Communications Act Revisions: Selected Issues for Consideration

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Summary

The passage of the 1996 Telecommunications Act (P.L. 104-104) resulted in a major revision of the Communications Act of 1934 (47 U.S.C. 151 et seq.) to address the emergence of competition in what were previously considered to be monopolistic markets. Although less than a decade has passed, a consensus has grown that existing laws that govern the telecommunications and broadcasting sectors have become inadequate to meet the Nation's changing telecommunications environment. Technological changes such as the advancement of Internet technology to supply data, voice, and video, the transition to digital television, as well as the growing convergence in the telecommunications sector have, according to many policymakers, made it necessary to consider another "rewrite" or revision, of the laws governing these markets.

In the 109th Congress efforts to pass a comprehensive telecommunications measure, while successful in the House (H.R. 5252), did not make it to the Senate floor for consideration. The 110th Congress has held hearings on a wide range of topics including broadband deployment, the digital television transition, media ownership, universal service fund reform, FCC oversight, and public safety communications. Unlike in the 109th Congress however, where energy was focused on the passage of a single comprehensive telecommunications reform measure, it appears that the 110th Congress, to date, is focusing on more narrowly targeted incremental revisions which may be passed as stand-alone measures or in conjunction with other legislative vehicles. Regardless of the outcome of legislative proposals, however, the 110th Congress is taking, and is expected to continue to take, an active role in examining and debating the issues that such a revision may entail.

This report provides an overview of selected topics which the 110th Congress has begun, or is likely, to address in its examination of telecommunications issues. While far from a definitive list, the issues selected are wide-ranging and touch upon topics central to the telecommunications reform debate. The issues included in this report cover: broadband Internet regulation and access; broadcast indecency; digital television transition; Federal Communications Commission structure and reform; media ownership rules; municipal deployment of broadband; public safety communications, the "savings clause" and monopoly issues; spectrum auctions; and universal service fund reform.

This report addresses major issues, rather than addressing specific legislative activity. The underlying references to CRS products, included at the end of each issue, should be used to expand upon the issue, update relevant events and, where appropriate, track Congressional activity. This report will be updated occasionally.

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Introduction

The Telecommunications Act of 1996 (the 1996 Act), signed into law on February 8, 1996 (P.L. 104-104), represented the first major rewrite of our nation's telecommunications policy. The 1996 Act redefined and recast the Communications Act of 1934 (1934 Act) (47 U.S.C. 151 et seq.) to address the emergence of competition in what were previously considered to be monopolistic markets. Despite its relatively recent enactment, however, a consensus has been growing that the 1996 Act fails to adequately address the convergence and technological changes now facing the telecommunications and broadcasting sectors. Although many policymakers (as well as the popular and trade press) have labeled efforts to revise existing telecommunications law "the rewrite or revision of the 1996 Act," in actuality the revisions being considered are likely to go beyond what is included in the 1996 Act and will add to and modify the underlying statute which is the 1934 Act.

In the 109th Congress efforts to pass a comprehensive telecommunications measure, while successful in the House (H.R. 5252), did not make it to the Senate floor for consideration. The 110th Congress has held hearings on a wide range of topics including broadband deployment, the digital television transition, media ownership, universal service fund reform, FCC oversight, and public safety communications. Unlike in the 109th Congress however, where energy was focused on the passage of a single comprehensive telecommunications reform measure, it appears that the 110th Congress, to date, is focusing on more narrowly targeted incremental revisions which may be passed as stand-alone measures or in conjunction with other legislative vehicles. Regardless of the outcome of legislative proposals, however, the 110th Congress has taken, and is expected to continue to take, an active role in examining and debating the issues that such a revision may entail.

