

market intelligence

Telecoms & Media

Regulators remaining watchful
of consolidation

Global interview panel
covering key economies
led by Laurent Garzaniti

Regulatory developments • Major cases • Big Data • 2016 trends
Europe • North America • Asia-Pacific • Latin America

market intelligence

Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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TELECOMS & MEDIA IN THE UNITED STATES

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counsels communications, media, video programming and broadcast companies on compliance with federal and state regulatory requirements, licensing and business transactions. She has extensive experience advising companies regarding the Communications Act, the Telephone Consumer Protection Act, the Copyright Act and the Universal Service Fund.

GTD: What were the key developments in communications and media regulation in your jurisdiction last year?

Debra McGuire Mercer: The Federal Communications Commission (FCC) is the government agency responsible for communications and media regulation pursuant to the Communications Act of 1934, as amended (the Communications Act). The most significant legal development this year was a federal court's approval of the FCC's 2015 Open Internet Order, in which the FCC reclassified fixed and mobile broadband internet access as telecommunications services under Title II of the Communications Act, which is applicable to common carriers. The FCC used a 'light touch' in applying Title II and decided to forbear from enforcing many of the traditional Title II regulations. In the order, the FCC specifically banned practices deemed to be harmful to a transparent and open internet, including blocking of legal content, impairing internet traffic based on content, and favouring certain internet traffic for a charge. The federal court's approval of the Open Internet Order was noteworthy because the order was the FCC's third attempt to craft rules to foster net neutrality. The FCC's previous two efforts at developing rules governing internet access did not survive judicial review in 2010 and 2014. Broadband service providers have asked the federal court to rehear the matter. Nevertheless, the rules adopted in the Open Internet Order remain in effect and the FCC has continued to exercise jurisdiction over broadband internet service providers. Most recently, the FCC has initiated a rulemaking proceeding aimed at giving consumers increased control over the use of their personal information and strengthening broadband providers' duty to safeguard personal information and provide notice of data breaches.

GTD: Does sector-specific regulation – as opposed to the general competition regime – play a significant role in your jurisdiction? Is this expected to change?

DMM: Pursuant to the Communications Act, the FCC has jurisdiction over communications and media services, including wireline and wireless telecommunications, radio and television broadcasting, satellite communications, submarine cables, cable television services and radio frequency devices. The FCC's rules address a large range of issues including foreign ownership, technical standards, consumer privacy, reporting obligations, regulatory fees and licensing.

