

# CRS Report for Congress

## 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 (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 109<sup>th</sup> 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 110<sup>th</sup> Congress has held hearings on a wide range of topics including broadband deployment, universal service fund reform, FCC oversight, and public safety communications. Unlike in the 109<sup>th</sup> Congress however, where energy was focused on the passage of a single comprehensive telecommunications reform measure, it appears that the 110<sup>th</sup> 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 110<sup>th</sup> 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 110<sup>th</sup> 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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# 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) (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 109<sup>th</sup> 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 110<sup>th</sup> Congress has held hearings on a wide range of topics including broadband deployment, universal service fund reform, FCC oversight, and public safety communications. Unlike in the 109<sup>th</sup> Congress however, where energy was focused on the passage of a single comprehensive telecommunications reform measure, it appears that the 110<sup>th</sup> 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 110<sup>th</sup> 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 110<sup>th</sup> 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<sup>1</sup>**

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 — 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 110<sup>th</sup> Congress is considering the scope and effect of federal broadband financial assistance 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

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<sup>1</sup> Lennard G. Kruger, Specialist in Science and Technology, and Angele A. Gilroy, Specialist in Telecommunications Policy, Resources, Science, and Industry Division

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.

## **Broadcast Indecency<sup>2</sup>**

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 half-time show, gave broadcast indecency prominence in the 108<sup>th</sup> and 109<sup>th</sup> Congresses, and resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold.

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

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<sup>2</sup> Henry Cohen, Legislative Attorney, American Law Division.

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.”

### **For Further Information**

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

## **Digital Television Transition<sup>3</sup>**

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

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<sup>3</sup> Lennard G. Kruger, Specialist in Science and Technology, Resources, Science, and Industry Division.

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 have been introduced into American homes, and given the impetus to reclaim analog spectrum for commercial uses and public safety, the 109<sup>th</sup> Congress enacted the Deficit Reduction Act of 2005 (P.L. 109-171), which established a “date certain” digital transition deadline of February 17, 2009.

A key issue in the Congressional debate over the digital transition continues to be addressing the millions of American over-the-air households whose existing analog televisions will require converter boxes in order to receive digital signals when the analog signal is turned off. P.L. 109-171 allocated up to \$1.5 billion for a digital-to-analog converter box subsidy program to be administered by the Department of Commerce. The 110<sup>th</sup> Congress is closely overseeing the converter box program. Issues include whether the \$1.5 billion allocated to the program is sufficient to meet the needs of all requesting households, whether consumer education efforts among government and private stakeholders are adequate, and whether the program is sufficiently targeted to vulnerable populations. Additional digital transition issues 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<sup>4</sup>**

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

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<sup>4</sup> Patricia Moloney Figliola, Specialist in Telecommunications and Internet Policy, Resources, Science, and Industry Division.



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.

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.

## Media Ownership Rules<sup>5</sup>

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 108<sup>th</sup> 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 June 2006, the FCC adopted 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, but did not propose specific rule changes. In November 2006, the FCC announced that it had commissioned 10 economic studies of media ownership as part of its review of the media ownership rules; these studies were released on July 31, 2007 and the FCC is seeking public comment on them. In a separate but related action the FCC, on August 1, 2007, released a Second Notice of Proposed Rulemaking requesting public comment on several proposals to increase minority ownership of media outlets.

Congress may choose to provide guidance as the FCC rewrites its rules to meet the requirements of the Appeals Court. In the 109<sup>th</sup> Congress, a bill was voted out of the Senate Commerce Committee that would have required the FCC to seek public comment on the specific language of any proposed media ownership rule changes before adopting the modified rule.

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

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<sup>5</sup> Charles B. Goldfarb, Specialist in Industrial Organization and Telecommunications Policy, Resources, Science, and Industry Division.

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<sup>6</sup>**

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

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<sup>6</sup> Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry.

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 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 Linda K. Moore.

## Public Safety Communications<sup>7</sup>

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 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 110<sup>th</sup> 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.

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<sup>7</sup> Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry.

**For Further Information**

CRS Report RL33747, *Emergency Communications Legislation: Implications for the 110<sup>th</sup> Congress*, by Linda K. Moore.

**The “Savings Clause” and Monopoly Issues<sup>8</sup>**

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 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

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<sup>8</sup> Janice E. Rubin, Legislative Attorney, American Law Division.

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 Janice E. Rubin.

## **Spectrum Auctions<sup>9</sup>**

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 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

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<sup>9</sup> Linda K. Moore, Analyst in Telecommunications and Technology Policy, Resources, Science, and Industry Division.

of spectrum licenses in airwaves that would be vacated by broadcasters as they moved from analog to digital broadcasting technology.

The Deficit Reduction Act of 2005 (P.L. 109-171) set a deadline of February 17, 2009 as the last day of analog broadcasting and required that licenses for the freed-up spectrum be auctioned no later than January 28, 2008. About \$10 billion of the auction proceeds has been designated for specific purposes by the act.

The Federal Communications Commission (FCC) has announced the rules for the auction of the airwaves now used for analog TV broadcasting. Because the decisions the FCC makes in setting up an auction of spectrum licenses can shape the bidding process and the eventual outcome of the auction, the FCC typically finds itself under pressure to set requirements that favor specific interests or policy goals. The preparations for the upcoming auction have been particularly fraught with controversy. The propagation characteristics of the spectrum are such that it is considered ideal for wireless broadband. For this and other reasons, control of this spectrum is sought not only by the incumbent wireless companies wishing to expand their capacity but also by companies eager to apply next-generation technologies for new business models. The auction rules introduce two innovative business models for spectrum management and assignment that represent departures from past policy. One model requires a shared network to accommodate both public safety and commercial users in a partnership. The other innovative model designates spectrum licenses for a network that could be managed to accept any suitable wireless device. The decisions the FCC has made for this auction — and by extension for spectrum policy — have framed a new debate about access to the airwaves, the nature of competition in the wireless industry, and wireless access to the Internet.

### **For Further Information**

CRS Report RS22218, *Spectrum and the Transition to Digital TV*, by Linda K. Moore.

## **Universal Service Fund Reform<sup>10</sup>**

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

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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 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 Angele A. Gilroy.