



**AN INVESTOR'S GUIDE TO U.S.  
COMMUNICATIONS LAW**

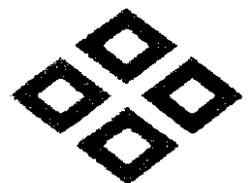
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**AUTUMN 2003**

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October 31, 2003

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Re: An Investor's Guide to U.S. Communications Law

Dear Steve:

Enclosed is the Autumn 2003 edition of our "*An Investor's Guide to U.S. Communications Law*." The title has been changed from the prior editions' "*Telecommunications Law*" to reflect the increased media/broadcast content in the Guide. Also new this time around is a "New in this Edition" section, highlighting coverage of major events since the last edition, in this case the January 27, 2003 *NextWave* Supreme Court decision; the June 2, 2003 FCC Media Ownership Concentration decision; and the August 21, 2003 FCC Local Competition triennial review order.

As in the past, the Guide is intended to be at once detailed enough to be practically useful, but not so dense as to be unreadable, for non-specialists who are contemplating strategic or financial investments in, lending to, operating or otherwise doing business with communications sector operators, service providers and equipment makers. We hope you find it useful, and welcome your feedback on how well we have succeeded.

Sincerely yours

Owen D. Kurtin

ODK:mb  
Enclosure

**NEW IN THIS EDITION**

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## I. Introduction.

In 1876, Alexander Graham Bell received a patent for the telephone. In 1896, Guglielmo Marconi received a patent for the radio. These two patents represent the “UR” inventions of the telecommunications world. All modern telecommunications can be traced to these two inventions. We are in the midst of a telecommunications revolution, spurred in part by technology and in part a rapidly changing legal and regulatory framework. In the U.S., the principal legal milestone of recent years has been the 1996 Telecommunications Act<sup>1</sup> (the “Telecommunications Act”). The Telecommunications Act was intended to promote convergence, increase competition, lower entry barriers, eliminate ownership restrictions and reduce end user prices through the removal of statutory and jurisprudential barriers to the cross-marketing of services among the various sectors of the telecommunications, broadcast and cable industries. The extent to which it has succeeded is the subject of debate, but it certainly unleashed an unprecedented flood of merger and acquisition activity in the telecommunications sector which only the recent economic downturn slowed, led by a “telecom meltdown” of well-publicized bankruptcies, gluts of overbuilt network capacity and tumbling prices for equipment manufacturers.

No one can doubt that telecommunications and information technologies will continue to be dominant features of the U.S. economy and therefore vehicles for investment. However, economic conditions have created both a buyer’s market of distressed assets at fire sale prices and great uncertainty as to what assets are worth buying and how much they are worth. These assessments are typically attempted by investment and finance professionals in companies considering either strategic or financial investments in telecommunications operators, service providers and equipment makers, with little knowledge of the legal and regulatory environment constraining the operations of the proposed investment targets. This guide has a simple goal. It is to help strategic and financial investors understand the legal and regulatory regimes under which different sectors of the telecommunications industry operate in a clear and concise manner, to help supply what is often a missing piece in the investment analysis.

## II. The History of U.S. Communications Law.

### A. Early Regulation: Mann-Elkins and the Radio Acts

Prior to the Telecommunications Act, there were several important sources of American communications law. Among these were the Mann-Elkins Act of 1910,<sup>2</sup> which vested regulatory control of telephones and telegraphs in the Interstate Commerce Commission, and the Radio Act of 1912<sup>3</sup>, which established the requirement of a license to operate a radio and set aside frequencies for government use with the aim of regulating interference. The Radio Act of 1927<sup>4</sup> initiated regulation of licensing and programming and established the Federal Radio Commission to govern the radio spectrum and allocate radio frequencies. During this period, there was little telephone regulation; the American Telephone and Telegraph Company (“AT&T”) had an initial monopoly on the strength of patents obtained subsequent to the expiration of the original Bell patent, with Western Union having the telegraph monopoly.

## B. The Communications Act of 1934

The Communications Act of 1934 (the "Communications Act")<sup>5</sup> consolidated the regulation of radio and telephone services. The Communications Act repealed the Radio Acts, established the Federal Communications Commission (the "FCC")<sup>6</sup> and vested regulatory administration of telephone and broadcast activities in the FCC, albeit through separate regulatory regimes. FCC jurisdiction is based on the commerce clause of the U.S. Constitution.<sup>7</sup> The Communications Act, amended by the Telecommunications Act and supplemented by other legislation, remains the basic U.S. telecommunications legislation to this day and is codified at Title 47 of the United States Code (47 U.S.C.). Its framework will be covered in Part IV.

## C. The Bell Divestiture and the MFJ

In 1974, the U.S. Department of Justice commenced legal action against AT&T in the U.S. District Court for the District of Columbia, Judge Harold H. Greene presiding. The complaint charged the company that had come to be known as the "Bell System" or "Ma Bell" with violations of the antitrust laws in creating an unlawful monopoly in long distance telephone service and equipment manufacture.

The AT&T trial began in January 1981. Following denial of AT&T's motion to dismiss, the case moved into a settlement posture under which AT&T would be structurally separated into constituent parts. The case's final result, the so-called Modification of Final Judgment ("MFJ") or AT&T Consent Decree, divested AT&T's twenty-two Bell Operating Companies ("BOCs"), required the BOCs to offer non-discriminatory interconnection of their networks to competitors, and prohibited the BOCs from offering any service or product other than local telephone service.<sup>8</sup>

The MFJ thus established a judicially-mandated regime that prohibited the BOCs from offering long distance services. Under the MFJ, the United States was divided into 163 "Local Access Transport Areas," or "LATAs." The MFJ prohibited the BOCs from carrying interLATA calls but required them to provide local access for interLATA carriers.<sup>9</sup> The MFJ further prohibited the BOCs from offering "information services"<sup>10</sup> or data-processed communications; a restriction that was withdrawn in 1991.<sup>11</sup> The MFJ also prohibited the BOCs from manufacturing telecommunications equipment.<sup>12</sup>

## D. The Telecommunications Act of 1996

From 1984 until 1996, the MFJ was the most important piece of telecommunications "law" in the country. On May 8, 1996, the Telecommunications Act was signed into law. The Telecommunications Act expressly supplants the MFJ.<sup>13</sup>

The heart of the Telecommunications Act, which is structured and section-numbered to function as an amendment to the Communications Act, replaces the judicial structural separation of the BOCs in the MFJ with extensive legislative/regulatory structural separation and other regulation of the BOCs through the "*Special Provisions Concerning Bell Operating Companies*," Telecommunications Act §§271-275. Under §271, Incumbent Local Exchange Carriers, or "ILECs," which include the BOCs, are prohibited from providing interLATA services unless they offer nondiscriminatory access and interconnection to segments

and elements of their networks, which are specified in Telecommunications Act §251 and appurtenant regulations (and which are discussed in greater detail in Part IV(A)(3), *infra*), to unaffiliated competitors or have not within a certain time received a request from a competitor for such access and interconnection. The ILECs must also complete a fourteen-point checklist on interconnection and local access provided to competitors. The first such approval was granted only in December 1999, when Bell Atlantic won approval to offer long distance service in New York.<sup>14</sup>

§272 requires structural separation of manufacturing and data-processed interLATA services. §273 prohibits the BOCs from manufacturing equipment for as long as they are prohibited from providing interLATA services under §271. §274 prohibited the BOCs from providing "electronic publishing" services for four years. §275 prohibited the BOCs from providing alarm monitoring services for five years.

Among other provisions of the Telecommunications Act, §222 imposes on telecommunications carriers the duty to protect the confidentiality of customer proprietary network information ("CPNI") and prohibits them from using such information for all but their own billing, administrative and consumer protection purposes, thereby preventing the use of that information for the offering of enhanced services to the competitive disadvantage of other service providers. However, a 1999 decision by the U.S. Court of Appeals for the 10th Circuit invalidated an FCC rule implementing §222 that required customers to affirmatively "opt-in" to marketing uses by carriers of CPNI, leaving an "opt-out" system in place pending the outcome of a new FCC rulemaking proceeding.<sup>15</sup>

§254 of the Telecommunications Act requires the FCC to implement universal service of telecommunications and information services (see Section IV(A)(2)), periodically reviewing what constitutes "universal service" as an evolving standard.<sup>16</sup> The Telecommunications Act also requires every telecommunications carrier to contribute to FCC-mandated universal service support mechanisms and provides that interstate telecommunications providers "may be required to contribute to the preservation and advancement of universal service if the public interest so requires."<sup>17</sup>

### III. Structure and Functions of the FCC.

The FCC is an independent federal agency based in Washington, D.C. It is composed of five commissioners who are appointed by the President and confirmed by the U.S. Senate. No more than three of the commissioners can be members of a given political party; traditionally, three commissioners are drawn from the political party occupying the White House and two from the other party. The current commissioners are Chairman Michael K. Powell, Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein.

The commissioners are served by a bureaucratic apparatus in which the FCC staff are employed. The FCC is organized into six operating bureaus and eleven staff offices. The FCC bureaus are:

(1) Consumer and Governmental Affairs, which deals with consumer education and complaints, as well as with other governmental organizations on the Federal, state and local level and non-governmental organizations;

(2) Enforcement, which deals with enforcement of the Communications Act, other laws that the FCC is charged with administering and the FCC's rules and regulations and punishment of their violators;

(3) International, which deals with international telecommunications services, submarine cables and satellites;

(4) Media, formed from the former Mass Media and Cable Services Bureaus, which deals with broadcast television and radio, cable television and post-licensing Direct Broadcast Satellite ("DBS") Service;

(5) Wireless Telecommunications, which deals with cellular telephones and radio spectrum allocation and licensing; and

(6) Wireline Competition, the former Common Carrier Bureau, which deals with companies that provide local and long distance wireline telephone service.

The FCC staff offices are:

(1) Administrative Law Judges, which holds hearings on contentious matters and issues initial decisions;

(2) Communications Business Opportunities, which advises the FCC on opportunities for small, minority and women-owned businesses;

(3) Engineering and Technology, which allocates radio spectrum for non-governmental use and advises the FCC on technical issues;

(4) General Counsel, which is the FCC's legal advisor;

(5) Inspector General, which conducts audits and investigations;

(6) Legislature Affairs, which is the FCC's liaison with Congress;

(7) Managing Director, which directs the FCC's operations under the FCC Chairman's supervision;

(8) Media Relations, which is the FCC's liaison with the media and which releases FCC decisions to the media;

(9) Secretary, which oversees the FCC's paper and electronic document filing and distribution systems;

(10) Strategic Planning and Policy Analysis, which coordinates the FCC's short and long-term policy objectives; and

(11) Workplace Diversity, which advises the FCC on workplace diversity, affirmative recruitment and equal employment opportunity.

Practice before the FCC involves a variety of proceedings. The FCC grants, regulates and revokes a variety of licenses related to broadcast, telecommunications and other activities. The FCC also promulgates rules and regulations pursuant to the Communications Act and other legislation which it is charged with administering. The public can participate in this process. When a bureau of the FCC is considering a regulatory rulemaking, it generally first issues a "Notice of Inquiry," or "NOI," seeking information from interested parties as to whether an issue requires a rule-making, rule modification or rule revocation. When the Bureau believes regulatory action is indicated, it issues a "Notice of Proposed Rulemaking," or "NPRM." The NPRM sets forth what the FCC proposes to do and the reasons for it. The NPRM invites public comments from interested parties for a certain period, and then reply comments, which are theoretically supposed to be confined to rebutting previously filed comments. NOIs and NPRMs are published in the Federal Register and on the FCC's Web site at [www.fcc.gov](http://www.fcc.gov) (the web site is a repository of useful information and links to other telecommunications-related web sites). Once the comment and reply periods have ended, the FCC will review and assimilate the comments, arrive at a decision and typically issue a "Report and Order," which contains the resulting rulemaking, sometimes in the form of a new rule or regulation, sometimes a repeal of a previously existing rule or regulation and sometimes a modification. The FCC's rules and regulations are published in the Federal Register and codified at Title 47 of the Code of Federal Regulations (47 C.F.R.).

#### IV. The Statutory and Regulatory Scheme.

##### A. Telephony

##### 1. Common Carrier Regulation

Telephone communications ("telephony") are governed by Title II of the Communications Act, as amended. The heart of Title II is so-called "common carrier" regulation. Under first the Mann-Elkins Act and then the Communications Act, telephone companies were considered "common carriers" or "carriers," defined by the Communications Act as "...any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy...but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."<sup>18</sup> Common carriers are required to submit to rate regulation and open public access in exchange for market domination and limitations on liability. Pursuant to the First Amendment to the U.S. Constitution, communications common carriers are not subject to any restrictions on the content carried by them. Common carrier status can be imposed merely for originating or terminating calls, rather than carrying them. The gravamen is control of transmission and sale to the general public. The Telecommunications Act authorizes the FCC to forbear from common carrier regulation when such regulation is not required to protect the public interest.<sup>19</sup>

Common carriers are required to offer "communication service upon reasonable request therefor" to any member of the general public.<sup>20</sup> They are also required to interconnect

with other carriers when in the public interest<sup>21</sup> and must charge rates that are “just and reasonable”<sup>22</sup> and that are non-discriminatory.<sup>23</sup> The FCC has the power to set common carrier rates, to eliminate discriminatory charges or to raise or lower rates.<sup>24</sup>

In practice, common carriers have long been regulated by the public filing of tariffs, or rate schedules, with the FCC.<sup>25</sup> So powerful has been the influence of tariffs that a doctrine, called the “Filed Tariff Doctrine,” developed by jurisprudence and recently reaffirmed by the U.S. Supreme Court, permits a carrier to invoke its own filed tariff to invalidate a (presumably less favorable) rate that it itself negotiated in a bilateral agreement executed with a customer.<sup>26</sup> The doctrine may be invoked even by a carrier that intentionally misrepresented its rates to that customer.

