Parity Rules: Mapping Regulatory Treatment of Similar Services

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The views expressed in this Article are those of the Author and do not necessarily represent the views of the FCC or any of its Commissioners or Staff.

I. INTRODUCTION

Regulatory parity arguments are hard to ignore because they are grounded in notions of fairness and equality that are fundamental values in our society. Additionally, in the context of communications policy, an economic justification for regulatory parity is that, if all other factors are equal, regulators should treat similar services similarly in order to promote efficiency. As Michael Katz, a former FCC Chief Economist, states, “unless all suppliers are treated equally, regulation—rather than the ability to satisfy consumer demands efficiently—will determine which suppliers prevail in the telecommunications marketplace."[1] If regulatory policy (rather than the marketplace) decides who prevails, the result is likely to be "lower quality, less innovation and investment, and higher costs and prices."[2]

Yet, as this survey will show, although regulatory parity may be a laudable goal it is not an easily achievable goal. There is disparate treatment in all areas of communications policy. To identify the reasons that disparities continue to exist, it is helpful to keep in mind the following questions:

- Is the disparity required by statute?
- Is the disparity due to jurisdictional differences? In other words, is one set of competing providers subject to rules established by one jurisdiction (such as the FCC) while another set of providers is subject to rules established by a different jurisdiction (e.g., states or localities)?
- Is the disparity due to a Commission rule or policy?
- If so, what is the stated justification for the disparity?

The objective of this survey is to understand the extent to which disparities exist and to explore whether the disparities are justified by legitimate policy goals. To the extent that disparities are derived from statutes, it may be beyond the ability of regulators to change. Similarly, to the extent that disparities result from the allocation of jurisdictional authority to state or local policymakers, federal regulators may have no ability to eliminate the disparity. This issue arises, for example, if one provider is required to pay for spectrum in order to offer a service and another does not use spectrum at all but has to pay a franchise fee to offer the service. Should policymakers seek to remedy only disparate treatment flowing from a specific rule?

An important caution is that it is essential to compare apples to apples and oranges to oranges (i.e., similar services). This is sometimes not an easy matter. For purposes of this Article, services are broadly grouped into voice services (including wireline and wireless telecommunications), video services (including broadcast TV, cable TV, and Direct Broadcast Satellite ("DBS") services), and data services (including "information services"

1. Michael L. Katz, *Regulation: The Next 1000 Years*, *in* Robert M. Entman, *Six Degrees of Competition: Correlating Regulation with the Telecommunications Marketplace*, 2000 ASPEN INST. COMM. & SOC'Y PROGRAM 29, *available at* http://www.ciaonet.org/wps/enr02/enr02.pdf. Katz is the Edward J. and Mollie Arnold Professor of Business Administration at the University of California at Berkeley.

2. *Id.*

such as narrowband and broadband Internet access, and ancillary data services). This categorization is necessary in order to permit an examination of regulatory parity arguments but, clearly, it has its limits. Indeed, as noted in subsequent sections, there are strong arguments that broadcast TV and cable TV are not similar services in many respects. Further, the categorization used here should not be considered as endorsing the view that these are similar services for other purposes, such as defining relevant markets in the context of a merger review.

II. TELECOMMUNICATIONS SERVICES

A. *Background*

Telecommunications carriers discussed in this section include Incumbent Local Exchange Carriers ("ILECs"), Competitive Local Exchange Carriers ("CLECs"), Interexchange Carriers ("IXCs"), and Commercial Mobile Radio Service ("CMRS") carriers. These carriers, whether they offer wireline or wireless services, supply a conduit over which two-way, switched voice communications are transmitted.[3] Consumers increasingly view all telecommunications services as similar services, even though carriers may use different transmission platforms and offer different rate plans.[4]

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3. "Telecommunications" is "the transmission, between or among points . . . of information of the user's choosing, without change in the form or content of the information." 47 U.S.C. § 153(43) (2000). A "telecommunications carrier" is "any provider of telecommunications services . . . ." *Id.* § 153(44). A "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). "Mobile service" means "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." *Id.* § 153(27) . Another type of telecommunications carrier is a provider of "fixed services," who offers "a radio communications service between fixed points." 47 C.F.R. § 101.3 (2002).

For the most part, this Article does not discuss other providers such as resellers and payphone operators.

4. *See, e.g.*, Fed.-State Joint Bd. on Universal Serv., *Further Notice of Proposed Rulemaking and Report and Order*, 17 F.C.C.R. 3752, para. 11, 25 Comm. Reg. (P & F) 1455 (2002).

> [M]obile service is becoming a substitute for traditional wireline services such as payphones and second lines to the home, and there is a small but growing number of customers who have substituted mobile wireless for their primary residential lines. In addition, many customers are using their mobile service rather than interexchange service to make long distance calls: according to one report, 16 percent of customers surveyed now make most of their long distance calls using mobile services.

Id. (footnotes omitted). *See also* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Eighth Report*, 18 F.C.C.R. 14783, para. 103 (2003) ("The

1. Wireline Telecommunications

The Communications Act of 1934 grants the states jurisdiction over intrastate telecommunications and the FCC jurisdiction over interstate calls.[5] Jurisdictional disputes between federal and state regulators are inevitable because, as one commentator notes, "[e]very telecom box or wire is located in one state or another, and is thus a candidate for local regulation. Virtually every box or wire also connects in one way or another to facilities that cross state lines, and is thus a candidate for federal control."[6] The most recent boundary drawing gave the FCC, and not the states, authority to set the rules for interconnection and unbundling of local telephone networks, pursuant to Section 251 of the Telecommunications Act of 1996 ("1996 Act").[7]

An important jurisdictional issue involves separations issues, such as cost allocation of joint and common costs between interstate and intrastate rate bases. Separations issues arise because, "virtually [every] telephone plant that is used to provide intrastate service, is also used to provide interstate service, and thus is conceivably within the jurisdiction of both state and federal authorities."[8] Congress did not resolve separations disputes, but instead required the FCC to adopt a procedure for resolving them.[9] Separations issues are addressed in a Federal-State Joint Board.[10]

The FCC's role in regulating access to the interstate interexchange services market has undergone several changes over time. First, for about twenty-five years beginning in 1934, the FCC generally held that telecommunications was a natural monopoly that foreclosed competitive entry.[11] Second, after permitting limited competition to surface in the

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long-distance, local, and payphone segments of wireline telecommunications have all been losing business to wireless substitution.").

5. Communications Act of 1934, ch. 652, § 152, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.) (2000).

6. JOHN THORNE ET AL, FEDERAL BROADBAND LAW 166 (1995) [hereinafter FEDERAL BROADBAND LAW].

7. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). Justice Scalia, writing for the majority, apparently was not persuaded by the Eighth Circuit opinion holding that local interconnection and unbundling were intrastate issues protected by a fence that was "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd*, *AT&T Corp.*, 525 U.S. 366.

8. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986).

9. *See* 47 U.S.C. § 221(c) (2000).

10. *See id.* § 410.

11. *See, e.g.*, Mackay Radio and Tel. Co., Inc., 2 F.C.C. 592 (1936) (denying applicant a license to operate between the United States and Norway on a route already served by RCA Communications); Allocation of Microwave Frequencies Above 890 MHz, *Report and Order*, 27 F.C.C. 359, 18 Rad. Reg. (P & F) 1767 (1959) (allocating spectrum for

1960s, the Commission, in a crucial decision, agreed with AT&T that it had no obligation to interconnect with new entrants, other than for the limited purpose of offering private line service.[12] The U.S. Court of Appeals for the District of Columbia Circuit reversed this ruling, leading the Commission in 1980 to adopt an open entry policy for all interstate services.[13] Third, the FCC further undermined the Bell long-distance monopoly in the 1980s by permitting resale and requiring equal access.[14] Finally, as required by the 1996 Act, the FCC has sought to implement the Section 271 requirement that the Bell companies satisfy certain preconditions for long-distance entry.[15]

All carriers, except the former Bell companies,[16] are permitted to offer domestic interexchange services without obtaining prior authority from the FCC.[17] Within their in-region states, the Bells are required to open up local markets as the quid pro quo for offering long-distance services.[18]

private use bypassing the Bell network); *see* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 734 (1999) [hereinafter FEDERAL TELECOMMUNICATIONS LAW] ("[C]ompetition was considered to be inefficient in the short run and not economically viable in the long run, so the Commission did nothing to encourage it.").

12. AT&T Co. et al., *Memorandum Opinion and Order*, 67 F.C.C.2d 1455, 42 Rad. Reg.2d (P & F) 789 (1978) (concerning MCI's *Execunet* service); *See also* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 754-56 (discussing MCI v. FCC, 580 F.2d 590 (D.C. Cir. 1978)).

13. *See* MTS and WATS Market Structure, *Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking*, 81 F.C.C.2d 177, 48 Rad. Reg.2d (P & F) 67 (1980).

14. *See, e.g.*, Resale and Shared Use, *Report and Order*, 83 F.C.C.2d 167, para. 18, 48 Rad. Reg.2d (P & F) 1067 (1980); AT&T Co., *Memorandum Opinion and Order*, 94 F.C.C.2d 1110, 53 Rad. Reg.2d (P & F) 112 (1983); MTS/WATS Market Structure, *Report and Order*, 100 F.C.C.2d 860, 57 Rad. Reg.2d (P & F) 1303 (1985); *see also* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 756-60, 766-70.

15. 47 U.S.C. § 271 (2000); *see also* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 733, 830-49.

16. 47 U.S.C. § 271(a) (2000) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.").

17. 47 C.F.R. § 63.01 (2002) ("Any party that would be a domestic interstate common carrier is authorized to provide domestic interstate services to any domestic point."). Carriers, however, must obtain approval to discontinue service. *Id.* § 63.71.

18. *See* 47 U.S.C. § 271(b)(1) (2000). In December 2003, the Commission announced that Bells in all states had satisfied the statutory requirement to open their in-region markets to local competition. Press Release, FCC, Bell Operating Companies Long Distance Application Process Concludes: Entire Country Authorized for "All Distance" Service, (Dec. 3, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241858A1.doc.

2. Wireless Telecommunications

Wireless telecommunications services include mobile and fixed wireless services. As required by Section 332 of the 1996 Act, providers of "mobile services" (including cellular, paging, specialized mobile radio ("SMR"), and personal communications services ("PCS")) are collectively referred to as CMRS carriers.[19] In 1994, the Commission adopted rules generally distinguishing mobile from fixed wireless services for purposes of implementing Section 332. The Commission held that services provided through equipment that is "capable of transmitting while the platform is moving" are mobile services. [20] The Commission subsequently amended its rules to permit CMRS carriers to provide fixed wireless services on a co-primary basis with mobile services.[21]

Cellular licenses, first issued in 1981, were assigned to the incumbent wireline carriers ("B" Block) and awarded through comparative hearings to the new entrants ("A" Block).[22] SMR licenses were initially issued for private carriage services, such as taxicab dispatch services, but were subsequently modified to authorize wireless telecommunications services.[23] PCS was authorized in 1992.[24] Since 1993, licenses for most wireless telecommunications services (including cellular, PCS, SMR, and paging)

19. Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 F.C.C.R. 1411, para. 11, 74 Rad. Reg.2d (P & F) 835 (1994) [hereinafter *CMRS Second Report and Order*] (classifying cellular, paging, SMR, and PCS as CMRS services).

20. *Id.* para. 38.

21. Amendment of the Comm'n's Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Servs., *First Report and Order and Further Notice of Proposed Rule Making*, 11 F.C.C.R. 8965, 3 Comm. Reg. (P & F) 1190 (1996) [hereinafter *CMRS First Report and Order*]. The Commission later stated it would decide, on a case-by-case basis, how fixed and hybrid wireless services should be regulated. Amendment of the Comm'n's Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Services, *Second Report and Order and Order on Reconsideration*, 15 F.C.C.R. 14680, 21 Comm. Reg. (P & F) 638 (2000).

