
Preface to the Paperback Edition

Just as one cannot step in the same river twice, neither can one take two successive snapshots of the same telecommunications industry; in each case, the only constant is change. True to form, the telecommunications policy field has evolved since the original hardcover edition of this book was published in January 2005. We have thus written this new preface to bring this new paperback edition up to date. In substance, however, this preface is more an afterword than a foreword, in that it presupposes familiarity with the main text of this book. First-time readers may wish to read the relevant chapters first before turning to the discussion below.

Industry consolidation

As foreshadowed in chapter 13, Bell company SBC merged with long-time rival AT&T Corp. in 2005 to form a new company called “AT&T Inc.” Although it adopted AT&T’s better-known brand name, SBC achieved a rare corporate feat: a company’s acquisition of its former parent. In early 2006, the combined company announced further plans to merge with BellSouth, a move that will reunify many elements of the original Bell System in nearly two dozen states spanning the Sun Belt and Midwest. Meanwhile, the other Bell company with global ambitions, Verizon, merged with MCI, which for years had been AT&T’s only true peer in the retail market for the sophisticated voice and data services purchased by enterprise business customers. Through these mergers, SBC (now AT&T) and Verizon obtained the assets and expertise they needed to become preeminent communications firms not just in their traditional service regions, where they had focused most of their efforts since their inception, but in major metropolitan areas throughout the country and the world.

A number of industry groups and consumer advocates fervently opposed the SBC-AT&T and Verizon-MCI mergers when they were announced in early 2005. The opponents argued that, by reconstituting the local and long-distance operations of the original Bell System within SBC's local service region, the SBC-AT&T merger would recreate the discriminatory evils that the 1984 divestiture was designed to prevent (see chapter 2). And the opponents likewise resisted the merger of Bell offspring Verizon with longstanding AT&T rival MCI. The merging parties responded that radical changes in the telecommunications marketplace during the ensuing 20 years had erased those discrimination concerns. They argued that the Bell companies, which faced no local exchange competition to speak of in 1984, now confronted greater local competition than ever before from wireless, wireline, and voice over Internet Protocol (VoIP) providers, and that such competition would itself discipline any anticompetitive conduct. More generally, they added, regulators in 2005, unlike regulators in 1984, had developed effective regulatory safeguards against discrimination in local exchange markets.

The merging parties essentially won this debate: the Justice Department and FCC not only approved both mergers in late 2005, but imposed less onerous conditions on the merging parties than many industry analysts expected. Because AT&T and MCI had recently stopped marketing services to new residential customers in response to the regulatory developments discussed in chapter 3, the merger-review authorities focused instead on whether these combinations would unduly increase concentration in the business-oriented market for "special access" services: for example, last-mile fiber-optic links between individual office buildings and long-distance voice and data networks. The Justice Department ultimately conditioned its approval on the merging parties' commitment to divest fiber-optic capacity on designated routes to rival special access providers.¹ The FCC followed up with a few conditions of its own, extracting from the merging parties, among other "voluntary" concessions, a commitment to comply for at least

1 *E.g.*, *United States v. SBC Communications, Inc.*, Civil Action No. 1:05CV02102, Final Judgment (D.D.C. filed Oct. 27, 2005). As of this writing, a federal court is reviewing Tunney Act claims that the Justice Department should have imposed stricter conditions on the merging companies, but that proceeding appears unlikely to result in major new obligations for those companies.

two years with the FCC's Net neutrality "policy statement" (discussed later in this preface).²

Quite apart from their commercial impact, these mergers marked the end of a 20-year era in regulatory advocacy. Since AT&T's 1984 divestiture of its local exchange operations (described in chapter 2), the wireline telecommunications industry was characterized by disputes between the regional Bell companies, of which Verizon and SBC had become the largest, and their wireline competitors, of which the traditional long-distance giants AT&T and MCI were the most prominent and politically influential. The elimination of those two companies as independent actors has thus reshaped not merely the commercial landscape, but the political dynamics of telecommunications policy.

A trend toward increasing consolidation characterized other segments of the telecommunications industry as well in 2005–06. Cingular's acquisition of AT&T Wireless in 2004 (see chapter 8) was followed in 2005 by Sprint's merger with Nextel. These mergers reduced from six to four the number of mobile wireless providers with national networks of their own (the other two are Verizon Wireless and T-Mobile). The Justice Department and the FCC approved both mergers without imposing any particularly onerous conditions, reasoning in each case that the wireless market would remain robustly competitive despite these incremental increases in concentration. The cable industry continued to consolidate as well, as Time Warner and Comcast acquired and divided up the assets of Adelphia, a scandal-racked cable provider. That set of transactions, which the FCC approved with programming-related conditions in 2006,³ further cemented the leadership position of those two companies in the cable industry.

