



**Morgan Lewis**

TECHNOLOGY MAY-RATHON

# NEW ADMINISTRATION, NEW RULES: TECH, MEDIA & TELECOM IN 2017 AND BEYOND

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# Morgan Lewis Technology May-rathon

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# Overview

- Federal Communications Commission
- Department of Justice
- Congress
- The Courts
- Administration Priorities

SECTION 01

# FEDERAL COMMUNICATIONS COMMISSION

# Federal Communications Commission

- Governed by five Commissioners (three – including Chairman – from Party of current Administration and two from other Party)
  - Currently two vacancies, leaving 2 Republican & 1 Democratic commissioners
  - New Commissioners may not be nominated until Spring/Summer 2017, confirmed until Fall (or later), based on 2009 experience and this Administration's track record
- Commissioners nominated by President and confirmed by Senate
- Commissioner's term in office is five years (except when filling an unexpired term)
- Chair appoints staff and controls agenda; first among equals

# FCC Membership

- Ajit Pai (R), Chairman
  - Designated as Chairman by Pres. Trump immediately after inauguration
  - Term expired 6/30/2016; renomination sent to Senate in 2017
  - Can serve until end of 2017 without reconfirmation
- Mignon Clyburn (D), term expires 6/30/2017
- Michael O'Rielly (R), term expires 6/30/2019

# Post-Election Changes at FCC

- Both Pai and O’Rielly were critical of many Wheeler initiatives
  - Several key proceedings were halted after election
    - Special access/Business Data Services pricing
    - Set-top box rules
  - Pai has moved quickly to reverse some signature Wheeler actions:
    - Open Internet rules
    - Broadband privacy rules
    - UHF discount
  - Other possible targets:
    - Lifeline/Universal Service expansion
    - Inmate calling rules
- Supreme Court has upheld the right of FCC and other independent agencies to reverse their previous decisions, including statutory interpretations, as long as they articulate a rational basis for doing so
- Spectrum auction unaffected
  - Has bipartisan support, revenues needed for other Administration initiatives



SECTION 02

# ANTITRUST / M&A OUTLOOK

# Department of Justice – Antitrust Division

- President nominates and the Senate confirms the Assistant Attorney General for the Antitrust Division
  - Makan Delrahim, former Bush DOJ official, Senate Judiciary counsel, and law professor, nominated March 27
  - Former lobbyist on behalf of AT&T, Comcast, Qualcomm; also represented Google, Dish, other telecom companies in private law practice
  - Confirmation process may take many months
- Importance of DOJ for most telecom mergers (FTC for cable, but not always and not recently)
- FTC still relevant in certain media and tech combinations

# Post-Election Changes at Antitrust Division

- Decisions on merger approval, litigation, and enforcement actions are made by Antitrust AAG and other mid-level political appointees based on recommendations of professional staff
  - Individual case decisions made largely on a non-political basis
  - But political factors come into play in adjusting merger standards and interpretation of antitrust laws
  - Republicans tend to favor more flexibility for mergers/acquisitions, while Democrats are suspicious of size

# Antitrust Outlook

- Expect somewhat less aggressive review of horizontal mergers, especially where combined market share < 60%
  - More expansive definitions of product markets
  - Merger of #3 and #4 wireless carriers modestly easier, but still very difficult and challenging
- Under Democrats, agencies were focused on preventing harm to distribution of competitive content via broadband
  - Expect new Administration to be less concerned with potential vertical effects
- Republican administrations tend to be more inclined to settle deals than to litigate them
  - Expect more structural and less regulatory/conduct relief
- Impact on pending telecom/media mergers?