22. Cellular Comm. Systems, *Report and Order (Proceeding Terminated)*, 86 F.C.C.2d 469, 49 Rad. Reg.2d (P & F) 809 (1981).

23. Amendment of Part 90 of the Comm'n's Rules to Facilitate Further Development of SMR Systems in the 800 MHz Frequency Band*, Further Notice of Proposed Rule Making*, 10 F.C.C.R. 7970 (1994); *see also* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 924-27.

24. Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecomm. Techs., *Notice of Proposed Rule Making*, 7 F.C.C.R. 1542 (1992).

have been issued by auction.[25] CMRS providers generally are permitted to disaggregate or partition their spectrum for sale.[26]

For CMRS services, Congress preempted state authority to regulate intrastate rates and entry. As a result, the FCC has authority over regulating interstate rates and entry,[27] and the states have authority to regulate "other terms and conditions."[28] States continue to have authority to regulate rates and entry of fixed wireless services. In addition, states and local governments also have authority over siting towers and other facilities used to provide wireless services.[29] Moreover, states may petition the FCC for authority to regulate rates, and several states which had been regulating rates filed petitions to continue doing so, but these petitions were denied.[30] In practical terms, the FCC has "close to absolute authority over the structure of the [wireless telecommunications] industry, the geographic markets it serves and the services it provides."[31]

25. *See* Wireless Telecommunications Bureau, FCC, Auctions Summary, *available at* http://wireless.fcc.gov/auctions/summary.html (last updated Feb. 25, 2004) (listing auction completion dates and amounts).

26. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Second Report,* 12 F.C.C.R. 11266, 7 Comm. Reg. (P & F) 1 (1997); Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Servs. Licensees, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21831, 5 Comm. Reg. (P & F) 634 (1996); *CMRS First Report and Order*, *supra* note 21. *See* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 881 n.88, 911 n.232.

27. 47 U.S.C. § 332(c)(3)(A) (2000) (stating that states may not regulate "the entry of or the rates charged by" a CMRS provider). Until states were preempted by Congress in 1993, states had authority to regulate rates for purely intrastate wireless services. FEDERAL TELECOMMUNICATIONS LAW *supra* note 11, at 869.

28. 47 U.S.C. § 332(c)(3)(A). *See* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11 at 870, n.46 (by "other terms and conditions," Congress was referring to customer billing, consumer protection, and facilities siting issues).

29. 47 U.S.C. § 332(c)(7) (providing, however, that states may not use this authority to unreasonably discriminate among providers, and that all decisions must be in writing and supported by substantial evidence). In addition, states may not enact barriers to entry of telecommunications providers. *See id.* § 253. States and local governments are also prohibited from regulating zoning/siting of wireless facilities based on radio frequency effects so long as the facilities comply with FCC radio frequency regulations. *See id.* § 332(c)(7)(B)(iv).

30. 47 U.S.C. § 332(c)(3)(A). The FCC may authorize state rate regulation under two conditions: (a) rates are unjust, unreasonable, or discriminatory; or (b) wireless services are a replacement for wired telecommunications for a substantial portion of local exchange service subscribers in the state. *Id.* States with rate regulation in effect in 1993 were authorized to petition the FCC to continue such regulation. *Id.* § 332(c)(3)(B); *see* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 872 (noting FCC denials of petitions from Connecticut, Ohio, California, Louisiana, Arizona, New York, and Hawaii).

31. FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 867.

B. Regulatory Issues

1. Market Power

Under long-established principles, all telecommunications carriers are generally classified as common carriers that do not "make individualized decisions, in particular cases, whether and on what terms to deal."[32] They are required to offer service at reasonable rates and to serve all consumers on the same nondiscriminatory terms.[33] In the *Competitive Carrier* proceeding, conducted between 1979 and 1985, the Commission distinguished between carriers with market power (who were classified as dominant carriers) and carriers without market power (who were classified as nondominant carriers).[34] The Commission reduced regulation of the nondominant carriers, on the grounds that they lacked the ability to harm consumers by offering telecommunications services at unjust and unreasonable rates, terms, and conditions.[35] As a result, nondominant carriers are not subject to several common carrier duties. Thus:

- ILECs must file tariffs with supporting information, which in some cases includes detailed cost data.[36] Long-distance and CMRS carriers, as nondominant carriers, are not permitted to file tariffs,[37] but CLECs may do so.[38]

- The Commission regulates LEC access charges; Bell Operating Companies ("BOCs") and certain other large ILECs are subject to price cap regulation, while smaller ILECs are subject to rate of return regulation. (Price cap ILECs may seek pricing flexibility as competition develops.[39])

32. Nat'l Ass'n of Reg. Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976); *See* FEDERAL BROADBAND LAW, *supra* note 6, at 290.

33. 47 U.S.C. § 201(b), 202(a) (2000) (prohibiting unjust or unreasonable discrimination or giving undue or unreasonable preference with respect to any charges, classifications or services).

34. *See* Competitive Carrier Servs., *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985).

35. *Id.* para. 12.

36. 47 C.F.R. § 61.38 (2003).

37. *Id*. § 61.19 (2003).

38. *Id*. § 61.39 (2003); *see* Hyperion Telecomm. Inc. Petition Requesting Forbearance, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 F.C.C.R. 8596, 8 Comm. Reg. (P & F) 730 (1997) (granting permissive detariffing for interstate access service providers other than ILECs).

39. *See* 47 C.F.R. §§ 61.41-61.49 (price cap rules), 65.100-65.830 (rate of return rules); Price Cap Performance Review for Local Exch. Carriers, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 14221, 17 Comm. Reg. (P & F) 299 (1999); Multi Ass'n Group (MAG) Plan for Reg. of Interstate Servs. of Non-Price Cap Incumbent Local Exch. Carriers and Interexch. Carriers, *Second Report and Order and*

By contrast, AT&T's long-distance rates have not been regulated since AT&T was classified as nondominant in 1995.[40] CLECs face limited rate regulation (i.e., they cannot set access charges at levels higher than the rates charged by ILECs).[41]

• Reporting requirements, such as filing Automated Reporting Management Information System ("ARMIS") reports, are imposed on large and midsize ILECs but not IXCs, CLECs, or CMRS carriers.[42]

In addition, in 1992, Congress classified all CMRS providers as common carriers but authorized the Commission to forbear from enforcing any Title II provisions other than Sections 201, 202, and 208.[43] The Commission very quickly determined that CMRS carriers lacked market power and exempted them from requirements to file tariffs, submit copies of contracts with other carriers to the FCC, notify the Commission of interlocking directorates, or obtain prior approval before initiating or terminating service.[44] The Commission declined to forbear from other

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Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 F.C.C.R. 19613, 25 Comm. Reg. 1 (2001).

40. Motion of AT&T Corp. to be Reclassified as a Nondominant Carrier, *Order*, 11 F.C.C.R. 3271, para. 163, 1 Comm. Reg. 63 (1995). Payphone providers, similarly, benefited from a Commission ruling that rate regulation was not needed. Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555, 562-3 (D.C. Cir. 1997) (noting that since statute required that payphone providers be "fairly compensated," Commission was justified in favoring market forces over rate regulation).

41. Access Charge Reform, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 9923, paras. 32, 40-44 (2001) (noting that the "market for access services does not appear to be structured in a manner that allows competition to discipline rates.") (emphasis omitted).

42. ARMIS collects information required in 47 C.F.R. Parts 32, 36, 43, 51, 64, 65, and 69. FCC, ARMIS Data Descriptions, *available at* http://www.fcc.gov/wcb/armis/descriptions.html (last updated Apr. 1, 2004). *See* Indus. Analysis & Tech. Div., FCC, ARMIS Filing Requirements for Carriers, *at* www.fcc.gov/wcb/armis/filereqt.html (describing revenue, corporate structure, and price cap status of ILECs required to file ARMIS reports).

43. 47 U.S.C. § 332(c)(1) (2000). Sections 201 and 202 generally require carriers to serve the public at just, reasonable, and nondiscriminatory rates. *See id.* §§ 201, 202 (2000). Section 208 authorizes the Commission to investigate complaints for violations of the applicable rules by common carriers. *See id.* § 208 (2000). The Commission was petitioned to forbear from applying Sections 201 and 202 to PCS providers, but declined to do so. Pers. Comm. Indus. Ass'n Broadband Pers. Comm. Servs. Alliance's Petition for Forbearance for Broadband Pers. Comm. Servs., *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.R. 16857, para. 119, 12 Comm. Reg. (P & F) 852 (1998) [hereinafter *PCIA Broadband PCS Petition*].

44. *CMRS Second Report and Order*, *supra* note 21, paras. 173-82, 196-197. Thus, CMRS carriers are exempt from some of the statutory requirements that apply to other common carriers. *See* 47 U.S.C § 203 (tariff filing requirements); *id.* § 204 (tariff suspensions); *id.* § 205 (requirements to offer services at just and reasonable rates); *id.* § 211 (requirements to file with the FCC copies of contracts with other carriers); *id.* § 212

sections, including "dial-a-porn" prohibitions, disability access requirements, and telemarketing.[45] As the Commission noted, "Taken together, these actions have substantially relieved CMRS providers from the most burdensome aspects of common carrier regulation."[46]

2. Local Competition

Section 251 of the 1996 Act and Commission rules impose significantly different requirements on ILECs, CLECs, and CMRS carriers. All telecommunications carriers have a general duty to interconnect with each other. In addition, ILECs are required to resell to their competitors any telecommunications service they offer to the general public, and to do so at wholesale rates.[47] ILECs are also required to offer to their competitors unbundled network elements ("UNEs"), such as local loop, switching, and transport, at cost-based rates.[48] In deciding which elements the ILEC is required to unbundle, the 1996 Act specifies that the Commission must consider whether access to proprietary elements is necessary and whether failure to provide access to any other elements would impair the ability of the requesting carrier to compete.[49] CLECs who offer facilities-based competition by building their own infrastructure are entitled to interconnect

(prohibitions on interlocking directorates); *id.* § 214 (service initiation and discontinuance requirements).

45. *CMRS Second Report and Order*, *supra* note 19, paras. 205-213. CMRS carriers are not exempt, however, from all of the statutory requirements applicable to all common carriers. *See* 47 U.S.C. § 223 (prohibitions against making or permitting obscene or harassing calls); *id.* § 225 (disability access requirements); *id.* § 226 (operator services rules); *id.* § 227 (telemarketing rules); *id.* § 228 (pay-per-call services rules). *See also* Forbearance from Applying Provisions of the Comm. Act to Wireless Telecomm. Carriers, *First Report and Order*, 15 F.C.C.R. 17414, 21 Comm. Reg.2d (P & F) 802 (2000).

46. *PCIA Broadband PCS Petition*, *supra* note 43, para. 8.

47. 47 U.S.C. § 251(c)(4) (2002).

48. *Id.* § 251(c)(3) (2002).