2 *E.g.*, Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18,290 (2005). As this paperback edition goes to press, the Justice Department has approved the AT&T-BellSouth merger without conditions, but a politically divided FCC is mulling proposals to impose conditions similar to those it imposed on the SBC-AT&T merger.

3 Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors*, MB Dkt. No. 05-192, FCC No. 06-105 (July 21, 2006).

Network access and “Net neutrality”

When we submitted our manuscript two years ago, we devoted much of chapter 5 to a discussion of “Net neutrality” even though that issue had not yet become what it is now: the fiercest battle in telecommunications policy. Indeed, the FCC’s only foray into the area came in the form of then-Chairman Michael Powell’s 2004 speech exhorting broadband providers to observe vaguely defined “Internet Freedoms,” such as the freedom of consumers “to run applications of their choice” over any broadband platform, except where doing so “exceed[s] service plan limitations or harm[s] the provider’s network” (see p. 178 below). Since then, few policy disputes in any field have generated as much controversy as this one, not just at the FCC but, more recently, in Congress itself. Before turning to those developments, we first place this Net neutrality debate within the larger context of present-day network access disputes.

For decades, telecommunications policymakers have debated whether and when the government should force the owners of last-mile transmission facilities to give rivals access to their networks. When Congress passed the Telecommunications Act of 1996, the debate focused on the rights of new entrants to lease physical elements of the telephone network (see chapter 3). In June 2006, after ten years of litigation, that debate neared closure when the D.C. Circuit upheld the FCC’s *Triennial Review Remand Order*, the Commission’s fourth major attempt to define network element rights (see p. 109 below).⁴

Meanwhile, in the late 1990s, a new dispute had arisen about whether the government should give unaffiliated Internet service providers rights of access to cable modem networks (see chapter 5). The Supreme Court effectively ended that “open access” debate when, in 2005, it decided the long-running *Brand X* case.⁵ By a vote of 6–3, the Court reversed the Ninth Circuit and affirmed the FCC’s determination that cable modem service should be classified as a Title I “information service” without any Title II “telecommunications service” component. The Court thereby undermined any argument that current law requires a cable company to give unaffiliated ISPs common-carriage-type access to its cable modem platform.

4 Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

5 National Cable & Telecomm. Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

The resolution of this dispute about how to characterize cable modem service prompted the FCC to announce its long-delayed *Wireline Broadband Order* concerning the proper regulatory treatment of the competing DSL-based Internet access offered by telephone companies.⁶ First, the FCC affirmed its tentative conclusion that DSL Internet access, like cable modem service, is an “information service” without a “telecommunications service” component. The FCC further announced that, after a transition period, it would eliminate all *Computer Inquiry* “unbundling” obligations in this context (see pp. 153, 166–67 below): in other words, that it would allow telephone companies to offer broadband Internet access without offering the underlying transmission component as a common carrier service to unaffiliated ISPs and other willing buyers. In short, the FCC relaxed the major “legacy” obligations that the telephone companies, but not their cable rivals, had faced in the broadband market.

In March 2006, a four-member FCC—shorthanded by one commissioner—split 2–2 on whether to grant a Verizon forbearance petition seeking similar deregulation of an expansively defined class of business-oriented “broadband” services beyond the basic Internet access services at issue in the *Wireline Broadband Order*. Because the Communications Act provides that any forbearance petition “shall be deemed granted if the Commission does not deny” it within fifteen months, the Commission issued a short press release announcing that its 2–2 deadlock operated to grant Verizon’s petition by default.⁷ The other Bell companies have now filed forbearance petitions of their own seeking the same relief Verizon has won. But the precise scope of that relief is unclear in the absence of any substantive FCC order granting Verizon’s broadly worded forbearance request.

At the same time that it eliminated the telcos’ regulatory obligation to deal with unaffiliated ISPs, the FCC sought to address any ensuing concerns about the “openness” of the Internet by issuing a non-binding “policy statement” that, in substance, embraced Michael Powell’s “Internet Freedoms.”

6 Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14,853 (2005).