As competition has grown and displaced the need for rate regulation, the FCC has engaged in a series of “detriffing” proceedings, eliminating long distance<sup>27</sup> and international tariffs.<sup>28</sup> Today, the only tariff-dominated telephony traffic is that carried by the BOCs for local service.

Common carriers are also prohibited by Communications Act §214 from discontinuing service without obtaining a certificate from the FCC.<sup>29</sup>

## 2. Regulation of Data Traffic

The FCC has traditionally distinguished between services in which the transmitted information arrives unaltered, the paradigm of which is voice telephony, which are subject to common carrier regulation, and services in which the transmission is “processed,” or altered, by a computer during transmission, which are unregulated. Beginning in 1966, the FCC examined the convergence of telecommunications and computer technology in a series of so-called “Computer Inquiries.” In the *First Computer Inquiry* decision, in 1971,<sup>30</sup> the FCC decreed a case-by-case analysis to distinguish between services in which information was transmitted unaltered, as with simple voice telephony, and services in which information was data-processed during transmission. Common carriers were required to provide “maximum separation” between ordinary communications services and data processing services in order to prevent them from using revenues from their regulated but market-dominant common carrier activities to subsidize and unfairly compete in data processing activities.

This formula was updated and the case-by-case approach eliminated in the *Second Computer Inquiry* in 1980,<sup>31</sup> in which the FCC established a new distinction between “basic” services, those in which the transmitted information was not processed or altered in transmission, which would be subject to common carrier regulation, and “enhanced” services, in which processing altered the transmission, which would be exempt from common carrier regulation.<sup>32</sup>

The Telecommunications Act preserves the distinction, separately defining “Telecommunications,”<sup>33</sup> which essentially corresponds with “basic services” and “Information Service,”<sup>34</sup> which essentially corresponds with “enhanced services.” The former is subject to common carrier regulation; the latter is not. The rise of the Internet as a medium of mass communication has stressed the distinction, for example in the case of IP Telephony-telephone

calls carried by Internet Protocol-which compete with ordinary voice service, yet which are unregulated as Information Service. This issue will be discussed further in Subsection G.

### 3. Local Competition

The FCC implemented the Telecommunications Act's *Special Provisions Concerning Bell Operating Companies* through a number of proceedings, the most important of which was the August 8, 1996 local competition order ("Local Competition Order").<sup>35</sup> The Local Competition Order was immediately the subject of highly-contested litigation that essentially paralyzed its implementation for the first two and one-half years of its existence and had the practical result of delaying BOC entry into the long distance market pursuant to Telecommunications Act §271. On January 25, 1999, in *AT&T Corp. v. Iowa Utilities Board*,<sup>36</sup> the U.S. Supreme Court substantially reversed a decision of the 8th Circuit U.S. Court of Appeals that had vacated most of the Local Competition Order.<sup>37</sup> The Supreme Court rejected challenges by state public utility commissions and local telephone companies and upheld the power of the FCC to regulate *intrastate* telecommunications service in furtherance of the local competition goals of the Telecommunications Act. The *AT&T* decision relied on §201(b) of the Telecommunications Act, which provides that the FCC may prescribe such rules and regulations as may be necessary in the public interest to carry out the Telecommunications Act's provisions. The Court held that the FCC has explicit jurisdiction to promulgate implementing rules and must be given reasonable latitude in doing so.

#### (1) Interconnection and Unbundled Access

ILECs are required by §251(c) of the Telecommunications Act to share their proprietary networks with competitors in three ways: by interconnection of their facilities with the network facilities of a competitor at any "technically feasible" point (interconnection);<sup>38</sup> by allowing competitors to lease combinations of elements of their proprietary networks ("Unbundled Network Elements" or "UNEs") (unbundled access);<sup>39</sup> and by reselling telephone services to competitors on a nondiscriminatory basis (resale).<sup>40</sup> A duty of good faith negotiation is expressly imposed by §251(c)(1). An obligation of "collocation" is imposed by §251(c)(6) to allow the physical connection of equipment necessary to achieve interconnection or unbundled access.

The unbundling rules require ILECs to make discrete network "elements" available on an "unbundled" basis, where technically feasible, and not tie the lease of one network element to the lease of another. Pursuant to §251(c)(3), the provision of Unbundled Network Elements by incumbents to competitors must be under "rates, terms, and conditions that are just, reasonable and nondiscriminatory." §251(d)(2) provides that the FCC shall, in considering what UNEs must be made available by ILECs under §251(c)(3), at a minimum take into account access to which network elements are necessary, and the failure to provide access to which would impair, the competitor's ability to provide service. This "necessary and impair" standard has provided a substantial part of the ammunition used to attack the FCC's unbundling rules.

The FCC promulgated a rule known as Rule 319 to specify those network elements that must be offered on an unbundled basis under the "necessary and impair"

standard.<sup>41</sup> The rule included as necessary network elements services such as the “local loop,” or the transmission facility between the ILEC’s central office switch and the end-user customer’s premises, directory assistance, operator services, operational support systems, and vertical switching functions (e.g., caller I.D., call forwarding and call waiting).

However, the *AT&T* Supreme Court held that that the FCC had impermissibly failed in its rulemaking to distinguish those network elements to which blanket access should be given and those which should only be made available on a case-by-case basis, and vacated the rule. The determination and review of which network services should be freely available to competitors must be guided, said the Court, by a consistent and rational application of the “necessary and impair” standard, taking into account the availability of comparable elements outside the ILEC’s network. The FCC then repromulgated Rule 319 with minor modifications, adding to the network elements list “dark” (non-activated) fiber local loops and sub-loop elements. The ensemble of network elements to which unbundled access must be given to meet the “necessary and impair” standard became known as the UNE platform, or UNE-P.

By contrast, the Supreme Court did not vacate another rule which forbids an incumbent to separate already-combined network elements before leasing them to a competitor. Under the “All Elements” Rule,<sup>42</sup> competitors without proprietary network facilities will be able to provide local telephone service on a “switchless basis,” relying solely on elements in an incumbent’s network, or by purchasing an entire preassembled network. Despite objections that this Rule will allow competitors to lease an entire prefabricated telephone network, the Court found the Rule to be reasonable and consistent with the Telecommunication Act.

On May 24, 2002, in *U.S. Telecom Ass’n v. FCC*, the D.C. Circuit U.S. Court of Appeals again directed the FCC to review the unbundling rules, finding that in establishing a uniform national list of network elements that must be unbundled, the FCC had failed to consider individual market differences and had therefore violated the “necessary and impair” standard.<sup>43</sup> The Court also overturned the FCC’s rule requiring the BOCs to allow competitors to sell high speed DSL Internet service on the same line that the BOCs were using for voice service (“line sharing”), finding that the FCC had failed to consider DSL competition from other broadband platforms such as cable modems and satellites.

Instead of appealing to the Supreme Court, the FCC chose to review the unbundling rules in the context of its Telecommunications Act-mandated triennial regulatory review, and on February 20, 2003 issued a contentious 3-2 split decision on the rules’ revision in a climate of intense political scrutiny. An order based on the February 20 decision did not issue until August 21.<sup>44</sup> Significant parts of the triennial review order effect a major revision of Rule 319 and presumptively remove high-speed, broadband network elements from the unbundling requirements, while reserving a critical role for state regulators, in deference to the *U.S. Telecom Ass’n* ruling that the vagaries of individual markets must be considered.

In its August 21 order, the FCC established a national “impairment” standard, finding that impairment exists when lack of access to an ILEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make market entry uneconomic for a competitor. The standard is thus a lower threshold than the “necessary” standard.

The FCC ruled that local switching for business customers served by high capacity loops will not be subject to unbundling, based on a standard presumptive finding of non-impairment to competitors if access to high capacity loops is not required. Rather, state regulators would have to rebut the national finding for their particular markets. For the residential and small business market, the FCC found competitor impairment associated with the ILEC "hot cut" process, and directed states to determine whether economic and operational impairment exists in a given market, or to approve a batch "hot cut" process for ILECs to follow.

In addition, ILECs will no longer be required to unbundle packet switching network elements, including routers. ILECs will only be required to offer unbundled access to signaling networks when a competitor carrier is purchasing unbundled switching. Similarly, unbundled access to call-related databases such as directory assistance will only be required when a carrier is purchasing access to the ILEC's switching, not when the carrier uses its own switches.

The FCC removed line sharing from the list of network elements to which access must be given, and decided that the high frequency portion of the loop is not an UNE, since, although lack of access to the local loop would constitute general impairment in providing broadband services, access to the entire stand-alone copper loop is sufficient to overcome impairment. Competitors are allowed to continue to offer line sharing to existing DSL customers until that customer discontinues service; competitors are given three years to transition new line-sharing high frequency customers commencing service within a year of the order's effective date to new arrangements, after which the ILEC may discontinue line sharing service.

By contrast to its decisions concerning high-speed network elements critical for data and Internet traffic, the FCC decided that ILECs must continue to provide competitors with unbundled access to copper loops and subloops, the backbone of voice traffic, for the provision of both narrowband and broadband services. No copper loops or subloops may be retired without permission from the relevant state regulator. Competitors will be permitted to order new UNE combinations and to commingle UNEs with other wholesale services. ILECs must provide shared transport to the extent they are required to provide unbundled local switching. The FCC clarified the §271 checklist to establish an independent obligation on the part of BOCs to provide unbundled access, irrespective of the requirements of §251.

The result of the 2003 triennial review order is maintenance of the *status quo* for the unbundling requirements particularly pertaining to voice traffic and presumptive deregulation and dismantling of the unbundling rules as they pertain to broadband traffic, but with great latitude on the part of state regulators to selectively maintain or modify the rules for given markets. The triennial review's critics complain that the decision raises the possibility of patchwork treatment in different parts of the U.S.; the decision's defenders state that individual market-gearred regulation is the essence of local competition.

## (2) Pricing

In the *AT&T* decision, the Supreme Court also restored that part of the Local Competition Order vacated by the 8th Circuit which mandated payments to the ILECs by competitors for access to unbundled network elements and for resale under §252(d) of the

Telecommunications Act pursuant to a controversial forward-looking pricing methodology called TELRIC (Total Element Long Run Incremental Cost). TELRIC, which is based on a hypothetical ideally efficient telephone network, calculates the cost of a network element based on the long-term incremental cost of its production, including depreciated costs of equipment and facilities used solely for that element as well as a proportional allocation of costs of shared equipment and facilities. Marketing and other shared costs are not factored into TELRIC, nor are capital costs incurred by ILECs in building their networks but not yet recovered through tariffed subscriber charges. ILECs opposed the TELRIC methodology because it took no account of the historical costs of building their networks.

However, the 8th Circuit, on remand from the Supreme Court, again invalidated the FCC's pricing rules in *Iowa Utilities Board v. FCC*.<sup>45</sup> The Circuit Court rejected the FCC's use of a hypothetical ideal network model and held that the Telecommunications Act required basing payments to ILECs for providing access to unbundled network elements on the actual costs to the ILECs of providing access to that network element. In addition to invalidating TELRIC, the 8th Circuit also invalidated the FCC's wholesale pricing rules for resale to the extent the rules assume that the ILEC has itself abandoned the retail business. On May 13, 2002, the Supreme Court again reversed the 8th Circuit, restoring the TELRIC model and holding that TELRIC was a reasonable policy and that the FCC had to be given deference in its implementation of the Telecommunications Act.<sup>46</sup>

In the August 21, 2003 triennial review order, the FCC clarified the TELRIC rules to establish that the risks of competitive markets should be reflected in calculating the risk-adjusted cost of capital for UNE prices.

(3) Pick-and-Choose

The *AT&T* decision also restored the FCC's "Pick-and-Choose" Rule,<sup>47</sup> which the 8th Circuit had struck down. The Pick-and-Choose Rule provides that an ILEC shall make available any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party and which is approved by a state commission pursuant to §252 of the Telecommunications Act, upon the same rates, terms, and conditions as those provided in the agreement. Potentially each and every part of an agreement to provide network services negotiated by an ILEC with a competitor will have to be made available to all others with exceptions to be granted by state service commissions. The Supreme Court held that the Pick-and-Choose Rule tracks almost precisely the language of §252(i) of the Telecommunications Act. In the August 21, 2003 triennial review order, the FCC issued a NPRM seeking comment on whether to modify the Pick-and-Choose rule restored by the *AT&T* decision.