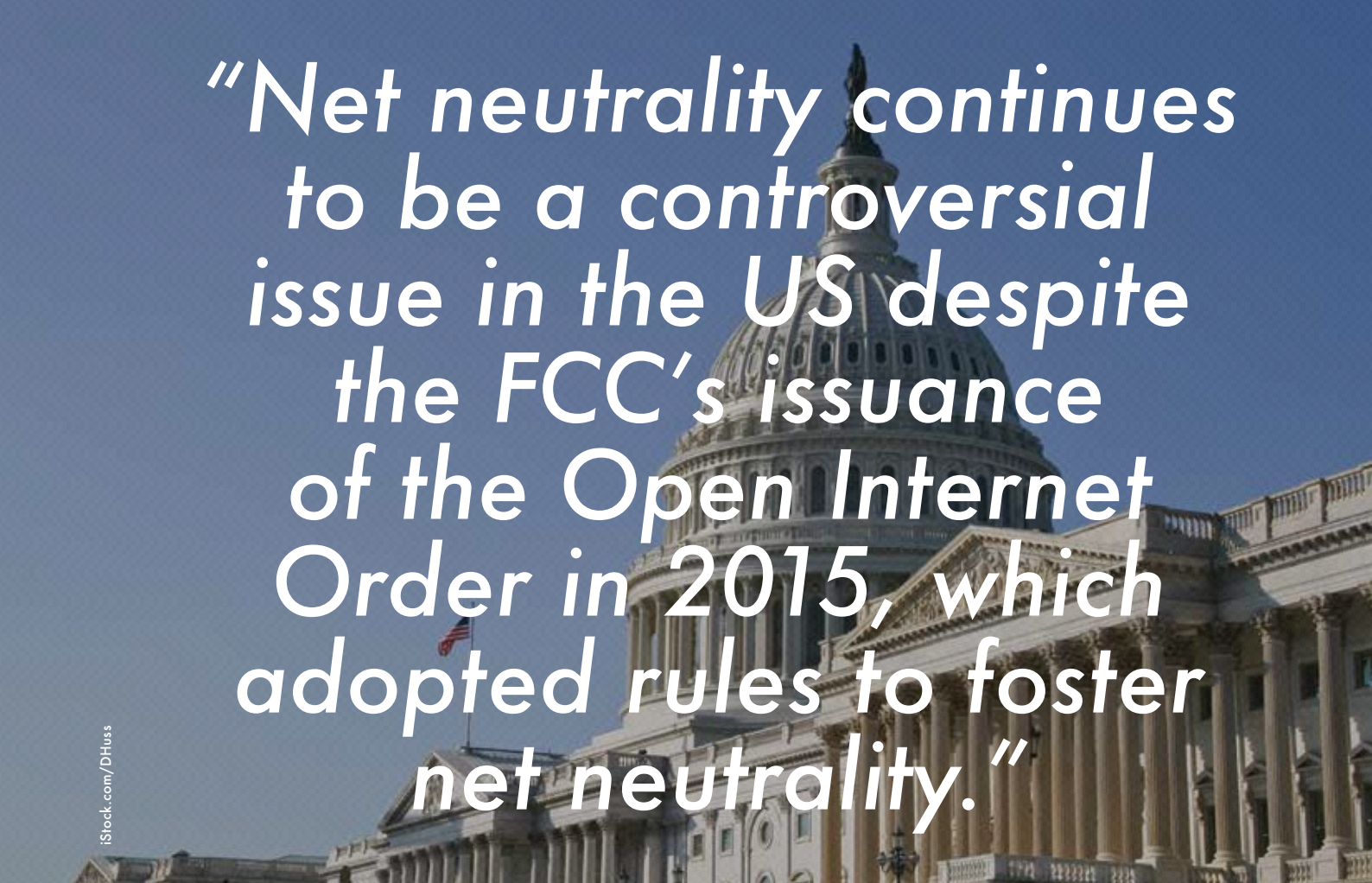
Over the past several years, communications and media service providers have come to increasingly rely on the internet to provide services. Rather than allow competition to set industry standards, the FCC has issued

regulations governing certain aspects of broadband internet access services to ensure that all individuals enjoy unfettered access to the internet. Although the FCC classified internet access services as telecommunications services, and therefore subject to the Commission's jurisdiction under Title II of the Communications Act, the FCC decided to forbear from enforcing many Title II requirements, including those rules that require unbundling of last-mile facilities, tariffing, rate regulation and various cost accounting rules. Therefore, the FCC's regulation of internet access services is substantially less burdensome than its regulation of traditional telecommunications services.

The FCC is also overseeing the transition of US wireline telecommunications networks from legacy network technology (ie, time division multiplexing (TDM)) using copper wire to internet protocol-based (IP) technology using copper, co-axial cable, wireless and fibre. These next-generation IP networks can be used to provide broadband, video and data services, in addition to voice services. FCC rules governing the transition from TDM to IP technology networks include consumer protections such as requiring telecommunications service providers to provide adequate notice to consumers and to offer the option of purchasing a backup power solution in the event of a power outage to ensure access to emergency services. Wireline telecommunications networks continue to be regulated in a technologically neutral manner such that the same statutory and regulatory requirements are applicable to networks whether they rely on legacy or next-generation technology.

GTD: What is the attitude to net neutrality in your jurisdiction?

DMM: Net neutrality continues to be a controversial issue in the US despite the FCC's issuance of the Open Internet Order in 2015, which adopted rules to foster net neutrality, and a federal court's recent approval of that order. In the FCC's Open Internet Order, the FCC banned fixed and mobile broadband internet access service providers from the following practices: (i) blocking of legal content; (ii) impairment (throttling) of internet traffic based on content; and (iii) favouring certain internet traffic in exchange for consideration (paid prioritisation). The order also requires broadband internet access providers to clearly disclose applicable rates, plan terms (eg, data caps) and network metrics; prohibits discriminatory practices; and includes data privacy protections (to be clarified in a later rule-making). Finally, the order contains a general prohibition on unreasonably interfering or disadvantaging consumers' ability to reach internet content or edge providers' ability to access consumers via the internet. Alleged violations of this



“Net neutrality continues to be a controversial issue in the US despite the FCC’s issuance of the Open Internet Order in 2015, which adopted rules to foster net neutrality.”