7 See 47 U.S.C. § 160(c); see generally p. 215 below (discussing forbearance mechanism). A trade group representing competitive carriers has challenged this unprecedented deregulation-by-default on constitutional and administrative law grounds. *COMPTEL v. FCC*, No. 06-1113 (D.C. Cir. filed Mar. 29, 2006).

The policy statement provides, among other things, that consumers are “entitled to run applications and use services of their choice,” such as VoIP or video, “subject to reasonable network management” and “the needs of law enforcement.”⁸ And the policy statement applies not just to telcos, but more broadly to all broadband providers, including the cable companies that had never been subject to any remotely similar obligations under federal law. Although the FCC stressed that it was “not adopting rules” on the subject, this policy statement signaled a critical shift in regulatory focus from the now moribund, ISP-oriented “open access” debate to a new generation of “Net neutrality” disputes (see pp. 168–79 below).

The term “Net neutrality” means different things to different people. Broadly speaking, it refers to rules that forbid broadband network owners to discriminate against unaffiliated providers of applications and content. But the devil is in the details. As of this writing, the debate about those details has moved from the FCC to Congress, which is considering several competing proposals. One of the less interventionist of these, approved by the House of Representatives in mid-2006, would formally authorize the FCC to enforce its 2005 policy statement but bar the Commission from expanding on that policy statement or even adopting rules that flesh out what it means. Another proposal, sponsored by Senate Republicans, would accomplish much the same thing, except that it would replace the FCC’s policy statement with a longer “consumer bill of rights.” Most major network owners have reluctantly signaled their readiness to acquiesce in such proposals in exchange for legislative relief on other issues, such as video franchising requirements (see below).

In contrast, sizable minorities in the House and Senate support a “strong” form of Net neutrality legislation that would greatly limit the freedom of network owners to give more favorable quality-of-service assurances to some application providers (say, those willing to pay for them) than to others. Such preferential treatment can make the difference between, for example, high and low quality streaming video. Advocates of strong Net neutrality rules argue that permitting network owners to divide applications providers into “tiers” this way would unfairly favor entrenched economic interests, including the network owners’ affiliates, and would suppress

⁸ Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14,986, ¶¶ 4–5 & n.15 (2005).

upstarts innovating at the edge of the network.⁹ These advocates are unlikely to win majority support in either house of Congress in the near term. But they may have enough political strength to forestall the passage of any comprehensive telecommunications reform legislation that omits “strong” Net neutrality guarantees.

Discussions of Net neutrality tend to be long on rhetoric and short on practical considerations. Part of the reason is that, with rare exceptions, broadband providers have not discriminated in any plainly abusive sense against unaffiliated applications or content providers.¹⁰ But the issue will come to a head when telcos and the cable companies begin running all of the services they provide consumers, including both voice and video, as applications over a unified IP platform.

We address the economic dimensions of this debate in chapter 5. Policymakers, we observe, must weigh the asserted *need* for prospective Net neutrality rules to prevent market failures against the potential costs of such preemptive intervention, and we conclude that this cost-benefit analysis is difficult to resolve in the abstract because so many of the economic variables

9 See pp. 169–71 below. For example, the key Senate sponsor of “strong” Net neutrality legislation, Oregon Senator Ron Wyden, has condemned access tiering for its “chilling effect on small mom and pop businesses that can’t afford the priority lane, leaving these smaller businesses no hope of competing against the Wal-Marts of the world.” News Release, “Wyden Moves to Ensure Fairness of Internet Usage with New Net Neutrality Bill,” (Mar. 2, 2006) (http://wyden.senate.gov/media/2006/03022006_net_neutrality_bill.html). In contrast, he says, “[n]eutrality in technology enables small businesses to thrive on the Internet, and allows folks to start small and dream big[.]” *Id.* By focusing more on small business interests than on the ultimate consumer welfare effects of his policy, Senator Wyden signaled disagreement with the modern antitrust principle that the government should interfere with free market dynamics only for “the protection of *competition*” in the sense of overall market efficiency, “not *competitors*” as such. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added; internal quotation marks omitted).

10 See pp. 173–74 below. The most prominent exception in the United States has been the short-lived decision of a rural telephone company, Madison River Communications, to block the ports that its DSL customers used for VoIP services. Madison River quelled the ensuing public furor by agreeing, in a consent decree, to unblock the ports. See Consent Decree, *Madison River Communications LLC*, 20 FCC Rcd 4,295 (2005). Significantly, the FCC’s authority to regulate port blocking and similar broadband practices remains uncertain because it depends on open questions about the scope of the agency’s “ancillary jurisdiction” (discussed at pp. 216–23 below and later in this preface).

remain unknown. At bottom, we address the issue the way antitrust law would address any other concern that a firm's market power in a platform market might lead it to harm consumer welfare by discriminating inefficiently against unaffiliated providers of complementary applications.

