# II. Overview of Salient Communications Laws

## A. General

The Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996 (1996 Act),[115] remains the cornerstone of federal communications regulation. Title II of the Act regulates common carriers and their provision of interstate telecommunications.[116] Title II requires the Federal Communications Commission (FCC) to ensure that all Americans have access to interstate telecommunications service upon request, without discrimination and at reasonable rates.[117] The FCC accomplishes these objectives primarily through its licensing regime and enforcement powers. The provisions in Title III of the Act regulate both radio/television and wireless telecommunications[118] service providers. Regulation of U.S. spectrum[119] through licensing allows the FCC to ensure efficient spectrum use and prevent interference between spectrum users.

In passing the 1996 Act, Congress sought to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and informa-

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[115] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[116] The Act defines common carriers as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Chapter." 47 U.S.C. § 153(10) (2005). Common carriers include LECs, CMRS providers and long-distance providers. Common carriers are entities that hold out their services to the general public and may not deny those services to any party making a reasonable request for service. Telecommunications providers or carriers are common carriers that, in addition to providing nondiscriminatory access, allow their customers to "transmit intelligence of their own design and choosing." *Nat'l Ass'n of Regulatory Comm'ns v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir. 1976).

[117] *See* 47 U.S.C. §§ 201-202 (2005).

[118] Wireless telecommunication is the transmission, reception and switching of signals by electromagnetic (*i.e.*, through-the-air) means. Mobile phones are the most ubiquitous form of wireless telecommunications.

[119] Spectrum refers to the range of electromagnetic frequencies over which radio communications, including wireless telecommunications, are transmitted.

tion technologies and service to all Americans by opening all telecommunications markets to competition."[120] To that end, the 1996 Act endeavored to eliminate legal barriers to entry into the local and long-distance telephone markets and to expedite the deployment of "advanced" (*i.e.*, high-bandwidth) services.[121] The 1996 Act authorized competition in local service while providing a mechanism for the regional Bell operating companies (RBOCs) to enter the long-distance market. The 1996 Act completely altered the economic landscape and revolutionized the telecommunications industry. From 1996 through the present, economic analysis and competition theory have been the hallmarks of telecommunications industry regulation.

**B. Tariffs**

A "tariff" is a publicly filed document that regulated telecommunications carriers file with state and federal regulators. Historically, a tariff detailed the terms, conditions and pricing of services that the regulated carrier offers to all potential customers, including other telecommunications carriers, large businesses and residential subscribers. State tariffs contain similar provisions for most local and intra-state services. Notably however, the FCC eliminated (or de-tariffed) the majority of federal tariffs,[122] with the exception of the interstate access tariffs of the incumbent local exchange carrier's (ILECs) and certain limited international services.[123]

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[120] S. Rep. No. 104-23, at 1 (1996) (Conf. Rep.).

[121] Advanced services, or advanced capability, are the availability of "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Pub. L. No. 104-104, Title VII, § 706, 110 Stat. 153 (1996).

[122] The FCC has permanently de-tariffed non-ILEC access tariffs, which formerly applied to and governed the terms of agreements under which long-distance carriers or interexchange carriers (IXCs) gained access to the networks of local phone companies in order to terminate or receive the traffic they carried over their long-distance lines. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, *Second Report and Order*, 11 FCC Rcd. 20730, 20732-33, ¶ 3 (1996), *aff'd*, *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

[123] The term "interstate access" refers to the facilities used to originate and terminate long-distance calls between states.