# TMT Deal Outlook: Spectrum

- New Administration still likely to oppose deals among the top four wireless carriers
  - Government believes market better with four competitors than three, even if one is weak
- Deals involving significant combinations of wireless assets that could be used for broadband will also receive scrutiny; other deals certainly possible
- Smaller spectrum swaps/acquisitions not likely to raise significant competitive concerns but will be reviewed
- Republican Administration less inclined to scrutinize, condition mergers that don't combine direct competitors

# TMT Deal Outlook: Broadcast

- New FCC leadership more open to allowing industry consolidation
  - 39% national TV audience cap was adopted by Congress; not clear whether FCC has authority to alter it unilaterally
  - UHF discount was abolished in 2016, but new FCC leadership reversed that decision this month
    - Since more TV stations are in the UHF band since digital transition, this opens the door to larger station groups
    - Public interest groups have already signaled plans to appeal
- Likely to relax other broadcast ownership rules (e.g., no two Top Four, newspaper/broadcast ban)
  - Expect an order later this year eliminating newspaper/radio ban, relaxing others on a market-by-market basis
  - Joint Sales Agreement rule likely to be eliminated
- Some deals that were on hold pending the close of the Spectrum Auction likely to move forward now

# TMT Deal Outlook: MVPD

- Under Obama Administration, FCC and DOJ review of MVPD combinations closely examined the ability and incentive to disadvantage over-the-top (OTT) content providers and online video distributors (OVDs)
  - Agencies imposed additional deal requirements :
    - Prohibiting contract terms restricting on-line availability of programs (e.g., limit MFNs or ADMs)
    - Prohibiting internet usage caps
    - Prohibiting internet interconnection fees
    - Buildout/overbuild commitments
- New Administration's approach to these deals not yet known, but likely to be less intrusive

# TMT Deal Outlook: Broadband

- Expect FCC and DOJ to take a more hands-off approach to broadband mergers under new Administration
  - Exception: horizontal mergers between direct competitors will still undergo traditional antitrust scrutiny
  - Extensive buy-out activity in 2016 may limit opportunities for further acquisitions by the largest national players, but second-tier combinations likely to continue
    - Many smaller metro and regional fiber networks reportedly in play
  - FCC likely to take a much narrower view of its “public interest” review of mergers, defer to DOJ on competition issues
  - Regulatory intervention into interconnection terms and OTT access less likely, short of outright blocking/denial of access



# TMT Deal Outlook: State and Local Review

- Increased role of state PUCs; NY and CA especially; local franchise authorities have also exerted authority
  - Authority limited to wireline and cable acquisitions
- State public service commissions can require transaction to have net positive public interest benefits
  - Build-out requirements for unserved and underserved regions
  - Upgrades to faster download speeds with deadlines
  - Standalone broadband and low-income offerings
  - Customer support improvement
  - Maintenance of service quality; penalize for failure
  - Job retention commitments
- Leveraging cable authority and federal statute to promote advanced services to impose broadband conditions

# TMT Deal Outlook: Rural LECs

- Rural LEC transactions:
  - Expect continued consolidation in this sector
    - Potential roll-ups of many smaller rural carriers
    - Many owners were waiting to see how High-Cost Support model plays out before committing to deals
    - Many smaller companies are still family-owned, so one-off issues (estate planning, family feuds, etc.) can impact deal timing
  - These deals usually face relatively minimal antitrust review, since the parties are rarely direct competitors
- State approvals often more significant than FCC/DOJ
- State regulatory agencies are concerned with price controls, quality of service, and financial backing
  - States requesting broadband investment as well
  - May require assurances that post-merger entity viable

# Committee on Foreign Investment in the U.S. [CFIUS]

- Inter-agency committee comprised of 9 Cabinet-level officials
- Has authority to block or unravel foreign acquisitions of U.S. businesses on national security grounds
  - Exon-Florio Amendment
  - A subgroup, Team Telecom, reviews all applications by foreign-owned entities for FCC licenses
- Has been more aggressive in recent years, has delayed or blocked several proposed acquisitions of telecom and tech firms
  - Can also impose conditions, such as national security agreements
- Administration's America First theme suggests even more important role for CFIUS

SECTION 03

# CONGRESS

# Outlook for 115th Congress

- Republicans retained majorities in both House and Senate
  - GOP holds 52 Senate seats, short of the 60 needed to stop filibusters
  - And 246 seats in the House, for a majority of 44
- First time White House and both houses of Congress controlled by same party since 2009-10



