Preface to the Second Printing

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. And, sure enough, the telecommunications policy field has kept evolving since the presses first began running on this book in January 2005. We were thus a little bemused when, in August, the MIT Press asked us to update this book for its second printing—but somehow keep the existing pagination intact—by making a few inconspicuous line edits to account for recent industry developments. After explaining why that would be difficult, we settled on this alternative, though somewhat unusual, solution: a preface to the second printing. In substance, this preface serves more as an afterword than a foreword in that it presupposes familiarity with the main text of this book. It briefly canvasses the major policy themes of 2005, which build on the themes of previous years: industry restructuring, convergence, and slow but steady deregulation. We expect that future editions will explore the issues below in greater depth, along with whatever new ones arise in the coming years.

Industry restructuring: the year in mergers

In late January 2005, Bell company SBC announced that it was merging with long-time rival AT&T, a possibility noted in chapter 13 of this book. Although it may adopt AT&T's brand name, SBC thereby achieved a rare corporate feat: a company's acquisition of its former parent. A few weeks later, the other giant Bell company with global ambitions, Verizon, announced that it would merge 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 and Verizon hoped to obtain 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.

As many commentators have observed, these long-anticipated mergers mark the end of a twenty-year era in regulatory advocacy. Since AT&T's 1984 divestiture of its local exchange operations (described in chapter 2), the wireline telecommunications industry had become increasingly 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 by far the most prominent and outspoken. The elimination of those two companies as independent actors thus promised to reshape not merely the commercial landscape, but the very terms of the telecommunications policy debate.

The mergers will almost certainly win the necessary clearances from the Justice Department, the FCC, and the states. The question, still unanswered as this book enters its second printing, is whether these authorities will require asset divestitures or impose other conditions on merger approval. Because AT&T and MCI had already stopped marketing services to new residential customers in 2004 in response to the regulatory developments discussed in chapter 3, the merger-clearance debate has tended to focus instead on whether these combinations will unduly increase concentration in the market for "special access" services: for example, last-mile fiber-optic links between individual office buildings and long-distance voice and data networks.

A trend toward increasing consolidation similarly characterized other segments of the telecommunications industry in 2005. 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 market concentration. Meanwhile, the cable industry continued to consolidate as well, as Time Warner and Comcast agreed on a plan to purchase and divide up the assets of Adelphia, a scandal-wracked cable provider. If approved,

these transactions would further cement the leadership position of those two companies in the cable industry.

Convergence: the video franchising debate

As explained in chapter 1, the term "convergence" means the coalescence of different types of communications services, traditionally offered over distinct transmission platforms, into mere applications riding on top of largely interchangeable transmission platforms. In 2005, a new set of regulatory disputes arose as wireline telephone companies began making good on their plans (see chapters 4 and 5) to build out fiber-optic loop facilities capable of transmitting high-quality video signals to residential customers in direct competition with traditional cable and satellite television services.

Title VI of the Communications Act requires anyone operating a "cable system"—an intricately defined term of disputed scope—to obtain franchises from local authorities before digging up the streets and using public rights-of-way to provide a "cable service" to the public.[1] This is a significant hurdle to overcome for any new entrant in the video market. Simply as a procedural matter, it can be quite burdensome for a new video entrant to negotiate franchise agreements with thousands of different local authorities across the country. And, as a substantive matter, such authorities tend to exact significant concessions from franchisees, ranging from the payment of franchise fees (typically a fixed percentage of revenues) to "anti-redlining" commitments: in other words, promises to serve everyone in a geographic community, not just those in the neighborhoods containing the highest concentration of lucrative customers.

The telephone companies, led by SBC and Verizon, argue that any obligation to negotiate franchise agreements with thousands of franchising authorities is a barrier to much-needed entry in the video services market. The cable incumbents, which have already obtained such agreements, reason that any preferential regulatory treatment for the telephone companies would undermine fair and efficient competition. This battle is playing itself out in many different forums: local franchising authorities, state legislatures,

1 *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").

Congress, and the FCC. In a much-watched state-level initiative in 2005, the Texas legislature enabled a new video entrant to circumvent local authorities by applying for a single statewide franchise, much to the satisfaction of SBC (headquartered in Texas) and the consternation of the cable industry, which promptly challenged the new law in federal court. Congress also began considering proposals for franchise reform legislation, but there are only slim prospects for immediate congressional action. And the FCC began taking notice of a growing dispute about whether and when video delivery systems based on the Internet protocol are "cable systems" subject to franchise obligations under Title VI.

Such issues emphasize once more the obsolescence of a federal statutory regime created for an earlier era before convergence, when telephone and cable companies used their different transmission platforms to provide nonoverlapping services. At some point Congress will need to step in to resolve these issues with comprehensive legislation. Given the political strength of the opposing commercial interests, the timing of such legislation is hard to predict.

Deregulation: *Brand X,* the *Computer Inquiries,* and Net neutrality

Just as this debate about regulatory parity in the video market was heating up, the debate about regulatory parity in the Internet access market was winding down. In June 2005, the Supreme Court issued its decision in the *Brand X* case, discussed in chapter 5.[2] 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.

The resolution of this dispute about how to characterize cable modem service prompted the FCC in turn to announce its long-delayed *Wireline Broadband* decision concerning the proper regulatory treatment of the competing DSL-based Internet access offered by telephone companies. First, the FCC affirmed its tentative conclusion that DSL Internet access, like

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

cable modem service, is an "information service" without a "telecommunications service" component. The FCC further announced that, after a transition period, it would eliminate the *Computer II* "unbundling" obligation in this context (see pp. 153, 166–67): 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.

The FCC simultaneously issued a non-binding "policy statement" embracing several "Net neutrality" principles, including the principle that consumers should be able to run Internet applications of their choice, such as VoIP, over any broadband platform. Similar in substance to Michael Powell's 2004 speech on the same subject (see p. 178), this policy statement formalizes a key shift in regulatory focus from ISP network access rights to the costs and benefits of government-imposed Net neutrality rules (see pp. 168–71).

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Three other developments in 2005 warrant brief mention here. First, 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. This step confirms 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.

Second, 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."[3]

3 American Library Ass'n v. FCC, 406 F.3d 689 (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.

Third, despite the D.C. Circuit's decision, there is light at the end of the tunnel for the transition to digital television. Congress appears to have reached a consensus on the need to impose a date certain for the completion of that transition, perhaps as soon as mid-2009. But no consensus has emerged on what substantive rules Congress should adopt to govern that transition. The main disputes include how much, if any, compensation should be paid to analog set owners stranded by the conversion, whether to 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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