49. *Id.* § 251(d)(2) (2002); *see* Implementation of the Local Competition Provisions of the Telecomm. Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 F.C.C.R. 3696, 18 Comm. Reg.2d (P & F) 888 (2000), *rev'd and remanded,* U.S. Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (setting forth principles for determining the "impair" standard), *cert. denied sub nom.* WorldCom, Inc. v. U.S. Telecom Ass'n, 538 U.S. 940 (2003). In August, 2003, the Commission held that, based on a finding of "impairment" on a state-by-state basis, LECs could be required to provide unbundled access to switches for the residential market. Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, paras. 486-524 (2003) [hereinafter *Triennial Review Order*]. On March 2, 2004, the Court of Appeals for the District of Columbia Circuit reversed the Commission's decision with respect to switches. *See* USTA v. FCC, No. 00-1012, 2004 WL 374262, slip op. at 11-26, 34-46 (D.C. Cir. 2004). Other aspects of this decision are discussed in section IV.B.1., *infra.*

with all other telecommunications carriers.[50] They are not required to offer potential competitors unbundled access to network elements or to resell their telecommunications services at wholesale rates.[51] In addition, like all local exchange carriers, they have a duty under Section 251(b) not to prohibit resale, to provide for number portability, to give access to rights of way for pole attachment purposes, and to establish reciprocal compensation arrangements for transport and termination of local traffic.[52]

CMRS carriers, too, have a general duty to interconnect with other telecommunications carriers and, as providers of "telephone exchange service," are entitled to interconnect with the landline networks at cost-based rates.[53] Because the Commission has determined that CMRS providers are not at present LECs, they are not required to offer interconnection to requesting telecommunications carriers at cost-based rates under Section 251(b).[54] However, the Commission has imposed other obligations on CMRS carriers through regulation. For instance, cellular, broadband PCS, and SMR providers were prohibited, until November 24, 2002, from restricting resale of their services.[55] CMRS carriers are not required to provide CMRS-CMRS interconnection or interconnect their switches directly with CMRS resellers' switches.[56] The Commission required CMRS carriers to provide local number portability to enable CMRS customers to "port" their telephone numbers if they switch from one CMRS carrier to another or from a CMRS to a wireline carrier.[57] However,

50. 47 U.S.C. § 251(a) (2002).

51. FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 481-484.

52. 47 U.S.C. § 251(b).

53. *See* Implementation of the Local Competition Requirements of the 1996 Act, *First Report and Order*, 11 F.C.C.R. 15499, paras. 1012-15, 4 Comm. Reg.2d (P & F) 1 (1996) [hereinafter *Local Competition Order*].

54. *Id.* paras. 1004-05.

55. 47 C.F.R. § 20.12 (2003); *see also* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Servs., *First Report and Order*, 11 F.C.C.R. 18455, paras. 15-21, 3 Comm. Reg. (P & F) 895 (1996). After November 24, 2002, although the Commission's rules do not explicitly require resale of wireless services, carriers continue to be bound by the Communications Act's general prohibition against discrimination, and complaints alleging denial of resale agreements will be decided on a case-by-case basis to determine if they violate antidiscrimination requirements. *Id.* para. 22; *see* 47 U.S.C. §§ 201-202 (2002) (requiring nondiscriminatory treatment).

56. Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Servs., *Fourth Report and Order*, 15 F.C.C.R. 13523, paras. 14-22, 26-29, 21 Comm. Reg.2d (P & F) 669 (2000); *see also* Implementation of Sections 3(n) and 332 of Comm. Act, *Memorandum Opinion and Order on Partial Reconsideration of Second Report and Order*, 11 F.C.C.R. 19729, 5 Comm. Reg. (P & F) 1302 (1996).

57. Cellular Telecomm. Indus. Ass'n's Petition for Forbearance from Commercial Mobile Radio Servs. Number Portability Obligations, *Memorandum Opinion and Order*, 14 F.C.C.R. 3092, para. 39, 15 Comm. Reg. (P & F) 82 (1999) [hereinafter *CTIA Petition*].

the Commission granted CMRS carriers an extension until November 24, 2003, to implement local number portability plans.[58] The Commission noted that CMRS carriers face unique technical difficulties, such as the need to configure their networks so that CMRS users with ported numbers would be able to make and receive calls while roaming outside their home areas.[59]

LECs are required to provide equal access to other carriers serving the long-distance market.[60] Under equal access, IXCs are able to get access to consumers (or, alternatively, consumers are able to select the long-distance carrier of their choice).[61] Equal access obligations apply also to other types of interstate services, such as 800 numbers, calling cards, and operator services.[62] Congress prohibited the Commission from imposing equal access rules on CMRS carriers.[63]

3. Universal Service

The 1996 Act requires all telecommunications carriers that provide interstate telecommunications services to "contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service."[64] The 1996 Act also grants the Commission permissive authority to require providers of interstate telecommunications to contribute to universal service if the public interest so requires, and to exempt from contribution obligations carriers whose contributions would be de minimis.[65] Carriers must contribute even if they are not eligible to receive universal service support.[66] The Commission decided to assess contributions on carriers' end-user telecommunications revenues on a

58. Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Servs. Number Portability Obligation, *Memorandum Opinion and Order*, 17 F.C.C.R. 14972, para. 23, 27 Comm. Reg. (P & F) 331 (2002); *see also* Cellular Telecomm. Indus. Ass'n's Petition for Forbearance from Commercial Mobile Radio Servs. Number Portability Obligations, *Order on Reconsideration*, 15 F.C.C.R. 4727, 19 Comm. Reg. (P & F) 1041 (2000).

59. *CTIA Petition*, *supra* note 57, paras. 40-41.

60. 47 U.S.C. § 251(g) (2002).

61. FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 767.

62. *Id.* at 777-85.

63. 47 U.S.C. § 332(c)(8) .

64. *Id*. § 254(d).

65. *Id.*

66. Fed.-State Joint Bd. on Universal Serv., *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72*, 13 F.C.C.R. 5318, paras. 262-266, 288-289 (1997).

competitively neutral basis.[67] Foreign carriers providing interstate or international telecommunications in the United States are generally not required to contribute. Domestic carriers must include revenues derived from interstate and international telecommunications in their assessment base.[68]

CMRS carriers, as telecommunications carriers providing interstate telecommunications services, are required to contribute to universal service. But, because of the nature of mobile services, these carriers cannot easily separate their intrastate and interstate revenues.[69] For instance, because a single switch may serve areas located in more than one state, calls originating and terminating in one state may be transported by a switch in another state. In addition, a mobile caller could travel from one state to another during the course of a call, making it difficult to determine whether it should be classified as an interstate or intrastate call. Thus, until final rules are set, the FCC has established an interim "safe harbor" specifying that, for purposes of calculating contribution obligations, cellular, PCS broadband, and digital SMR carriers may elect to report up to 28.5% of their total telecommunications revenues as interstate, and paging providers may elect to report up to twelve percent of total telecommunications revenues as interstate.[70]

In 2002, the largest contributors were IXCs, who contributed approximately fifty-five percent of the total support. IXCs include long-distance carriers, toll resellers, and pre-paid calling card providers. (In addition, Bell companies contributed almost four percent from their interstate toll revenues.) The next largest group is providers of interstate exchange access services, such as ILECs, and CLECs. ILECs contributed

67. Fed.-State Joint Bd. on Universal Serv., *Report and Order*, 12 F.C.C.R. 8776, paras. 843-54 (1997) [hereinafter *Universal Service Order*].

68. *Id.* para. 779. If contributors' interstate revenues are equal to or greater than twelve percent of total interstate and international revenues, their contributions are based on both categories of revenue. Fed.-State Joint Bd. on Universal Serv.*, Further Notice of Proposed Rulemaking and Report and Order*, 17 F.C.C.R. 3752, paras. 125-28, 25 Comm. Reg. (P & F) 1451 (2002).

69. *See* Fed.-State Joint Bd. on Universal Serv., *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 13 F.C.C.R. 21252, para. 6, 14 Comm. Reg. (P & F) 64 (1998) [hereafter *Interim CMRS Safe Harbor*].

70. *See* Fed.-State Joint Bd. on Universal Serv., *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 F.C.C.R. 24952, paras. 21-22 (2002) [hereinafter *Contribution Methodology Order and NPRM*] (raising "safe harbor" from 15% percent to 28.5% due to increased mobile wireless usage for interstate calls).The Commission noted that CMRS carriers that elect the interim "safe harbor" may assume that the Commission will not question the data underlying the percentages. *Interim CMRS Safe Harbor*, *supra* note 69, para. 13.

approximately twenty-three percent, and CLECs contributed approximately three percent. Wireless providers contributed about fifteen percent.[71]

The Commission also recently began a proceeding to review its universal contribution methodology in light of technical and marketplace developments that have resulted in a decline in interstate telecommunications revenues.[72] One proposal under consideration would require contributions on the basis of connections to the network.[73]

4. Intercarrier Compensation

In April 2001, the Commission initiated a proceeding to explore the feasibility of adopting a unified regime for compensating carriers for exchanging telecommunications traffic.[74] The Commission stated that a unified compensation regime was needed because the existing compensation arrangements exhibited "symptoms of market failure."[75] In particular, the Commission sought comment on proposals to reform two main types of intercarrier compensation for essentially the same type of service.

Access charges are the rates IXCs pay to LECs for origination and termination of long-distance traffic.[76] Reciprocal compensation is the arrangement for all other carriers for transport and termination of local calls. The 1996 Act requires LECs to offer reciprocal compensation arrangements for the transport and termination of local traffic.[77]

Access charges are determined by rate of return or price cap rules or the CALLS plan.[78] By contrast, reciprocal compensation charges must be

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71. *See* FCC, Trends in Telephone Service, at Table 19.6 (2003), *available at* http://www.fcc.gov/wcb/iatd/trends.html. The data for ILECs includes contributions from RBOC's CLEC affiliates. *Id.*

72. Fed.-State Joint Bd. on Universal Serv., *Notice of Proposed Rulemaking*, 16 F.C.C.R. 9892 (2001).

73. Fed.-State Joint Bd. on Universal Serv., *Further Notice of Proposed Rulemaking and Report and Order*, 17 F.C.C.R. 3752, paras. 34-83, 25 Comm. Reg. (P & F) 1451 (2002); *Contribution Methodology Order*, *supra* note 70, paras. 70-74 (seeking further comment on proposals).

74. Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, 16 F.C.C.R. 9610 (2001) [hereinafter *Intercarrier Compensation NPRM*].

75. *Id.* para. 2.

76. *See* Access Charge Reform, *First Report and Order,* 12 F.C.C.R. 15982, para. 20 (1997).

77. 47 U.S.C. § 251(b)(5) (2000).

78. *Intercarrier Compensation NPRM*, *supra* note 74, para. 7 n.6. CALLS is a plan developed by the Coalition for Affordable Local and Long Distance Service ("CALLS"), and adopted by the Commission, to reduce access charges over the next five years. Access Charge Reform, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and*

set at forward-looking economic cost.[79] Thus, although both types of calls cost essentially the same, rates may differ greatly. In addition, information service providers are exempt from paying per-minute access charges to the local phone companies.[80]

Chart: Intercarrier Compensation

	Originating LEC	**Originating Wireless**
Terminating LEC	Local call (LEC to LEC): *reciprocal compensation* ---------------------- Dial-up Internet call (LEC to LEC to 2d LEC's ISP customer): *reciprocal compensation, subject to interim caps.* -------------- Long distance (LEC to IXC to LEC): *IXC pays access charges at both ends*	Local call (CMRS to LEC): *Reciprocal compensation* ------------ Long distance (CMRS to IXC to LEC): *IXC pays terminating access to LEC, negotiates an arrangement with CMRS* --------- Internet access (CMRS to LEC to LEC's ISP customer): *reciprocal compensation*
Terminating Wireless	Local (LEC to CMRS): *Reciprocal compensation* [*CMRS may use cost study to charge higher rate than LEC charges*] Long distance (LEC to IXC to CMRS): *IXC negotiates with CMRS*	Local (CMRS to CMRS): *Reciprocal compensation.* Long distance (CMRS to IXC to CMRS): *IXC negotiates any originating and terminating fees to CMRS*

To summarize the main compensation arrangements:

- Carriers use reciprocal compensation arrangements to compensate each other for transporting and terminating local traffic, whether the call originates on a wireline or wireless phone.
- For long-distance calls, different rates apply, depending on whether the caller uses a wireline or wireless telephone. For wireline calls, the

Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 F.C.C.R. 12962, 20 Comm. Reg. (P & F) 636 (2000).