# 115th Congress – Committee Leadership

- House
  - Greg Walden (R-OR), former Telecom subcommittee chair, also outgoing NRCC chair, was chosen as new Committee chair by House Republican Caucus
    - Frank Pallone (D-NJ), ranking minority member
  - Marsha Blackburn (R-TN), new chair of Telecom subcommittee
    - Michael Doyle (D-PA), ranking member on Telecom subcommittee
- Senate
  - Commerce Committee leadership unchanged:
    - Chair John Thune (R-SD) was easily re-elected
    - Ranking member Bill Nelson (D-FL) was not up for election last year
  - Communications subcommittee leadership:
    - Roger Wicker (R-MS), Chair
    - Brian Schatz (D-HI), Ranking member

# 115th Congress – Policy Outlook

- Both Houses took some preliminary steps towards a Telecom Act rewrite in 2015-16, but made little progress
  - History of 1996 Telecom Act
  - Expect both Commerce Committee chairs to make the rewrite a priority during this Congress, but not a short-term project
- Republican leadership hostile to Open Internet Rules
  - Already passed resolution disapproving 2016 Broadband Privacy rulemaking
    - Used expedited procedures under Congressional Review Act to avoid chance of filibuster
  - Good chance of House bill to restrict FCC's jurisdiction
  - Possibility of filibuster in Senate
- Republicans also likely to revive several bills that passed the House last year but stalled in the Senate, including FCC process reforms

# 115th Congress – Policy Outlook

- Bipartisan legislative initiatives remain possible, although likely focused on narrower issues
  - Spectrum sharing
  - Cybersecurity
  - Consumer privacy
  - Second incentive auction?



SECTION 04

# THE COURTS

# Telecommunications Policy and the Courts

- All FCC final decisions are subject to review by U.S. Courts of Appeals
  - 75-80% of appeals result in affirmance
  - Stays are rare, but still occur (e.g., inmate calling)
  - But remands can alter the FCC agenda by forcing the agency to reopen proceedings
  - New FCC leadership can also voluntarily withdraw orders that are on appeal
- Most cases go to D.C. Circuit, which has tended to give more deference to FCC policy decisions in recent decisions
  - Most notably, affirming Open Internet Order
  - Current make up; future make up of Court
    - 7 of 11 current judges were appointed by Democratic presidents (six senior judges also hear cases, five of whom were Republican appointees)
    - No current vacancies
  - Spectrum issues must be brought to DC Circuit

# Telecommunications Policy and the Courts

- Third Circuit review of broadcast ownership rules has been particularly critical, resulting in multiple remands
  - FCC's August 2016 orders are now on appeal, which could require new Chair to revisit this topic in a year or two
- Other circuits are usually more deferential than DC Circuit to FCC (e.g., 10th Circuit on USF/ICC)
- Most (not all) circuit courts have majorities of Democratic appointees, but this trend likely to reverse over time
  - Nominees to lower courts not subject to filibuster in Senate

# Telecommunications Policy and the Courts

- Other major cases pending in Courts of Appeals:
  - DC Circuit:
    - Appeal of FCC award of local number portability contract
    - Appeals of FCC ruling interpreting TCPA “robocall” prohibition
    - Multiple cases challenging various aspects of the Incentive Auction
    - Appeals of inmate calling decision
- FCC action on special access (“Business Data Services”) pricing rules will likely be appealed

# US Supreme Court

- Gorsuch appointment does not significantly change the Court's ideological balance, but future vacancies could
- Potentially most significant longstanding impact of President Trump
- Few telecom cases make it to the Supreme Court and, historically, few of those have been 5–4 decisions
  - Since 1996, Supreme Court has tended to uphold FCC on implementation of the Telecom Act
- Four justices required to grant cert

