



ASPATORE

**Inside the Minds:
Recent Developments in
Telecommunications Law**

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**Complying with Laws that Affect Domestic and
International Telecommunications Businesses**

Introduction

When the Telecommunications Act of 1996¹ became law, it represented the greatest change to the laws regulating the telecommunications and media industries in the U.S. since the Communications Act of 1934 was passed. The sixty two years that elapsed between the 1934 Act and the 1996 Act certainly witnessed substantial change in the telecommunications industry, including the mass market availability of television (first black & white, then color) and the first geostationary earth orbit satellite. Yet when the 1996 Act was passed, few observers expected the pace of technological change in the two decades following 1996 to so vastly eclipse the pace of change in the previous six decades. Still, less than twenty years after passage of the 1996 Act, over two billion people are now connected to the Internet and over six billion people subscribe to cell phone service. With the advent of these two transformative technologies – the Internet and wireless phone service, both of which barely existed in 1996 – the world has suddenly become a much smaller place and privacy can be hard to find. Regulators face a daunting task trying to keep pace with such rapid technological changes, as evidenced by the table below.

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

Estimated Total Mobile Wireless Connections²

	NRUF			CTIA
	<i>Connected Devices (millions)</i>	<i>Increase from previous year (millions)</i>	<i>Connections Per 100 People</i>	<i>Estimated Connections (millions)</i>
2001	128.5	n/a	45	128.4
2002	141.8	13.3	49	140.8
2003	160.6	18.8	54	158.7
2004	184.7	24.1	62	182.1
2005	213.0	28.3	71	207.9
2006	241.8	28.8	80	233.0
2007	263.0	21.2	86	255.4
2008	279.6	16.6	91	270.3
2009	290.7	11.1	94	285.6
2010	301.8	11.1	97	296.3
2011	317.3	15.5	102	316.0

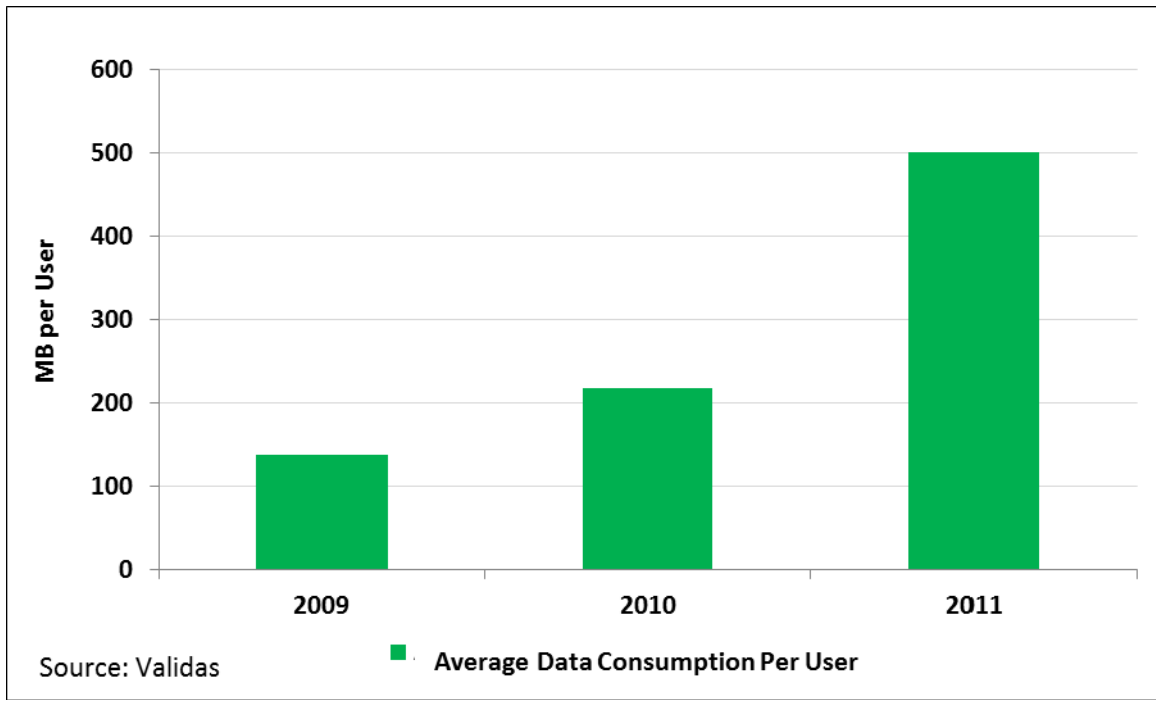
As industry participants look to the future with the hope of seizing on opportunities and avoiding pitfalls, they can expect to see regulators continue to grapple with the impact that the Internet has on traditional telecommunications and media services and the increasing demand by both consumers and governments for greater (and faster!) access to wireless services. Part and parcel of these changes is the increasingly global and sophisticated telecommunications marketplace, where investors and regulated companies need to be more aware than ever of the potential role of regulations across multiple jurisdictions and in increasingly specialized areas. As with any change, however, the astute observer will be able to find opportunities worth seizing.