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‘general-conduct’ rule are examined by the FCC on a case-by-case basis.

Several entities, including a trade association representing broadband service providers, challenged the Open Internet Order by filing petitions for review with a federal court. The petitioners claimed that the Open Internet Order imposed excessively burdensome requirements of questionable enforceability that will invariably limit investment in new infrastructure and technologies. On 14 June 2016, the court rejected the petitioners’ arguments and upheld the FCC’s Open Internet Order. The petitioners have asked the court to exercise its discretion to rehear the case and ultimately may seek review at the US Supreme Court.

Although the Open Internet Order continues to face potential judicial review, the rules adopted by the order remain in effect. One issue that has arisen is whether ‘zero-rating’ plans are consistent with net neutrality. Zero-rating is when a broadband service provider exempts certain data usage from counting against a data cap, such as data used for video streaming from a particular website. Zero-rating is attractive to consumers because it allows them to use data without worrying about exceeding a data cap or paying for additional data. However, there is a concern that zero-rating allows broadband providers to favour certain types of internet traffic, such as traffic that originates from an affiliated company or from a company that pays for its traffic to be zero-rated,

and limits consumer choice. Although zero-rating is not specifically prohibited by the Open Internet Order, the FCC has indicated that it will consider zero-rating services on a case-by-case basis, and such arrangements could be determined to violate the general-conduct rule. Earlier this year, the FCC asked several broadband service providers to provide information about their use of zero-rating, but it has not initiated any enforcement actions.

GTDT: What is the regulator’s approach to over-the-top services?

DMM: The FCC considers over-the-top (OTT) or online video distributors (OVDs) to include entities that provide video programming via the internet where the transmission path is provided by an entity other than the OVD. The FCC generally does not regulate OVDs, with one exception. The FCC’s rules provide that all video programming delivered using internet protocol, which includes OTT programming, must be provided with closed captions if the programming was exhibited on television with captions. The FCC’s Open Internet Order also impacts OVDs to the extent that it regulates the broadband services upon which OVDs rely to deliver programming to customers.

The FCC is in the process of determining whether it will regulate OVDs in a manner similar to how it regulates multichannel video programming distributors (MVPDs). Pursuant

to the Communications Act and FCC rules, MVPDs enjoy privileges that facilitate access to programming and are subject to several obligations, including restrictions on loudness of commercials and provision of equal employment opportunities. In December 2014, the FCC initiated a rule-making proceeding in which it proposed to interpret the term MVPD to include distributors that make available for purchase multiple linear (pre-scheduled) streams of video programming, including OVD service providers. However, the FCC has not adopted a final order in that proceeding.

Federal courts have addressed whether OVDs may distribute television broadcast signals via the internet without obtaining the broadcasters' consent. In June 2014, the US Supreme Court agreed with broadcasters that such services violate certain copyright holders' exclusive rights to perform the works contained in the broadcast signals. The US Supreme Court did not determine whether OVDs can rely on a statutory copyright licence that is only available to cable systems to distribute broadcast signals. In July 2015, a federal district court in California ruled that an OVD that was retransmitting television broadcast signals via the internet could rely on a statutory copyright licence applicable to cable systems. Other federal district courts have ruled that OVDs may not rely on that statutory copyright licence. The losing parties in each of these cases have filed appeals with the appropriate federal appellate courts.

GTDT: *Has there been any recent granting of spectrum? Are any significant grants planned in the near future?*

DMM: The FCC is continuously working to make additional spectrum available to meet the growing demand for mobile broadband services. The FCC assigns licences to use newly available spectrum through an auction process. The FCC is currently conducting a spectrum auction, known as the Broadcast Television Spectrum Incentive Auction, to transfer underutilised broadcast television spectrum to wireless service providers.

“The federal government, including the FTC and the Office of the President, has also raised concerns about discriminatory use of big data by companies to deny credit, employment, education and other services to low-income individuals.”