# FCC POLICY OUTLOOK

# 600 MHz/Broadcast Incentive Auction

- Auction started March 29, 2016; bidding ended March 30, 2017; formal announcement of results April 13, 2017
- FCC set initial clearing target at 126 MHz (required clearing 21 TV channels, yielding 100 MHz for mobile carrier use)
- After multiple rounds of bidding, finally cleared 84 MHz (14 TV channels, yielding 70 MHz for mobile carriers)
- Spectrum buyers will pay \$19.3 B, covering \$10.1 B price of 2,776 relinquished TV licenses plus approx. \$2 B for TV relocation fund and auction expenses, leaving net profit of approx. \$7.3 B for Treasury
- Even though proceeds were lower than some optimistic forecasts, and clearing price per MHz/POP was below past record, some at FCC and in Congress are already talking about a second auction

# 600 MHz/Broadcast Incentive Auction

- Clearing band and making spectrum available will be multi-year process
- All TV stations will be relocated to UHF channel 36 and below; channels 38-51 will be reassigned for wireless service (37 reserved for other uses)
- Broadcasters need to be repacked before reclaimed spectrum can be used; not easy task
  - Limited tower crews
  - Weather will restrict work in colder climates
- Repacking for original DTV transition took 10 years; process will be faster this time but do not expect 600 MHz spectrum to be available in meaningful way before mid-2020
  - FCC set 39 month transition period for repacking (starting from April 2017 Public Notice), but broadcasters complain this is too little



# Infrastructure Deployment Initiatives

- One of Chairman Pai's first acts was to establish a Broadband Deployment Advisory Committee, targeting ways to expand availability of broadband nationwide
- April FCC meeting focused on multiple broadband initiatives –
  - Rulemaking on regulatory barriers to wireless deployment
    - Could preempt local zoning reviews and other requirements, or impose “shot clock”
    - Streamlining environmental and historic preservation reviews under Federal law
  - Rulemaking and inquiry on barriers to wireline deployment
    - Speeding up pole attachment process, reducing charges
    - Facilitating retirement of copper networks and replacement with fiber
    - Possible preemption of some state/local laws impeding network deployment

# Spectrum Policy: 5G Transition Looms

- In 2010, FCC set goal to repurpose 500 megahertz for broadband use below 3.7 GHz
- So far, 315 MHz achieved
  - AWS-3 band + 65 MHz
  - AWS-4 band + 40 MHz
  - H-Block + 10 MHz
  - WCS band + 30 MHz
  - Voluntary Incentive Auction + 70 MHz
  - 3.5 GHz + 100 MHz
- On balance successful, albeit with a few setbacks that remain unresolved
  - Still sorting concerns regarding repurposing 40 MHz of L-band spectrum
  - Facing stiffer resistance than expected to 22 MHz TLPS initiative

# Spectrum Policy: 5G Transition Looms

- 5G Transition requires re-examination of technical goals:
  - Geographic coverage and reliability no longer the best performance metric for cellular networks
    - 600 MHz, 700 MHz, 850 MHz, AWS and PCS bands already adequately built out to serve in-motion commuters
    - WiFi offload accommodates personal/portable end user needs in less densely populated suburban and ex-urban residences
  - Other metrics, including throughput in densely populated urban areas, more relevant in 2017 and beyond
    - Ultra HD and video intensive games and apps remain very bandwidth hungry
    - Demand for bandwidth remains very asymmetric and weighted towards download (we still consume/pull far more content than we create/push)

# Spectrum Policy: Heavy R&D Investment Makes mmWave Spectrum Viable for 5G

- Heavyweight cellular and chipset manufacturers recognized several years ago that low band (<3.7 GHz) spectrum could not satisfy future end user throughput needs
- Significant R&D dedicated to developing underutilized frequencies at 24 GHz and above millimeter wave (mmWave) frequencies for 5G network deployment
- Propagation limitations overcome through a combination of technologies
  - Multiple Input/Multiple Output
  - Phased array antennas
  - Distributed antenna systems
- mmWave technology now viable for mobile applications, with certain limitations
  - Propagation limitations still require dense network deployment, making mmWave 5G networks viable for urban core with ready access to building rooftops and facades