It is worth noting that many proponents of Net neutrality rules resist viewing these issues from the perspective of traditional competition policy, or at least would weigh the costs and benefits of market intervention differently from the way antitrust law would weigh them. Some of these advocates might favor strict Net neutrality rules even if there were little risk that, in the absence of such rules, platform owners would discriminate among applications providers in *anticompetitive* ways that would harm overall economic welfare as measured by conventional antitrust analysis. To these advocates, the problem lies in the very fact of discrimination, even when it might be economically efficient. They believe that any differential treatment among similarly situated applications providers threatens the core attribute that makes the Internet a uniquely valuable global resource: the equal opportunity that the end-to-end principle guarantees for all fledgling innovators at the edge of the network. Net neutrality opponents, in contrast, tend to view the Internet the same way they would view any other marketplace. Thus, absent a demonstrated market failure, they are no more inclined to support government intervention in the terms of network access than in any other set of business disputes between large and small companies. This fundamental difference in perspective, coupled with differing assessments on the level of competition in broadband Internet access, helps to explain why the two sides of this debate tend to talk past one another, and why the Net neutrality debate often generates more heat than light.¹¹

A second, less discussed, aspect of the Net neutrality dispute concerns the set of institutional competence issues we explore in chapter 13. In June 2006, the Federal Trade Commission officially claimed jurisdiction to police “unfair methods of competition” involving most types of broadband Inter-

11 For a discussion of these competing viewpoints, and a proposal for a new approach to the issue, see Robert D. Atkinson and Philip J. Weiser, *A “Third Way” on Network Neutrality* (2006) (<http://www.itif.org/files/netneutrality.pdf>). For a provocative economic critique of Net neutrality proposals, see Benjamin E. Hermalin and Michael L. Katz, *The Economics of Product-Line Restrictions With an Application to the Network Neutrality Debate* (2006) (<http://repositories.cdlib.org/iber/cpc/CPC06-059>).

net access.¹² That announcement reinvigorated a debate about who is better positioned to enforce competition policy principles related to potentially anticompetitive conduct in broadband markets: the FCC, which has traditionally overseen the industry through prescriptive regulation, or an anti-trust authority such as the FTC, which operates on a more retrospective, case-by-case basis?¹³ That institutional question is as fundamental as the substantive debate about the content of any Net neutrality rules. As of this writing, policymakers do not appear to be approaching a consensus on either issue.

Video franchising reform

The current Congress might never have taken Net neutrality legislation seriously if the telcos—the most politically powerful opponents of such legislation—had not themselves sought intervention on a different issue: video franchising requirements.

Since the dawn of cable television several decades ago, the states and thousands of local governments have played a critical role in deciding the terms on which cable companies can use public rights of way to provide multi-channel video services to end users. Originally, policymakers tended to view cable television as a natural monopoly market, and many states and localities granted exclusive franchises to particular companies in exchange for heavy regulatory oversight. Over time, as we discuss in chapter 11, policymakers recognized that the public would benefit from competition in this market—from direct-to-home satellite providers such as DirecTV and EchoStar, cable overbuilders such as RCN, and traditional telephone companies. The telcos never seriously threatened to enter this market until, with the growth of broadband Internet access, they began deploying fiber-optic

12 See Prepared Statement of the FTC Before the Senate Judiciary Committee on FTC Jurisdiction Over Internet Access Services (June 14, 2006). The FTC reasoned that, because *Brand X* and the *Wireline Broadband Order* hold that most Internet access services are information services rather than common carrier services, most such services fall outside the statutory “common carrier exemption” to the FTC’s jurisdiction. See *id.* at 3 n.4 (citing 15 U.S.C. §§ 44, 45(a)(2)).

13 See Raymond L. Gifford, Testimony to the U.S. Senate Judiciary Committee on “Reconsidering Our Communications Laws: Ensuring Competition and Innovation” (June 16, 2006) (http://www.pff.org/issues-pubs/testimony/060616gifford_com.pdf) (arguing for FTC oversight).

cables deeper and deeper into the nation's residential neighborhoods—cables with enough capacity to support not just fast access to the public Internet, but high-quality video programming as well. Although that fiber build-out remains a work in progress, the largest telcos—AT&T and Verizon—contend that they will deliver the benefits of widespread video competition as soon as they are assured of freedom from any cumbersome obligation to obtain thousands of franchises to use public rights-of-way for that purpose.

