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Communications Act Revisions: Selected Issues for Consideration

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Communications Act Revisions: Selected Issues for Consideration

Summary

The passage of the 1996 Telecommunications Act (P.L.104-104) resulted in a major revision of the Communications Act of 1934 (47U.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.

What role the 109th Congress may play in such a revision remains unclear. While there seems to be a growing consensus for reform, there are some, who question the need for a significant revision. While the House passed a telecommunications reform measure (H.R. 5252) on June 8, 2006, it is unclear whether a comprehensive telecommunications bill passed by the Senate Commerce Committee will make it to floor for consideration prior to the close of the 109th Congress. Regardless of the final outcome, Congress has taken and is expected to continue to pursue an active role in examining and debating the issues related to a possible revision of existing telecommunications law.

This report provides an overview of selected topics which the 109th Congress may 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; intercarrier compensation; 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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Communications Act Revisions: Selected Issues for Consideration

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) (47U.S.C.151et.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.

What role the 109th Congress may play in such a revision has yet to be determined. While the House passed a telecommunications reform measure (H.R. 5252) on June 8, 2006, it is unclear whether a comprehensive telecommunications bill passed by the Senate Commerce Committee will make it to the floor for consideration prior to the close of the 109th Congress. It is uncertain whether a consensus can be formed to pass a comprehensive telecommunications reform measure, however, it is possible that more narrowly focused incremental revisions may be passed in conjunction with other legislative vehicles. Regardless of the outcome of legislative proposals, however, 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 might be considered if Congress chooses to revise 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; intercarrier compensation; 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, if available, 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), satellite, and fixed wireless Internet — are currently being deployed nationwide primarily by the private sector. While President Bush has set a goal of universal broadband availability by 2007, some areas of the nation, particularly rural and low-income communities, continue to lack full access to high-speed broadband Internet service. In order to address this problem, the 109th Congress is considering the scope and effect of federal broadband financial assistance programs (including universal service), 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 provide financial assistance to support broadband deployment 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.

Finally, emerging broadband technologies — such as 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 Angele A. Gilroy and Lennard G. Kruger.

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[1] Lennard G. Kruger, Specialist in Science and Technology, and Angele A. Gilroy, Specialist in Telecommunications Policy, Resources, Science, and Industry Division

Broadcast Indecency[2]

Two prominent television events in recent years have placed increased attention on the Federal Communications Commission (FCC) and its broadcast indecency regulations. The airing of an expletive during the 2003 Golden Globe Awards and the subsequent ruling of the FCC's Enforcement Bureau, coupled with the controversy surrounding the 2004 Super Bowl half-time show, have brought broadcast indecency to the forefront of the congressional agenda. During the 109th Congress, several bills have been introduced to increase the penalties imposed for broadcast indecency and prohibit the broadcast of certain words and phrases. Legislation to apply the broadcast indecency regulations to cable television is also being considered.

Title 18 of the United States Code makes it unlawful to utter "any obscene, indecent, or profane language by means of radio communication"(18 U.S.C. 1464). Violators of this provision are subject to fines or imprisonment of up to two years. The FCC has the authority to enforce this provision by forfeiture or revocation of license. The Commission's authority to regulate material that is indecent, but not obscene, was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*. Pursuant to the Court's decision, whether any such material is "patently offensive" is determined by "contemporary community standards for the broadcast medium." The Court noted that indecency is "largely a function of context — it cannot be judged in the abstract."

In 1995, the FCC modified its indecency regulations to prohibit the broadcast of any material which is indecent on any day between 6 a.m. and 10 p.m. These regulations have been enforced primarily with respect to radio broadcasts and thus have been applied to indecent language rather than to images. However, the Commission has recently initiated more enforcement actions against broadcast television. Broadcasts deemed indecent are subject to a forfeiture of up to $32,500 per violation. In 2004, the FCC has started to consider each utterance of an indecent word as a separate violation, rather than viewing the entire program as a single violation, which could lead to fines in excess of $32,500. Legislation being considered could increase the penalties to up to $500,000 per violation, and would also apply the increased penalties to performers as well as broadcast licensees.