# Spectrum Policy: FCC Lays Claim to Leadership on 5G/mmWave Through “Spectrum Frontiers”

- Prompted by OEMs conducting R&D and influential policymakers, repurposing mmWave spectrum for 5G gradually became a top priority for former Chairman Wheeler
- Effort to repurpose mmWave spectrum given the moniker “Spectrum Frontiers”
- All hands effort to approve NPRM prior to WRC-2015 to enable U.S. delegation to assert leadership on 5G policy
- Unanimous approval of Order and FNPRM at July 2016 FCC Open Meeting
- Expect current FCC leadership to continue this policy

# Spectrum Policy: Spectrum Frontiers (Cont.)

- Licensed Spectrum Frontiers bands
  - 27.5-28.35 GHz (28 GHz), 38.6-40.0 GHz (39 GHz) and 37.0-38.6 GHz (37 GHz) bands made available for licensed mobile use
  - County-wide geographic licenses for 28 GHz, and Partial Economic Area (“PEA”) geographic licenses for 39 GHz and 37.6-38.6 GHz sub-range of 37 GHz
  - Site-based licensing for 37.0-37.6 GHz sub-range required to protect existing federal incumbents
  - Existing licensees in good standing enjoy fixed + mobile rights; licenses in FCC inventory to be auctioned
- Unlicensed Spectrum Frontiers bands
  - 64-71 GHz range made available under same Part 15 rules as existing 57-64 GHz unlicensed band
- Rulemaking continues
  - FNPRM Seeks comment on making 24.25-24.45 GHz together with 24.75-25.25 GHz (24 GHz), 31.8-33 GHz (32 GHz), 42-42.5 GHz (42 GHz), the 47.2-50.2 GHz (47 GHz), 50.4-52.6 GHz (50 GHz), and the 71-76 GHz band together with the 81-86 GHz bands (70/80 GHz), as well as bands above 95 GHz.

# Spectrum Policy: Spectrum Frontiers (Cont.)

- Spectrum Frontiers Order service rules meant for maximum flexibility
  - Transmission technology agnostic (no waveform/modulation specified)
  - Antenna design agnostic (phased array expressly contemplated)
  - Generous power limits
    - +75dBm/100 MHz (for all elements of a mobile base station transmitter)
    - +43 dBm (for handsets)
    - +55 dBW (EIRP) (for fixed or point-to-multipoint transmitters)
  - Reasonable out-of-band emission restrictions
    - -13 dBm/MHz or lower (out-of-channel for mobile base stations)
    - Reduced by at least  $43 + 10 \log_{10}$  (mean output power in watts) decibels, or 80 decibels (out-of-band for fixed stations)
  - Coverage obligations may be satisfied through fixed or mobile network build-out
    - 40% coverage if licensee opts to build out mobile
    - 4 links if pop. < 268,000 in a geographic area and 1 link per 67,000 if pop. >
  - Partitioning and disaggregation permissible

# Spectrum Policy: Spectrum Frontiers Early Winners & Losers

- Winners
  - Early cellular buyers of mmWave licenses
    - Writing on the wall that mmWave spectrum would be valuable in 2014 but no guarantees that incumbent licensees would retain mobile rights
    - At least one national carrier rolled the dice and picked up a large pool of 28 GHz licenses before the market could effectively revalue mmWave spectrum; a big advantage now that incumbent mobile rights confirmed
  - 28 GHz and 39 GHz Incumbent Licensees
    - Spectrum that appeared to only support fixed communications a few short years ago now has significant value, particularly in dense metropolitan areas
  - Cellular network and chipset manufacturers
    - Early testing and R&D Samsung in 28 GHz gave the FCC confidence to initiate the proceeding; the companies involved have political capital to burn at the Commission and a likely R&D advantage
- Losers
  - Fixed Satellite Service (FSS) Industry
    - The FSS industry lost rights in the 28 GHz and 39 GHz bands, and may lose more ground in other bands that it has never fully utilized