Interstate access tariffs detail the terms, conditions and pricing that customers—predominantly long-distance carriers—must pay for connecting calls to the ILECs' networks.[124]

When a customer orders services pursuant to a tariff, the tariff establishes the relationship between the service provider and the customer. Typical tariff provisions define the circumstances under which the service provider may collect a security deposit or penalties and establish cure obligations, as well as the means by which the service provider can terminate service for nonpayment or other violations of the tariff. Once a tariff has become effective, it is considered to have the force and effect of a federal regulation and, therefore, to conclusively and exclusively enumerate the rights and liabilities between the carrier and customer.[125] Moreover, federal tariffs are deemed lawful unless they are challenged in a hearing or a complaint proceeding.[126] Consequently, a tariff is similar to a contract because it establishes certain salient terms of the parties' legal relationship and obligations, but it is also more than a mere contract because it carries the force of law.[127]

Once a carrier's tariff has become effective, the carrier is forbidden from charging rates for services contained in the tariff other than as set out in its filed tariff. Customers, whether end-user customers or carrier customers, are also charged with notice of the tariff terms and rates, precluding their ability to invalidate, alter or add to the terms of the filed tariff

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[124] It should be noted that there is some uncertainty regarding VoIP services and the payment of access charges. *See* Petition for Declaratory Ruling that AT&T's Phone to Phone IP Telephony Services Are Exempt from Access Charges, *Order*, 19 FCC Rcd. 7457, 7457-58, ¶¶ 1-2 (2004) (finding that access charges apply to AT&T's specific IP service, but leaving open the possibility that other VoIP services might not have to pay access charges).

[125] *Lowden v. Simonds-Shields Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (citing *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998)).

[126] Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, *Order on Reconsideration*, 17 FCC Rcd. 17040, 17041-43, ¶¶ 3-6 (2002).

[127] *See Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998); *Evanns*, 229 F.3d at 840 n.9 (collecting authority).

through a court action.[128] This principle that a carrier may not charge rates other than those set out in its tariff, known as the "filed rate doctrine," bars any claim or challenge, whether couched in terms of federal or state law, to the collection of funds in compliance with the terms of a filed tariff. Thus, under the filed rate doctrine, no one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff,[129] and neither the carrier nor its customers may deviate from the tariff. The purpose of the filed rate doctrine is to prevent a common carrier from offering off-tariff discounts or otherwise preferring some customers to others. It is for this reason that the parties cannot agree to terms different from those set forth in a tariff, even if they desire to, and any such agreement is unenforceable.[130] Indeed, contracts that deviate from the terms of a filed tariff are prohibited even if the customer reasonably relied on the carrier's promise to file the negotiated rate as a tariff.[131] However, in regulatory proceedings, a service provider or regulator is permitted to unilaterally modify a tariff,[132] and customers are permitted to challenge the reasonableness of its terms.[133]

### C. Discontinuance of Domestic Service: 47 U.S.C. § 214

Section 214 of the Act requires that common carriers obtain FCC authorization before discontinuing, reducing or impairing domestic common carrier service. Section 214(a) states: "No carrier shall discontinue, reduce, or impair service ... unless and until there shall first have been obtained from the [FCC] a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby."[134] The requirements of Section 214 apply to all carriers and all types of discontinuances of domestic

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[128] *Evans*, 229 F.3d at 840 n.11 (citing *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222, 227 (1998)).

[129] *See Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2001).

[130] *See id.*, 277 F.3d at 1170; *Cahnmann*, 133 F.3d at 487.

[131] *Cahnmann*, 133 F.3d at 487 (citing *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990)).

[132] For some long-term service offerings, carriers need substantial cause to modify their tariff.

[133] *See* 47 U.S.C. § 204(a)(1) (2005) (granting the FCC the authority to hold hearings, on its own motion or upon the filing of complaint, to determine the lawfulness of a filed "charge, classification ... or practice" submitted by a carrier).