This report provides an introduction to selected issues which the 110th Congress has begun, or is likely, to address as it continues to examine possible revision of telecommunications law. While far from an exhaustive list, the following issues have been selected for discussion due to their relevance and prominence in the current telecommunications reform debate: broadband Internet regulation and access; broadcast indecency; digital television transition; Federal Communications Commission structure and reform; media ownership rules; municipal deployment of broadband; public safety communications; the "savings clause" and monopoly issues; spectrum auctions; and universal service fund reform. Other issues such as taxation, privacy, and copyright, to name a few, while of equal importance, go beyond the scope of this report and may be found in other CRS products. This report is not a tool for tracking legislation. The underlying references to CRS products included at the end of each issue, should be used to update relevant events and, to track Congressional activity. This report will be updated occasionally.

Broadband Internet Regulation and Access[1]

Broadband Internet access gives users the ability to send and receive data at speeds far greater than conventional "dial up" Internet access over existing telephone lines. Broadband technologies—cable modem, digital subscriber line (DSL), fiber, satellite, and wireless Internet—

[1] (name redacted), Specialist in Science and Technology Policy, and (name redacted), Specialist in Telecommunications Policy, Resources, Science, and Industry Division.

are currently being deployed nationwide primarily by the private sector. While the number of new broadband subscribers continue to grow, some areas of the nation, particularly rural and low-income communities, continue to lack sufficient access to high-speed broadband Internet service. In order to address this problem, the 110th Congress is considering the scope and effect of federal broadband financia1assistance programs (including universal service and the broadband loan and grant programs at the U.S. Department of Agriculture), and the impact of telecommunications regulation and new technologies on broadband deployment.

Some policymakers, believing that disparities in broadband access across American society could have adverse economic and social consequences on those left behind, assert that the federal government should play a more active role to avoid a "digital divide" in broadband access. One approach is for the federal government to collect better broadband deployment data and to provide financial assistance to support broadband in underserved areas. Others, however, question the reality of the "digital divide," and argue that federal intervention in the broadband marketplace would be premature and, in some cases, counterproductive. The regulatory treatment of broadband technologies, whether offered by traditional or emerging providers, or incumbents or new entrants, has also become a major focal point in the debate. Whether present laws and subsequent regulatory policies are necessary to ensure the development of competition and its subsequent consumer benefits, or are overly burdensome and only discourage needed investment in and deployment of broadband services, continues to be at issue. The policy debate focuses on a number of issues including the extent to which legacy regulations should be applied to traditional providers as they enter new markets; the extent to which legacy regulations should be imposed on new entrants as they compete with traditional providers in their markets; and, the appropriate treatment of new and converging technologies. What, if any, role regulators should play to ensure the Internet remains open to all, often referred to as "open access" requirements or "net neutrality" is a major and contentious part of the dialogue.

Finally, emerging broadband technologies—such as fiber, wireless (including "3G", "wi-fi" and "Wimax") and broadband over power lines (BPL)—continue to be developed and/or deployed and have the potential to affect the regulatory and market landscape of broadband deployment. Congress and the FCC will likely consider policies to address the emergence of these and other new broadband technologies.

For Further Information

CRS Report RL33542, *Broadband Internet Regulation and Access: Background and Issues*, by (name redacted) and (name redacted).

Broadcast Indecency[2]

Two prominent television events placed increased attention on the Federal Communications Commission (FCC) and the broadcast indecency statute that it enforces. The airing of an expletive by Bono during the 2003 Golden Globe Awards, as well as the "wardrobe malfunction" that occurred during the 2004 Super Bowl Halftime Show, gave broadcast indecency prominence in the 108th and 109th Congresses, and resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold.

[2] (name redacted), Legislative Attorney, American Law Division.

Federal law makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication" (18 U.S.C. § 1464). Violators of this statute are subject to fines and imprisonment of up to two years, and the FCC may enforce this provision by forfeiture or revocation of a broadcaster's license. The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium." The federal government's authority to regulate material that is indecent but not obscene was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*, which found that prohibiting such material during certain times of the day does not violate the First Amendment.