While the FCC has increased its enforcement of the broadcast indecency regulations in recent years, some argue that the fines levied are so small that the broadcasters simply consider them a cost of doing business. Increased penalties imposed on broadcasters and performers are viewed as the only way to deter the airing of indecent programming. Others argue that the indecency regulations themselves have no constitutional justification, that imposing the regulations on cable television would violate the First Amendment, and that imposing the increased fines on performers could have a chilling effect on free speech. They also cite optional measures, such as the use of the V-chip, as a more appropriate way to protect the public from what they may feel is inappropriate material.

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[2] Angie A. Welborn, Legislative Attorney, American Law Division.

For Further Information

CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Angele A. Wellborn and Henry Cohen.

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 in the 1950s. DTV can provide sharper pictures, a wider screen, CD-quality 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 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.

In 1997, Congress and the FCC set a target date of December 31, 2006 for broadcasters to complete their transition to DTV, cease broadcasting their analog signals, and return their existing analog television spectrum licenses to be auctioned for commercial services (such as broadband) or used for other purposes, such as public safety telecommunications. The Balanced Budget Act of 1997 (P.L. 105-33) required the FCC to grant extensions for reclaiming the analog television licenses in the year 2006 from stations in television markets where at least 15% of television households do not receive digital signals. Given the slower-than-expected pace at which digital televisions have been introduced into American homes, virtually no observers believed that the goal of digital televisions in 85% of American homes by 2006 would be reached, with the result that television stations would continue to broadcast both analog and digital signals past the 2006 deadline for an indefinite period of time. The key issue for Congress and the FCC has been: what steps should be taken by the government to further facilitate a timely, efficient, and equitable transition to digital television?

Paramount in this debate has been setting a "hard" and "date-certain" deadline for the digital transition and addressing the millions of American over-the-air households whose existing analog televisions will require converter boxes in order to receive television service after analog signals are turned off. The Deficit Reduction Act of 2005 (P.L. 109-171), signed by the President on February 8, 2996, resets the digital transition deadline at February 17, 2009, and allocates up to $1.5 billion for a digital-to-analog converter box subsidy program, to be administered by the Department of Commerce. Remaining digital transition issues, not addressed by the

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[3] Lennard G. Kruger, Specialist in Science and Technology, Resources, Science, and Industry Division.

Deficit Reduction Act of 2005, include whether Congress should mandate or permit "must carry" requirements for digital multicasts, "downconversion" of broadcasted digital to analog signals for cable and satellite households, and copyright protection technologies such as the "broadcast flag" and the "analog hole."

For Further Information

CRS Report RL31260, *Digital Television: An Overview*, by Lennard G. Kruger.

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, most recently in 2002, 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

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[4] Patricia Moloney Figliola, Specialist in Telecommunications and Internet Policy, Resources, Science, and Industry Division.

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.

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 Patricia Moloney Figliola.

Intercarrier Compensation[5]

Intercarrier compensation refers to the payments that carriers make to one another when more than one carrier's network is used to complete a telephone call or other electronic communication. Under current statutory requirements and regulatory rules, these payments vary widely (from 0.1 cents to 5.1 cents per minute), even though in each case basically the same transport and switching functions are provided. Payments depend on two factors: the classification of the interconnecting party (i.e., whether the entity is a local exchange carrier, a long distance carrier, a wireless carrier, or an information service provider); and the classification of the service (i.e., whether the service is telecommunications or information, local or long distance, or interstate or intrastate). The Federal Communications Commission (FCC) is currently examining proposals to modify the intercarrier compensation system and Congress may also wish to address this issue and provide guidance as part of its review of existing telecommunications law.

As markets move from a regulated monopoly towards a competitive model, nondiscriminatory intercarrier compensation reform is considered to be vital to the development of a competitively neutral regulatory regime. There is general agreement that in today's competitive environment, such reform is needed, but the details of how this should be accomplished remain open to debate. There is consensus, however, that the system as currently designed tends to have the following negative effects: distorts investment and undermines efficient competition

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[5] Charles B. Goldfarb, Specialist in Industrial Organization and Telecommunications Policy, Resources, Science, and Industry Division.

by providing artificial advantages/disadvantages to service providers; stifles innovation by causing uncertainty about the intercarrier compensation regime to which new services will be subject; encourages providers to make business decisions based on the artificial rates set for intercarrier compensation, rather than on true underlying costs; discourages carriers from offering large baskets of minutes or unlimited calling at a fixed price, contrary to the preference of many consumers; requires carriers to expend millions of dollars and scarce information technology resources developing systems to identify, or dispute, the classification of traffic; and undermines the stability of universal service subsidy funds.