79. 47 C.F.R. § 51.705 (2002); *see also Local Competition Order*, *supra* note 53, paras. 1111-18.

80. *See* MTS & WATS Market Structure, *Memorandum Opinion and Order*, 97 F.C.C.2d 682, paras. 75-90, 54 Rad. Reg.2d (P & F) 615 (1983); Amendments to Part 69 of the Comm'n's Rules Relating to Enhanced Serv. Providers, *Order*, 3 F.C.C.R. 2631, 64 Rad. Reg.2d (P & F) 1294 (1988).

IXC pays access charges to the LEC at both ends of the call. For wireless calls to an LEC customer, the IXC pays access charges to the LEC at the terminating end and negotiates an originating charge with the CMRS provider. For wireless calls to a wireless customer, the IXC negotiates originating and terminating fees with both CMRS providers.

- For a dial-up Internet access call by an LEC customer, the ISP is not required to pay access charges to the LEC. For wireless Internet access, the CMRS carrier and the LEC serving the ISP negotiate a reciprocal compensation arrangement. The Commission determined that the 1996 Act also requires LECs to enter into reciprocal compensation arrangements with CMRS carriers for the transport and termination of local traffic.[81] Compensation between LEC and CMRS providers must be symmetrical: an LEC must pay a CMRS provider the same rate for transport and termination of a call as the rate it charges for transport and termination of a call originated by the CMRS provider. But since CMRS subscribers may move locations during the course of a call, it is not always possible to determine the exact transport and termination rate.[82] Thus, the Commission authorized the parties to extrapolate rates based on traffic studies.[83]

There has been an ongoing dispute about the appropriate compensation rules for calls to ISPs. CLECs argue that they should be compensated for delivering an ILEC customer's calls to their ISP customer. ILECs argue that such calls are interstate and not local, therefore rendering Section 251(b)(5) inapplicable. The Commission initially ruled that ISP-bound traffic was interstate in nature but permitted states to determine if reciprocal compensation rules should apply.[84] CLECs appealed, and the D.C. Circuit remanded the case to the Commission for a fuller explanation of its ruling.[85] On remand, the Commission concluded that Congress

81. *Local Competition Order*, *supra* note 53, paras. 1094-95.

82. A CMRS caller may cross state lines or local boundaries during the course of a single call, making it difficult to determine jurisdictional issues. This could affect carrier compensation rates. As the Commission noted, "traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA . . . is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges." *Id.* para. 1043.

83. *Id.* para. 1044.

84. Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 F.C.C.R. 3689, paras. 21-27, 15 Comm. Reg. (P & F) 201 (1999). The Commission also initiated a rulemaking to consider intercarrier compensation rules for ISP-bound traffic. *Id.* para 28.

85. Bell Atl. Tel. Co. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

intended to exclude ISP-bound traffic from reciprocal compensation arrangements, and determined that it would establish a separate cost-recovery mechanism for such traffic.[86] The Commission also set an interim cap on ILEC payments to CLECs as reciprocal compensation for calls to ISPs.[87]

C. *Summary and Analysis*

As summarized below, some telecommunications carriers are treated differently because they are singled out by a statute, because they have market power, or because they are regulated by different entities.

1. Statutes

Congress imposed the local competition requirements on ILECs. Thus, ILECs, but not other carriers, must offer to interconnect at cost, unbundle network elements, and resell telecommunications services at wholesale rates. Congress also statutorily exempted CMRS carriers from equal access obligations that fall upon other carriers. Congress did not create statutory exemptions for particular carriers with respect to local number portability and universal service contribution requirements, and the Commission has striven to achieve parity (or at least comparability) in those areas. For instance, CMRS carriers were given additional time to comply with local number portability rules because of features that are unique to CMRS carriers. CMRS carriers are also permitted, on an interim basis, to contribute to universal service based upon a 28.5% safe harbor of revenues, rather than attempt to separate local from interstate traffic as other carriers must do.

With respect to "mobile services," all carriers are treated alike, as required by statute.

2. Commission Rules

Carriers with market power must comply with various dominant carrier rules. Competitive carriers (e.g., CMRS carriers, CLECs, nondominant IXCs) are exempt from the most burdensome regulations or are fully deregulated. In addition, ILECs and CLECs (with respect to

86. Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *Order on Remand and Report and Order*, 16 F.C.C.R. 9151, paras. 3-6, 23 Comm. Reg. (P & F) 678 (2001) [hereinafter *Compensation for ISP-bound Traffic*], *rev'd and remanded sub nom.* WorldCom v. FCC, 288 F.3d 429 (D.C. Cir. 2002) (holding that Commission lacks authority under 47 U.S.C. § 251(g) and remanding for further proceedings but not vacating rules).

87. *Compensation for ISP-Bound Traffic*, *supra* note 86, para. 8 (setting rate caps and total ISP-bound minutes for which LEC may receive compensation in the interim period).

access charges for terminating access services) are subject to rate regulation because they are dominant carriers. These rules are imposed by the Commission on the basis of differences in market power. The authority to regulate market power flows from the Commission's statutory mandate to ensure that consumers are protected against unfair and discriminatory pricing, which market power can promote. Thus, disparate treatment based on whether or not a carrier has market power continues to exist as a well-established feature of communications law.

Differences also exist with respect to intercarrier compensation and may prove difficult to eliminate. As the Commission has recognized, these issues are inextricably intertwined with access charge reform and reform of universal services funding.[88] In March, 2004, the Commission sought additional comment on this issue.[89]

3. Jurisdictional Differences

The FCC has exclusive authority over CMRS rates, although the states may petition the FCC to permit state rate regulation under certain conditions. Authority to regulate rates for wireline telecommunications is shared between states, who have jurisdiction over intrastate rates, and the FCC, which has jurisdiction over interstate rates. In these cases, the extent of rate regulation may vary.

III. VIDEO SERVICES

A. Background

Video services providers such as broadcasters, cable operators, and Direct Broadcast Satellite ("DBS") providers deliver content to viewers using different technologies.[90] Broadcasting is provided free of charge to

88. *See, e.g.*, *Intercarrier Compensation NPRM*, *supra* note 74, para 7 n.6.

89. IP-Enabled Services, *Notice of Proposed Rulemaking,* FCC Docket No. 04-28 paras. 61-63 (March 10, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf [hereinafter *VOIP NPRM*].

90. "Broadcasting" is "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(6) (2000). "Cable service" is "the one-way transmission to subscribers of . . . video programming . . . [and the] subscriber interaction . . . which is required for the selection or use of such . . . programming . . . ." *Id.* § 522(6). "Direct Broadcast Satellite service" is "a radio communication service in which signals from earth are retransmitted by high power, geo-stationary satellites for direct reception by small, inexpensive earth terminals." Application of Satellite TV Corp. for Auth. to Construct an Experimental Direct Brdcst. Satellite Sys., *Memorandum Opinion and Order*, 91 F.C.C.R. 953, para. 1 n.2, 53 Rad. Reg.2d (P & F) 431 (1982). Other technologies that may become significant video services providers or distributors in the future are not discussed in this Article. *See, e.g.*, Amendment

viewers; cable and DBS are subscription services. Cable and DBS are multichannel systems; broadcast stations generally occupy a single channel. DBS and some cable systems offer hundreds of digital channels; most broadcasters and other cable operators do not.

1. Broadcast Television

The FCC sets the initial rules for assigning broadcast licenses, sets rules for transferring or renewing licenses, and establishes the public interest obligations, if any, that are imposed on licensees.[91] State authority is limited to issues on which the FCC has not acted (e.g., advertising by doctors and lawyers).[92]

In exchange for obtaining use of the spectrum without charge, broadcasters are considered as "public trustees" with special obligations.[93] In a landmark case, *Red Lion Broadcasting v. FCC*, the Supreme Court held that, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[94] Until the 1980s, several FCC rules directly regulated content to some extent. For instance, the FCC required broadcasters to ascertain the programming desires of the community as a condition for license renewal.[95] In 1984, however, the Commission concluded that broadcast television programming should be substantially deregulated to permit "marketplace forces, not [FCC]

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of Parts 2 and 25 of the Comm'n's Rules to Permit Operation of NGSO FSS Systems, *Memorandum Opinion and Order and Second Report and Order*, 17 F.C.C. R. 9614, paras. 126-138, 141 (2002) (authorizing 500 MHz of spectrum in the 12.2 to 12.7 GHz band for fixed satellite service operators to provide multichannel video distribution of local television programs to compete with cable TV and DBS operators).

91. STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 62-64 (2001) [hereinafter TELECOMMUNICATIONS LAW AND POLICY].

92. *See* FEDERAL BROADBAND LAW, *supra* note 6, at 176.

93. TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 157.

94. 395 U.S. 367, 390 (1969). By contrast, in a case involving a newspaper, the Court said:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 258 (1974).

95. *See* CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET, para. 3.12 (2003) [hereinafter TELECOMMUNICATIONS REGULATION].

guidelines," to determine what programs to air on commercial television.[96] Similarly, until it was suspended in 1985 and repealed in 1987, the Fairness Doctrine required broadcasters to present contrasting viewpoints ("balanced" coverage) on controversial issues of interest to the community.[97] In addition, the Commission has since repealed the "personal attack" and "political reply" rules.[98]

2. Cable Services

Although the FCC asserted jurisdiction over cable as early as 1966, Congress first granted explicit authority in the 1984 Cable Act.[99] Subsequently, in 1992 and 1996, Congress added to the federal responsibility over several specific cable issues. Today, the FCC sets rules for "must carry," ownership limits, pole attachments, technical standards, rate regulation, and leased channel access.

Congress created a complex relationship that divides responsibility between the FCC and the local franchising authorities ("LFAs") with respect to rate regulation and franchising.[100] The FCC and the LFAs are not authorized to regulate rates outside the basic tier. LFAs may regulate a cable system's monthly charges for basic service and equipment leasing, unless the FCC finds that the cable system is subject to "effective competition."[101] Similarly, LFAs issue cable franchises but are constrained by federal law from exercising this authority to unreasonably refuse to

96. Commercial TV Stations, *Report and Order (Proceeding Terminated)*, 98 F.C.C.2d 1076, para. 19, 56 Rad. Reg.2d (P & F) 1005 (1984); *see also* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 157-58 (discussing FCC retreat from programming regulation).

97. Fairness Doctrine, *Report (Proceeding Terminated)*, 102 F.C.C.2d 145, 58 Rad. Reg.2d (P & F) 1137 (1985); Complaint of Syracuse Peace Council, *Memorandum Opinion and Order*, 2 F.C.C.R. 5043, para. 61, 63 Rad. Reg.2d (P & F) 541 (1987) ("the fairness doctrine in operation disserves both the public's right to diverse sources of information and the broadcaster's interest in free expression").

98. Repeal or Modification of the Personal Attack and Political Editorial Rules, *Order (Proceeding Terminated)*, 15 F.C.C.R. 20697 (2000); *see also* Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557 (2001).

99. Prior to 1984, the FCC asserted that cable regulation was necessary as "ancillary" to its authority to regulate broadcasting. The Supreme Court upheld this assertion of "ancillary" authority in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television,* 44 LAW & CONTEMP. PROBS. 77 (1981), *excerpted in* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 380-390.

100. *See generally* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 413-440; TELECOMMUNICATIONS REGULATION, *supra* note 95, at ch. 13, sec. A.