In 1992, Congress enacted P.L. 102-356 (47 U.S.C. § 303 note), section 16(a) of which, as interpreted by the courts, requires the FCC to prohibit indecent material on broadcast radio and broadcast television from 6 a.m. to 10 p.m. Under P.L. 109-235, indecent broadcasts are now subject to a fine of up to "$325,000 for each violation or each day of continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears to have the statutory authority to fine performers as well (up to $32,500 per incident), but has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."

The federal restriction on indecent material applies only to broadcast media, and this stems from the fact that there are a limited number of broadcast frequencies available and that the Supreme Court, therefore, allows the government to regulate broadcast media more than other media. In addition, the Court noted in *Pacifica* that broadcast media have a "uniquely pervasive presence" and are "uniquely accessible to children." Since 1978, however, when the Court decided *Pacifica*, cable and satellite media have become more pervasive, thereby rendering broadcast media less uniquely pervasive. The Supreme Court, however, continues to cite *Pacifica* with approval. It has held, however, that cable television is entitled to full First Amendment protection, so that any governmental restrictions on the content of its programming must satisfy the same strict scrutiny by the courts that governmental restrictions on the content of print media must satisfy. It therefore seems unlikely that it would be constitutional for Congress to limit indecent material on cable or satellite media. It also seems uncertain whether the FCC's application of the indecency restriction to Bono's expletive was constitutional, as the Supreme Court in *Pacifica* left open the question whether broadcasting an occasional expletive would justify a sanction.

In 2006, the FCC took action against four other television broadcasts that contained fleeting expletives, but, on June 4, 2007, in *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the Second Circuit found "that the FCC's new policy regarding 'fleeting expletives' represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry. We further find that the FCC has failed to articulate a reasoned basis for this change in policy. Accordingly, we hold that the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act." Having overturned the FCC policy on statutory grounds, the court had no occasion to decide whether it also violated the First Amendment. It explained, however, why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster." The U.S. Supreme Court has agreed to hear the case.

On July 21, 2008, the U.S. Court of Appeals for the Third Circuit issued a unanimous decision invalidating the FCC's fine against CBS broadcasting station affiliates for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during the 2004 Super Bowl Halftime Show. The court found that the FCC had acted arbitrarily and capriciously in finding the incident indecent; the court did not address the First Amendment question.

For Further Information

CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by (name redacted) and (name redacted).

Digital Television Transition[3]

Digital television (DTV) is a new service representing the most significant development in television technology since the advent of color television. DTV can provide sharper pictures, a wider screen, superior sound, better color rendition, multiple video programming or a single program of high definition television (HDTV), and other new services currently being developed. The Telecommunications Act of 1996 (P.L. 104-104) provided that initial eligibility for DTV licenses issued by the Federal Communications Commission (FCC) would be limited to existing broadcasters. Because over-the-air DTV signals cannot be received through existing analog televisions, the FCC decided to phase in DTV over a period of years, so that consumers would not have to immediately purchase new digital television sets or converters. Broadcasters were given new spectrum for digital signals, while retaining their existing spectrum for analog transmission so that they could simultaneously transmit analog and digital signals to their broadcasting market areas.

Initially Congress and the FCC set a target date of December 31, 2006, for broadcasters to cease broadcasting their analog signals and return their existing analog television spectrum to be auctioned for commercial services (such as broadband) or used for public safety communications. However, the Balanced Budget Act of 1997 (P.L. 105-33) allowed a station to delay the return of its analog spectrum if 15% or more of the television households in its market did not subscribe to a multi-channel digital service and did not have digital television sets or converters. Given the slower-than-expected pace at which digital televisions were introduced into American homes, and given the impetus to reclaim analog spectrum for commercial uses and public safety, the 109th Congress enacted the Deficit Reduction Act of 2005 (P.L. 109-171), which established a "date certain" digital transition deadline of February 17, 2009, and allocated up to $1.5 billion for a digital-to-analog converter box subsidy program administered by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.