(4) Tauzin-Dingell

The Tauzin-Dingell Bill,<sup>48</sup> passed by the U.S. House of Representatives in March 2002, seeks to exempt ILECs from the provisions of §271 compliance to enter the long distance market for high speed data service. Since these services are expected to be far more profitable than voice traffic and are therefore the services that ILECs really care about, the bill is essentially an attempt to vitiate the §271 conditions on ILEC entry into interLATA service. The

Tauzin-Dingell bill faces possibly insurmountable opposition in the U.S. Senate, but with §271 applications now being routinely granted by the FCC, it is an open question how significant the bill is. Nevertheless, Tauzin-Dingell's proponent's were outraged by the latitude given to state and local regulators by the February 20, 2003 triennial review decision notwithstanding the presumptive removal of high-speed broadband network elements from the UNE-P, and will probably continue to seek separate "relief" for broadband services.

#### 4. Intercarrier Compensation

As seen, a great deal of legislative and regulatory attention has been devoted to governing the manner in which telecommunications carriers interconnect with each other. The legislative and regulatory scheme requires carriers to pay each other for interconnection. In practice, these payments fall into three categories: (i) access charges, the charges paid by interLATA carriers to local exchange carriers for originating and terminating their traffic; (ii) reciprocal compensation between local exchange carriers; and (iii) international settlements, the off-setting payments by carriers to carriers from other countries to originate and terminate traffic. International settlements will be covered in Part IV(D)(5).

#### B. Broadcast

##### 1. Licensing

Broadcast activities are governed by Title III of the Communications Act, as amended. The heart of Title III is the FCC's exclusive jurisdiction to grant, regulate and revoke radio licenses for "the transmission of energy or communications or signals by radio."<sup>49</sup> The FCC regulates broadcasting under a broad "public interest" standard. The Telecommunications Act restricts broadcast licenses and renewals to eight-year terms.<sup>50</sup> Renewal applications must be made four months before the expiration of the current license.

##### 2. Content Regulation

By contrast to the telephony regime, radio and television broadcast service providers are specifically not considered common carriers pursuant to the Communications Act and are therefore not required to permit public access.<sup>51</sup> Broadcast service providers, however, are the only media subject to content regulation and are not protected by the First Amendment to the United States Constitution, based upon doctrines that emerged in a series of U.S. Supreme Court decisions that justified broadcast content restriction on grounds of the early scarcity of bandwidth spectrum, the "invasive" nature of broadcasting and the very tradition of government regulation of broadcasting.<sup>52</sup> The FCC therefore regulates the broadcast of "indecent" and "obscene" material, and has the power to enforce its authority by, *inter alia*, fines and suspensions or revocations of broadcast licenses.

In the famous "seven dirty words" case, *FCC v. Pacifica Foundation*, the U.S. Supreme Court upheld the FCC's definition of "indecent speech," "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."<sup>53</sup> The *Pacifica* Court held that "indecent" speech is protected by the First Amendment to the U.S. Constitution, and that any governmental circumscription of it is subject to "strict scrutiny"

analysis and can only be justified by a compelling governmental interest that must be achieved by the least intrusive means possible. Following a series of cases in the D.C. Circuit, *sub. nom. Action for Children's Television v. FCC*,<sup>54</sup> in which the Court attempted to draw a line between the free speech rights of adults and the compelling governmental interest in protecting children, the FCC settled on a rule prohibiting "indecent material" to be broadcast between 6:00 a.m. and 10:00 p.m.<sup>55</sup>

By contrast, obscenity is not protected by the First Amendment. Obscene language in radio or television broadcasts is prohibited.<sup>56</sup> It is for this reason that arguably obscene language on broadcast channels is "bleeped" out, while the same language is transmitted unbowdlerized by cable channels that may be a few numbers away on the dial. The determination of obscenity is subject to a three-part test laid down by the U.S. Supreme Court that: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.<sup>57</sup>

A vigorous line of jurisprudence has struggled with the "patently offensive" and "contemporary community standards" elements of both indecency and obscenity and with the "serious literary ... value" element of obscenity. In April 2001, the FCC issued a Policy Statement intended to clarify the indecency standard.<sup>58</sup>

### 3. Ownership Limits

In addition to content regulation, broadcasters have also been subject to ownership and inter-media "cross-ownership" limitations intended to assure competition and a diversity of content reaching the public. Under the rules, television broadcasters have been subject to a national ownership "cap" preventing any entity from owning broadcast stations reaching more than 35% of U.S. households. Radio stations have not had national ownership limits since the passage of the Telecommunications Act.

On August 15, 1999, the FCC relaxed broadcast ownership restrictions for local television and radio stations, permitting one company to own more than one television station in a market without counting against the national coverage cap. Under the so-called "Duopoly" rule, common ownership of two television stations within the same Nielsen Designated Market Area ("DMA") was permitted if eight full-power commercial and non-commercial stations remain in the DMA and one of the jointly-owned stations was not among the top four-ranked stations in its market. Common ownership of up to six radio stations (AM and FM) was permitted in any market in which at least 20 independent voices remained, or up to four stations where at least 10 independent voices remained.<sup>59</sup>

At the same time, the FCC adopted a Report and Order that liberalized "attribution" rules that regulate whether interests in broadcast stations count towards the ownership limits, and how the national audience cap is calculated.<sup>60</sup> The "equity/debt plus" rule provided that a holder of a financial interest, whether equity, debt or mixed, in excess of 33% in a licensee's total assets will have an attributable interest in the licensee if the interest holder is either a major program supplier to the licensee (over 15% of the licensee's weekly program

hours) or if it is a “same market media entity” (whether broadcast, cable or print). Interests acquired prior to November 7, 1996 were grandfathered.

Under a newspaper/broadcast cross-ownership rule, no entity could own both a newspaper and a commercial broadcast station in the same market. A cable television/broadcast television cross-ownership rule forbade ownership of a broadcast station and a cable station in the same market (for cable ownership limits, see subsection C(2), below).

However, in early 2002, decisions by the U.S. Court of Appeals for the D.C. Circuit began dismantling these rules. On February 19, 2002, the D.C. Circuit invalidated the cable/broadcast cross-ownership rule and directed the FCC to reconsider the television broadcast ownership limits, finding that the rule was arbitrary and had not been shown to be in the public interest.<sup>61</sup> On April 2, 2002, the D.C. Circuit Court held that the Duopoly rule was arbitrary and capricious in its definition of “independent voices,” and directed the FCC to reconsider it as well.<sup>62</sup>

On June 2, 2003, the FCC, as part of its congressionally-mandated biennial regulatory review, issued a comprehensive media ownership concentration decision in a politically charged atmosphere following voluminous submissions of comments and public hearings on the proposed rulemakings. In its June 2 decision, the FCC relaxed the national television ownership cap from 35% to 45%.

In addition to relaxing the national broadcast television ownership cap, the June 2 decision also relaxed the Duopoly rule. Pursuant to the decision, in markets with five or more television stations, a company can own two stations, only one of which may be among the top four-rated, while in markets with 18 or more television stations, a company can own three stations, only one of which may be among the top four-rated. A case-by-case waiver review process is available for mergers of top four-rated stations.

The June 2 decision continued existing local radio ownership limits, but changed the methodology for defining local radio markets. In markets with 45 or more radio stations, a company can own eight stations, only five of which may be in one class (AM or FM); in markets with 30-44 radio stations, a company can own seven stations, only four of which may be in one class; in markets with 15-29 radio stations, a company can own six stations, only four of which may be in one class; and in markets with 14 or fewer radio stations, a company can own five stations, only three of which may be in one class.

The June 2 decision also relaxed the cross-ownership rules. Under the new rules, in markets with three or fewer television stations, no cross-ownership is permitted among television, radio and newspapers. In markets with four to eight television stations, a company can own either (a) one television station, one daily newspaper and up to half of the local radio ownership limit for that market; or (b) no television stations, one daily newspaper and up to the local radio station ownership limit for that market; or (c) two television stations (if allowable under the local television ownership limit for that market), up to the radio station limit for that market and no daily newspapers. For markets with nine or more television stations, the FCC eliminated the cross-ownership rules altogether.

The June 2 decision also continued the prohibition on mergers among the four top-ranked national broadcast networks.

In reaching its June 2 rulings, the FCC relied upon a so-called "diversity index" that it developed, based upon similar tools used in antitrust review, to measure the degree of media concentration in local markets. Fundamentally, the index measures diversity of independent voices by adding the sum of the square of market shares of competitors in each local market. Of course, as with any data processing algorithm, the end result is only as good as the data input, and the FCC's diversity index has generated controversy based on its assumptions about which, and how many, media sources are actually competing in given local markets and which are available to provide choice to consumers.

Public and congressional groundswell in opposition to the June 2 decision increased immediately after its announcement. The opposition comes not only from the center-left of the political spectrum, but from unlikely allies from the political left and right wings. Both sides are expressing concern that the new rules will lead to further media concentration that will deny them outlets for the expression of their views. Members of Congress from both sides of the aisle have also risen up, expressing concern about the rules' effect on their access to the airwaves to speak to their constituents and the fate of independent media outlets in non-media center districts.

The alignment of such groups of normally divergent agendas clearly caught congressional leaders, the White House and the FCC by surprise. On June 20, 2003, the Senate Commerce Committee passed legislation to reverse the June 2 rules, reinstating the 35% national ownership cap and cross-ownership rules and to force Clear Channel Communications of San Antonio, Texas to divest radio stations it has acquired since the national radio ownership cap was eliminated. On July 23, the House of Representatives, by a vote of 400-21, also voted to roll back the national television ownership cap to 35%. On September 3, 2003, the U.S. Court of Appeals for the Third Circuit issued a preliminary injunction blocking any of the new rules from taking effect. Despite threats by the White House, the lopsided House vote may be presumed veto-proof, and particularly with the broad coalition opposing the June 2 rules, wholesale expenditure of political capital to preserve them is unlikely. Substantial compromise and rollback to pre-June 2 limits and perhaps beyond may be expected in the next Congressional term.

It is also possible that the reaction to the June 2 rules represents an emerging "re-regulatory" attitude grounded not only in concern over media ownership concentration that has already occurred since the Telecommunications Act's passage, but in reaction to the last two years' accounting and securities scandals and to a widely perceived failure of the Telecommunications Act in other areas, such as ensuring local telephone competition. Among legislation proposed is requiring the FCC to conduct biennial reviews not only of what existing regulations may not be needed, but of what non-existing regulations may need to be promulgated. A rule like that would dramatically change the deregulatory philosophy that has prevailed in recent years. If so, the entire direction of communications regulation may be open for reconsideration.

## C. Cable

### 1. The Cable Regime

Cable service is generally regulated under Title VI of the Communications Act, as amended. Initially, the FCC regulated cable television. However, state and local challenges to FCC jurisdiction arose because cable television does not require a radio broadcast, is not intrinsically interstate by nature and therefore is seemingly not subject to FCC jurisdiction, which is based, as stated, on the U.S. Constitution's Interstate Commerce Clause.

The Cable Communications Act of 1984 (the "Cable Act")<sup>63</sup> divested the FCC of much of its authority over cable television. The Act established a regulatory regime by which systems meeting the statutory definition of "Cable System[s]" are subject to state and local regulation as franchisees. A Cable System is defined in the Cable Act and the FCC's rules as: "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community."<sup>64</sup>

The Cable Act governs general state and local franchise requirements for Cable Systems and their operators ("Cable Operators").<sup>65</sup> Among the general franchise rules are that any franchise shall be construed to authorize construction of a Cable System over public rights-of-way;<sup>66</sup> that except for systems operating prior to July 1, 1984, no Cable System may operate without a franchise;<sup>67</sup> that a Cable System is not subject to common carrier regulation<sup>68</sup> (conversely, cable services provided solely over a common carrier's facility, such as former video dialtone systems, are not Cable Systems<sup>69</sup>); and that the Cable Act's grant of state and local authority to award franchises does not extend to "any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way."<sup>70</sup>

The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act")<sup>71</sup> superceded much of the 1984 Cable Act and amended the Communications Act, reasserting FCC authority to establish regulations for cable service pricing. The 1992 Act also directed the FCC to establish limits on the number of cable subscribers a Cable Operator is permitted to serve; the Telecommunications Act eliminated cable rate regulation.

Cable Operators are subject to other regulation, notably "must carry" rules, that guarantee programming access for public, educational and governmental use as well as for commercial use.<sup>72</sup>

### 2. Ownership Limits

Cable service providers have also been subject to an ownership "cap" pursuant to the 1992 Act barring entities from owning cable systems that reached more than 30% of U.S. subscribers. The FCC's two Reports and Orders of October 8, 1999<sup>73</sup> loosened its rules for horizontal cable ownership and attribution. Under the rules, the existing 30% cap on percentage of cable households that a single company can serve was maintained, but horizontal ownership was measured by total nationwide cable subscribers, DBS and other multichannel video programming distributors, not just cable subscribers, theoretically allowing a single company to

control nearly 37% of current cable subscribers. In its October 8 Orders, the FCC implemented a 33% “equity/debt” attribution rule like that for broadcasters (see subsection B, *supra*) and narrowed the interpretation of limited partnership interests that would count against the cap, insulating limited partners not “materially involved” with management or operation of “video programming activities” of the partnership (the prior rule insulated only those not materially involved with “media activities”). In 2001, in *Time Warner v. FCC*,<sup>74</sup> the D.C. Court ruled that the FCC had failed to justify the 30% limit based on market data and directed the FCC to reconsider the rule. As noted in subsection B, *supra*, the D.C. Circuit Court struck down the cable/broadcast cross-ownership rule in February 2002.