101. 47 U.S.C. § 543(a)(2) (2000).

renew franchises,[102] collect excessive franchise fees,[103] or grant exclusive franchises.[104]

The courts have not extended the *Red Lion* analysis to cable operators but have permitted numerous regulatory restrictions that may limit the programming they carry. For instance, the courts have upheld the FCC's "must-carry" rules that require cable operators to allocate channel capacity to local broadcast stations.[105] Similarly, the courts held that national cable ownership limits tailored to promote diversity and preserve competition do not violate the First Amendment.[106]

3. DBS

The Commission approved the first license for DBS in 1982[107] and declined to apply public interest obligations or almost any other regulations to the new service.[108] In 1988, Congress enacted the Satellite Home Viewer Act ("SHVA"), which included an exemption permitting satellite carriers to deliver network programming to "unserved households" without the copyright owner's permission.[109] In 1992, Congress required DBS providers to reserve four percent to seven percent of channel capacity for "noncommercial programming of an educational or informational nature."[110] Congress also required the Commission to impose public interest obligations on DBS providers, including, at a minimum, the broadcast time requirement and the use of facilities requirements.[111] In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"), which adopted changes in several areas, including retransmission consent, must-carry, and retransmission of local broadcast

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102. *Id.* § 546.
103. *Id.* § 542.
104. *Id.* § 541.
105. Turner Brdcst. Sys. v. FCC, 512 U.S. 622 (1994).
106. Time Warner Entm't v. U.S., 211 F.3d 1313 (D.C. Cir. 2000). Subsequently, however, the D.C. Circuit overturned the Commission's numeric ownership cap as arbitrary, and remanded the matter to the FCC for further proceedings. Time Warner Entm't v. U.S., 240 F.3d 1126 (2001).
107. Satellite TV Corp., *Memorandum Opinion & Order*, 91 F.C.C.2d 953, 53 Rad. Reg.2d (P & F) 431 (1982). *See generally* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 541-544.
108. Subscription Video, *Report and Order*, 2 F.C.C.R. 1001, 62 Rad. Reg.2d (P & F) 389 (1987).
109. 17 U.S.C. § 119 (2000).
110. 47 U.S.C. § 335(b) (2000).
111. *Id.* § 335(a).

signals.[112] Until SHVIA, DBS providers were prohibited from offering subscribers access to local TV stations pursuant to the compulsory copyright licensing process.[113] In 2004, the Commission reaffirmed that it has authority to auction DBS licenses because the licenses are used to provide a domestic service and therefore are not subject to the statutory prohibition against auctioning spectrum for international satellite services.[114]

B. Regulatory Issues

1. Content Restrictions

Content-related regulation of broadcasters exists in three areas. First, FCC guidelines require broadcasters to offer programs at least three hours a week that serve the educational and informational needs of children under sixteen.[115] Broadcasters must file quarterly reports describing the children's educational programming they offer.[116] FCC rules also limit the use of commercials during children's programming.[117] Second, broadcasters cannot refuse to sell airtime to political candidates.[118] Also, sponsors of political advertising must be identified.[119] Third, licensees are prohibited from broadcasting obscene material at any time[120] and indecent material between 6 a.m. and 10 p.m.[121] The FCC is authorized to impose forfeitures for any violations of its obscenity and indecency rules.[122] Additionally, broadcasters are subject to a voluntary ratings system that offers parental

112. *Id.* § 338; *see* Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues, *First Report and Order*, 15 F.C.C.R. 5445, 5447, 19 Comm. Reg. (P & F) 1151 (2000).

113. Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, *Report and Order*, 16 F.C.C.R. 1918, 22 Comm. Reg. (P & F) 655 (2000) [hereinafter *DBS Broadcast Signal Carriage Issues*].

114. Auction of Direct Broadcast Satellite Licenses, *Order*, 19 F.C.C.R. 820, para. 12 (2004).

115. 47 C.F.R. § 73.671 (2002); *see* Policies and Rules Concerning Children's TV Programming, 11 F.C.C.R. 10660, 3 Comm. Reg. (P & F) 1385 (1996).

116. 47 C.F.R. § 73.673.

117. *Id.* § 73.670 (allowing no more than 10.5 minutes per hour during weekends and 12 minutes per hour during the week).

118. 47 U.S.C. § 312(a)(7) (2002); 47 C.F.R. § 73.1944.

119. 47 C.F.R. § 73.1212.

120. *Id.* § 73.3999(a).

121. *Id.* § 73.3999(b); *see* Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Brdcst. Indecency, *Policy Statement*, 16 F.C.C.R. 7999, 23 Comm. Reg. (P & F) 857 (2001).

122. 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D) (2000).

guidance on sexual, violent, and indecent content; and all TV equipment manufacturers are required to install V-chips in TV sets.[123]

Cable operators are also subject to several content-related prohibitions. These rules apply only to the content of programming generated entirely by cable operators and not to retransmitted broadcast station signals.[124] First, although cable operators are not required to carry children's programming, they must limit the use of commercials during any children's programming they do carry, and they must keep records of such programming available for public inspection.[125] Second, cable operators are not required to sell airtime to political candidates, but if they sell advertising to any candidate, they cannot refuse to sell to other candidates.[126] Also, sponsors of political advertising must be identified.[127] Third, cable operators may transmit sexually explicit programming.[128]

DBS providers must permit political candidates to purchase "reasonable access" to DBS service.[129]

2. Access

Cable operators face several requirements to make channel capacity available.[130] First, local franchising authorities typically require a certain number of channels designated for use at no charge for public, educational, or governmental ("PEG") use.[131] Second, cable operators are required to set aside certain channels for lease by unaffiliated third parties[132] and are

123. Tech. Requirements to Enable Blocking of Video Programming Based on Program Ratings, *Report and Order*, 13 F.C.C.R. 11248, 11 Comm. Reg. (P & F) 907 (1998); *see* TELECOMMUNICATIONS REGULATION, *supra* note 95, para. 3.20.

124. *See* TELECOMMUNICATIONS REGULATION, *supra* note 95, at para. 8.06.

125. 47 C.F.R. § 76.225 (allowing no more than 10.5 minutes per hour during weekends and 12 minutes per hour during the week).

126. *Id.* § 76.205(a).

127. *Id.* § 76.1212.

128. *Id.* § 76.227 (section removed and reserved 2002); *see* U.S. v. Playboy Entm't Group, 529 U.S. 803, 827 (2000) (holding unconstitutional statute, 47 § U.S.C. 561, which required cable operators to scramble sexually explicit programming, on the grounds that less restrictive alternatives were available).

129. 47 C.F.R. § 25.701(b) (requiring compliance with 47 U.S.C. § 312(a)(7)).

130. Cable operators must also make satellite-delivered cable or satellite-delivered broadcast programming available to their competitors such as DBS providers. 47 U.S.C. § 548(b) (prohibiting exclusive contracts); *see* Implementation of the Cable TV Consumer Protection & Competition Act of 1992, *Report and Order*, 17 F.C.C.R. 12124, paras. 77-80 (2002) (extending prohibition on exclusivity until October 5, 2007).

131. 47 U.S.C. § 531 (2000); *see* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 430.

132. 47 U.S.C. § 612.

permitted to charge the third parties fees for leased access.[133] Parties unable to obtain access may seek judicial relief.[134] Third, cable systems with more than thirty-six channels must carry local broadcast TV stations (commercial and noncommercial) requesting carriage (with some exceptions to avoid duplication of signals).[135] Stations within a cable system's "designated market area" are considered local stations for must-carry purposes.[136] Cable systems must carry the broadcast signal in its entirety and without material degradation.[137] Cable operators cannot accept payments from broadcasters who elect must-carry[138] for carrying the signal or channel positioning.[139] The FCC is authorized to resolve disputes between cable operators and television stations, and to do so in expedited proceedings.[140] Broadcasters are also entitled to cable carriage of digital signals instead of analog signals.[141] However, an ongoing proceeding includes review of whether "dual carriage" of analog and digital signals should be required during the transition to digital broadcasting.[142]

If broadcasters elect not to exercise must-carry rights, they may seek to charge cable operators for the right to retransmit broadcast signals. Broadcasters may also waive charges or negotiate for other rights, e.g., cable carriage of a broadcaster's cable programs.[143] Three further limitations apply: (1) a local broadcaster may prevent a cable operator from showing a distant broadcaster's programs for which the local broadcaster has obtained exclusive rights,[144] (2) a broadcaster may similarly block

133. *See* TELECOMMUNICATIONS REGULATION, *supra* note 95, para. 15A.06[7].

134. 47 U.S.C. § 532(d).

135. 47 C.F.R. § 76.56 (smaller systems are required to carry fewer channels).

136. *Id.* § 76.55(e).

137. *Id.* § 76.62(b). Subsequently, the Commission clarified that only "program-related" content must be carried, thus excluding Electronic Program Guides. Gemstar Int'l Group, Ltd. & Gemstar Dev. Corp., *Memorandum Opinion and Order*, 16 F.C.C.R. 21531, 25 Comm. Reg. (P & F) 333 (2001).

138. Broadcasters who choose the retransmission consent option, instead of exercising their rights under the "must-carry" regime, are entitled to negotiate payment arrangements. 47 C.F.R. § 76.60(c).

139. *Id.* § 76.60. Channel positioning refers to the cable system number that is assigned to broadcast stations and cable networks.

140. 47 U.S.C. § 534(d) (2000); 47 C.F.R. § 76.61.

141. Petition for Declaratory Ruling that Digital Brdcst. Stations Have Mandatory Carriage Rights, *Memorandum Opinion and Order*, 16 F.C.C.R. 2692, para. 2, 23 Comm. Reg (P & F) 582 (2001).

142. Carriage of Digital TV Brdcst. Signals, *First Report and Order and Further Notice of Proposed Rule Rulemaking*, 16 F.C.C.R. 2598, paras. 8-26 (2001) [hereinafter *Carriage of Digital TV Broadcast Signals*].

143. *See* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 453-56 (discussing different strategies available to broadcast stations).

144. 47 C.F.R. § 76.101 (2002) (syndicated exclusivity).

network programming for which the broadcaster has obtained exclusive rights, [145] and (3) sports blackout rules apply.[146]

DBS providers must set aside four percent of their channel capacity for noncommercial educational programming.[147] In addition, as a result of the SHVIA Act of 1999 and the FCC's implementing rules, DBS providers are subject to a modified "must-carry" requirement that is generally described as "carry one, carry all."[148] This requirement is triggered only if DBS providers use the statutory copyright license to retransmit a local broadcast station. In short, if a DBS provider voluntarily decides to carry one local station in a market under the statutory license scheme, it is required to carry all requesting stations in that market.[149] Subsequently, the Commission adopted rules applying the network nonduplication, syndicated exclusivity, and sports blackout rules to DBS providers.[150]

3. Structural Limits

Structural limits have long been a feature of communications regulatory policy. Over the years, the Commission has modified broadcast ownership limits on several occasions.[151] In July, 2003, in the *Biennial Review*, the Commission adopted several changes to its media ownership rules. The Commission raised the national ownership cap from thirty-five percent of the national audience to forty-five percent, eliminated prohibitions on cross-ownership of newspapers and broadcast TV stations in the same market, eliminated prohibitions on cross-ownership of radio and television stations in the same market, modified the local TV multiple ownership rule,[152] and retained the dual network rule.[153] Subsequently,

145. *Id.* § 76.92 (network nonduplication).

146. *Id.* § 76.111 (sports blackout).

147. 47 C.F.R. § 25.701(c).

148. *DBS Broadcast Signal Carriage Issues*, *supra* note 113, paras. 3-5, 22. The Fourth Circuit Court of Appeals upheld the constitutionality of this requirement. Satellite Brdcst. & Comm. Ass'n v. FCC, 275 F.3d 337 (2001).

149. *DBS Broadcast Signal Carriage Issues*, *supra* note 113, paras. 14-15.

150. *Carriage of Digital TV Broadcast Signals*, *supra* note 142; *see* 47 C.F.R. §§ 76.120-76.130.

151. *See* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 313-14.

152. The modified rule permits ownership of two stations in markets with seventeen or fewer TV stations and up to three stations in markets with eighteen or more TV stations. However, a single entity is not permitted to own more than one station among the top four stations in any market based on audience share.