The preeminent issue for Congress is ensuring that American households—particularly those reliant on over-the-air broadcasting—are prepared for the February 17, 2009 DTV transition deadline, thereby minimizing a scenario whereby analog television sets across the nation "go dark." Specifically, Congress is actively overseeing the activities of federal agencies responsible for the digital transition—principally the FCC and the NTIA—while assessing whether additional federal efforts are necessary, particularly with respect to public education and outreach. The Congress is also monitoring the extent to which private sector stakeholders take appropriate and

[3] (name redacted), Specialist in Science and Technology Policy, Resources, Science, and Industry Division.

sufficient steps to educate the public and ensure that all Americans are prepared for the digital transition.

For Further Information

CRS Report RL34165, *The Transition to Digital Television: Is America Ready?*, by (name redacted).

Federal Communications Commission Structure and Reform[4]

The Federal Communications Commission (FCC), an independent Federal agency directly responsible to Congress, is charged with regulating interstate and international communications by radio, television, wire, satellite, and cable. Since it was established by the Communications Act of 1934, Congress has periodically called for varying degrees and types of FCC reform. The FCC has taken internal actions to restructure itself in an attempt to improve its ability to oversee and regulate the changing telecommunications sector. However, some policymakers believe that the FCC has not met the needs of a changing telecommunications industry. If Congress undertakes a significant effort to revise existing telecommunications law, it could consider addressing provisions to further modify the FCC's structure and duties.

Suggestions for reform have ranged from modest reorganization to total agency abolishment. Other proposals include replacing the five commissioners with a single "telecommunications czar" and downsizing the agency by eliminating its regulatory functions and transforming it into an enforcement agency. More recently, the proposals for reform that have been suggested can be broadly grouped into two categories: (1) procedural changes made within the FCC or through Congressional action that would affect the agency's day-to-day operations, or (2) substantive policy changes requiring Congressional action that would affect how the agency regulates different services and industry sectors.

Some experts have suggested a number of procedural changes. One suggestion is to limit the time between the adoption and actual public release of an order. For example, the FCC often adopts orders and issues press releases with a summary of the order weeks or even months prior to releasing the order itself. Such a delay, critics claim, often results in confusion among the affected industry segments. Some policymakers are discussing instituting a "shot clock," which would require the FCC to issue the actual order within a set time frame once the order is adopted and a press release issued. Another procedural change which has gained support from a variety of policymakers, calls for the amendment of the Sunshine Act (P.L. 94-409) requirements for meetings among commissioners. Current law limits to two the number of commissioners that may meet outside the construct of an "official open meeting." While the intent of the law is to promote open discussion of issues, some contend that it may actually hinder discussion and inhibit the ability to forge compromises. Other procedural changes include limiting the time allowed to complete actions on license transfers for mergers/sales and license renewals and developing new and stronger enforcement mechanisms.

[4] (name redacted), Specialist in Internet and Telecommunications Policy, Resources, Science, and Industry Division.

Even with what appears to be strong Congressional interest in FCC reform at this time, the substantive changes which some believe are needed to enable the FCC to effectively regulate the converged telecommunications industry may remain difficult to achieve. Without a congressional mandate for change, the FCC may find it difficult to conduct its work under the current structure and restrictions of the 1934 Act. If Congress chooses to revise the 1934 Act it may wish to consider what changes, if any, are needed to enable the FCC to perform its duties in a changing telecommunications environment.

For Further Information

CRS Report RL32589, *The Federal Communications Commission: Current Structure and Its Role in the Changing Telecommunications Landscape*, by (name redacted).

Media Ownership Rules[5]

The Federal Communications Commission's (FCC's) media ownership rules are intended to foster the three primary goals of U.S. media policy—competition, diversity of voices, and localism. These rules set restrictions on the number of broadcast television or radio stations an entity can own or control in a single market; the "cross-ownership" of newspapers and broadcast stations or of television and radio stations within a single market; and the number of broadcast television stations a single network can own nationally. The assumption underlying these rules is that undue consolidation of media ownership could harm competition, diversity, or localism. In 2003, the FCC adopted new rules that generally relaxed multi-ownership restrictions. The 108th Congress modified the national television ownership rule reducing the 45% ownership cap adopted by the FCC to 39%. The U.S. Court of Appeals for the Third Circuit stayed and remanded the other FCC rules. In June 2005, the U.S. Supreme Court declined to consider an industry appeal of a case that overturned the FCC's rules.

