrum, but are imposed on spectrum applications and entities regulated by the FCC regardless of whether they use the spectrum.

**8.7 Are spectrum licences able to be traded or sub-licensed and if so on what conditions?**

With limited exceptions, spectrum licences can be transferred or assigned upon obtaining prior FCC consent. The parties to the transaction are required to file an application and demonstrate that the transfer or assignment is consistent with the public interest, which generally requires them to show that (a) the purchaser is qualified to hold the licence and (b) the acquisition will not have an adverse effect on competition. Transactions that do not raise public interest concerns may be granted on the day after they are filed with the FCC.

Spectrum also can be leased by the licencee to entities that would qualify to hold the licence. Leases can be for all or part of the spectrum covered by the licence. Except for spectrum management leases, where the FCC must only be notified, FCC consent must be obtained for a spectrum lease. Leases that do not raise public interest concerns may be granted on the day after they are filed with the FCC. In general, the leased spectrum is subject to the same rules as apply to the licencee and the licencee retains some responsibility, depending on the nature of the lease, to ensure that the spectrum is used in accordance with those rules. The term of the lease cannot extend beyond the licence term.

## 9 Data Retention and Interception

**9.1 Are operators obliged to retain any call data? If so who is obliged to retain what and for how long? Are there data protections (privacy rules) applicable specifically to telecommunications?**

Telecommunications service providers must retain certain data to aid law enforcement. *See* question 9.2.

Certain information that telecommunications service providers and VoIP providers collect from customers, Customer Proprietary Network Information (CPNI), may only be used or disclosed by the provider in limited circumstances, including: (1) in supplying the service from which the customer information was obtained; (2) as required by law; or (3) with the customer's approval. The provider must keep records regarding disclosure of customer information to third parties and whether the customer has allowed use of CPNI for marketing purposes. Providers must certify annually that they comply with these rules.

**9.2 Are operators obliged to maintain call interception (wire-tap) capabilities?**

Telecommunications service providers, interconnected VoIP providers and facilities-based broadband Internet access service providers are subject to CALEA, which requires that telecommunications networks take technical measures that would permit interception of the content of communications and the provisioning of other information by authorised law enforcement personnel. CALEA excludes "information" services, although the FCC has interpreted this exclusion more narrowly than it has the definition of "information" services under the Communications Act. Thus, CALEA obligations only apply to the switching and transmission components of facilities-based broadband Internet access service providers, while such providers have no CALEA obligations for Internet service provider (ISP) functionalities (e.g. email storage, web hosting) of its Internet access service. The Wiretap Act, the Criminal Trap and Trace Statute, and the Foreign Intelligence Surveillance Act (FISA) also authorise the government to obtain the assistance of telecommunications carriers and electronic communications service providers to intercept communications and provide pen register/trap and trace information under certain circumstances.

**9.3 What is the process for authorities obtaining access to retained call data and/or intercepting calls? Who can obtain access and what controls are in place?**

In order to obtain call data, authorities may obtain a court order, trial subpoena, administrative subpoena, consent from the customer, or a search warrant. State law may provide other requirements for access to call data.

A law enforcement officer seeking a wiretap for criminal investigative purposes must obtain federal court approval based on the showing of probable cause that the wiretap may provide evidence of a felony violation of federal law. The judge must continue to monitor the implementation of the wiretap. FISA provides a separate process for obtaining access to the content of communications and to call data for intelligence purposes.

## 10 The Internet

**10.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?**

Although the FCC has jurisdiction over Internet services, it has refrained from imposing any significant regulation, preferring the Internet to develop in a deregulated environment. The extent of state PUC regulatory authority over Internet services has not been determined, although the FCC has pre-empted state regulation of VoIP services and broadband Internet access service. ISPs are subject to the antitrust laws and to consumer protection laws at both the state and federal levels. However, ISPs are exempt from state and local taxation in connection with the provision of Internet access, although entities selling products or services may be subject to taxation on those transactions.