It was one thing for cable companies to negotiate such franchises with municipalities over a period of many years when, for all practical purposes, they were literally the only multi-channel video providers in town. It is quite another thing for a new video entrant to negotiate thousands of franchises when it must build up a big footprint quickly enough to cover the prodigious cost of programming and the enormous capital expenditures needed to bring fiber close to the home, all before it wins any significant market share. Thus the telcos claim that they could provide price-lowering competition to the cable incumbents much faster if Congress or the FCC stepped in to impose national rules for telco entry into the video market.

In late 2005, the FCC opened an inquiry into whether it could and should adopt national rules forcing local authorities to streamline the process for obtaining video franchises.¹⁴ But the FCC soon put that proceeding essentially on hold pending congressional consideration of video franchising reform. In early 2006, different bills began circulating in the House and Senate that, depending on the bill, would either (i) give the FCC explicit authority to grant video franchises for new entrants on a national level or (ii) formally leave franchising authority in the hands of localities but subject

14 See Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended, by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18,581 (2005). Section 621 of the Communications Act generally requires any “cable operator providing a cable service” to obtain a franchise from local authorities. 47 U.S.C. § 541. In 2005, a controversy arose concerning whether an IP-based video-delivery system, such as AT&T’s “Project Lightspeed,” is a “cable system” subject to that franchise obligation in the first place, an issue that turns on several abstruse statutory definitions. See 47 U.S.C. §§ 522(5) (definition of “cable operator”), 522(6) (definition of “cable service”), 522(7) (definition of “cable system”), 522(20) (definition of “video programming”). That issue, too, was placed on the back burner when Congress and many states in AT&T’s region began considering franchise reform legislation in earnest.

those localities to severe federal limitations on their ability to withhold franchise applications.

As with any other highly regulated market that is suddenly subject to new entry, much of the video franchise debate concerns questions of regulatory parity. One such question is whether telcos and other new entrants should be subject to the same build-out and anti-redlining obligations that franchising authorities have long imposed on the cable companies: that is, obligations to serve most households in a geographic area over time, not just those in the neighborhoods containing the highest concentration of wealthy individuals who are most likely to order premium packages.¹⁵ The cable companies argue that it would be unfair to exempt the telcos from such obligations; the telcos disavow any interest in redlining but add that upstarts in any regulated market often are, and should be, exempt from public-service obligations traditionally imposed on incumbents. As a case in point, they note that incumbent telcos (ILECs) are subject to carrier-of-last-resort obligations and various forms of economic regulation, whereas new telco entrants (CLECs) are generally subject to relatively modest government oversight (see pp. 46 and 78 below).

Cable companies also fear that franchise relief would tilt the playing field in favor of the telcos by exempting them from various benefits the cable companies have traditionally bestowed on local governments. These range from revenue-based franchise fees to the miscellaneous obligations that cable incumbents have long undertaken for municipalities in exchange for the issuance (or renewal) of a franchise, such as providing institutional networks or wiring fire stations and other local government buildings for free. The telcos argue that, as a philosophical matter, they should not have to pay states or localities any fees in addition to those they already pay for use of the same rights-of-way to provide broadband services, given that municipalities incur no extra costs or disruption when telcos shoot video-related packets through the same pipes used for conventional Internet access. To achieve a political compromise, however, the major telcos support legislation that would require them to pay essentially the same franchise fees that their rival cable incumbents pay, typically about 5% of revenues.

As of this writing, video franchise legislation has at least temporarily stalled in the Senate, where proponents have not yet won enough support to

¹⁵ See 47 U.S.C. § 541(a)(3), (4).

block a threatened filibuster from senators who oppose any telco-friendly telecommunications reform legislation that excludes Net neutrality requirements. And the telcos may soon lose much of their incentive to compromise on Net neutrality in order to win federal franchise relief, because while Congress stands idle, an increasing number of states, beginning with Texas in 2005, have given the telcos much of the franchise relief they need on a state-by-state basis. It thus remains unclear whether and when Congress will finally achieve the political consensus needed to take action.