In December 2007, the FCC adopted an order that modified only one of its media ownership rules—the newspaper-broadcast cross-ownership rule. Under the new rule, it would be presumptively in the public interest, in the 20 largest markets, for a major daily newspaper to own a single television or radio station, so long as the television station is not among the four highest-rated stations in the market and after the transaction there are at least eight independently owned and operating major media voices. With several exceptions, other proposed newspaper-television combinations would be presumptively not in the public interest, though critics of the order have argued that those exceptions could result in cross-ownership combinations in all markets. The new rule, which has been appealed both by parties opposing any loosening of the FCC's newspaper-broadcast cross-ownership rule and parties seeking greater loosening of the rule, cannot take effect until approved by the Court.

The FCC also adopted an order implementing 12 proposals for increasing minority ownership of broadcast stations, although eligibility was not limited to minority or socially and economically disadvantaged businesses, but rather was available to all small businesses. The FCC also has sought comment on eligibility criteria and on how best to improve FCC collection of data regarding the gender, race, and ethnicity of broadcast licensees.

[5] (name redacted), Specialist in Telecommunications Policy, Resources, Science, and Industry Division.

Some parties have argued that the rules now in place are not in the public interest because they block mergers that might be beneficial. For example, there may be situations in which a small-market television station could not afford to provide in-depth news coverage on its own, but could do so if it were allowed to combine its news gathering facilities and staff with a newspaper in the same market. More broadly, these parties claim that greater consolidation than is allowed under current rules would yield a more financially stable media sector better able to serve local communities. They argue that the Internet, cable television, satellite television, and satellite radio now provide enough independent media outlets in most locations to ensure competition, diversity of voices, and localism even if further consolidation were to occur. Others have argued that loosening current media ownership restrictions would result in mergers that would directly reduce the number of independent voices, lessen competition, and reduce local programming. They claim that the new technologies—Internet, cable, and satellite television and radio—provide very little local programming.

For Further Information

CRS Report RL34416, *The FCC's Broadcast Media Ownership Rules*, by (name redacted).

Municipal Deployment of Broadband[6]

One purpose of the Telecommunications Act of 1996 was to foster and encourage competition among providers of telecommunications services. In the 1996 Act, Congress barred states from "prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." (47 U.S.C. 253 (a)). Some states have in recent years passed laws that prohibit or limit local governments from providing telecommunications services. An effort to challenge such a law in Missouri by municipalities offering local communications services in the state was heard before the U.S. Supreme Court in 2004 (Docket Number 02-1238). The Court ruled that "entity" was not specific enough to include state political divisions. If Congress wished to specifically protect both public and private entities, they could do so by amending the language of the law. This decision, combined with the steady improvement in broadband communications technologies, has provided fuel for a policy debate about access to broadband services owned or sponsored by municipalities for the benefit of their communities. The central debate is whether municipal broadband services are part of essential infrastructure—like electrical power or water—with many benefits, including stimulus to the local economy, or whether they provide unfair competition that distorts the marketplace and discourages commercial companies from investing in broadband technologies.

The two main broadband technologies that are particularly attractive to communities (in part because they support existing community services such as Internet access for schools and communications for public safety) are fiber-optic-based networks and wireless access. The spread of wireless access to the Internet—commonly referred to as Wi-Fi—and anticipated advances in wireless technology are modifying the business case for broadband. Networks that depend on a fiber-optic cable backbone are capital-intensive and usually most profitable in high-density urban areas. A number of rural communities have used their resources to install fiber-optic broadband services in part because they were too small a market to interest for-profit companies. The technology for Wi-Fi costs less and has a wider geographic reach, broadening the size of potential