153. 2002 Biennial Reg. Rev., *Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, paras. 132-134 (local TV), 235-239 (local radio), 328-330 (newspaper/broadcast cross-ownership), 370-371 (radio/TV cross-ownership), 500-501 (national TV), and 621 (dual network) (2003). The modified local TV rule permits ownership of two stations in markets with seventeen or fewer TV stations, and up to three

Congress set the national broadcast TV limit at thirty-nine percent of the national audience.[154]

As a result of judicial action, the prior rule prohibiting common ownership of a broadcast TV station and cable operator in the same market has been eliminated.[155] As with all transfers of spectrum licenses, the Commission is required to determine that foreign ownership exceeding twenty-five percent serves the public interest.[156]

Cable operators also face structural limits. In the Cable TV and Consumer Protection Act of 1992, Congress directed the Commission to set rules "establishing reasonable limits on the number of cable subscribers a person is authorized to reach."[157] Congress identified specific guidelines the Commission should consider in setting these numerical limits. Applying these guidelines, the Commission set the following limits: a cable operator could have an attributable interest in cable systems serving up to thirty percent of national subscribers[158] and forty percent of channel capacity.[159] In 1999, the Commission adopted new rules for calculating the cable operator's ownership interests for attribution purposes.[160] In 2001, the D.C. Circuit Court of Appeals struck down the national subscriber and channel occupancy limits as arbitrary.[161] In 2001, the Commission began new proceedings to implement the statutory directive on cable ownership.[162]

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stations in markets with eighteen or more TV stations. However, a single entity is not permitted to own more than one station among the top four stations in any market based on audience share. *Id.* paras.132-134; *see also* Sinclair Brdcst. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) (holding that under the Commission's prior local TV rules, adopted in 1999 and vacated in 2002, the same entity may own two commercial TV stations in the same market provided that both stations are not ranked in the top four, and there are at least eight other independent stations in the same market). The dual network rule permits multiple ownership of TV networks but prohibits one of the top four networks (i.e., ABC, CBS, Fox, or NBC) from buying another of the top four networks.

154. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

155. Fox TV v. FCC, 280 F.3d 1027, 1034 (D.C. Cir. 2002). The rule was codified at 47 C.F.R. § 76.501(a) (2002).

156. 47 U.S.C. § 310(b)(4) (2000).

157. *Id.* § 553(f)(1)(A).

158. 47 C.F.R. § 76.503(a) (2000).

159. *Id.* § 76.504(a).

160. *See* Implementation of Section 11(c) of the Cable TV Consumer Protection and Competition Act of 1992, *Third Report and Order*, 14 F.C.C.R. 19098, 17 Comm. Reg. (P & F) 1158 (1999).

161. Time Warner Entm't v. U.S., 240 F.3d 1126 (D.C. Cir. 2001). As noted, however, the court had upheld the constitutionality of national subscriber limits. Time Warner Entm't v. U.S., 211 F.3d 1313 (D.C. Cir. 2000).

162. Implementation of Section 11 of the Cable TV Consumer Protection and

The 1996 Act eliminated prohibitions on telephone companies offering cable services but limited cross-ownership in the same market.[163] Thus, LECs cannot acquire more than ten percent of a cable operator in their local markets, except in certain rural and smaller markets.[164] Cable operators, similarly, may not own more than ten percent of a LEC in its franchise area.[165] The Act, however, creates exceptions for rural areas and certain competitive markets.[166] In addition, the Commission is authorized to grant waivers if enforcement of these provisions would cause "undue economic distress" to the cable operator or LEC.[167]

There is no prohibition on ownership of DBS by cable operators, but the FCC adopted a "one-time" rule in 1995 that prohibited a cable operator with an attributable interest in DBS channels at one orbital location from acquiring an attributable interest in channels at another orbital location without divesting its prior interest.[168] In addition, the Commission recently clarified that the foreign ownership rules do not apply to DBS services that are offered as subscription services, because these services are neither common carrier nor broadcast services.[169]

C. Summary and Analysis

There appear to be two sets of regulatory parity issues. First, there are differences in regulatory treatment between broadcasters, on the one hand, and cable and DBS providers, on the other hand. Second, Congress took several steps to require some form of regulatory parity between cable and DBS providers.

Competition Act of 1992, *Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 17312 (2001).

163. 47 U.S.C. § 571 (2000) ("Regulatory treatment of video programming services"); *Id.* § 572 (cross-ownership limits); *see* Thomas G. Krattenmaker, *The Telecommunications Act of 1996,* 49 FED. COMM. L.J. 1, at 13 (1996) (describing repeal of ban and option to choose "open video systems" regulations).

164. 47 C.F.R. §§ 76.505(a), (d).

165. 47 U.S.C. § 572(b).

166. 47 U.S.C. § 572(d).

167. *Id.* § 572(d)(6).

168. Revision of Rules and Policies for the Direct Brdcst. Satellite Serv., *Report and Order*, 11 F.C.C.R. 9712, para. 62, 1 Comm. Reg. (P & F) 928 (1995) [hereinafter *DBS Auction Order*].

169. Policies and Rules for the Direct Brdcst. Satellite Serv., *Report and Order*, 17 F.C.C.R. 11331, paras. 33-34, 27 Comm. Reg (P & F) 1 (2002) [hereinafter *DBS Report and Order*]. DBS licensees previously were required to obtain waivers. 47 C.F.R. § 100.11 (repealed 2002).

1. Statutes

It is striking that there are so few content restrictions of any sort on video services providers. To the extent they exist, however, content restrictions (e.g., indecency restrictions) are greater on broadcasters than on cable operators or DBS providers. The oft-stated justification is that these differences reflect the differences in the levels of constitutional protection for the various transmission platforms, particularly the *Red Lion* rationale that spectrum scarcity permits greater regulation of broadcast content. Thus, as a result of choices made by Congress and sanctioned by the judicial branch, cable and DBS providers are free from content restrictions that apply to broadcasters.[170] These differences are likely to remain until the Supreme Court decides to revisit *Red Lion*.[171] With respect to the other content restrictions (e.g., political advertising, children's TV), similar rules apply to all providers.

Another statutorily-imposed difference concerns access requirements, which apply to cable and DBS providers (who control access to multiple channels), but not to broadcasters (who control access to only one channel). Cable companies challenged the statutes in court, arguing that "must-carry" violates their First Amendment rights to choose their own programming but the Supreme Court rejected those claims on the grounds that ensuring the survival of broadcast TV was a valid statutory purpose.[172]

In several respects, Congress has sought to put cable and DBS providers on an equal footing. For instance, as noted, both cable and DBS providers are required to offer broadcast signal carriage.[173] Congress also enacted SHVIA to give DBS providers the same rights as cable operators to offer local programming to their customers.[174] In addition, Congress

170. *See* HARVEY L. ZUCKMAN ET AL, MODERN COMMUNICATIONS LAW 153-159 (1999) (describing and criticizing "variable First Amendment" protection for identical program depending on the transmission source).

171. *See, e.g.*, Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687, 1700 (1997); Monroe E. Price, Red Lion *and the Constitutionality of Regulation: A Conversation Among the Justices, in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST 89-117 (Charles M. Firestone & Amy Korzick Garner eds., 1998) (depicting imaginary conversation using Justices' actual statements in reported decisions).

172. Turner Brdcst. Sys. v. FCC, 520 U.S. 180, 197 (1997) ("Congress [had] specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets.").

173. The requirements are not exactly alike. Cable operators are required to carry a specified number of local broadcast signals ("must-carry"). DBS providers, by contrast, are not required to carry any broadcast signals, but if they carry one signal they must carry all the signals ("carry one, carry all").

174. *See* TELECOMMUNICATIONS LAW AND POLICY, *supra* note 91, at 544-557 (discussing Congressional efforts to remove disparities between cable and DBS operators).

imposed a public access requirement on DBS providers that is similar to the PEG access requirement often imposed by LFAs on cable operators.

Statutory differences also exist with respect to the national ownership rules that apply to broadcasters and cable operators. Congress set the national TV audience limit at thirty-nine percent but did not specify the limit for cable audience reach; instead, Congress directed the Commission to set "reasonable limits." A significant development on the media ownership front is the almost across-the-board elimination of prohibitions on cross-ownership, as a result of actions taken by Congress, the courts, and the Commission.

2. Jurisdictional Differences

Cable and DBS operators face different entry requirements. Cable operators pay a franchise fee to local franchising authorities; DBS operators do not pay a franchising fee to the FCC, although they may incur substantial expenses in acquiring spectrum at auction.

IV. DATA SERVICES

A. Background

> All the important legal issues in the new telecosm cut across technology and traditional categories of service. The telecosm today encompasses television, cable, and telephone. It spans wireline and wireless. It is under ground, in the air, and in geosynchronous orbit. It doesn't move voice, video, or data: it moves bits. [175]

With the advent of digital data transmissions and the explosive growth of the Internet, data networks are becoming the networks over which all communications services can be offered. Particularly on broadband digital channels, "data encompasses everything."[176] Determining the appropriate regulatory framework for data networks is one of the most significant challenges facing communications policymakers.[177]

175. FEDERAL BROADBAND LAW, *supra* note 6, at xxv.

176. *See* FEDERAL TELECOMMUNICATIONS LAW*, supra* note 11, at 984 ("[D]ata inmates are taking over the regulatory asylum.").

177. *See e.g.*, Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11501, 11624 (1998) (concurring statement of Commissioner Michael K. Powell) ("Sorting hybrid services into their appropriate regulatory bin is difficult, yet something we will be forced to do more and more as new and innovative services explode from the fuel of IP networks. This reflects the growing challenge of adapting a balkanized regulatory structure to a world of technological convergence.").

"Data services" is not a statutorily-defined term.[178] Instead, the Commission has developed various policies for different types of data services. This Article first discusses the rules for "enhanced services," which the Commission determined should be applied to the statutory category of "information services."[179] The rules for narrowband information services offered by telecommunications carriers are discussed in Part IV.B.1. Rules for regulating broadband services offered by telecommunications carriers[180] and cable operators[181] are also discussed in this Part. Next, the Article discusses rules for other types of data services provided by broadcasters, DBS providers, and wireless telecommunications carriers. The rules for these services are discussed in Part IV.B.2.

B. Regulatory Issues

1. Information Services

a. Narrowband Internet Access

Under the *Computer II* rules, all facilities-based carriers who offer interstate information services are required to offer the transmission component of their service as a separate tariffed service.[182] They are also required to acquire transmission services for their own service at tariffed rates. These requirements apply alike to dominant and nondominant

178. As used in this Article, "data services" refer to narrowband and broadband Internet access, as well as the ancillary services provided by CMRS carriers, broadcasters, and DBS providers.

179. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272, of the Comm. Act of 1934 as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, para. 103, 5 Comm. Reg. (P & F) 696 (1996) ("[A]ll enhanced services are information services, [but] not all information services are enhanced services."). "Information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . ." 47 U.S.C. § 153(20) (2000); *see* Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11501, paras. 39, 59, 11 Comm. Reg. (P & F) 1312 (1998).

180. Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, paras. 32-37 (2002) [hereinafter *Wireline Broadband Notice*].

181. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798 (2002) [hereinafter *Cable Modem Declaratory Ruling*].