Other developments

Intercarrier compensation. Completed in late 2004, chapter 9 concludes with an all-important question: whether policymakers in general, and the FCC in particular, have the political will to adopt comprehensive intercarrier compensation reform. The jury is still out. After the collapse of the Intercarrier Compensation Forum plan (see p. 330), the core members of the ICF, with the encouragement of state regulators, began negotiating with representatives of the nation's mid-sized and rural carriers to forge a consensus plan that might win broad-based political support. The result of this collaborative effort is the 83-page "Missoula Plan," named after the site of key negotiations. Among other things, the Plan proposes a rationalized calling-network-pays regime that would reduce access charges over time and ultimately unify the call-termination rates of all carriers except the smallest rural telephone companies. In July 2006, the National Association of Regulatory Utility Commissioners, on behalf of state regulators, filed this plan with the FCC but stopped short of endorsing it. Shortly thereafter, the FCC invited comment on the plan. Various industry groups oppose the plan, however, and it remains unclear when the FCC might take decisive action in this politically sensitive area.

Incremental regulation of VoIP. Relying in part on its "ancillary" authority under Title I (see chapter 6), the FCC ordered each VoIP provider interconnected with the public switched network to upgrade the emergency dialing features of its service and inform its customers of any remaining deficiencies.¹⁶ The FCC further adopted, and a split panel of the D.C. Circuit

16 First Report and Order, *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005).

upheld, new CALEA rules requiring interconnected VoIP providers to facilitate official wiretaps of VoIP calls.¹⁷ Both measures confirm that, even as the FCC emphasizes the need to keep the Internet free of traditional common carrier regulation, it will impose non-economic regulation of Internet-based services in the name of particular social welfare objectives.

Universal service contributions. In the same vein, the FCC required interconnected VoIP providers to contribute to the federal universal service fund for the first time, and it further increased the contribution obligations of wireless carriers.¹⁸ The FCC took these steps to accommodate not just a steady increase in the fund's size, but also the increasing use of VoIP and wireless services as substitutes for wireline long-distance service, which had borne a disproportionate share of the contribution burden. The FCC also acted to avoid a sudden shortfall of its own making: In the *Wireline Broadband Order*, it had exempted DSL service from contribution obligations in order to bring DSL into parity with cable modem service, which has never borne such obligations (see pp. 350–51, *infra*). But these are mere band-aids. As we explain in chapter 10, the FCC will never bring lasting stability to the federal fund until it fundamentally reforms its contribution methodology to avoid arbitrary regulatory classifications.

FCC ancillary jurisdiction. In 2005, the D.C. Circuit reminded the FCC, in the quite different context of the digital television transition (see chapter 12), that its Title I authority has limits. In particular, it invalidated the FCC's "broadcast flag" order (see pp. 403–05) as the product of an excessively expansive view of the Commission's ancillary jurisdiction, holding that, "at most, the Commission only has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication while those apparatus are engaged in communication."¹⁹

17 *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006); see pp. 222–23 below (discussing CALEA).

18 Report and Order, *Universal Service Contribution Methodology*, 2006 WL 1765838 ¶¶ 52–53 (June 27, 2006). The FCC imposed a rebuttable presumption that 64.9% of VoIP calls are "interstate" and thus subject to assessment under the current revenue-based contribution methodology. See pp. 348–49, 607 n.49 below. The FCC raised the comparable figure for mobile wireless services from 28.5% to 37.1%.

19 *American Library Ass'n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005). In its *Brand X* decision, the Supreme Court hinted at a more generous view of the FCC's ancillary jurisdiction. See 125 S. Ct. at 2711.

Digital television transition. There is finally light at the end of the tunnel for the transition from analog to digital television. Congress set a date certain—February 17, 2009—for the completion of that transition and agreed to help subsidize the provision of converter boxes to analog TV set owners that would otherwise be stranded by end of analog broadcasting.²⁰ Several disputes about the DTV transition remain unresolved as of this writing, including whether the government should require multicast must-carry (see pp. 401–02), and whether any rules will govern cable companies’ decisions about “down-converting” local signals (in other words, carrying them in a lower quality format, see pp. 401–02). We hope that Congress will reach closure on these (and other) issues in time for our next preface.

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²⁰ *Digital Television Transition and Public Safety Act of 2005*, Pub. L. 109-171, Title III, §§ 3001 *et seq.*, 120 Stat. 21 (2006) (codified in part at 47 U.S.C. §309(j)(14)(A)).