In this auction, broadcast television licensees may voluntarily choose to go off the air, move to another channel, or share a channel with another broadcaster. The auction is comprised of two sub-auctions: (i) a reverse auction that determines the price for spectrum relinquished by broadcast television licensees and (ii) a subsequent forward auction that determines the price for new wireless licences using the relinquished spectrum. The reverse auction began on 29 March 2016 and was completed on 29 June 2016. The reverse auction established an initial clearing cost of \$88.4 billion (which includes \$86.4 billion to pay broadcasters for relinquished spectrum, \$1.75 billion to pay broadcasters relocation expenses related to repacking of the spectrum and \$226 million for auction administrative costs). The forward auction is scheduled to commence on 16 August 2016. The conclusion date for the auction is unknown at this time because the auction may be extended if it does not generate sufficient proceeds. Most major wireless carriers are expected to participate in the forward auction.

How has the debate about ‘big data’ played out in your jurisdiction? What has the debate focused on?

DMM: In the US there is no single authority responsible for monitoring and enforcing the variety of federal and state-based sector-specific data protection laws (eg, healthcare, financial services, telecommunications services and collection of information on minors). Although there have been attempts to pass federal legislation specifically aimed at protecting personal data, those attempts have not been successful. While there is significant interest in protecting personal data, the federal government, including the Federal Trade Commission (FTC) and the Office of the US President, has also raised concerns about discriminatory use of big data by companies to deny credit, employment, education and other services to low-income individuals.

At the federal level, the FTC traditionally has been the primary agency to investigate conduct that compromises the security and privacy of consumer data. However, during the past few years the FCC has initiated enforcement actions against telecommunications carriers related to carriers' failure to adequately protect customer data from being accessed by employees and third parties. As promised in the Open Internet Order, the FCC initiated a rule-making proceeding regarding data privacy in April 2016. The FCC's proposed data privacy rules, which would only be applicable to broadband internet access providers, are based on three principles: (i) transparency (requiring broadband providers to clearly disclose their data collection and sharing practices); (ii) choice (giving customers the right to decide how broadband providers can use and share their data with third parties); and (iii) security (requiring

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

The most important skill needed by an adviser in this area is the ability to understand how applicable laws will impact a client's business. Having a thorough understanding of how a client's business operates and its strategic plan enables an adviser to offer viable and practical solutions to legal issues. In addition, given the FCC's significant role in regulating telecommunications and media companies, it is helpful to develop relationships with FCC staff, who can often provide informal guidance and clarification about how FCC rules may impact a particular line of business.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

Parties and their advisers must know the applicable laws, understand how federal and state laws interact, and be aware of potential changes to the law being considered by Congress, the FCC and other relevant authorities. It is also essential for companies to be aware of developments in technology and trends in how both technology companies

and their customers choose to use those technologies. By keeping current on both legal and technological developments, advisers can alert companies to risks attached to certain business decisions and companies can determine how they can best use their assets to build and maintain successful businesses.

What were the most interesting or challenging cases you have dealt with in the past year?

We represent a wireless carrier that provides nationwide service, so ensuring compliance with applicable federal and state laws governing the provision of service, customer privacy, taxes and fees, and record-keeping can be challenging. We also represent various video programming providers and provide advice regarding their distribution agreements. Our representation requires us to understand how various distribution platforms, including making programming available via the internet, affect business strategies and legal compliance.

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broadband providers to protect customer information from unauthorised access and to notify customers and law enforcement authorities of data breaches). Under the FCC's proposed rules, broadband providers could use customer data as follows: (i) as necessary to provide broadband service without customer approval; (ii) to market communications-related services subject to a customer's right to opt out; and (iii) to share with third parties only if a customer agrees or opts in. Broadband providers that rely on the sale of customer data to third parties do not favour the proposed rule because only a small percentage of customers would likely opt in to such data sharing. The FCC has received comments on its proposed rules, but has not yet adopted final rules.

GTDT: What about media plurality? How have policymakers and regulators addressed this issue?

DMM: The FCC's rules prohibit several types of media plurality, including the following: (i) common ownership of a full-power broadcast station (television or radio) and a daily newspaper if the station covers the newspaper's city of publication; (ii) common ownership of television stations that reach more than 39 per cent of US

television households; and (iii) mergers between two of the four major television networks – ABC, CBS, Fox and NBC. The FCC's rules also include limitations on the number of television or radio stations that may be owned in a particular market.