**10.2 Is there any immunity (e.g. 'mere conduit' or 'common carrier') defence available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?**

Under Section 230 of the federal Communications Decency Act, providers of an interactive computer service are not treated as the publisher or speaker of content provided by a third party. This law generally protects such providers from liability for claims arising out of the publication of information generated by a third-party user. However, federal courts disagree on the scope of this protection.

The Digital Millennium Copyright Act (DMCA) includes safe harbour provisions that protect online service providers in certain circumstances. If providers meet the DMCA's requirements, the providers will be exempt from liability for copyright infringement when the provider is involved in transitory digital network communications, system caching, and storage of a third party's material, among other things.

**10.3 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?**

Even if the provider meets the threshold requirements of the DMCA, the provider still must take certain steps to be entitled to statutory immunity. These steps vary depending on what conduct is at issue. For example, to qualify for protection under the DMCA for infringement based on third-party content residing on the provider's system or network, the provider must implement a specific notice and takedown procedure.

**10.4 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?**

ISPs and the telecommunications carriers providing the underlying transport are subject to the FCC's Internet Policy Statement, which establishes a requirement of "network neutrality." The Policy provides that consumers are entitled to (a) access lawful Internet content of their choice, (b) run applications and use services of their choice, (c) connect devices of their choice that do not harm the network and (d) competition among network, application and service, and content providers. This policy precludes telecommunications and Internet service providers from blocking, or impairing the ability of, Internet service customers to access lawful content of their choice but permits reasonable network management practices. It is unclear what additional restraints, if any, this policy might impose. The matter is under review by the FCC and the U.S. Congress. A recent FCC decision is on appeal to the courts.

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

The FCC has not determined whether VoIP should be treated as a telecommunications service or an information service for regulatory purposes under the Communications Act. However, the Commission has imposed certain public interest obligations on interconnected VoIP providers. Interconnected VoIP providers must comply with E-911 requirements, contribute to the Universal Service Fund, comply with CALEA and CPNI regulations, support the Telecommunications Relay Service fund, comply with discontinuance of service requirements and allow customers to port their numbers to a new carrier in the same geographic area. The FCC has pre-empted much state regulation of VoIP services.

**10.6 Are there any rules to prevent, restrict or otherwise govern internet or email communications, in particular, marketing and advertising communications?**

The federal CAN-SPAM Act regulates commercial emails - emails that contain advertisements or promote a commercial product or service - and precludes materially misleading header information, obscuring the identity of the sender, or sending the commercial email from an email account obtained through false or fraudulent pretences. A commercial email must: (i) identify itself as an advertisement or solicitation; (ii) notify the recipient of his or her right to opt out of receiving future commercial emails from the sender; and (iii) provide the physical postal address of the sender. Additionally, it must contain an Internet-based mechanism (such as reply email or a link to a web "unsubscribe" page) that the recipient can use to submit an opt-out request. The sender must stop sending commercial emails to the recipient within ten days and is prohibited from providing the recipient's personal information (including email address) to third parties. Violations may be aggravated if the sender obtained the address by automated harvesting or generated the address by combining names, letters, or numbers into numerous permutations. These provisions apply to all senders who send commercial email to U.S. recipients, not just to senders located in the United States.

## 11 USO

**11.1 Is there a concept of universal service obligation; if so how is this defined, regulated and funded?**

Universal service is a fundamental premise of U.S. telecommunications policy, and the FCC has established an elaborate funding mechanism designed to ensure that (i) the rates charged in rural and other high-cost areas for voice and related services, e.g., directory assistance, remain affordable (high-cost funds) and (ii) low-income families can afford basic telephone service. This support is provided through the payment to certified eligible telecommunications carriers from the Universal Service Fund, which is funded by charges assessed on the retail revenue of all interstate service and international service originating or terminating in the U.S., including VoIP service. The availability of high-cost funds and the amount of the subsidy is a function of the ratio of the carrier's average costs of service to generally averaged costs of providing wireline voice service. All wireless carriers receive subsidies in the same amount as the wireline carrier it overlaps. Internet services used by medical service providers located in rural areas and by educational institutions are subsidised through Universal Service Fund payments made to the telecommunications provider providing the Internet service. The FCC is reviewing both the manner in which the universal service system is funded and provides support.