At the same time, in some quarters, there is resistance to comprehensive intercarrier compensation reform because of concerns that some carriers and some consumers may be harmed by the changes. Reform is likely to result in an increase in end-user subscriber line charges, (i.e., the fixed charges that all subscribers pay on a monthly basis to connect to the telecommunications network). Various consumer groups argue that the shifting of such costs from carriers to consumers would unfairly burden low-usage and low-income customers. Reform also is likely to reduce the intercarrier compensation revenues of rural local exchange carriers, placing further pressure on the Universal Service Fund (USF), a mechanism which is currently facing its own issues. (See section on Universal Service Fund Reform, below.) Furthermore, reform is likely to require modification of intrastate intercarrier compensation rates, which lie within the jurisdiction of state regulatory commissions. Some observers have questioned whether the FCC can undertake such reform without active state involvement.

For Further Information

CRS Report RL32889, *Intercarrier Compensation: One Component of Telecom Reform*, by Charles B. Goldfarb.

Media Ownership Rules[6]

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

[6] Charles B. Goldfarb, Specialist in Industrial Organization and Telecommunications Policy, Resources, Science, and Industry Division.

of a case that overturned the FCC's rules. On June 21, 2006, the FCC adopted, but did not release, a Further Notice of Proposed Rulemaking seeking comment on how to address the issues raised by the Third Circuit and initiating a statutorily required quadrennial review of all of its media ownership rules. Congress may choose to provide guidance as the FCC rewrites its rules to meet the requirements of the Appeals Court.

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.

One key aspect of this debate is whether it is better to review proposed media mergers by using a "bright-line" rule that allows a combination to occur so long as the merged entity would not exceed the maximum number of media outlets an entity may own or control in a market; or by performing a case-by-case analysis of the market impact of each proposed merger. Proponents of a bright-line rule argue that such an approach provides certainty to the merging parties, as opposed to the uncertainty associated with a lengthy regulatory review. Proponents of case-by-case analysis claim that today's media marketplace is characterized by very large, vertically integrated companies that may own or control broadcast stations and networks, cable channels, program production studios, and even satellite or cable distribution networks. They argue that a simple bright line test fails to identify the unique impact on competition, diversity, and localism of a merger involving a large vertically integrated company.

Since there are other public policies also intended to foster competition, diversity, and localism — for example, utilizing the spectrum more efficiently to create additional voices, fostering the development and deployment of new technologies that may provide additional voices, maintaining public interest obligations on existing broadcast licenses to foster localism — one part of the debate has been how the ownership rules and these other policies can work to reinforce, supplement, or substitute for one another.

For Further Information

CRS Report RL31925, *FCC Media Ownership Rules: Current Status and Issues for Congress*, by Charles B. Goldfarb.

Municipal Deployment of Broadband[7]

One purpose of the 1996 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, plus the steady improvement in broadband communications technologies that municipalities wish to have available in their communities, have provided fuel for a policy debate about access to broadband services. 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 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 profit 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 HotSpots (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 (including New York and Chicago;

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[7] Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry.

one is planned for the entire city of Philadelphia). 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 Linda K. Moore.

Public Safety Communications[8]

The lack of communications interoperability for first responders at the World Trade Center on September 11, 2001 has been widely recognized as a possible contributing cause of unnecessary deaths. The 9/11 Commission urged that Congress take prompt action to assure the release of spectrum at 700 MHz — allocated for public safety, but not released — to support needed interoperable networks. To meet the needs for increased spectrum for public safety and to facilitate the clearing of spectrum for revenue-generating auctions, Congress included measures in the Deficit Reduction Act of 2005 (P.L. 109-171) that release spectrum at 700 MHz by 2009.