### 3. Forced Access/Open Access

The success of high speed cable modem service for Internet access has led to challenges from competitors seeking access to Cable Operators’ networks. The issue highlights lack of consistency in the regulatory regimes: Title II telecommunications services, as seen, are subject to common carrier regulation and complex regulations that require incumbent service providers to open their networks to competitors. Title VI cable franchisees are subject only to limited carriage and “must carry” requirements. Information Service, as seen, is not regulated.

There is currently a split in the U.S. Circuit Courts of Appeal on how to classify cable networks. The 9th Circuit has held that cable modem service is telecommunications service and that the networks should be forced to grant open access to competitors.<sup>75</sup> The 11th Circuit found that cable modem service is not telecommunications service; the case is on appeal to the U.S. Supreme Court.<sup>76</sup> On March 14, 2002, the FCC cast its own vote, ruling that cable modem service was “Information Service,” and therefore (i) subject to FCC jurisdiction, not state and local franchise jurisdiction; and (ii) not subject to telecommunications service-like open access or common carrier regulation.<sup>77</sup> On October 7, 2003, the Ninth Circuit, following its prior decision, held that the FCC erred in classifying cable modem service as Information Service and that the service was telecommunications service.<sup>78</sup>

## D. Wireless Telecommunications

Wireless telecommunications service is governed by Title III of the Communications Act, as amended. Wireless communication is intrinsically radio communication; paradoxically, the true parent of cellular telephones is Marconi’s, not Bell’s, invention. All wireless service providers must have a radio license. Pursuant to §332 of the Telecommunications Act, wireless service providers, or Commercial Mobile Radio Service (“CMRS”) operators, as commercial cellular and wireless service providers are styled in FCC rules and regulations, may be subject to common carrier regulation.

### 1. Types of Wireless Service

Unlike some 118 countries, including most of Europe, which early on decided on the unified Global System for Mobile Communications (“GSM”) standard for wireless communications, the U.S. labors under a fractured market, divided among analog cellular “first generation” subscribers, a “second generation” digital technology called TDMA,<sup>79</sup> another second generation digital technology called CDMA,<sup>80</sup> and GSM. So-called “Third Generation,”

“3G” or “UMTS” service, which holds out the promise of harmonizing competing standards, has nearly bankrupted several European telecoms with license fees paid for spectrum to be used for advanced broadband capabilities and has been the subject of a long series of World Administrative Radiocommunication Conferences (“WARC”), is in the earliest stages of roll out.

## 2. The Spectrum Cap

Many wireless policy issues are driven by the scarcity of a natural resource: the electromagnetic spectrum that contains, along the different wavelengths and frequencies of its continuum, infrared and ultraviolet radiation, x-rays, gamma rays, visible light and radio waves. Until this year, CMRS operators have been subject to a “spectrum cap” on the amount of spectrum to which they may hold licenses. The ostensible purpose of the spectrum cap was to promote wireless competition and lower consumer fees. The CMRS spectrum cap was 45 MHz for a single entity in any given cellular geographic service area (“CGSA”) and 55 MHz in rural areas (to accelerate deployment of wireless service to underserved regions).<sup>81</sup> The FCC set an attribution benchmark intended to assess control group equity participation in spectrum licenses by passive institutional investors to 40% from a prior 20% in order to increase capital available to CMRS operators, and relaxed cross-ownership rules to allow a party with a controlling or otherwise attributable interest in one cellular licensee to have a non-controlling or otherwise non-attributable direct or indirect ownership interest of up to 5% in another licensee in an overlapping CGSA, allowing a single party to have non-controlling interests of up to 20% in both cellular licensees in overlapping CGSAs. On December 18, 2001, the FCC decided to (i) “sunset” the spectrum cap effective January 1, 2003, (ii) immediately raise the cap to 55 MHz in all markets until that date and (iii) eliminate the cross-interest rule for urban markets (although the rule is retained for rural markets).

## 3. The Spectrum Auction Rules and “Entrepreneur Blocks”

U.S. wireless spectrum licenses are awarded by auction pursuant to §309(j) of the Communications Act, as amended. §309(j) was enacted as part of the Omnibus Budget Reconciliation Act of 1993 to replace a pre-existing lottery system and to encourage Federal Government revenue realization from what was increasingly recognized to be a scarce, if non-depletable, resource. §309(j)(3)(B) requires the FCC to promulgate rules for “disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women,” the so-called “Designated Entities.”

The FCC implemented §309(j)’s provisions through a proceeding entitled “In the Matter of Implementation of §309(j) of the Communications Act – Competitive Bidding” (the “Proceeding”). As part of the Proceeding, the FCC planned auctions of letter-designated “blocks” of spectrum to CMRS operators. The “C” and “F” blocks were reserved for §309(j)(3)(B) Designated Entities with limits on maximum annual gross revenues and total assets and were dubbed the “entrepreneur” blocks. The C and F block licenses fees were to be payable in installments, in order to reduce the pre-and post-auction financing needed to bid, and therefore open the process to more thinly-capitalized bidders.

In the Proceeding's "Fifth Report and Order,"<sup>82</sup> and "Fifth Memorandum Opinion and Order,"<sup>83</sup> the FCC implemented control and attribution rules for assessing control group equity participation in designated entities that, *inter alia*, allowed companies which were prohibited from bidding in auctions for the entrepreneurial C and F block licenses to invest in C and F block bidders (as much as 75% of the equity of a bidder could be held by as few as three passive, non-voting investors that would be too large themselves to bid); gave a 10% bidding credit to small business bidders; and gave favorable installment payment terms to such bidders when they succeeded at auction. In addition, the rules allowed women and minority-owned businesses to have a single, passive, non-voting investor with an interest as large as 49.9%, as long as the other 50.1% was women or minority-held; allowed an individual member of a minority group to participate as a member of the control group of the applicant even though the individual's other business properties would otherwise make the applicant too large to bid in an entrepreneur's block; and gave minority and women-owned businesses an additional 15% bidding credit, tax certificates and a more favorable installment payment plan than other small businesses.

In a "Sixth Report and Order" in the Proceeding,<sup>84</sup> the FCC reacted to opposition to the control and attribution rules by industry groups on Constitutional race and gender discrimination grounds and forestalled court challenges by amending the rules, *sua sponte*, to eliminate the race and gender preferences and scale those benefits upward to include all small businesses. The FCC's amended rules were upheld by the U.S. Court of Appeals for the D.C. Circuit in *Omnipoint Corporation v. FCC*.<sup>85</sup> Critics of the control and attribution rules claim that many so-called "small businesses" are mere nominees for major CMRS operators.

#### 4. The NextWave Case

At the 1996 auction for C and F block licenses, NextWave Personal Communications, Inc., a company formed in order to bid, was a successful bidder with a high bid of \$4.74 billion. The FCC rules for the C and F block permitted financing of up to 90% of the license fee, which NextWave did, paying an initial installment of \$474 million. The company thereafter had difficulty in obtaining investment to fund the remaining installments and in 1998 filed for bankruptcy protection. NextWave blamed the FCC for the investment climate, taking the position that subsequent auctions had devalued its licensed spectrum, making financing of the remaining installments and buildout of its planned network impossible. The FCC then purported to revoke the licenses.

The FCC opened a new C and F Block auction on December 12, 2000 for 422 licenses on frequencies of cancelled or returned prior licenses, including those of NextWave, in 195 markets, including New York, Los Angeles, Chicago, Boston and Washington, D.C. The issuance of new licenses for the NextWave Spectrum was conditioned on the outcome of litigation between NextWave and the FCC. 170 of the licenses were available only to "entrepreneurs" in "closed" bidding. In order to qualify as an "entrepreneur" in this auction, an applicant, including its attributable investors and affiliates, had to have had gross revenues of less than \$125 million in each of the preceding two years and had to have had less than \$500 million in total assets. 252 licenses were available to all bidders in "open" bidding. On open bid licenses, "small businesses," defined as bidders with average annual gross revenues of not more than \$40 million for the preceding three years, received a 15% credit, or discount on their

winning bids. "Very small businesses," defined as those with annual gross revenues of not more than \$15 million for the preceding three years, received a 25% discount on their winning bid (the discounts were not cumulative; a bidder could qualify for the 15% or the 25% discount, but not both). The small business and very small business bidding credits were not available for licenses subject to closed bidding. The C and F Block auction ended on January 26, 2001 after 101 rounds of bidding and raised a total of \$16,857,046,150. Winning bidders of the NextWave spectrum included Verizon Wireless and Designated Entity affiliates of AT&T and Cingular.

On January 27, 2003, The U.S. Supreme Court, in a stunning setback for the FCC, affirmed a June 22, 2001 decision of the U.S. Court of Appeals for the D.C. Circuit<sup>86</sup> and held that the FCC, by revoking NextWave's licenses, had violated §525 of the U.S. Bankruptcy Code,<sup>87</sup> which prohibits a federal agency like the FCC from revoking the license of a bankruptcy debtor "solely because" the debtor has failed to pay a debt that would be dischargeable in the bankruptcy. In response to the FCC's argument that it had a "valid regulatory motive" for revoking the NextWave licenses, and had not done so solely because of the nonpayment, the Court found that the ultimate motive of a federal agency in revoking a license was irrelevant, that §525 meant that "the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation-the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be," and that accepting the "valid regulatory motive" argument urged by the FCC would denude §525 of all applicability, since some such motive other than the mere failure to pay could always be found by an interested government agency.

The FCC also argued that NextWave's obligation to pay the remaining installments on its winning bids was not a debt that was dischargeable in the bankruptcy proceeding. In rejecting this argument, the Supreme Court found that the Bankruptcy Code provides that virtually all debts that arose before a bankruptcy (with nine Bankruptcy Code-enumerated exceptions, among which FCC licenses are not included) are dischargeable in bankruptcy. The Court stated, echoing the D.C. Circuit Court of Appeals, that a federal agency like the FCC is subject to all federal laws, not merely the statute it administers.

## 5. Pole Attachments

While wireless service is within the FCC's jurisdiction, pursuant to §704 of the Telecommunications Act, state and local governments still have limited authority over the placement of certain wireless facilities, subject to obligations not to unreasonably discriminate among wireless service providers or to prohibit or effectively prohibit the provision of wireless service.

The Pole Attachments Act, codified as §224 of the Telecommunications Act,<sup>88</sup> provides that utilities must allow telecommunications carriers or cable systems access to their poles, ducts, conduits and rights of way on a nondiscriminatory basis, thereby providing a right of way for attachment of wireless antennas. The Telecommunications Act further provides that state or local zoning authorities have jurisdiction over the "placement, construction and modification" of necessary infrastructure for wireless service, provided that the state and local authorities do not "unreasonably discriminate among providers of functionally equivalent services" or use their powers to effectively prohibit wireless service.<sup>89</sup>

## 6. Calling Party Pays

Unlike most other jurisdictions, U.S. CMRS subscribers pay to receive as well as make calls. This policy, a form of use tax imposed by regulations,<sup>90</sup> is the result of BOC lobbying at a time when incumbents perceived cellular to be a marginal, luxury service and has been criticized as responsible for relatively low U.S. cellular penetration compared to some European and Asian jurisdictions. The FCC has launched a “Calling Party Pays” proceeding to attempt to remedy the situation.<sup>91</sup>

### E. Submarine Cables

#### 1. Submarine Cable Systems

Submarine cable service is older than the two telecommunications “UR” inventions, the telephone and the radio. The first submarine cable was laid for telegraph service in 1866. Submarine cables are composed of “wet plant” – fibre optic cable laid under the ocean, and “dry plant” – cable joining the wet plant and connected to a landing station and thence, by another section known as the “backhaul,” to a gateway facility from which interconnection to the public switched telephone network (“PSTN”) is made. Submarine cables have traditionally been owned and operated by consortia of market-dominant carriers. In recent years, these systems have encountered new competition from “private” submarine cable systems. In these systems, two or more carriers own a cable through a joint venture.

#### 2. Regulatory Structure

The Submarine Cable Landing License Act of 1921 (the “Submarine Cable Act”)<sup>92</sup> imposes a federal license requirement to land or operate a submarine cable connecting the United States with any foreign country or connecting one part of the U.S. with another part. The Submarine Cable Act, *inter alia*, permits the President or his designee to enquire whether the withholding or revocation of a submarine cable license will aid in the procurement of reciprocal rights in foreign countries or promote national security.<sup>93</sup> In addition, the Submarine Cable Act provides that the license granted may not be exclusive.<sup>94</sup>

Submarine cable operators can provide service on a common carrier or non-common carrier basis. As with other communications common carriers, submarine cable operators providing service on a common carrier basis must file tariffs (where detariffing is not in effect), offer service on a reasonable and nondiscriminatory basis, pay regulatory fees, make certain reports and comply with Communications Act §214. In exchange for these obligations, the operator is a beneficiary of Telecommunications Act §251, which grants interconnection and collocation rights to the facilities of local exchange carriers and incumbent local exchange carriers. Conversely, if a submarine cable operator operates on a non-common carrier basis, it foregoes both the §251 rights and the obligations of filing tariffs, reporting and offering service on a reasonable and nondiscriminatory basis; in other words, it can pick and choose the traffic to be carried on its cable.