# Spectrum Policy: Industry Awaits Clarification on Standards/Spectrum for Internet of Things

- Several trillion dollar investment likely in networked devices in coming decade
  - 10 billion networked devices 2015 growing to 35+ billion by 2020
- Short-range IoT applications (e.g., streaming Netflix to a living room TV) use existing unlicensed spectrum and voluntary standards (e.g., 2.4 GHz WiFi)
- Long-range IoT applications rely heavily on GPRS (2.5G) soon to be decommissioned cellular networks
- Many competing standards vying to fill GPRS hole (e.g., LoRa, Sigfox, NB-IoT)
  - Some use unlicensed spectrum (Sigfox)
  - Some use licensed spectrum and infrastructure (LTE-M)
- Unclear which standard will win
- Possible that paging frequencies and/or other narrow slivers of unused spectrum below 1 GHz become targets for IoT-oriented service rules
- IoT also a potential additional stream of revenue for mobile satellite operators Globalstar, Iridium and Inmarsat, who cannot effectively compete for international voice and broadband service but have ample capacity for narrowband M2M services

# Spectrum Policy: 3.5 GHz Proceeding Becoming FCC Technology/Policy Test Bed

- 3.5 GHz Citizens Broadband Radio Service (CBRS) band involves shared use between federal and commercial users in 3550-3650 MHz band bonded with already commercially available 3650-3700 MHz band
- Technology and policy developed in the 3.5 GHz CBRS proceeding likely to trickle down into other bands, including mmWave and 2.7-3.5 GHz frequencies also proposed for shared use between federal and commercial users
  - Environmental sensing coupled with geolocation database technology being vetted as framework for shared use with sensitive incumbents
  - Secondary market rules dramatically streamlined to facilitate fluid and near instantaneous spectrum trading

# Spectrum Policy: Satellite Industry Continues to Experience Dramatic Changes

- Tremendous growth in new satellite technology and systems
  - Boom in launch of earth observation spacecraft likely to continue unabated as construction and launch vehicle costs continue to trend downward
  - High demand is creating congestion in available feeder link bands
- Two massive Low Earth Orbit constellations planned for launch in near term
- Traditional geostationary satellite operators stagnant and losing ground in spectrum wars
- Geostationary arc congested and unable to accommodate new satellites in core Ku- and C- bands
- Geostationary satellites a poor transmission medium for services beyond video distribution due to latency and throughput limitations
- mmWave and other bands allocated for fixed satellite service remain high priority targets for repurposing by FCC; even C-band back in play for repurposing

# Open Internet Order

- FCC first announced open Internet “principles” in 2005, and codified them as rules in 2010, but was overturned twice by appeals courts
  - DC Circuit 2014 decision affirmed transparency rule, and suggested FCC could use Sec. 706 authority to impose some additional net neutrality obligations
- Amid public outcry and White House advocacy, FCC opted to reclassify Broadband Internet Access as a Title II telecommunications service
  - Followed this up by adopting new consumer privacy rules
- D.C. Circuit ruling in June 2016 upheld rules against all challenges
  - Broad deference to FCC’s administrative judgment
- New FCC leadership strongly opposed rules
  - Congress repealed broadband privacy rules
  - FCC voted 2-1 to open a new rulemaking to reverse Title II reclassification
    - Process likely to take 4-8 months
    - In meantime, expect FCC to avoid aggressive enforcement of Open Internet rules

# Open Internet Order: Highlights

- Order treats “broadband Internet access service” as a common carrier service, but forbears from applying certain traditional common carrier rules (tariffs, rate controls, etc.)
- Reinstates bright-line “no-blocking” and “no-throttling” rules
  - Adds “no paid prioritization” rules
  - Applies these rules fully to mobile services, unlike 2010 rules
- Enhances transparency rule by requiring additional disclosures
  - Smaller providers exempted from these disclosures at least thru 2016
  - Congressional pressure to extend exemption
- Prohibits “unreasonable interference” or “unreasonable disadvantage” to user’s ability to access lawful Internet content and applications
  - To be defined and applied on a case-by-case basis