[6] (name redacted), Analyst in Telecommunications Policy, Resources, Science, and Industry Division.

markets for broadband. Most of the discussion about the municipal provision of broadband applies generally to all types of broadband services. However, it is the long-term market potential of Wi-Fi and its successor technologies that are apparently spurring commercial wireless service providers to lobby against municipal competition. In particular, the fact that municipalities in urban areas are creating Wi-Fi networks and providing, among other services, free access to Hot Spots (wireless links to the Internet) is viewed as a threat to commercial companies and a form of unfair competition. Many municipalities have installed free Wi-Fi zones or city-wide coverage. The cities argue that generally available access to the Internet through wireless connections has become an urban amenity, arguably a necessity, in sustaining and developing the local economy. Municipal Wi-Fi also provides the opportunity to improve social services and Internet access in disadvantaged communities that often are not served by fiber optic networks.

The fierce debate around public-sector provision of what some consider to be a private-sector service is expected to continue. Increasingly, Congress can expect pressure from advocates from both sides to clarify the language of Section 243 or to take some other action that addresses the issue.

For Further Information

CRS Report RS20993, *Wireless Technology and Spectrum Demand: Advanced Wireless Services*, by (name redacted).

Public Safety Communications[7]

Since September 11, 2001, successive Congresses have passed legislation regarding technology, funding, spectrum access and other areas critical to emergency communications. These new laws have tended to address specific issues, dealing separately, for example, with interoperability for first responders, improvements in emergency alerts, and 911 call centers. When reviewing emergency communications legislation, whether for oversight or new initiatives, Congress may review the pace of technological convergence and its impact on policies for emergency communications. What once were discrete areas of emergency response are increasingly sharing common technologies. First responders and other emergency workers not only have access to better tools, but also—by adopting new technologies—find themselves confronted with the need to rethink their internal organizational structure and the ways that they communicate with external groups.

Most emergency communications in use today have been built on core technologies such as two-way radio for emergency responders, telephone line switches for 911 calls, and broadcasting for emergency alerts. Operated independently of each other, these three pillars of emergency response have developed along separate technology tracks. Advances in information technology—and particularly the ubiquity of the Internet—have laid the groundwork for connecting the functions of communications for emergency responders, 911 call centers, and public alerts. For example: digital broadcasting used for emergency alerts can also be used to deliver information to emergency responders; the use of Internet Protocols (IP) provides a standard for network inter-connectivity; interoperable radio networks used by first responders can open a channel for real-time participation by operators in 911 call centers; these same call centers

[7] (name redacted), Analyst in Telecommunications Policy, Resources, Science, and Industry Division.

can be used to generate local alerts, over all types of communications media, to virtually any enabled device. Developing communications technologies with common elements provide synergies that benefit both provider and user.

Federal policy and congressional action tend to treat these three important areas of emergency communications through different agencies and different committees. Some observers cite cross-agency coordination at the federal level and cross-jurisdiction cooperation at the congressional level as areas where rapprochement could facilitate homeland security. Because the preponderance of incidents involving emergency workers occurs at the local level, local, state and regional participation and coordination are included in federal solutions. Encouraging the right balance of cooperative policy and federal leadership—to support both daily operations and national response in catastrophic situations—is one of the goals of Congress.

Among the implications for the 110th Congress, in addition to fundamental policy issues such as standards development and funding, is the possible need to explore the Department of Homeland Security's response to enacted legislation.

For Further Information

CRS Report RL33747, *Emergency Communications Legislation: Implications for the 110th Congress*, by (name redacted).