### 3. IRUs

Indefeasible Rights of Use, or "IRUs," have emerged as a controversial feature of certain distressed telecoms. IRUs are essentially long term leases by which a carrier contracts to assure itself of expected needed levels of capacity on the network on an indefeasible-irrevocable and exclusive-basis over a long period of time, as long as the expected lifetime of the cable, typically as long as twenty-five years. IRUs allow a carrier to hedge against market pressures that could deprive it of capacity on the cable when needed. They also allow the cable owner to sell capacity and provide for a steadier revenue stream than occasional or "as needed" service contracts would allow. Because IRUs are so long term, they are often capitalized by their holders. They are often paid for through substantial up-front payments. Moreover, the FCC typically treats the holder of an IRU as a facilities-based carrier. In other words, though facially leases, IRUs present many indicia of fee ownership.

When the grantor or holder of an IRU becomes bankrupt, the question is therefore posed whether the IRU is an executory contract that the bankruptcy debtor may affirm or reject pursuant to §365 of the Bankruptcy Code.<sup>95</sup> When an executory contract such as a true lease is rejected under §365, it is treated as a pre-petition claim and forces the creditor to seek redress as a general unsecured creditor. The grantor of the IRU is therefore exposed to considerable risk when the IRU holder becomes bankrupt. On the one hand, it cannot resell the capacity represented by the IRU, since the right to use is irrevocable and exclusive. On the other hand, it runs the risk of rejection, reduction to unsecured creditor status and the possibility of being forced to try to mitigate its damages under unfavorable market conditions.

Since the examination of IRUs by bankruptcy courts is a new phenomenon, assumptions about whether bankruptcy courts will interpret IRUs as a sale or lease must be made based on treatment of contracts in other contexts. Among the factors courts have used in making the sale or lease determination are: whether the full price is paid at the outset; whether the right to use the asset during its lifetime is exclusive or irrevocable; who bears the risk of the asset's loss; whether the "lease" is for the expected life of the asset; whether the "lessee" has the right to purchase the asset for a nominal fee at the end of the "lease" term with a minimal reversionary interest in the grantor; whether the "lessee" capitalizes rather than expenses the asset; and whether the two parties have ongoing obligations to each other.

Accordingly, parties wishing to maximize the chances that an IRU would be considered by a bankruptcy court to be a sale with a security interest rather than a true lease will provide in the IRU for full upfront payment by the holder to the grantor; an irrevocable right of use for the expected life of the cable with minimal reversionary rights in the grantor; and for maintenance, technical support and other executory functions to be performed by the grantor, if any, to be pitched out to a separate agreement, preferably between the holder and a different entity than the grantor, rather than being contained in the IRU itself.

In addition, IRUs have been exposed as the occasional vehicle for "capacity swaps" between companies supposedly operating on an arms' length basis, in a manner reminiscent of the land flips of the Savings and Loan Crisis of the 1980s. In this iteration of an old scam, companies concerned about overbuilt, underused networks have apparently entered into reciprocal capacity swaps through IRUs in which each company, by reason of the IRU, is

able to claim a greater use of its network assets than is the case, with positive, but spurious, ramifications for its balance sheet, stock price and debt service.

## F. Satellites

### 1. Orbits and Bands: Types of Satellites

Among other means of categorization, communications satellites are known by the orbits they keep. Most common are geostationary (“GEO”)<sup>96</sup> or geosynchronous<sup>97</sup> satellites, which orbit at a fixed altitude of 35,786 km (22,235 miles) with an orbital period equal to the earth’s rotation about its axis, and, in the GEO case, remain apparently “stationary” above a fixed point on earth. As their names suggest, low-earth orbit and mid-earth orbit satellites (“LEOs” and “MEOs”, respectively) orbit lower,<sup>98</sup> and therefore faster, than GEOs, and do not remain above a fixed point on earth (the familiar analogy of twirling a stone on a string explains enough about orbital mechanics for this purpose: the longer the string between the hand and the stone, the slower the orbit. When the string is shortened, the stone goes around faster in its “lower orbit.”). LEO and MEO projects consist of “constellations” of multiple satellites. LEOs come in three types: “Big LEOs,” for use in real time voice communication as well as data transmission; “Little LEOs,” to be used for delayed communications, such as data storage, messaging and paging; and “Broadband LEOs,” for use in high-speed data networking and voice communication. MEOs can be used for voice, data, fax and other services; probably the best know application is the U.S. military’s Global Positioning System (“GPS”).

LEOs and MEOs are held by their proponents to be more suitable for mobile communications than are GEOs. The high fixed orbit of GEOs requires large earth station antennas unsuitable for handheld communication devices and causes perceptible lapse rates (called “latency”) for voice telephony and two-way data transmission, although improving technology may be narrowing these GEO disadvantages. The reason that LEO and MEO projects require constellations of satellites is that their lower, faster orbits do not provide as much, or continuous, coverage of a given site on earth as does a GEO, requiring the satellites to hand off the signal from one to another to maintain coverage as they pass overhead. LEO or MEO orbit is lower, easier, and therefore less expensive, to reach than geostationary or geosynchronous orbit. These constellations also provide redundancy; the loss of any one LEO or MEO is not likely to be catastrophic to its network, and may not result in any perceptible degradation of service to a given user. The loss of a single LEO or MEO is also not necessarily financially catastrophic, in that it can either be fully insured at affordable levels or its total or partial loss can be absorbed by the project while service continues. The loss of a GEO is likely to be catastrophic to its owners and operators on both a network-service and a financial-insurance basis. Finally, despite the satellites’ relatively short service life, the LEO and MEO models theoretically allow for gradual, planned obsolescence and a replacement program that can avoid network disruption and be treated as an operating expense.

Nevertheless, LEOs and MEOs have not been a financial success, however compelling their technology. The three leading projects, Iridium, Globalstar and ICO, all went into bankruptcy following failure of their financial models, a changing investment climate and, in some cases, launch and technical problems.

Satellites are also known by their bands. "Bands" are designated ranges of electromagnetic spectrum, or radio frequencies, over which the satellites receive "uplinked" signals and transmit "downlinked" signals (usually, the uplink and downlink frequencies are different to avoid interference). These frequencies are designated by regulatory authorities (see subsection 3, below), but are in fact intrinsically suitable for different functions. The commonly used bands are:

<u>Fixed Earth Stations</u>	<u>Use</u>	<u>Downlink Frequency (MHz)</u>	<u>Uplink Frequency (MHz)</u>
C-band	Voice, Data, Video	3,700 – 4,200	5,925 – 7,075
Ku-band	Data, Video	10,700 – 12,200	14,000 – 14,500
Ka band	Broadband	17,700 – 20,200	27,500 – 30,000
<u>Mobile Earth Stations</u>			
L-band	Maritime	1,530 – 1,544	1,626.5 – 1,645.5
L-band	Aeronautic	1,545 – 1,559	1,646.5 – 1,660
<u>Fixed and Mobile Earth Stations</u>			
X-band	Military	7,250 – 7,750	7,900 – 8,400
SHF	Military	20,200 – 21,200	30,000 – 31,000
EHF	Military		43,500 – 45,500
EHF	Military and Commercial	39,500 – 40,500	50,400 – 51,400
<u>Space Research and Intersatellite</u>			
S-band	Space Research, Mobile Satellite Service	2,025 – 2,110 2,200 – 2,290	

Finally, satellites also come in "bent-pipe" and "on-board logic" varieties. The bent-pipe system uses the satellite as a simple relay device for signals to and from the earth, without extensive on-board data processing of those signals. The advantage of the bent-pipe system is that there is less to go wrong in inaccessible orbit; a problem in the system's computers will occur on the ground, where it can be readily and inexpensively fixed or replaced. In

addition, satellites with on-board data processing are heavier, and therefore more expensive to launch and insure and are more subject to in-flight obsolescence. Despite its advantages, the bent-pipe system is not always possible; for constellations of LEO and MEO satellites in which signals may need to be transmitted not merely from each satellite to and from the ground, but “handed off” directly between neighboring satellites in the constellation, on-board data processing with its inherent risks is sometimes unavoidable.

## 2. History of Communications Satellites

The first man-made satellite, Sputnik I, was a two foot diameter, 184-pound metal sphere launched into orbit by the Union of Soviet Socialist Republics on October 4, 1957, thereby inaugurating the space age. The United States launched its first satellite, Explorer I, on January 31, 1958. In 1962, the first telephone and television broadcasts by satellite were provided by the American satellite ECHO I. The same year saw the launch of Telstar I, the first telecommunications satellite, in sub-geostationary orbit. The first geostationary telecommunications satellite, Syncom 3, followed in 1965. On April 6, 1965, the United States launched the first COMSAT satellite, “Early Bird” (Intelsat I). A discussion of COMSAT and Intelsat is at subsection 4, *infra*.

## 3. Satellite Design

Communications satellites are essentially radio transceivers in orbit above the Earth. Satellites typically consist of a main “bus,” the frame or body of the satellite; a power source, usually the characteristic wing-like solar panels; rechargeable batteries that are fed by the power source; an on-board computer for self-monitoring; an “Attitude Control System,” for maintaining, with small rocket engines, the satellite’s attitude, or orientation, in space; and a radio transmitter, receiver and antennas.

The satellite also includes transponders. Transponders are radio devices that accept the uplinked signal received by the satellite’s receiving antenna, filter and amplify the signal, convert the frequency of the received signal as necessary, and transmit the signal back to earth through the transmitting antenna. Modern satellites carry many transponders, and the number and type of transponders, which each operate in one of the frequency bands described above, dictate the amount and type of communications traffic that the satellite can uplink and downlink. Transponder capacity is often expressed in 36 MHz equivalents. A 36 MHz transponder can typically carry one analog television channel or between four and twelve digital television channels. Transponder capacity is also expressed in “throughput.” A typical 36 MHz transponder can throughput 45 Megabits of data per second (45 Mbps).

As important as the satellite, sometimes called the “space station” or “space segment” of the satellite system, is the transmitting and receiving apparatus on the ground, called the “earth station” or “earth segment.” Earth stations are familiar from the satellite “dishes” that serve as uplink/downlink antennas. In bent-pipe systems, as noted, the earth station will also consist of computer equipment for processing the signal. In addition, the earth station has computerized “tracking, telemetry and control” (“TT&C”) apparatus for monitoring and controlling the satellite’s orbit, attitude and functions.

Satellites are launched by “launch vehicles,” the rockets that lift off from locations like Cape Canaveral, Florida and Kourou, French Guiana. A launch vehicle bears the responsibility for boosting its satellite payload above the earth’s orbit, protecting it during the ascent, and achieving the “escape velocity,” 40,320 km/hr (25,039 mph), necessary to place the satellite in earth orbit.

Although satellites can be and are used for point-to-point communications, because of their coverage of a wide swath of territory on the ground (called a “footprint” because of its characteristic shape when plotted on a map), most of their successful commercial applications have been point-to-multipoint transmissions-broadcasting or narrow-casting.

#### 4. Satellite Regulation

As orbiting radio transmitters and receivers, communications satellites are subject to Communications Act Title III requirements. Most satellites do not operate on a common carrier basis, and are therefore not subject to Title II requirements. Other than Title III, the main body of law and regulation for satellites is to be found in the FCC’s rules and regulations, specifically Part 25, 47 C.F.R. Under the rules and regulations, in addition to their Title III obligations, satellite projects are required to obtain a “space station” license, launch authorization and an “earth station” license from the FCC.<sup>99</sup> These applications are relatively complex and require, *inter alia*, radio frequency data, orbital location data, spacecraft data, financial qualifications of the applicant and other information.<sup>100</sup> On June 26, 2003, the FCC adopted the Third Satellite Licensing Reform Order.<sup>101</sup> The reform order consolidated and standardized much of the data on satellite applications and implemented a streamlined form for routine earth station applications.

The 1962 Satellite Act<sup>102</sup> established COMSAT, a then quasi-public entity charged with the development of a commercial satellite system. COMSAT was considered a communications common carrier under the Satellite Act. In 1973, INTELSAT was formed, from predecessors dating back to 1964, as an international organization with commercial aims. COMSAT became the U.S. INTELSAT signatory. The Open-market Reorganization for the Betterment of International Telecommunications Act, (the “ORBIT” Act)<sup>103</sup> eliminated ownership restrictions on COMSAT, which is now owned by Lockheed Martin Global Telecommunications, and required INTELSAT’s privatization. INTELSAT, which was privatized in 2001, currently has over 130 members and operates 23 satellites in the C and Ku bands. INMARSAT (International Maritime Satellite Organization), founded in 1979 as another intergovernmental organization, provides satellite maritime communications through nine satellites.

Satellites are required by the FCC to be spaced at no less than two degrees of arc separation to avoid interference. In practice, each two degree spacing is about 1,000 miles of distance, and a system called “co-location” (different from collocation between wireline telephone companies) permits placement of more than one satellite in each orbital slot.

## 5. DBS and DARS

DBS service has emerged as a formidable competitor to cable service, and the two major U.S. operators, Echostar and DirecTV, have rapidly added subscribers.

The Satellite Home Viewer Act ("SHVA")<sup>104</sup> amended the U.S. Copyright Act of 1976 to establish a mandatory licensing and royalty scheme for DBS retransmissions of "superstation" and network broadcast signals. The November 1999 Satellite Home Viewer Improvement Act (SHVIA)<sup>105</sup> allows DBS providers to carry local broadcast channels for the first time. Despite the local channel authorization, satellite companies may continue to have difficulty competing with cable companies. The final version of SHVIA did not include a proposed provision that would have prohibited local station owners from charging DBS providers more than they charge to cable companies. Cable companies generally pay station owners little to nothing to carry their channels; satellite companies, with less market power, may be less fortunate. SHVIA also required satellite companies to carry all local channels in any market in which they carry any local channels by 2002; current DBS capacity arguably does not allow for such mirroring of cable "must-carry" rules.