Regulations Addressing an Increasingly Connected and Mobile World

The primary drivers of change in today's telecommunications industry are the Internet and wireless technology, reflected in the rate of consumer data consumption shown in the table below:

² See *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 11-186, Sixteenth Report, FCC 13-34 ¶ 2 tbl. 4, (rel. Mar. 21, 2013) ("Sixteenth Wireless Competition Report")

**Average Monthly Data Consumption per User:
Nationwide Providers, 2009-2011³**

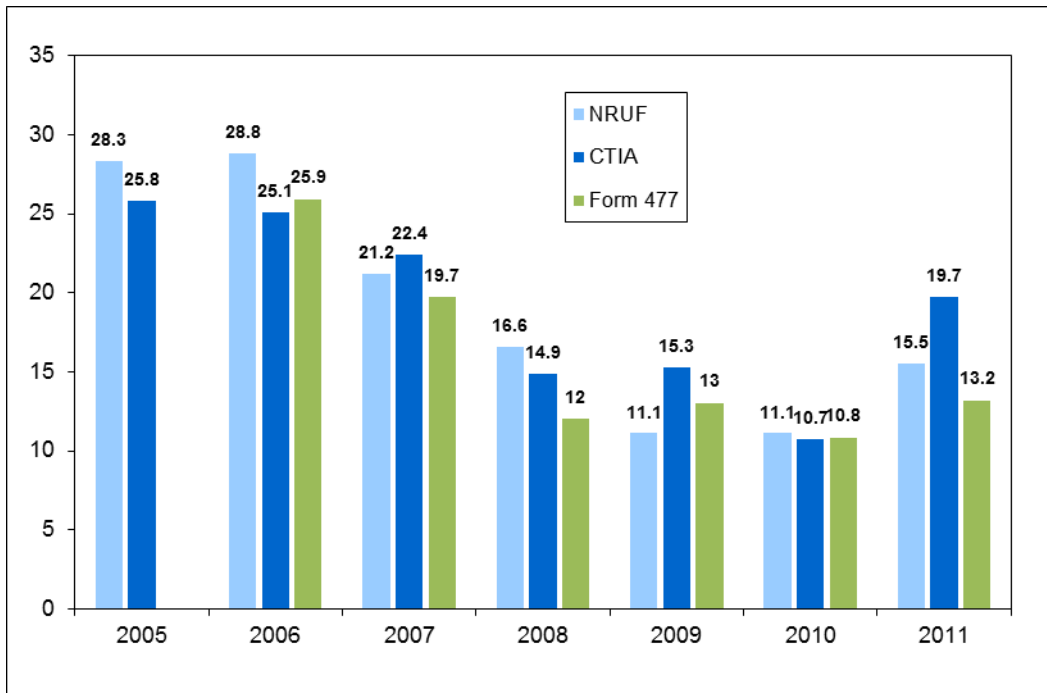


These drivers impact everything from television viewing habits (less time in front of the TV and more time on YouTube)⁴, to methods of “phone” communication (the movement from voice calls to text messaging), to consumption habits for movies and music (the transition from CDs and DVDs to IP-delivered content). Traditional telecommunications providers, cable companies, and broadcasters all face challenges to their business models as more and more people move to IP-delivered and wireless services.