In April 2014, the FCC adopted a new rule regarding attribution of television station ownership providing that when a joint sales agreement allows one station to sell 15 per cent or more of the advertising time on the other station then the owner of the advertising-selling station is also deemed to own the other station for purposes of ownership totals in the market. Television broadcasters and a trade association representing television broadcasters appealed this rule to a federal court. On 25 May 2016, a federal appeals court rejected the FCC's rule attributing ownership of a television station based on having a joint sales agreement with that station. The court explained that the FCC's failure to complete a statutorily required quadrennial review of its broadcast ownership rules (which was last required to be conducted in 2010) precluded the FCC from adopting new rules regarding attribution of broadcast ownership. The court advised the FCC that it must complete both the 2010 and 2014 quadrennial reviews (both of which are ongoing) and determine that the current

broadcast ownership rules are necessary and in the public interest before it can amend those rules. On 10 August 2016, the FCC voted to adopt a media ownership order. Although the text of the order has not been released yet, it has been reported that the order maintains the current rules and includes the joint sales agreement ownership attribution rule that was vacated by the federal appeals court in May 2016.

GTDT: Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?

DMM: On 3 May 2016, the FCC approved the merger of Altice NV (Altice), a Netherlands company that provides voice, video and broadband services throughout the world (and that owns Suddenlink Communications (Suddenlink), a US company that offers television, broadband, and VoIP in the Southern and Western regions of the US) and Cablevision Systems Corporation (Cablevision), which provides cable television, internet and VoIP services to a few states in the Eastern region of the US. The merged company, which operates as Altice and serves 4.6 million customers in 20 states, is now the fourth-largest cable television operator in the US. The FCC's approval follows the decision by the Department of Justice (which shares responsibility for merger reviews with the FTC) to close its investigation after determining that Altice's foreign ownership interests would not raise any national security issues that could not be addressed by Altice's continued compliance with a national security agreement that it entered in 2015 regarding its merger with Suddenlink. In the national security agreement, Altice agreed to protect classified and sensitive information, maintain the security of its network, route domestic communications through network equipment located in the US, comply with US laws governing storage, retention and production of information or data, and be subject to reporting and auditing requirements.

On 5 May 2016, the FCC approved the merger of three MVPDs – Time Warner Cable, Charter Communications and Bright House Networks – to form the second-largest internet service provider (Comcast is the largest internet service provider) and the third-largest MVPD in the US, serving over 25 million customers in 41 states. The FCC's approval is conditioned on the company's (New Charter) compliance with several conditions to address its concern that New Charter would have the incentive and ability to inhibit OVDs given New Charter's increased broadband footprint and number of subscribers. These conditions, which are to be effective for seven years, include the following: (i) New Charter may not impose data caps or charge usage-based pricing for residential broadband service; (ii) New Charter may not charge interconnection fees for certain

qualifying high-volume data users; (iii) New Charter may not enter or enforce distribution contracts with video programmers that prevent or discourage programmers from permitting online distribution of their content; and (iv) New Charter must undertake a build-out programme that will deploy high-speed broadband to 2 million more homes (1 million of which must be outside the company's footprint) and a low-income broadband programme for eligible households. Two trade associations representing broadband providers have asked the FCC to reconsider the build-out requirement, asserting that it may harm competition in areas outside New Charter's current footprint. Those petitions remain pending.

Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?

DMM: There have not been any recent major antitrust cases initiated by the Department of Justice or FTC against US communications or media companies.

What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?

DMM: The communications and media sectors continue to move away from legacy technologies and fixed service models in favour of internet technology that can support mobile services. The rise of internet technology can be seen in various industries: telecommunications networks are being upgraded from copper wires to infrastructure that relies on internet protocol technology; media companies are distributing video programming over-the-top; automobile manufacturers are relying on internet connections to support automobile safety features and autonomous driving; and consumer product manufacturers are using the 'internet of things' to connect various devices to the internet, including wearable fitness trackers, household appliances and security systems. As consumers increase their use of services provided via the internet, it is expected that there will be further regulation aimed at maintaining the security and privacy of personal data and providing consumers with the ability to choose how their data are used and shared. Such regulation could impact those companies that rely on customer data as a source of revenue by selling the data to third parties or by selling advertisement space that is promised to target customers with certain attributes. Moreover, there could be compliance and other costs associated with such regulations, including steep monetary fines for failing to protect consumer data.

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