Digital Audio Radio Service ("DARS") is satellite-transmitted radio service, promising digital quality programming nationwide. In other words, a car with a receiver should be able to drive across the U.S. and never have to change channels. The two current licensees, Sirius Satellite Radio and XM Satellite Radio, recently started to offer service.

### G. The Internet

Many issues already touched upon in prior sections, for example, the Tauzin-Dingell bill to exempt broadband service from §271 requirements on ILECs, and the open access/forced access issue for cable service providers, are in fact primarily Internet issues. Another is reciprocal compensation, touched on briefly as the mechanism by which local exchange carriers pay each other to carry traffic.

On February 25, 1999, the FCC for the first time addressed the jurisdictional nature of Internet traffic in a Declaratory Order and NPRM concerning payments between phone companies for carriage of dial-up Internet traffic by customers to Internet Service Providers ("ISPs") (the "ISP Order").<sup>106</sup> ISPs have been considered enhanced service, or Information Service, providers by the FCC, and as such, not subject to common carrier regulation, access charges paid by long distance carriers to ILECs, universal service charges, international settlement rates or even, since the ISPs receive calls from their customers rather than make them, end-user per-minute charges. These exemptions are a major contribution to the lower cost structure that IP telephony (also called "Voice over Internet Protocol," or "VoIP") has offered.

The ISP Order continued the long distance access charge exemption for ISPs. However, the FCC also stated that dial-up Internet traffic is *largely interstate* for regulatory purposes under its destination-based jurisdiction rules in that, even if the ISP's server is reached by the customer through a seven-digit local number, the call ultimately reaches an Internet address that is usually out-of-state for the customer. Under American federalism rules, the

justification for not subjecting ISPs to Title II common carrier regulation is menaced by the FCC's determination that ISP traffic is largely interstate.

The ISP Order also ruled that carriers are bound by their existing interconnection agreements and are therefore subject to the reciprocal compensation obligations in those agreements, as determined by their state commissions, acting under §§251 and 252 of the 1996 Telecommunications Act. The reciprocal compensation obligations govern local calls and require the call-originating carrier to pay the destination carrier, including the carrier serving the ISP. Interstate calls are not subject to reciprocal compensation charges. Notwithstanding its upholding of reciprocal compensation, the FCC noted that ISP calls are generally interstate under the Commission's destination-based jurisdiction rules, in that even if the ISP's server is reached by the customer through a seven-digit local number, the dial-up call ultimately reaches an Internet address that is not usually intrastate for the customer.

The ISP Order therefore favored ISPs that receive calls from their customers and the ISPs' nonincumbent carrier customers, since ILECs will continue to be bound by their existing interconnection agreements until they expire and nonincumbents will continue the lucrative business of terminating calls for ISPs and receiving reciprocal compensation payments. ILECs, which pay the reciprocal compensation fees to nonincumbents on every customer-to-ISP call, wanted the interconnection agreements struck down. In spite of the ISP Order's upholding of existing interconnection agreements, its defining of ISP traffic as interstate is likely to be used by ILECs in further challenges to ISP regulatory exemption, including attempts to overturn the long-standing ISP access fee exemption. In the meantime, the FCC has attempted to reassure consumers that Internet dial-up calls will continue to be exempt from long distance access charges. Following vacatur by the D.C. Circuit of the ISP Order on the grounds that the FCC had not explained its conclusion that Internet traffic was naturally interstate,<sup>107</sup> the FCC reaffirmed its conclusions.<sup>108</sup> On May 3, 2002, the D.C. Circuit again rejected the FCC's rules on reciprocal compensation for dial-up calls to ISPs, and while leaving the rules in place, directed the FCC to reexamine the issue.<sup>109</sup>

## H. Mergers and Acquisitions

Antitrust, or competition, law has been a preoccupation of American regulatory policy since the passage of the Sherman Antitrust Act of 1896.<sup>110</sup> Under the Sherman Act, every contract, combination or conspiracy in restraint of interstate or international trade is a crime.<sup>111</sup> Every attempt to monopolize, or conspiracy to monopolize, interstate or international trade is a crime.<sup>112</sup> Although the vigor with which different government administrations have pursued antitrust remedies has varied, the illegality of monopolies and actions in restraint of trade remains a steady theme of American law. Modern antitrust law in the context of mergers and acquisitions is focused not on the Sherman Act, but on §7 of the Clayton Act<sup>113</sup> and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("Hart-Scott-Rodino").<sup>114</sup>

### 1. Hart-Scott-Rodino

Hart-Scott-Rodino requires the parties to certain qualifying acquisitions of any voting securities or assets of the acquired party to notify the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DoJ") of the transaction and await the expiration of a

mandatory waiting period (30 days generally, 15 days in the case of a cash tender offer) prior to the closing. Hart-Scott-Rodino reporting obligations arise when: (a) either the acquiring or the acquired person is engaged in U.S. commerce or in an activity affecting U.S. commerce; and (b) as a result of the transaction the acquiror would hold voting securities or assets of the target in excess of (i) \$200 million or (ii) \$50 million and the acquiror or target company has total assets or annual net sales of \$10 million or more and the other company has total assets or annual net sales of \$100 million or more. It is important to note that the qualification “voting securities” exempts bonds, notes, mortgages, and similar instruments and is limited to securities allowing the owner or holder to vote for directors, or analogous persons in the case of unincorporated entities. Also, rules and regulations assess the \$100 million and \$10 million total asset and annual net sales thresholds with reference not only to the party to the transaction, but to the total assets or annual net sales of companies or individuals under an “ultimate parent entity” with “control” established by 50% ownership of voting rights or rights to distribution.

A joint venture in which a juridical entity is formed to embody the joint venture can activate Hart-Scott-Rodino’s reporting requirements, because the statute treats each joint venture participant as an acquiring person and the joint venture entity that is formed as an acquired person. Reporting requirements may be activated if either: (a)(i) the joint venture participant has gross assets or net sales of \$100 million or more; (ii) the joint venture entity will have assets of \$10 million or more; and (iii) at least one other joint venture participant has annual gross assets or net sales of \$10 million or more; or (b)(i) the joint venture participant has total gross assets or net sales of \$10 million or more; (ii) the joint venture entity will have total assets of \$100 million or more; and (iii) at least one other joint venture participant has annual total gross assets or net sales of \$10 million or more.<sup>115</sup>

The formation of a general or limited partnership or transfer of less than all of the interests in a partnership ordinarily does not require a Hart-Scott-Rodino filing, subject to the rule concerning acquisition of the voting securities for any issuer included in the partnership. By contrast, transfer of all of a partnership’s interests is considered an asset acquisition and is reportable under Hart-Scott-Rodino. The formation of a limited liability company (“LLC”), a recently developed business form in the United States that combines the limited liability of a corporation with the pass-through taxation of a partnership, may trigger Hart-Scott-Rodino reporting obligations if two or more pre-existing, separately controlled businesses are contributed and at least one of the “members” controls the LLC in that it has a 50% “membership interest” or a right to 50% of the LLC’s assets on dissolution.<sup>116</sup> Post-formation acquisitions of LLC interests are not reportable except in certain circumstances in which the acquisition is treated as a new LLC formation.

Exemptions from Hart-Scott-Rodino filings exist, notably for transactions in the ordinary course of business and in the case of an acquisition of 10% or less of an issuer’s voting securities that is made strictly for investment purposes. During the mandatory waiting period, the FTC or DoJ may request from the parties additional documentation and extensions of the waiting period. Once documentation requests have been fully complied with, upon a finding that the proposed acquisition violates §7 of the Clayton Act, discussed below, the FTC or DoJ may move within twenty days for an injunction to block the proposed acquisition.

## 2. The Clayton Act

§7 of the Clayton Act prohibits acquisitions, directly or indirectly, of the whole or any part of the stock or assets of any company if “the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or tend to create a monopoly.”<sup>117</sup> Pursuant to §11 of the Clayton Act, the FCC has jurisdiction to enforce compliance with §7 of the Clayton Act when it is applicable to “common carriers engaged in wire or radio communication or radio transmission of energy.”<sup>118</sup> The FCC, in performing Clayton Act review, has access to the documentation produced to the DoJ in the Hart-Scott-Rodino reporting process, but conducts its own evidentiary hearings as well.

In practice, compliance and enforcement review of telecommunications mergers and acquisitions is performed concurrently by the DoJ and the FCC, a seemingly redundant time and expense-consuming process that has generated a great deal of industry and congressional complaint. However, the two agencies have different mandates and agendas in performing their respective reviews, notwithstanding the common statutory foundation. The DoJ in its review process employs the 1992 Joint DoJ/FTC Horizontal Merger Guidelines,<sup>119</sup> which provide for measurement of specific product and geographic markets to determine the extent to which the proposed transaction will increase market concentration and decrease competition. Under the Horizontal Merger Guidelines, the primary analysis is based upon the ability of consumers in a given market to switch to other goods or services, whether supplied from that market or otherwise.

The FCC tends to focus on more strategic, less compartmentalized trends within the telecommunications industry and employs a “public convenience, interest or necessity” standard to determine whether approval should be granted. In a general sense, the DoJ performs a “negative” review to determine whether competition will be decreased by the proposed acquisition; the FCC performs a “positive” review to determine whether the public interest will be served by the proposed acquisition. Clearly, notwithstanding the common statutory foundation of the Clayton Act and the data developed by Hart-Scott-Rodino reporting, the approaches taken before the DoJ and the FCC may be markedly different.

State commissions are also empowered to review proposed mergers and acquisitions on competition grounds for intrastate communications. Telecommunications mergers and acquisitions are subject to state regulatory review in every jurisdiction in which the target and acquiror have operations, and are subject to heightened scrutiny in jurisdictions in which the two have overlapping operations. State public utility commissions usually require the filing of certificates of public convenience and tariffs as part of the approval and certification process.

## 3. Bankruptcy Acquisitions

Although a full review of U.S. bankruptcy law is beyond the scope of this guide, in the current economic climate, several points are in order. Acquisitions of telecommunications assets in bankruptcy offer several advantages. First, the assets are obviously available at a

distressed price. Second, the purchaser is able to “pick and choose” the assets it wishes. Third, the purchase will be judicially washed of any potential liabilities of the seller.

Bankruptcy reorganization asset sales are conducted either pursuant to a reorganization plan under Chapter 11 of the U.S. Bankruptcy Code<sup>120</sup> or outside of a plan pursuant to §363 of the Bankruptcy Code.<sup>121</sup> A sale pursuant to a reorganization plan requires the approval of the principal interested parties in the bankruptcy proceeding.

§363 provides a mechanism for sales by a bankruptcy debtor “out of the ordinary course of business.” §363 sales are subject to public hearings or auctions at which the prospective purchaser runs the risk of being outbid, and then to the bankruptcy court’s approval. Thus, §363 sales typically proceed with an initial prospective purchaser of the debtor’s assets being used as a “stalking horse” by the debtor and creditors in shopping for better offers. The result, even when the stalking horse is the ultimately successful bidder, is often a substantially restructured offer.

The acquisition process of a §363 sale, once the bid has been won, is similar to a parallel acquisition outside of bankruptcy court. However, the deal documents will provide for the bidding and auction process and will provide the mechanism for court approval. The documents will also address issues of concern to the court, and certain representations, warranties, conditions to closing, breakup fees and other deal terms commonly used by purchasers for their own protection in non-bankruptcy acquisitions may not be approved by the court. Although the purchaser may be loathe to part with various deal protections, it may be motivated by recognition that the court may view contingencies in its proposed acquisition documents as making its offer inferior to that of another bidder, assuming that the price offered for the assets is comparable, and may therefore lose the deal.

#### 4. Other Matters

The FCC must also approve all direct or control transfers and assignments of FCC licenses, whether in the context of an acquisition or otherwise. The general FCC procedure is to file license or control transfer applications, following which there is a public notice of acceptance, a period for comments and petitions to reject, a further period for opposition to comments and petitions, replies, and then FCC Bureau or FCC action, followed by notification of approval or rejection. FCC authorizations are required for grants of radio licenses, §214 international carrier authorizations (see subsection I(2)) and submarine cable landing rights (see subsection (E)(2), *supra*).

##### I. International

The United States traditionally considered telecommunications a natural monopoly and utility and barred foreign ownership of radio and broadcast facilities. Although foreign ownership restrictions have been eased, they continue to exist. The U.S. also imposes restrictions on non-U.S. investment in and export of technology with national security implications.

## 1. The I.T.U. and the W.T.O.

The International Telecommunications Union ("ITU") is a treaty-based United Nations agency through which member states seek to coordinate telecommunications standards and services such as satellite orbital slots and radio frequencies. An example is the ITU's service as the forum for efforts to agree on a 3G wireless standard.