New and emerging technologies have positioned wireless companies as equal competitors to broadcasters and cable companies, among others, in providing communications, information, and other services. The allocation and effective management of spectrum has become an essential component of telecommunications policy as well as public safety policy. Congress could consider plans for future spectrum allocations that meet public safety needs as well as other uses such as commercial applications, defense, aviation, maritime activity, and medical telemetry. Congress might also consider the extent to which the current regulatory framework for telecommunications and other media helps or hinders social goals associated with public safety. Social benefits might include assuring access to wireline or wireless lifeline telecommunications, supporting 911 call centers, or expanding emergency alert networks. Broader-based policy decisions can also have an impact. For example, call centers and emergency alert systems can benefit from web-enabled communications capability; interoperability at all levels of communications benefits from digital technologies.

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[8] Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry.

The long-term goal for public safety communications is to create a seamless network of emergency communications that integrates every level of emergency response from the initial warning or call for help, through the process of rescue, and during the recovery stages. Congress currently tends to treat these aspects as discrete problems, with different policies. For example, at the federal level, some of the technical requirements for 911 calls are regulated by the Federal Communications Commission (FCC) and some 911 programs receive funding from the Department of Transportation; federal planning for emergency alert systems occurs primarily within the Department of Homeland Security, with key technology provided by the National Oceanic and Atmospheric Administration (NOAA); federal planning and funding for emergency communications is the responsibility of different directorates within the Department of Homeland Security; and spectrum planning is managed by the National Telecommunications and Information Administration (NTIA), at the Department of Commerce, and by the FCC. Spectrum policy for public safety is in turn bifurcated with the NTIA handling federal spectrum use and the FCC dealing with state and local public safety spectrum needs

For Further Information

CRS Report RL32594, *Public Safety Communications Policy*, by Linda K. Moore.

The "Savings Clause" and Monopoly Issues[9]

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 — 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 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

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[9] Janice E. Rubin, Legislative Attorney, American Law Division.

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 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 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, 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 as part of a possible revision of existing telecommunications law 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 RS20241, *Monopoly and Monopolization — Fundamental But Separate Concepts in U.S. Antitrust Law*, by Janice E. Rubin.

Spectrum Auctions[10]

The Communications Act of 1934, as amended primarily by the Telecommunications Act of 1996 and by the Balanced Budget Act of 1997, gives the Federal Communications Commission (FCC) the authority to allocate spectrum and to conduct auctions.

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[10] Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry Division.

The Balanced Budget Act of 1997 (47 U.S.C. 153) contained several spectrum management provisions. It amended Section 309(j) of the Communications Act to expand and broaden the FCC's auction authority and to modify other aspects of spectrum management. Whereas previous statutes gave the FCC the authority to conduct auctions, the Balanced Budget Act required the FCC to use auctions to award ownership in mutually exclusive applications for most types of spectrum licenses. The Telecommunications Act of 1996 contains provisions about spectrum policies for broadcasters (47 U.S.C 336) and provides for the creation of a Telecommunications Development Fund to receive interest earned on spectrum auction escrow accounts (47 U.S.C. 309 (j) (8) (C)).

Spectrum policy issues before Congress are characterized by economic, technological, and regulatory complexity. An increasing number of public comments have criticized the effectiveness of spectrum management and policy in the United States. Proceeds from spectrum sales are presently attributed to general revenue in the U.S. Budget (47 U.S.C 309(j) (8) (A)). The 108th Congress asked the Government Accountability Office (GAO) to prepare a study regarding the allocation of spectrum licenses, due by October 2005 [P.L. 108-494, Title II, Sec. 209 (a)]. The study (*Strong Support for Extending FCC's Auction Authority Exists, but Little Agreement on Other Options to Improve Efficient Use of Spectrum,* December 2005, GAO-06-236) concluded that auctions were generally perceived as a desirable way to allocate spectrum. The GAO could not find evidence that market participants that had bought spectrum were at a disadvantage in competing with service providers who had been assigned spectrum. It found that the high cost of developing infrastructure was a barrier to market entry and that this cost was more significant in shaping competition and pricing decisions than the cost of spectrum. Many findings were inconclusive and the GAO recalled that in an earlier study it had recommended the creation of an independent commission to examine spectrum management.

For Further Information

CRS Report RL31764, *Spectrum Management: Auctions*, by Linda K. Moore.

Universal Service Fund Reform[11]

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 in 1983 an explicit

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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.

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 three major concerns: 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 is currently defined, how these policies are 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 RL30719, *Broadband Internet Access and the Digital Divide: Federal Assistance Programs*, by Lennard G. Kruger and Angele A. Gilroy.