The "Savings Clause" and Monopoly Issues[8]

The 1996 Telecommunications Act contains an antitrust "savings clause" that specifically states that neither the 1996 Act nor any amendment to it should "be construed to modify, impair, or supercede the applicability of any of the antitrust laws" (section 601(b)(b), codified at 47 U.S.C. § 152, note). In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (540 U.S. 398 (2004)), the Supreme Court denied the antitrust claim advanced by a consumer of telecommunications services against a local exchange carrier (Verizon) that had previously been subject to regulatory discipline by both the Federal Communications Commission and the New York Public Service Commission. According to the Court, the fact that Verizon had been found to have breached its duty under the Telecommunications Act of 1996 to adequately share its network with telecommunications companies—including AT&T, which provided service to Trinko (the consumer plaintiff)—wishing to provide competitive local exchange services did not provide sufficient basis for finding a violation of the antitrust laws. Despite the existence of the "antitrust-specific savings clause," the Court said, "the act does not create new claims that go beyond existing antitrust standards."

Trinko was received unfavorably by both the (then) chairman and ranking minority member of the House Judiciary Committee, and by numerous commentators and members of the so-called "competitive telecom industry." The ruling has also led to questions about its impact on the antitrust law's prohibition against monopolization, creating particular apprehension about the fate of the "essential facilities" ("bottleneck," with reference to telecommunications) doctrine. That doctrine, whose validity was seemingly questioned by the *Trinko* Court, has been thought to require that the proprietor of a facility deemed essential to a competitor's ability to compete share

[8] (name redacted), Legislative Attorney, American Law Division.

that facility with the competitor, assuming that such sharing is feasible and the competitor is not reasonably able to duplicate the facility.

On the other hand, the (then) chairman of the House Energy and Commerce Committee, who at that time was Representative Tauzin, received the decision with approval. In addition, there are those who believe that *Trinko* did no violence to the saving clause: they reason, as the Court appeared to, that absent the 1996 Act's imposition on local exchange carriers of the obligation to deal favorably with competitors, Verizon violated no existing obligation under the antitrust laws. In a statement to the Senate Judiciary Committee, made just prior to the decision, R. Hewitt Pate, (then) Assistant Attorney General, Antitrust Division, Department of Justice, noted that "passage of the 1996 Act did not have the effect of increasing any party's obligations under the antitrust laws," and that it is "important to preserve the distinction between a violation of the Telecommunications Act and a violation of the Sherman Act."

If Congress chooses to address this issue there are at least four options available. Congress could choose to allow the current law to remain unchanged with respect to the savings clause; it could amend the savings clause to clarify that the phrase, "the antitrust laws," means the literal words of the statutory provisions but excludes any judicial interpretation of them; it could amend the enforcement provisions of the act so that even if there had already been regulatory action, certain provisions of the act would remain enforceable by private individuals who are not competitors of LECs; or, it could characterize a violation of any (or some) mandatory, competitive obligation(s) of the act as prima facie evidence of violation of the antimonopoly provision of the antitrust laws (15 U.S.C. § 2). The last three might have the effect of providing the breadth of private action some members apparently thought they had assured in the 1996 Act.

For Further Information

CRS Report RL33708, *The Distinction Between Monopoly and Monopolization in Antitrust Law*, by (name redacted).

Spectrum Auctions[9]

The Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) amended the Communications Act of 1934 with a number of important provisions affecting the availability of spectrum licenses. The Licensing Improvement section of the act laid out the general requirements for the FCC to establish a competitive bidding methodology and consider, in the process, objectives such as the development and rapid deployment of new technologies. The law prohibited the FCC from making spectrum allocations decisions based "solely or predominately on the expectation of Federal revenues. . . ." The Emerging Telecommunications Technologies section directed the FCC to assign licenses for frequencies newly released for commercial use over a period of at least 10 years. As in the requirements for competitive bidding, the FCC was instructed to ensure the availability of frequencies for new technologies and services, and also the availability of frequencies to stimulate the development of wireless technologies. The FCC was further required to address "the feasibility of reallocating portions of the spectrum from current commercial and other non-federal uses to provide for more efficient use of spectrum" and for "innovation and

[9] (name redacted), Analyst in Telecommunications Policy, Resources, Science, and Industry Division.

marketplace developments that may affect the relative efficiencies of different spectrum allocations."