The FCC has engaged in a process of administrative rulemakings pursuant to the Telecommunications Act intended to facilitate the entry of foreign investors. Key to this process have been the FCC's 1997 companion orders implementing the World Trade Organization ("WTO") Basic Telecommunications Agreement. In 1997, the FCC implemented the WTO Basic Telecommunications Agreement through two companion orders, the "Foreign Participation Order," which liberalizes foreign ownership rules for telecommunications sector investment by WTO members in the United States,<sup>122</sup> and the "DISCO II Order," which liberalizes entry into the U.S. market for WTO member satellite operators and carriers.<sup>123</sup>

## 2. Communications Act Provisions

Two provisions of the Communications Act, as amended by the Telecommunications Act and implemented by the FCC, particularly affect non-U.S. acquisition and investment activity in the U.S. telecommunications sector: §§310<sup>124</sup> and 214.<sup>125</sup>

§310 concerns foreign ownership restrictions applicable to FCC licenses. An FCC radio license is required for broadcast and common carrier wireless activities in the U.S. Pursuant to §310(a) and (b)(1) and (2), non-U.S. governments, corporations organized under the laws of non-U.S. governments and non-U.S. persons may not own or hold broadcast or common carrier radio licenses. In addition, pursuant to §310(b)(3), U.S. corporations may not own or hold FCC broadcast and common carrier radio licenses if more than 20% of their capital stock is owned or controlled by non-U.S. governments, non-U.S. corporations or non-U.S. persons. Under §310(b)(4), a U.S. corporation directly or indirectly controlled by any other corporation may not hold such licenses if more than 25% of the controlling corporation's capital stock is owned or controlled by non-U.S. governments, non-U.S. corporations or non-U.S. persons if the FCC finds that the public interest will be served by the refusal or revocation of such a license. The conditional element of §310(b)(4), generally ignored by the FCC, has been given new life by the Foreign Participation Order.

The restrictions have been held to apply to general and non-insulated partners in limited partnerships.<sup>126</sup> It should be noted that §310 restricts only certain enumerated FCC licenses and permits; theoretically, if a wireline telephone company could function without a radio license, its ownership would not be restricted. Similarly, IP technology projects are not subject to such a restriction. A non-U.S. company would nevertheless require a §214 authorization for U.S. operations.

§214 provides an international service authorization procedure for U.S. operations of non-U.S. carriers or their affiliates. Pursuant to the Foreign Participation Order, the FCC has, for WTO member §214 applications, abandoned the former "effective competitive opportunities" ("ECO") test, a case-by-case analysis previously used to examine equivalent access, or

reciprocity, for U.S. carriers in the applicant's home country, in favor of a rebuttable presumption of entry eligibility. The Foreign Participation Order put in place post-entry safeguards, in the form of quarterly traffic and revenue reporting and dominant carrier and international settlement rate benchmark classifications, to ensure that reciprocal competitiveness and access exist. An expedited §214 application procedure now exists for both facilities-based carriers and resellers.<sup>127</sup> For non-WTO member §214 applications, the ECO test remains in place. The Foreign Participation Order standard also applies to WTO member applications for cable landing licenses and applications to exceed the §310(b)(4) ownership limits.

On March 18, 1999, the FCC adopted rules for streamlined processing of §214 international authorizations. Under the new rules,<sup>128</sup> approximately 99% of 214 applications are eligible for streamlined processing; waiting periods are reduced from 35 to 14 days; the streamlined process may be used whether or not public comments have been filed; prior approval of *pro forma* assignments and control transfers are no longer required; authorized carriers may provide service through wholly-owned subsidiaries without prior approval; the streamlined process may be used to obtain the same authorization that any affiliate with the same ownership has already obtained; the authorization to use International Simple Resale ("ISR") (see subsection 5) is simplified; any authorized facilities-based carrier may use any non-licensed submarine cable system without prior approval; and the rules and applications procedures for §214 authorizations are simplified.

Pursuant to the DISCO II Order, WTO member satellite operators are presumptively entitled to offer service in the U.S. market for fixed and mobile services without satisfying an ECO test. The presumption is rebuttable upon a showing of competitive harm in the U.S. satellite market. The FCC may also impose conditions on license grants to address competitive concerns and deny applications that pose serious competitive risks. DBS and DARS services are subject to more restrictive entry conditions under DISCO II by imposition of the so-called "ECO-Sat" test. Under ECO-Sat, a non-U.S. satellite operator must affirmatively demonstrate that U.S. satellite operators have effective competitive opportunities, not only in the non-U.S. operator's home market, but in all "route markets" that the operator intends to serve from U.S. earth stations. ECO-Sat is not applied to WTO member route markets served by non-WTO member-licensed satellites; however, the test is applied for non-WTO member route markets.

### 3. Exon-Florio

There is no general law regulating foreign investment in the U.S. The most important law affecting foreign investment generally is the Exon-Florio amendment to the 1988 Omnibus Trade Bill ("Exon-Florio").<sup>129</sup> Exon-Florio authorizes, and in some cases mandates, the President of the United States to review, on national security grounds, mergers, acquisitions and takeovers of U.S. businesses by non-U.S. persons. The investigation is mandatory when the acquiror is "an entity controlled by or acting on behalf of a foreign government" and when the acquisition could "affect" U.S. national security.<sup>130</sup> This definition, it should be noted, could apply to many non-U.S. telecoms, including ones not majority state-owned, but in which the non-U.S. government retains a minority "golden share," signifying control equivalent to majority status or veto rights. Conversely, Exon-Florio implicates even minority investments when effective control of the target is gained. Exon-Florio review is in practice conducted under

delegated executive authority by an inter-agency panel, the Committee on Foreign Investment in the United States ("CFIUS").

Upon receipt of notice of a transaction, CFIUS has 30 days to decide whether to conduct an Exon-Florio review. If CFIUS decides to review the transaction, it then has 45 days to review and render a decision. The President then has 15 days to review and approve the CFIUS decision. Information submitted during the review process is confidential. Executive authority under Exon-Florio may be exercised only if the President finds that: (i) there is credible evidence that the non-U.S. entity "might take action that threatens to impair the national security,"<sup>131</sup> and (ii) other statutory authorities, including the International Emergency Economic Powers Act<sup>132</sup> do not provide adequate protection for national security. Upon such findings, the President may prohibit or suspend a proposed transaction, or order divestiture of a completed one. No judicial review is permitted. Because transactions not reported to CFIUS may be subsequently reviewed at any time and the divestiture sanction imposed, without the possibility of judicial review, voluntary Exon-Florio reporting in the early stages of a transaction that would grant control to a non-U.S. person and which may implicate security concerns is sound practice.

#### 4. Export Controls

Although the U.S. does not generally restrict export of technology, limits have been imposed on technology exports considered to have security implications. Certain telecommunications equipment and components, as well as information security software, including encryption products, are considered to implicate national security and are therefore subject to export restriction. Where technology export restrictions apply, acquisition of a U.S. company by non-U.S. persons may breach export controls.

The scope of restriction depends on relevant Export Administration Regulations ("EAR") of the U.S. Department of Commerce Bureau of Industry and Security (formerly the Bureau of Export Control)<sup>133</sup> or the International Traffic in Arms Regulations ("ITAR") of the U.S. Department of State Directorate of Defense Trade Controls.<sup>134</sup>

Violations of the EAR and ITAR carry both civil and criminal penalties.<sup>135</sup> Certain technologies, deemed to be vital to national security or anti-terrorism measures, may be completely restricted in their export to a short list of countries that the U.S. Government considers to be engaged in state-sponsored terrorism. Others require an individual exporter's license for export. Even where a license is not required because a general license is already in place, some telecommunications and information technologies are subject to reporting requirements and to governmental review to obtain the necessary export license exemption.

The October 1998 U.S. military budget Bill required the Clinton Administration to shift control of satellite technology exports to the State Department from the Commerce Department, thereby supposedly tightening control of technology transfers. The State Department, by law, considers only security issues when reviewing technology transfers. The Commerce Department is more concerned with business and trade development. Therefore, communications satellites and launch vehicles are currently subject to ITAR.

The January 3, 1999 Report of the Select Committee of the U.S. House of Representatives (the "Cox Report,")<sup>136</sup> charged the People's Republic of China ("P.R.C.") with engaging in a systematic campaign of espionage to appropriate U.S. missile and thermonuclear weapon technology. According to the Report, part of the Chinese campaign occurred when U.S. satellite manufacturers Hughes and Loral analyzed three launch failures involving P.R.C.-manufactured Long March rockets and Hughes and Loral-manufactured satellites, and recommended improvements to the rockets without required State Department export licenses and in violation of ITAR. According to the Cox Report, the assistance given by Hughes and Loral had applications to ballistic missile launchings.

The United States is a participant in the Wassenaar Arrangement, a multinational arrangement on export controls for conventional weapons and sensitive dual-use goods and technologies.<sup>137</sup> Pursuant to the Wassenaar Arrangement and in part at the urging of the global e-commerce sector, the United States in 1998 began to liberalize its export restriction policy on cryptographic technologies. Current EAR make so-called "mass market" encryption products with symmetric algorithms exceeding 64 bits eligible for export to the fifteen nations of the E.U., Australia, Japan, New Zealand, Norway, Switzerland, the Czech Republic, Poland and Hungary following a 30-day Bureau of Industry and Security review pursuant to a filed "classification request." Encryption products do not require authorization when exported to Canada. There are no post-export reporting or license requirements for such products following the review, meaning that export may proceed without notification of formal approval.

Export of "information security" evaluation and production equipment to subsidiaries of U.S. companies outside the U.S., E.U. governmental and non-governmental end-users and other country non-governmental end-users is also allowed, with the exception of seven prohibited countries (Cuba, Iran, Iraq, Libya, North Korea, the Sudan and Syria). There is provision for *de minimus* treatment for software programs such as e-mail, browsers, games, office applications and utilities intended for desktop or laptop CPUs. Telecommunications service providers, ISPs and financial institutions may export retail encryption commodities and software to provide services to their own affiliates, commercial firms and non-governmental end-users without a license, but will require a license for non-retail products to non-approved governmental end-users.

Federal encryption limits have been the subject of court challenges based upon the free speech guarantees of the First Amendment to the U.S. Constitution. In one instance, the Ninth Circuit U.S. Court of Appeals held that the EAR violated the First Amendment because they prohibited export of encryption software without a license.<sup>138</sup> The Court's holding was based on its finding that because software programmers could read and write source code, and could therefore express ideas to each other by means of source code, that those expressions were constitutionally protected speech.<sup>139</sup>

##### 5. The International Settlements Policy

The International Settlements Policy ("IS Policy") consists of a series of administrative decisions dating back to 1936, the IS Policy Order of 1986,<sup>140</sup> and the related "No Special Concessions" rule<sup>141</sup> (which prohibits U.S. carriers from accepting "special concessions" or exclusive arrangements for a given route from a foreign carrier possessing sufficient market

power to adversely affect competition in the U.S.), as modified by the Foreign Participation Order<sup>142</sup> (which presumes that carriers with less than 50% market share in relevant markets lack sufficient market power to have an anti-competitive effect in the U.S.). The IS Policy was originally designed to prevent foreign carriers, which were at the time generally state-owned monopolies, from taking advantage of the competitive marketplace in the United States by playing one U.S. carrier off against another. Since the U.S. carriers effectively had no choice of a foreign carrier to terminate their calls in a given country, they were subject to discriminatory pressures to extract higher rates for termination of international calls originating in the United States by foreign carriers that could not themselves be discriminated against. This practice became known as "whipsawing." The IS Policy discouraged whipsawing by requiring: (i) the equal division of accounting rates between the U.S. carrier and the foreign carrier; (ii) U.S. carriers not to accept or pay discriminatory terms and conditions (meaning the same accounting rate, with the same effective date) for the termination of U.S. - originated traffic in overseas markets; and (iii) proportionate return of inbound traffic. Under the IS Policy, all accounting rate agreements are publicly filed with the FCC.

Competition in WTO signatory countries has changed the reality on which the IS Policy was premised. The FCC recognizes that whipsawing is not a serious concern in the case of non-dominant foreign carriers or in the case of dominant foreign carriers on traffic routes for which competition exists. The FCC has also recognized that the IS Policy, while successful in its purpose of protecting U.S. carriers and consumers, can in some cases inhibit competition—for example, by reducing incentives to negotiate settlement rates aggressively or to offer innovative services. In fact, settlement rates have declined sharply since 1998 and consumer prices have dropped even more sharply on competitive routes. Because of the changing competitive conditions, the FCC developed exceptions to the IS Policy for U.S. carriers to route overseas traffic without being subject to the IS Policy's requirements of equal division of accounting rates, nondiscriminatory terms and conditions and proportionate return of inbound traffic. The most important of these exceptions is the International Resale Order<sup>143</sup> that established ISR.

ISR permits authorized U.S. carriers to route switched traffic over international private lines interconnected to the PSTN. The IS Policy requirements are not imposed. ISR is permitted only on routes to WTO member countries where the settlement rates for at least 50% of the U.S.-originated traffic are at or below the appropriate benchmark or where the foreign carrier offers equivalent resale options. For non-WTO countries, both requirements must be met.

The scheme of the IS Policy was radically altered by an April 15, 1999 order.<sup>144</sup> In broad terms, the new IS Policy: (i) eliminates the IS Policy for arrangements with foreign carriers lacking market power; (ii) eliminates the IS Policy for arrangements with all foreign carriers (whether lacking or possessing market power) on routes for which rates to terminate at least 50% of U.S. calls are at least 25% lower than the rate for that route adopted in the FCC's Settlement Rate Benchmarks Order;<sup>145</sup> (iii) eliminates as superfluous the so-called Flexibility Policy, another exception to the IS Policy regime; (iv) allows confidential filings with dominant carriers on routes for which the IS Policy is removed; and (v) simplifies accounting rate filing procedures.