# Open Internet Order: Highlights (cont'd)

- FCC declined to impose specific requirements for interconnection arrangements between edge providers and broadband providers
  - Asserts jurisdiction for the first time; led to voluntary agreements
  - Will rely on the general prohibition against unjust and unreasonable rates, terms, and conditions, and unreasonable discrimination
  - Disputes reviewed on a case-by-case basis
  - Paid peering is not necessarily inconsistent with standard
- What the FCC did not do is also important; Forbearance
  - No rate regulation
  - No unbundling requirements
  - No universal service contributions required of broadband providers
  - Broadband service exempt from state and local taxation under Internet Tax Freedom Act

# Open Internet Order: Outlook

- Expect FCC to re-adopt 2005 Internet “principles” in some form (although unclear whether there will be enforceable rules or simply a policy statement):
  - No blocking of lawful content/applications
  - Consumer right to connect devices of their choice to the network
  - Some general reaffirmation of competition as a guiding principle
- But, Title II reclassification likely to be reversed, and direct regulation of broadband Internet access eliminated
  - Under court precedent, agency may reverse its own interpretation of the law as long as it provides a reasoned explanation for its action
- FCC action could be pre-empted if Congress intervenes, but prospect of Senate filibuster makes this unlikely

# Privacy and Surveillance Issues

- Privacy is a perennial and increasingly pertinent “wild card” at FCC
  - FCC has been looking to expand its authority in this area, especially over Internet
  - Agency tends to react to widely-publicized abuses rather than have a proactive agenda
  - Republican commissioners were critical of Enforcement Bureau’s aggressiveness and “eye-catching fines” under previous Administration
    - But more egregious practices may still merit enforcement action, especially where rules are clear
- Increasing FTC activity in privacy/cybersecurity area
  - FCC regulates telecom services, FTC regulates information services
    - Open Internet Order gave FCC more sway over Internet access, but this is likely to be reversed under new Administration
  - State laws may also apply (California)
- Broad consumer privacy legislation unlikely – factions in both parties support the concept, but differ on details



# Business Data Services Pricing: Background

- FCC opened rulemaking in 2005 to consider reimposing price controls on “special access” service (high-capacity dedicated services, Ethernet, etc.)
  - Legacy regulatory system featured price caps and tariffed rates in non-competitive markets, contracts in metro areas that met “competitive” criteria
  - FCC has renamed this market segment “Business Data Service”
  - Increasingly important for wireless network backhaul
- In 2012, FCC suspended new ILEC applications for pricing flexibility, but left existing MSA-based price flex in place while rulemaking is pending
  - Staff gathered extensive market data
- In 2016, Wheeler FCC proposed further rulemaking that would have imposed new limits on pricing for both “legacy” DS-1/DS-3 and newer broadband services (*e.g.*, Ethernet) based on a highly localized market competition analysis
  - Abandoned after election

# Business Data Services Pricing: Rulemaking (cont'd)

- In April, FCC adopted an order adopting a much lighter-touch regulatory regime than was proposed by the previous Administration
  - Legacy DS-1 and DS-3 (dedicated transport) services:
    - Channels to end user locations deregulated for all incumbent price cap carriers in most urban counties; price cap regulation remains in place for less-competitive counties, but carriers can still enter into customer-specific contracts for these services
    - Circuits between incumbent LEC offices deregulated nationwide
  - Ethernet, IP transport, and other packet-switched services deregulated nationwide
  - No regulation or rate caps for non-incumbent carriers
  - Deregulated services remain subject to Title II “backstops” prohibiting unreasonable discrimination and unreasonable pricing, but these will be enforceable only on complaint and the burden of proof will be on the complaining party

# Questions?

- Please submit questions to us using the Q&A tool at the bottom right of your screen. Type question in field and click “send.”
- Slides will be distributed shortly.

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Andy Lipman is Practice Group Leader and Senior Partner in Morgan Lewis's Global Telecommunications, Media & Technology practice group. He practices in most aspects of US and international communications law and related fields, including regulatory, financing and transactional. For over 30 years, Andy and his team have been in the forefront of the telecom and technology sectors. In the regulatory field, he played a key role in helping shape crucial provisions of the US Telecommunications Act of 1996 and used similar approaches to promote the opening of foreign markets.

## Our Global Reach

Africa  
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