The Balanced Budget Act of 1997 (P.L. 105-33) also contained spectrum management provisions. It expanded and broadened the FCC's auction authority and modified other aspects of spectrum management. The act also planned for the auction of spectrum licenses in airwaves that would be vacated by broadcasters as they moved from analog to digital broadcasting technology.

Proceeds from spectrum license sales are presently attributed to general revenue in the U.S. Budget. In the 108th Congress, however, a precedent was established with the creation of a Spectrum Relocation Fund to hold proceeds from the auction of specified radio frequencies allocated to federal use; federal agencies vacating spectrum to be auctioned for commercial use are being compensated from the fund for costs of relocation. In the 109th Congress, the Deficit Reduction Act (P.L. 109-171) included provisions that placed certain auction proceeds in a Digital Television Transition and Public Safety Fund. The fund is being mainly used to assist the transition from analog televison broadcasting to digital broadcasting, and for contributions to programs for public safety. Over $7 billion of the auction proceeds were applied to deficit reduction. The funding came from the auction of spectrum (at 700 MHz) currently used for analog television broadcasting, to be vacated by February 17, 2009. The auction, Auction 73, concluded on March 18, 2008; it grossed almost $19.6 billion.

During 2007, M2Z and several other companies petitioned the FCC to license airwaves for a national broadband network that would provide a basic service for free. In September 2007, the FCC issued a Notice of Proposed Rulemaking to establish service rules for the auction of a license or licenses for a network along the lines proposed by M2Z (WT Docket No. 07-195, released September 19, 2007). Opposition to the proposal includes allegations that the new network would cause harmful interference to users on nearby frequencies. The concept of a lifeline broadband service has significant support from many policy makers, however.

For Further Information

CRS Report RL31764, *Spectrum Management: Auctions*, by (name redacted).

Universal Service Fund Reform[10]

The universal service concept, as originally designed, called on the Federal Communications Commission (FCC) to establish policies to ensure that telecommunications services are available to all Americans, including those in rural, insular, and high cost areas, at reasonable rates. The Telecommunications Act of 1996 (P.L. 104-104) not only codified this long standing commitment, but also expanded the concept to include, among other principles, that universal service support be made available to qualifying schools, libraries, and rural healthcare providers, and other nontraditional providers known as eligible telecommunications carriers (ETCs). Over the years the universal service concept fostered the development of various FCC policies and programs, and an explicit Universal Service Fund (USF) was established to provide the necessary funding. There is a growing consensus, however, that the USF as presently designed, is no longer sustainable and universal service policies are threatened absent significant USF reform.

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Section 254 of the 1934 Communications Act requires the FCC to ensure that there be "specific, predictable and sufficient ... mechanisms to preserve and advance universal service." However, the growth of competition in the telecommunications marketplace coupled with technological advances have had a negative impact on the health and viability of the USF, as presently designed. While often leading to positive benefits to consumers and providers, these changes have led to a growing imbalance between the entities and revenue stream contributing to the fund and the growth in the entities and programs eligible to receive funding. The current policy debate has focused on four major concerns: the scope of the program; who should contribute to and what methodology should be used to fund the program; eligibility criteria for benefits; and concerns over possible program fraud, waste, and abuse. One additional, but more narrowly focused issue, is the application of the Antideficiency Act (ADA) to the USF program. ADA compliance requires that agencies have cash on hand to cover all obligations, causing a conflict with the way some USF commitments are currently treated.

While few question the commitment to the universal service concept, how this concept should be defined, how these policies should be funded, who should receive the funding, and how to ensure proper management and oversight of the fund remain open to discussion. While the FCC has taken (and will continue to take) action to sustain the USF, there is a growing consensus that legislation will be needed to fully address the modifications needed to not only ensure the viability of the USF, but also address the myriad issues surrounding USF reform. Members in both the House and Senate have expressed a desire to address this issue and it is likely that USF reform will play a key role in any telecommunications reform policy debate.

For Further Information

CRS Report RL33979, *Universal Service Fund: Background and Options for Reform*, by (name redacted).

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