³ See *Sixteenth Wireless Competition Report* at ¶ 2, tbl. 5.

⁴ For example, eMarketer, the digital marketing and media firm, estimates that for the first time, at some point in 2013, the “average time spent with digital media per day will surpass TV viewing.” See “Digital Set to Surpass TV in Time Spent with US Media,” available at: <http://www.emarketer.com/Article/Digital-Set-Surpass-TV-Time-Spent-with-US-Media/1010096> (last visited Aug. 21, 2013).

Total Mobile Wireless Connection Annual Net Additions, 2005-2011 (In millions)⁵



Meanwhile, telecommunications law is struggling to keep pace with these vast changes. The Telecommunications Act of 1996 is already terribly out of date—it was written at a time when Internet access and wireless service barely existed on a wide-scale consumer basis. While the 1996 Act remains in need of a major overhaul, there are no current signs coming from Capitol Hill that a wholesale re-write is imminent.

Nevertheless, there have been some recent changes in our nation’s laws with which telecommunications companies need to grapple. Perhaps one of the most wide-ranging of these new laws is The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which amends provisions of, and adds provisions to, the 1934 Act.⁶ The law is specifically designed to make the modern communications, video, and information world more readily accessible to people with disabilities. For example, on April 1, 2013, provisions of the CVAA went into effect that required many foreign companies selling products in the United States to file for the first time a notice with the Federal Communications Commission (FCC) indicating that they are keeping internal records with regard to how their products comply with the CVAA and address issues of accessibility for people with disabilities. This may include anything from ensuring a keyboard has a raised tab on one of the keys to implementing voice commands on a cell phone to aid the visually impaired. Similarly, the CVAA broadens the obligations of companies that sell IP-delivered video programming – such as Netflix, iTunes, and Amazon – to provide closed captioning of their video programming offerings.

⁵ See *Sixteenth Wireless Competition Report* at ¶ 2, tbl. 8.

⁶ Pub. L. No. 111-260, 124 Stat. 2751 (2010).

Traditionally, closed captioning requirements were applied primarily to broadcast and cable providers, and it was not until after the CVAA's passage that those laws were applied to the IP-delivered video programming industry.

Another area where industry participants can expect to see substantial regulatory changes emerging from the FCC is voice service. With the proliferation of Voice-over-Internet Protocol (VoIP) phone service providers, the FCC is currently assessing the best way to regulate these new service providers. Interconnected VoIP providers like Vonage are regulated to a very large extent in the same way that traditional voice service providers are. However, non-interconnected VoIP providers like Skype have escaped many of the regulations (e.g., Universal Service Fund contributions) that apply to interconnected VoIP providers and traditional phone companies. Many observers expect the FCC to close the gap in regulations between interconnected and non-interconnected VoIP providers within the next year. Anticipating changes like this at the FCC assists clients in planning their business strategies.

FCC Attempts to Reallocate Spectrum

Former FCC Chairman Julius Genachowski spent his first two years at the FCC complying with the request of Congress to develop a National Broadband Plan.⁷ The National Broadband Plan was designed to be a roadmap for the nation's future regarding broadband deployment. The FCC under Chairman Genachowski was heavily focused on making more wireless spectrum available to address what many observers believe to be a pending "spectrum crunch." In the years since the National Broadband Plan was released in 2010, the FCC has taken many concrete steps to increase the nation's supply of wireless spectrum. For example, in 2012 the FCC adopted a proposal by AT&T to alter the regulations governing the so-called Wireless Communications Service (WCS) in the 2.3 GHz range to make it useful for long-term evolution (LTE) broadband service.⁸ Also in 2012, the FCC permitted DISH Networks to acquire former satellite service providers TerreStar and DBSD out of bankruptcy and convert their satellite spectrum into terrestrial wireless spectrum, now called "AWS-4" spectrum.⁹ This FCC action alone expanded the nation's wireless spectrum resources by 40 MHz of spectrum in every market nationwide. The FCC's action on DISH's AWS-4 spectrum is also notable because it converted the spectrum from its original satellite use to a new terrestrial use. The nation's spectrum resources are so constrained that there is very little unused spectrum left to be tapped. Consequently, the FCC is increasingly looking at ways to convert spectrum from one allocated use to another.