182. 47 C.F.R. § 64.702 (2002); *see* Second Computer Inquiry, *Final Decision*, 77 F.C.C.2d 384, 47 Rad. Reg.2d (P & F) 669 (1980) [hereinafter *Computer II*]. *See generally* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 1107-29.

carriers.[183] Facilities-based carriers were initially required, under the *Computer II* rules, to offer information services through a separate subsidiary, but are now permitted to offer services if they adopt nonstructural safeguards.[184]

Under the nonstructural safeguards approach, a facilities-based carrier is required to unbundle its local network ("open network architecture" or "ONA") and interconnect with unaffiliated providers on the same terms as it interconnects with its own information service affiliates ("comparably efficient interconnection" or "CEI").[185]

b. Broadband Internet Access

There are several major ongoing proceedings to determine the classification and appropriate regulatory treatment of broadband services offered over DSL lines and cable modems. In December 2001, the FCC initiated a proceeding to determine whether ILECs should be reclassified as nondominant providers of broadband telecommunications services.[186] If ILECs are reclassified as nondominant providers of broadband telecommunications services, they may be exempt from tariff and other requirements for these services. In December, 2002, the Commission decided to forbear from requiring SBC Communications to file tariffs for advanced services provided through its affiliate, but the Commission deferred action on SBC's petition to be declared nondominant in the provision of advanced services.[187]

183. *Wireline Broadband Notice*, *supra* note 180, para. 42; *see* Policy and Rules Concerning the Interstate, Interexch. Marketplace, *Report and Order*, 16 F.C.C.R. 7418, paras. 39-46, 23 Comm. Reg. (P & F) 641 (2001) [hereinafter *Marketplace Policy and Rules*]; Independent Data Comm. Mfrs. Ass'n, Inc., *Memorandum Opinion and Order*, 10 F.C.C.R. 13717, paras. 42-46, 1 Comm. Reg. (P & F) 409 (1995).

184. 47 C.F.R. § 64.702. *See generally* FEDERAL TELECOMMUNICATIONS LAW*, supra* note 11, at 1107-29.

185. Third Computer Inquiry, *Report and Order*, 104 F.C.C.2d 958, para. 343, 60 Rad. Reg.2d (P & F) 603 (1986) [hereinafter *Computer III*]. This unbundling requirement formed the genesis of the Section 251 unbundling requirement in the Telecommunications Act of 1996. *See* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 1097-1100.

186. Review of Reg. Requirements for Incumbent LEC Broadband Telecomm. Servs., *Notice of Proposed Rulemaking*, 16 F.C.C.R. 22745 (2001).

187. Review of Reg. Requirements for Incumbent LEC Broadband Telecomm. Servs., *Memorandum Opinion* ***and*** *Order*, 17 F.C.C.R. 27000, para. 1 (2002). The Commission's authority to forbear from enforcing certain laws is found in found in the Communications Act. *See* 47 U.S.C. § 160 (2000). Under this provision, the Commission is required to forbear from enforcing any telecommunications regulation if it finds that enforcement is unnecessary to ensure that: (a) rates are reasonable, just and nondiscriminatory; (b) consumers are protected; and (c) the public interest is served. *Id.* Furthermore, Congress expressly excluded sections 251(c) (unbundling) and 271 (long-distance entry) from this authority. *Id.* § 160(d).

In February 2002, in the *Wireline Broadband Notice*, the Commission tentatively concluded that an entity offering wireline broadband Internet access over its own facilities is offering an "information service."[188] The Commission also tentatively concluded that "in the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications, and not a telecommunications service."[189] The Commission also tentatively concluded that a carrier is providing a telecommunications service to the extent it is providing only broadband transmission on a stand-alone basis, without a broadband Internet access service.[190] The Commission also sought comment on whether the *Computer II* tariffed access requirements should continue to apply to broadband information services.[191] In particular, the Commission sought comment on whether the *Computer II* tariffed access requirements should be imposed only on carriers with market power.[192]

Select Broadband Issues

	DSL Internet access	**Cable Modem Internet access**
Definitions and classifications	NPRM tentatively classifies DSL as an information service and transmission as "telecommunications" but not a "telecommunications service."	FCC classified cable modem service as "information service"; 9th Cir. reversed, held that transmission element of cable broadband service is a telecommunications service.
Regulatory status	ILECs now classified as dominant (under review); affiliates need not file tariffs.	Cable modem services providers are not classified as common carriers.
Unbundling/ open access	Transmission must be unbundled and offered at tariffed rates (policy is under review). No need to unbundle fiber loops. Line-sharing not required. NPRM on whether Title I requirements apply.	NPRM on whether Title I requirements apply.
Universal service	Must include revenues from bundled telecom/ information services offerings, pending further clarification.	Not required to contribute at present but Commission has sought comment on whether to require contributions.

188. *Wireline Broadband Notice*, *supra* note 180, paras. 17-25.
189. *Id.* para. 25.
190. *Id.* para. 26. ILECs are required to offer any requesting carrier unbundled access to network elements for providing a telecommunications service. 47 U.S.C. § 251(c)(3) (2000).
191. *Wireline Broadband Notice*, *supra* note 180, paras. 44-47.
192. *Id.* para. 46.

In March, 2002, in the *Cable Modem Declaratory Ruling*, the Commission classified cable modem Internet access as an "information service."[193] The Commission concluded that cable operators are not required to unbundle the transmission component of cable modem Internet access and offer it to consumers as a stand-alone service.[194] The Commission sought comment on whether it should preempt state laws in three areas that may be affected by the classification of cable modem services as an information service: access requirements, franchise requirements, and franchise fees.[195] The Commission also sought comment on whether any alternative access requirements should be imposed on cable operators under the Commission's Title I authority.[196] The Ninth Circuit Court of Appeals disagreed with the Commission's classification of cable modem services as an information service.[197] Citing its previous ruling in *AT&T v. City of Portland*,[198] the court held that cable broadband service consisted of two elements: a "pipeline" and the Internet service transmitted through that pipeline.[199] Further, the court held that the transmission element of cable broadband service (i.e., the "pipeline") was a "telecommunications service."[200]

In August 2003, in the *Triennial Review Order,* the Commission issued a major ruling on unbundling requirements.[201] First, the Commission reaffirmed that copper loops must be provided on an unbundled basis to any requesting carrier for the provision of narrowband and broadband services.[202] Second, the Commission held that ILECs were not required to unbundle Hybrid Fiber Copper Loops ("HFCL") for providing broadband services.[203] Third, the Commission held that ILECs were not required to unbundle fiber-to-the-home ("FTTH") loops.[204] Last, the Commission held that LECs were not required to offer "line-sharing," i.e., access to the high

193. *Cable Modem Declaratory Ruling*, *supra* note 181, paras. 34-59. The Commission also tentatively concluded that, to the extent cable modem service was classified as a telecommunications service by a court, the Commission would forbear from common carrier regulation of that service. *Id.* para. 95.

194. *Id.*

195. *Id.* para. 99.

196. *Id.* paras. 72-74.

197. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1129, 1132 (9th Cir. 2003).

198. 216 F.3d 871 (9th Cir. 2000).

199. *Brand X Internet Servs*., 345 F.3d at 1129.

200. *Id*.

201. *Triennial Review Order*, *supra* note 49.

202. *Id.* paras. 248-250.

203. *Id.* para. 288. ILECs, however, are required to unbundle HFCLs to the extent necessary to provide voice services. *Id.* para. 296.

204. *Id.* paras. 273-280. ILECs, however, are required to unbundle FTTH to the extent necessary to provide narrowband services. *Id.* para. 277.

frequency portion of copper loops that would be used to provide broadband DSL access.[205] On March 2, 2004, the Court of Appeals for the District of Columbia Circuit upheld these portions of the order.[206]

There are also several efforts underway to reform the universal service contribution methodology to accommodate the growth of new technologies and services. In 2002, the Commission determined that any telecommunications carrier offering interstate telecommunications services, including broadband transmission services on a stand-alone basis to affiliated or unaffiliated end users, including Internet Service Providers ("ISPs"), must contribute for revenues from that service.[207] If interstate telecommunications services, bundled with information services, are offered to consumers, the carrier may elect to contribute on the basis of only the revenue from the telecommunications services or, if it cannot separate such revenue, all revenues from the bundled offering. The Commission recently sought comment on whether these requirements are consistent with its tentative conclusion that wireline broadband Internet access is an "information service."[208] At present, Commission rules do not require providers of cable modem services to contribute to the universal service fund.[209] The Commission has sought comment on whether cable modem providers and other facilities-based providers of broadband services should be required to contribute.[210] In addition, on March 12, 2004, the Commission issued a Notice of Proposed Rulemaking which seeks comment on how the classification of IP-enabled services, including Voice over Internet Protocol ("VoIP") services, would affect the Commission's ability to fund universal service.[211]

205. *Id*. paras. 255-263. However, the Commission adopted a three-year transition period for phasing out the line sharing rules and grandfathered existing line sharing arrangements. *Id*. paras. 264-269.

206. *See* USTA v. FCC, No. 00-1012, 2004 WL 374262, slip op. at 34-46 (D.C. Cir. 2004). The court of appeals, however, reversed other portions of the order on the issue of unbundling switches. *See supra* note 49.

207. *Wireline Broadband Notice, supra* note 180; *see also Marketplace Policy and Rules*, *supra* note 183, paras. 47-54, 23 Comm. Reg. (P & F) 641 (2001).

208. *Wireline Broadband Notice*, *supra* note 180, at paras. 72-74.

209. *See Cable Modem Declaratory Ruling*, *supra* note 181, paras. 41, 110.

210. *Id*. para 110; *see also Wireline Broadband Notice*, *supra* note 180, paras. 79-80.

211. *VOIP NPRM*, *supra* note 89, para. 63.

2. Ancillary Data Services

a. Wireless Data

CMRS providers offer a wide range of mobile data services, including short messaging services, circuit-switched and packet-switched data transmissions, and dedicated data networks.[212] These data services are generally regulated to the same extent that CMRS telecommunications services are regulated, except that CMRS data services are exempt from certain regulations (e.g., local number portability, e-911) that apply only to providers of voice telecommunications services.[213] Cellular and PCS licensees are also permitted to offer their own audio or video programming (e.g., sports, weather, or other information and entertainment) and CMRS data services.[214] CMRS licensees, however, are prohibited from offering broadcast services. This prohibition does not apply, however, to offering video services on a nonbroadcast basis.[215]

b. Broadcast Data

Broadcasters are permitted to offer data services within the main video signals, as well as portions of the spectrum such as the subcarrier bands[216] and the vertical blanking interval[217] that are not used for broadcast purposes, provided they do not interfere with the video transmission.[218] Nonbroadcast data services are also permitted as ancillary or supplementary services on digital TV channels.[219] The Commission exempted these activities from traditional broadcast regulations, such as the requirement to offer airtime to political candidates at low rates,[220] but it

212. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Sixth Report*, 16 F.C.C.R. 13350, 13395-96, 24 Comm. Reg. (P & F) 170 (2001).

213. *See, e.g.*, 47 C.F.R. § 52.21(c) (2002); *Id.* § 52.31; *Id.* § 20.18(a) (2003).

214. *See* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 883.

215. Amendment of the Comm'n's Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Serv., *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8965, para. 25, 3 Comm. Reg. (P & F) 1190 (1996).

216. 47 C.F.R. § 73.667 (2002).

217. *Id.* § 73.646. Such services may include the "transmission of data, processed information, or any other communication in either a digital or analog mode." *See* Amendment of Parts 2, 73, and 76, *Report and Order,* 101 F.C.C.2d 973, para. 3, 57 Rad. Reg.2d 832 (1985) [hereinafter *Vertical Blanking Interval Order*].

218. Digital Data Transmission Within the Video Portion of Brdcst. Station Transmission, *Report and Order*, 11 F.C.C. R. 7799, 3 Comm. Reg. 519 (1996) [hereinafter *Digital Data Transmission*].

219. Advanced TV Sys. and Their Impact upon the Existing TV Brdcst. Serv., *Fifth Report and Order*, 12 F.C.C.R. 12809, paras. 34-36, 7 Comm. Reg. (P & F) 863 (1997) [hereinafter *Advanced Television Systems*].