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2        Pub. L. 61-218, 36 Stat. 539 (1910).  
3        Act, August 13, 1912, ch. 287, 37 Stat. 302 (1912).  
4        Act, February 23, 1927, ch. 169, 44 Stat. 1162 (1927).  
5        Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1964), 47  
U.S.C. §151 et. seq.  
6        47 U.S.C. §151.  
7        U.S. Const, Art. I, §8.  
8        1982 Decree, U.S. v. AT&T, 552 F. Supp. 131 (D.D.C. 1982).  
9        1982 Decree §II (B)(3), U.S. v. AT&T, 552 F. Supp. 131, 227 (D.D.C. 1982).  
10       1982 Decree §II (D)(1), U.S. v. AT&T, 552 F. Supp. 131, 227 (D.D.C. 1982).  
11       U.S. v. Western Electric, 767 F. Supp. 308 (D.D.C. 1991), aff'd 993 F. 2d 1572  
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12       1982 Decree §II(D)(2), U.S. v. AT&T, 552 F. Supp. 131, 227 (D.D.C. 1982).  
13       Telecommunications Act §601(a)(1).  
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2215 (2000).  
16       47 U.S.C. §254 (b) (c).  
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18       47 U.S.C. §153(10).  
19       47 U.S.C. §160.  
20       47 U.S.C. §201(a).  
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23       47 U.S.C. §202.

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- 25 47 U.S.C. §203.
- 26 AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 118 S. Ct. 1956 (1998).
- 27 In re Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, 11 FCC Rcd 20730 (1996), aff'd, MCI WorldCom v. FCC, 209 F.3d 760 (D.C. Cir. 2000).
- 28 FCC Public Notice, International De-Tariffing Order, IB Docket No. 00-202, DA 9-1126 (May 2, 2001).
- 29 47 U.S.C. §214(a).
- 30 28 F.C.C. 2d 267 (1971), aff'd in part and rev'd in part sub. nom. GTE Service Corp. FCC, 474 F. 2d 724 (2d Cir. 1973), decision on remand 40 F.C.C. 2d 293 (1973).
- 31 77 F.C.C. 2d 384 (1980), reconsideration, 84 F.C.C. 2d 50 (1981), further reconsideration, 88 F.C.C. 2d 512 (1981), aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), cert. denied 461 U.S. 938, 103 S. Ct. 2109 (1983), aff'd on second further reconsideration 56 Rad. Reg. 2d (P&F) 301 (1984).
- 32 In the Third Computer Inquiry, 104 F.C.C. 2d 958 (1986), the FCC attempted to relax its structural separation requirements and replace them with non-structural safeguards. The 9<sup>th</sup> Circuit U.S. Court of Appeals overturned the FCC, ruling that no justification for the relaxation of the structural separation requirement had been shown (California v. FCC, 905 F. 2d 1217 (9<sup>th</sup> Cir. 1990)).
- 33 47 U.S.C. §153(43).
- 34 47 U.S.C. §153(20).
- 35 In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (First Report and Order), *see also* 11 FCC Rcd 19392 (1996) (Second Report and Order, relating to dialing parity and ability to place calls without use of an access code).
- 36 525 U.S. 366, 119 S. Ct. 721 (1999).
- 37 Iowa Utilities Board v. FCC, 120 F. 3d 753 (first judgments); 124 F. 3d 934 (second judgments) (8th Cir. 1997).
- 38 47 U.S.C. §251(c)(2). The Local Competition Order specifies two points that are to be considered "technically feasible"; the ILEC's central office switch; and the ILEC's tandem switch. Economic criteria are not to be considered in deciding whether an interconnection point is technically feasible.
- 39 47 U.S.C. §251(c)(3).
- 40 47 U.S.C. §251(c)(4). 47 U.S.C. §251(b) requires all local exchange carriers (not just incumbents) to offer telecommunications services for resale.
- 41 47 C.F.R. §51.319 (1997). Rule 319 set out the following seven network elements that must be offered to competitors on an unbundled basis: the "local loop," network

interface device (cross-connections between the loop facilities and inside wiring), switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance.

42 47 C.F.R. §51.315(b) (1997).

43 U.S. Telecom Ass'n v. FCC, 390 F. 3d 415 (D.C. Cir. 2002).

44 CC Docket No. 01-338, 96-98, 98-147 (Aug. 21, 2003)

45 219 F. 3d 744 (8th Cir. 2000).

46 122 S. Ct. 1646 (2002).

47 47 C.F.R. §51.809 (1997).

48 H.R. 1542.

49 47 U.S.C. §301.

50 47 U.S.C. §307(c).

51 47 U.S.C. §153(10).

52 See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S. Ct. 1794 (1969); FCC v. Pacifica Foundation, 438 U.S. 726, 98 S. Ct. 3026 (1978); FCC v. League of Women Voters, 468 U.S. 364, 104 S. Ct. 3106 (1984); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445 (1994), Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 109 S. Ct. 2829 (1989).

53 438 U.S. 726, 732, 748-50 (1978).

54 (Act I), 852 F.2d 1332 (D.C. Cir. 1988); (Act II), 932 F.2 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); (Act III) 58 F.3d 654 (D.C. Cir. 1995), *cert. denied* 116 S. Ct. 701 (1996).

55 47 C.F.R. §73.3999(b) (2000).

56 18 U.S.C. §1464.

57 Miller v. California, 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

58 FCC Docket No. 01-90.

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61 Fox Television Stations, Inc. v. FCC, No. 00-1222 (D.C. Cir. Feb. 19, 2002).

62 Sinclair Broadcast Group, Inc. v. FCC, No. 01-1079 (D.C. Cir., April 2, 2002).

63 Pub. L. No. 98-549, 98 Stat. 2779, codified at 47 U.S.C. §521 et seq.

64 47 U.S.C. §522(7), 47 C.F.R. §76.5(a).

65 47 U.S.C. §541.

66 47 U.S.C. §541(a)(2).

67 47 U.S.C. §541(b).  
68 47 U.S.C. §541(c).  
69 See, In re Entertainment Connections, Inc., FCC 98-111, June 30, 1998.  
70 47 U.S.C. §541(e).  
71 Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. §533.  
72 47 U.S.C. §302  
73 FCC Docket Nos. 99-288, 289.  
74 240 F. 3d 1126 (D.C. Cir. 2001).  
75 AT&T v. City of Portland, 216 F. 3d 871 (9th Cir. 2000).  
76 Gulf Power Co. v. FCC, 208 F. 3d 1263 (11th Cir. 2000), cert. granted, National  
Cable Television Association, Inc. v. Gulf Power Co.; FCC v. Gulf Power Co., 121 S. Ct. 879  
(2001).  
77 FCC Docket No. 02-77 (March 14, 2002).  
78 Brand X Internet Services v. FCC, No. 02-70518 (9th Cir. October 6, 2003).  
79 Time Division Multiple Access, in which transmissions on the same frequency are  
given alternating time slots to avoid interference.  
80 Code Division Multiple Access, in which the signal is transmitted across a wider  
than necessary bandwidth, dispersing power and modulating the Code so as to allow  
simultaneous use of the same frequency without interference.  
81 FCC Docket No. 99-244.  
82 In re Implementation of Section 309(j) of the Communications Act, 9 FCC Rcd  
5532 (1994).  
83 In re Implementation of Section 309(j) of the Communications Act, 10 FCC Rcd  
403 (1994).  
84 FCC Docket No. 95-301(1995).  
85 78 F. 3d 620 (D.C. Cir. 1996).  
86 FCC v. NextWave Personal Communications, Inc., case no. 01-653 (January 27,  
2003), affirming NextWave Personal Communications, Inc. v. FCC, 254 F.3d 130, 133  
(D.C. Cir. 2001).  
87 11 U.S.C.  
88 47 U.S.C. §224.  
89 47 U.S.C. §332(c)(7).  
90 47 C.F.R. §20.11(b)(2).  
91 12 FCC Rcd 17693 (1997).  
92 47 U.S.C. §§34-39.

93 47 U.S.C. §35.

94 *Id.*

95 11 U.S.C. §365.

96 A *geostationary* orbit is synchronized with the earth's rotation and has a period equal to a sidereal day, 23 hours, 56 minutes and 4.1 seconds (as opposed to the solar day of 24 hours). The orbit must be *prograde*, eastward, as is the earth's rotation and have a nearly zero eccentricity. In other words, the orbit is circular above the equator. GEOs tend to be the heaviest and most costly satellites largely because of the weight and costs of the satellites' station-keeping thrusters. These factors also increase launch and weight cost, and in turn increase insurance costs.

97 A *geosynchronous* orbit also has period equal to a sidereal day and must be *prograde*. However, the orbit may be inclined at any angle to the earth's equator. The orbital appearance of an inclined orbit as seen from an earth station is a "figure 8."

98 LEOs orbit at altitudes between 750 and 2,500 km with periods of up to two hours; MEOs orbit at up to 15,000 km with four to nine hour periods.

99 47 C.F.R. §25.102, 25.114, 25.115.

100 47 C.F.R. §25.113.

101 FCC 03-154 (June 26, 2003).

102 Pub. L. No. 87-624, 76 Stat. 419 (1962), codified at 47 U.S.C. §701 et seq.  
(1990).

103 47 U.S.C. §763a (2000).

104 17 U.S.C. §119.

105 Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

106 CC Docket No. 96-98 (Declaratory Order), CC Docket No. 99-68 (Notice of Proposed Rulemaking). (February 25, 1999).

107 Bell Atlantic Corp. v. FCC (Case No. 99-1094 2000)

108 D.C. Docket Nos. 96-98, 99-68, FCC 01-131 (April 27, 2001).

109 WorldCom, Inc. v. FCC (Case No. 01-1218 May 3, 2002)

110 15 U.S.C. §1 et seq.

111 Id., at §1.

112 Id., at §2.

113 15 U.S.C. §18.

114 15 U.S.C. §18a, codified as §7A of the Clayton Act.

115 16 C.F.R. §801.40.

- 116 FTC Notice of Amendment of Formal Interpretation 15, 16 C.F.R. §803.30, July  
1, 1999.
- 117 15 U.S.C. §18.
- 118 15 U.S.C. §21.
- 119 57 Fed. Reg. 41552-01.
- 120 11 U.S.C.
- 121 11 U.S.C. §363.
- 122 In Re Rules and Policies on Foreign Participation in the U.S. Telecommunications  
Market, 12 FCC Rcd. 23891 (1997).
- 123 Amendment of the Commission's Regulatory Policies to Allow Non-U.S. -  
Licensed Space Stations to Provide Domestic and International Satellite Service in the United  
States, 12 FCC Rcd. 24094 (1997).
- 124 47 U.S.C. §310.
- 125 47 U.S.C. §214.
- 126 See, e.g., Cellwave Telephone Services L.P. v. FCC; 30 F. 3d 1533 (D.C. Cir.  
1994), Moving Phones Partnership L.P. v. FCC, 998 F.2d 1051 (D.C. Cir. 1993).
- 127 In re Streamlining the International §214 Authorization and Tariff Requirements,  
11 FCC Rcd. 12884 (1996).
- 128 FCC Docket No. 99-51.
- 129 Pub. L. No. 100-418, 102 Stat. 1425, 50 U.S.C. §2170.
- 130 50 U.S.C. §2170(b).
- 131 50 U.S.C. §2170(e).
- 132 50 U.S.C. §§1701-1706.
- 133 15 C.F.R. Part 730 *et seq.*
- 134 22 C.F.R. Part 120 *et seq.*
- 135 In a recent case, the McDonnell Douglas division of Boeing and China's leading  
aviation company were charged with export violations in the 1994 sale of nineteen machine tools  
for \$5 million, some of which the Chinese recipient shipped to a cruise missile factory. See,  
Financial Times, McDonnell Douglas Faces Export Charges, October 20, 1999, p. 12.
- 136 Available at [www.house.gov/coxreport](http://www.house.gov/coxreport)
- 137 The Wassenaar Arrangement on Export Controls for Conventional Arms and  
Dual-Use Technologies. See, [www.wassenaar.org](http://www.wassenaar.org).
- 138 Daniel J. Bernstein v. U.S. Dep't of Justice, No. 97-166686 (9<sup>th</sup> Cir. May 6,  
1999).
- 139 Id.

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<sup>140</sup> Implementation and Scope of the Uniform Settlements Policy, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (1986), modified in part on reconsideration, 2 FCC Rcd 1118 (1987), further reconsideration, 3 FCC Rcd 3552 (1988), on reconsideration 7 FCC Rcd 8049 (1992). 47 C.F.R. §§43.51, 64.1001.

<sup>141</sup> 12 FCC Rcd at 23891, 23955-65.

<sup>142</sup> Id., at 23928.

<sup>143</sup> In re Regulation of International Accounting Rates, 7 FCC Rcd 559 (1991).

<sup>144</sup> IB Docket No. 98-148.

<sup>145</sup> In re International Settlement Rates, 12 FCC Rcd at 15, 30-32, FCC 97-280 (1997).