## 12 Foreign Ownership Rules

**12.1 Are there any rules restricting direct or indirect foreign ownership interests in electronic communications companies whether in fixed, mobile, satellite or other wireless operations?**

There are restrictions on foreign ownership of telecommunications carriers, although the FCC has adopted policies which facilitate the ability of entities chartered in WTO countries to acquire controlling interests, including 100%, of telecommunications service providers in the U.S. The federal Communications Act prohibits a foreign person or entity from holding more than a 20% direct interest or more than a 20% noncontrolling, indirect interest in a telecommunications service provider or more than 25% of an entity that controls such a provider. The FCC can waive the latter limitation where the public interest will be served, and it has adopted as policy a presumption that the public interest will be served where the holder on the indirect interest is an entity chartered in a WTO country. These applicants are typically required to reach an agreement with the DoJ, the FBI and the Department of Homeland Security concerning the ability of those agencies to gain access to calling data. Foreign governments and their representatives may not own a telecommunications carrier operating in the U.S.

There are no restrictions on non-U.S. entities holding spectrum licences for other services, such as two-way private radio services, dispatch, aeronautical services, and other private wireless services. There are also no restrictions on non-U.S. entities providing Internet services.

## 13 Future Plans

**13.1 Are there any imminent and significant changes to the legal and regulatory regime for electronic communications?**

Telecommunications policy continues to be debated extensively as technology alters the marketplace and renders aspects of the current regulatory environment inapposite. Among the significant issues under review by the FCC and/or the U.S. Congress are:

- improving emergency communications systems, including the interoperability of telecommunications systems used by public safety entities;
- establishing a nationwide broadband policy to ensure broadband services are made available as widely as possible across the U.S.;
- the practice of wireless carriers and equipment manufacturers entering into arrangements for wireless handsets that contain exclusive terms;
- the universal service system, including determining whether universal service subsidies should be made available for services other than voice telephony, *e.g.*, broadband access;
- improving the variety and quality of services available in rural portions of the country;
- the manner in which long distance carriers compensate local exchange carriers for access to the local network, including the compensation carriers pay each other for terminating the other carrier's traffic;
- establishing rules for pricing of special access circuits used by competitive telecommunications providers;
- the manner in which telecommunications and Internet service providers manage their networks in light of the increasing demands of Internet traffic;
- establishing when wireless carriers should be obligated to provide service to other wireless carriers where the latter carrier lack facilities, i.e. roaming obligations;
- the regulatory treatment of VoIP;
- the availability of additional wireless spectrum;
- creating generally a regulatory framework that permits the growth and development of new services while assuring that those dependent on historic services and those who cannot afford expensive new services are served adequately; and
- whether the truth in billing rules should be applied more broadly.

It is unclear how many of these issues will be resolved in the immediate future, even though there is a general agreement that the Telecommunications Act of 1996, which made the promotion of competition a basic tenet of U.S. telecommunications policy, is no longer adequate and should be modified. It took almost 20 years for a consensus to develop making the 1996 Act possible; hopefully, the U.S. can arrive more quickly at a consensus as to how it should be changed.

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Arnold & Porter's telecommunications, Internet, and media team stands at the forefront of developments in these dynamic industries. We have guided companies through some of the largest mergers in history, represented cable television operators in franchise disputes with municipalities, advised wireless carriers (terrestrial and satellite) in novel spectrum transactions, counseled clients on how to obtain favourable regulatory treatment for their cutting edge technologies, and advised media clients on First Amendment and related issues. Our team includes attorneys who have held senior positions at U.S. government agencies such as the Federal Communications Commission, the Department of Justice, the Central Intelligence Agency, the National Security Agency, the Federal Trade Commission and the National Telecommunications and Information Administration as well as at Iridium, AT&T Canada and PBS.