220. *Digital Data Transmission*, *supra* note 218, para 18.

reserved the right to impose "public interest" requirements "if significant public interest uses of this ancillary transmission technology suggest themselves."[221] To the extent that these nonbroadcast services offer common carrier services, Title II rules may apply, although commentators note that the Commission has rarely enforced these rules.[222] To the extent that ancillary transmissions are a common carrier service, broadcasters are prohibited from exercising control over the content of these services.[223] However, FCC rules require licensees to maintain records of "material transmitted in a broadcast mode," and authorize rejecting any material that is "inappropriate or undesirable."[224]

c. DBS Data

In 1995, the Commission permitted DBS licensees to use the spectrum for ancillary or non-DBS uses provided that at least half of total capacity at a given orbital location was used for DBS service.[225] In June 2002, the Commission removed any restriction on spectrum use for non-DBS services.[226] Such services may utilize the DBS downlink bands in combination with uplink from another service (e.g., fixed satellite services) to offer two-way broadband Internet access.

C. Summary and Analysis

As noted above, in several related major proceedings pending at present, the Commission is reviewing its policies on broadband Internet access. One issue among the many in these proceedings is whether the Commission should seek to achieve "regulatory parity."[227] There is sharp disagreement on this question. ILECs take the position that, "[t]he

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221. *Id; see Advanced Television Systems*, *supra* note 219, para. 34.

222. *See* 47 C.F.R. § 73.667(b) ("TV subsidiary communications services that are common carrier . . . in nature are subject to common carrier . . . regulation."). *But see Vertical Blanking Interval Order*, *supra* note 217, para. 15 (requiring that VBI services be regulated in same manner as teletext, FM subcarriers, and TV aural subcarriers); FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 1058-59 ("Although services delivered over the VBI . . . have been deemed common carrier, the Commission has chosen to forbear from imposing traditional Title II requirements.").

223. *Digital Data Transmission*, *supra* note 218, para. 16.

224. 47 C.F.R. §§ 73.646(d), 73.667(e).

225. *DBS Auction Order*, *supra* note 168, para. 17.

226. *DBS Report and Order*, *supra* note 169, paras. 145-48.

227. *See Cable Modem Declaratory Ruling*, *supra* note 181, para. 85; *Wireline Broadband Notice*, *supra* note 180, para. 6. In addition, legislation was introduced in Congress to require the Commission to develop rules to provide for parity in regulatory treatment of broadband service providers and broadband access services providers. *See* Broadband Regulatory Parity Act of 2002, S. 2430, 107th Cong. 2d Sess. (2002).

continued imposition by the FCC of disparate regulatory burdens that disadvantage ILECs in the competitive broadband marketplace is punitive and unjustified."[228] Not surprisingly, the cable industry takes a different view: "notions of regulatory parity ignore fundamental differences among participants in the broadband marketplace, and take no account of the legacy regulations that have developed over the last half century to deal with the specific marketplace characteristics of such participants."[229] It would be foolhardy to speculate here about how the Commission or the courts will resolve these issues.[230]

Ancillary data services are generally fully deregulated so that there are very few, if any, differences in regulatory treatment.

V. CONCLUSION

The lesson from this survey is that the constraints on the Commission's ability to achieve regulatory parity in communications policy may be underappreciated. In many cases, differential treatment is required by statute, such as with respect to the content restrictions that apply to broadcasters but not to cable or DBS operators,[231] the interconnection and unbundling rules that apply to ILECs but not to CLECs,[232] and the exemption from equal access for CMRS carriers.[233] In these circumstances, the Commission has no authority to require parity. In still other cases, Congress has legislated equal or comparable treatment and the Commission has sought to fulfill this mandate. For example, in Section 332 of the 1996 Act, which requires similar regulatory treatment for all

228. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Comments of United States Telecom Association*, CS Docket No. 02-52, at 7, *available at* http://www.usta.org/filings/2002/dock02-52CablecoverTable.pdf (last visited Apr. 19, 2004); *see also* J. Gregory Sidak et al., *The Empirical Case Against Asymmetric Regulation of Broadband Internet Access*, 17 BERKELEY TECH. L. J. 953 (2002).

229. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Comments of National Cable Telecommunications Association*, CS Docket 02-52, at 41, *available at* http://www.ncta.com/pdf_files/CSDock02-52Comm.pdf (last visited Apr. 18, 2004); *see also* Howard J. Symons et al, *Regulatory Parity Will Always Be Around the Corner*, *in* PRACTICING LAW INSTITUTE, TELECOM DEALS: M&A, REGULATORY AND FINANCING ISSUES 2000, 1192 PLI/CORP 1025, 1038 (2000) ("Adopting a uniform regulatory scheme for all services would prevent policy makers from considering the nuances of individual services and the specific needs of consumers and businesses, and risks misapplying old paradigms to new technologies and services.").

230. For a critical analysis of the major issues, *see* Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 FED. COMM. L. J. 207, 224-241 (2003) [hereinafter Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation*].

231. *See* text accompanying note 170.

232. *See* text accompanying note 51.

233. *See* text accompanying note 63.

providers of "mobile services;"[234] and SHVIA, which aimed to put cable and DBS operators on an equal footing concerning the availability of local broadcast programming, the Commission has sought to achieve regulatory parity.[235]

Another obstacle to achieving regulatory parity is that the Commission may lack jurisdiction over particular services and providers.[236] For instance, there may be disparities in the licensing fees and entry conditions applicable to DBS operators, who are licensed by the Commission, and cable operators, who are licensed by local franchising authorities. This issue may also arise in the context of broadband Internet access to the extent that ILECs (who are DSL providers) must comply with regulatory requirements like tariffing and reporting rules imposed by the FCC and state commissions, while cable companies (who are cable modem service providers) must comply with an entirely different set of requirements (e.g., franchising fees, public access channels) imposed by LFAs.

Perhaps the most significant barrier to achieving regulatory parity is that it is rarely the case that two types of providers are so alike that they must be treated in exactly the same manner. "Parity" is raised as an issue when one party falls squarely within the terms of a rule and the other party does not, but the argument is made that "fairness" or "a level playing field" or some similar value demands that the two parties should be treated equally.[237] In these cases, there is often a stalemate when one side argues that regulatory parity should apply and the other side responds that it should not apply because the services are not similar. Trying to achieve parity in these circumstances may induce paralysis in policymaking. A better approach would be to resolve the issues on the basis of specific rules

234. *See* text accompanying note 19.

235. *See* text accompanying note 113. Congress, similarly, may have sought to achieve parity when it required DBS operators to make channel capacity available for "non-commercial programming of an educational or informational nature," in much the same manner that LFAs require cable operators to make capacity available for public, educational, and governmental access. 47 U.S.C. § 335(b) (2000). *See* text accompanying notes 110 and 131.

236. By contrast, the Commission may be able to achieve uniformity by exercising federal preemption authority in cases where a particular service falls within the Commission's jurisdiction. *See generally* FEDERAL TELECOMMUNICATIONS LAW, *supra* note 11, at 240-256; ZUCKMAN ET AL, *supra* note 170, at 761-768 (1999).

237. *See, e.g.,* Antonia M. Apps & Thomas M. Dailey, *Non-Regulation of Advanced internet Services*, 8 GEO. MASON L. REV. 681, 682-683 (2000) ("[I]t is difficult to understand why different technologies should trigger different regulatory requirement for the same service.").

or policies, rather than to seek to eliminate alleged disparities.[238] In legal terms, this suggests a focus on "rights" rather than "equality." [239] It is unlikely, however, that policy advocates will banish the term "regulatory parity" from their working repertoire. Like the term "equality," [240] the term

238. An alternative to the options discussed in the text is to engage in a wholesale revision of communications laws to accommodate network convergence. *See* Benjamin Lipschitz, *Regulatory Treatment of Network Convergence: Opportunities and Challenges in the Digital Era*, 7 MEDIA L. & POL'Y 14, 19 (1998) ("Underlying the network convergence environment is the pending demise of the massive governmental regime—a legacy of redundant and sometimes inconsistent schema, that has spawned and nurtured the disparate network industries.); M. Anne Swanson & J. G. Harrington, *The Future of Telecommunications (As We Know It)—Blurred Boundaries and Jurisdictional Conflicts*, *in* PRACTICING LAW INSTITUTE, 17TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS POLICY & REGULATION, 584 PLI/Pat 139, 145 (1999) (regulators "will be forced to determine not only what is subject to traditional telecommunications regulation and what is not, but also to determine whether other obligations must be applied to new hybrid services"); Lisa Blumensaadt, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 292 (2000) ("As delivery of services converges over an increasing number of transmission media, it becomes increasingly arbitrary to regulate according to the underlying transmission medium over which the service happens to be delivered."); Rob Frieden, *Regulatory Opportunism in Telecommunications: The Unlevel Playing Field*, 10 COMMLAW CONSPECTUS 81, 99 (2001) ("Governments should not automatically extend the application of legacy regulatory regimes to Internet-mediated equivalent services."); Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation*, *supra* note 230, at 245 ("A better way to consider the appropriate regulatory regime lies in the distillation of convergent services along a horizontal plane. . . ."); Philip J. Weiser, *Toward A Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L. REV. 41, 41 (2003) ("Over time, the FCC will thus need to shift its focus from specific regulatory approaches based on the particular technology platform. . . to a "layered" model" of telecommunications regulation that regulates functionally similar services in the same way regardless of the underlying technology platform."); James B. Speta, *FCC Authority to Regulate the Internet*, 35 LOY. U. CHI. L.J. 15 (2004) (discussing limits of FCC's Title I authority).

239. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 593 (1982) (distinguishing between "rights" and "equality"). Professor Westen's response to critics who argue that "equality" is needed to ensure fairness in the administration of rules is worth noting:

> It is true that rules should be applied equally, consistently, and impartially, if by "equally," "consistently," and "impartially" one means the tautological proposition that the rule should be applied in all cases to which the terms of the rule dictate that it be applied. But it is wrong to think that, once a rule is applied in accord with its own terms, equality has something additional to say about the scope of the rule—something that is not already inherent in the substantive terms of the rule itself. To say that a rule should be applied "equally," "consistently," or "uniformly" means simply that the rule should be applied to the cases to which it applies.

Id. at 551 (footnotes omitted). *But see* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983) (noting that although Professor Westen establishes that equality is insufficient to resolve moral and legal controversies, equality is a morally valuable concept for other reasons).

240. Westen, *supra* note 239 at 593 ("[V]alues asserted in the form of equality tend to

"regulatory parity" has a powerful effect on listeners. In addition, this is a favorite among economists.[241] Thus, regulatory parity arguments will continue to be made. These arguments would be more effective, however, if they specify the source of the alleged disparity. If the disparity results from action taken by Congress, the Commission has no discretion to change the law. If the disparity stems from the actions taken by states or localities, the Commission's ability may be similarly circumscribed. The strongest arguments are likely to be those that seek to apply a rule to two closely situated parties, in areas where a policymaker has the discretion to act. If the comparison is made between two services that are not closely similar, are regulated by different jurisdictions, or are subject to different laws enacted by Congress, disparities are sure to exist, and policymakers will likely be unable to eliminate them. Indeed, in these conditions, the values of equal treatment and fairness may dictate that just as like cases should be treated alike, unlike cases should be treated differently. Simple rules are not sufficient to solve these complex disputes; there is no substitute for common sense and a case-by-case analysis.

carry greater moral and legal weight than they deserve on the merits. That is why arguments in the form of equality invariably place all opposing arguments on the 'defensive.'").

241. *See e.g.*, Thomas W. Hazlett et al, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field' in Cable TV Franchising Statutes*, BUSINESS & POLITICS, Aug. 2001, at 21, 22 ("Economists, as a rule, like symmetric regulation."). The authors (one of whom is a former FCC Chief Economist) also note, however, that "the pursuit of a level playing field can yield surprisingly asymmetric consequences." *Id.* at 43.