⁷ National Broadband Plan, available at: <http://www.broadband.gov/plan/> (last visited July 16, 2013).

⁸ *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, WT Docket No. 07-293, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, IB Docket No. 95-91, *Order on Reconsideration*, 27 FCC Rcd 13651 (2012).

⁹ *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket Nos. 12-70 and 04-356, ET Docket No. 10-142, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102 (2012).

Another example of this trend is happening with broadcast television spectrum. The FCC plans to conduct so-called “incentive auctions” in 2014 with the hope that broadcast TV licensees will voluntarily relinquish their TV station licenses in the 600 MHz band for a share of the proceeds in the incentive auction.¹⁰ The FCC’s October 2012 Incentive Auction Notice of Proposed Rulemaking describes the three phases of the auction.¹¹ In Phase One, the FCC will conduct a “reverse auction” during which broadcast television licensees will be allowed (but not required) to submit bids to give up their current rights to use 600 MHz spectrum in exchange for a portion of the auction proceeds. In Phase Two, the FCC plans to repack the television licensees remaining in the broadcast television bands (i.e., those who did not voluntarily enter the auction) so that the newly reclaimed spectrum is suitable for commercial mobile broadband use. In Phase Three, the final phase, the FCC would “forward auction” new initial licenses to commercial bidders for flexible use of the reclaimed 600 MHz spectrum. Many hurdles remain before the FCC can conduct these incentive auctions, and some observers have suggested that the incentive auction model will not work. Nevertheless, there are many well-funded investors acquiring TV stations with the expectation of profit in the incentive auctions.

Just as the FCC regulates commercial wireless spectrum, the National Telecommunications and Information Administration (NTIA) regulates spectrum used by the federal government, including the spectrum used by the Department of Defense, the Federal Aviation Administration, and other federal government agencies and departments. In keeping with the FCC’s theme of reallocating spectrum from lower valued uses to higher valued uses, NTIA has identified many areas in which spectrum can be reallocated from government use to commercial use. For example, in its 2010 “Fast Track Evaluation,” NTIA recommended reallocating or sharing 115 MHz of spectrum. Specifically, NTIA proposed to reallocate the 1695-1710 MHz band (currently used by the Commerce Department’s National Oceanic and Atmospheric Administration for weather alerts by satellite), and share the 3550-3650 MHz band between commercial interests and the U.S. Department of Defense (which currently uses the spectrum for radar and radio services).¹² While NTIA’s role in increasing the nation’s supply of spectrum is no doubt critical, NTIA has cautioned that it will take many years before such reallocations can be accomplished.¹³

The FCC has taken the first steps to implement NTIA’s spectrum sharing proposal in the 3.5 GHz band, proposing in December 2012 to free up 100 MHz of spectrum in that band

¹⁰ Congress gave the FCC authority to conduct incentive auctions as part of the part of the Middle Class Tax Relief and Job Creation Act of 2012. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6406, 126 Stat. 156, 231 (2012), 47 U.S.C. § 1453 (Spectrum Act).

¹¹ Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012).

¹² NTIA Fact Sheet on Spectrum Plan and Timetable, Fast Track Evaluation, http://www.ntia.doc.gov/files/ntia/publications/spectrumfactsheet_11152010.pdf (last visited Aug. 23, 2013).

¹³ *See id.* (proposing to reallocate “Fast Track” spectrum within five years, and noting that the ability to do so is contingent on “the timely allocation of funding” and rulemakings at the FCC, among other issues).

for small cell use.¹⁴ The FCC may also explore other spectrum sharing paradigms, including by looking at ways to implement a controversial plan developed by the President's Council of Advisors on Science and Technology (PCAST) to share 1,000 MHz of federal spectrum with commercial wireless providers.¹⁵

¹⁴ Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, GN Docket No. 12-354, Notice of Proposed Rulemaking and Order (rel. Dec. 12, 2012).

¹⁵ Report to the President: Realizing the Full Potential of Government-Held Spectrum to Spur Economic Growth, http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast_spectrum_report_final_july_20_2012.pdf (last visited Aug. 23, 2013).