[134] *Id.* § 214(a).

service, "including but not limited to discontinuances resulting from sales of exchanges by local exchange carriers [LECs], sales of customer bases by interexchange resellers, and dissolutions of business or *bankruptcy*."[135] Section 214 also requires prior FCC authorization for the construction, acquisition and operation of, and the transmission over, lines of communication, for which Section 63.01 of the FCC's rules grants blanket domestic authorization.[136]

Part 63 of the FCC's rules, which implements Section 214, describes the process for obtaining authority to discontinue domestic service.[137] Specifically, Section 63.71 of FCC's rules requires a domestic carrier to give written notice to all affected customers and other specified entities, on or before the date it applies for authority to discontinue or impair[138] service under Section 214. The FCC designed these regulations to avoid unexpected service disruptions by ensuring that customers receive adequate notice of impending discontinuances of service so that they can arrange for alternate service.

Presently, the applicability of Section 214 to high-speed broadband services is in a state of transition. In June 2005, the U.S. Supreme Court upheld the FCC's classification of cable modem service as an "information service"[139] and not a "telecommunications service."[140] Because of this classification, cable modem services are not subject to Section 214 and the other

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[135] Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act, *Public Notice*, 16 FCC Rcd. 9522, 9522 (2001) (emphasis added).

[136] 47 U.S.C. § 214 (2005); 47 C.F.R. § 63.01(a) (2004); *see also* Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, *Report and Order,* 14 FCC Rcd. 11364, 11369-370, ¶ 7 (1999).

[137] 47 C.F.R. § 63.71 (2004). FCC's rules relating to international carriers can be found at 47 C.F.R. §§ 63.09-63.24. Specifically, Section 63.19 of FCC's rules states that international carriers must provide written notification to the FCC and to each affected customer 60 days prior to a planned discontinuance.

[138] "Impairing" service would include limiting the availability or quality of service contrary to agreed upon levels of service.

[139] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (*Brand X*), *aff'g* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 4802, ¶ 8 (2002).

[140] The definitions of telecommunications service and information service are mutually exclusive. 47 U.S.C. § 153(46) (defining telecommunications service as "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"); 47 U.S.C. § 153(20) (defining information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications").

sections of the Act's Title II common carrier regulations. Consistent with the U.S. Supreme Court's 2005 *Brand X* decision, the FCC subsequently determined that both wireline broadband Internet access service (mainly DSL) and the transmission component of that service are information services and thus generally free from the Act's Title II common carrier requirements.[141] Subject to a one-year transition period, facilities-based providers, generally the ILECs, will no longer have to offer wireline broadband Internet access service on a stand-alone common carrier basis.[142] In this *Wireline Broadband Order*, the FCC concluded that these providers may choose to offer the transmission component of wireline broadband Internet access services on a noncommon carrier or common carrier basis.[143] The Order provided a blanket certification to carriers to discontinue providing common carrier services subject to the Order. Carriers electing to discontinue common carrier treatment after the Order's transition period will have to comply with Section 214. However, the FCC did extend certain Title II requirements to wireline broadband Internet access services that are offered on a noncommon carrier basis.[144]

As part of its *Wireline Broadband Order*, the FCC issued a Notice of Proposed Rulemaking (NPRM) in which it sought comment on whether it should exercise its Title I authority "to impose discontinuance type requirements on providers of Broadband Internet access service."[145] The FCC specifically asked whether the need for customer notification grows stronger as customers become increasingly "more dependent on broadband access" or, in the alternative, whether notification requirements are unnecessary given the "multiplicity and availability of broadband ... providers."[146] In a footnote in the NPRM, the FCC observed that in 2001,

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[141] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853, 14903, ¶ 102 (2005) (*Wireline Broadband Order*).

[142] *Id.* at 14899, ¶ 86.

[143] *Id.* at 14903, ¶ 95. However, providers may not offer the same type of transmission on both a common carrier and noncommon carrier basis. *Id.* The services provided on a common carrier basis will be subject to Title II of the Act. *Id.*

[144] *See, e.g., id.* at 14919, ¶ 121.

[145] *Id.* at 14934, ¶ 156.

[146] *Id.*

one bankruptcy court gave a broadband provider permission to shut down its network, which resulted in loss of high-speed access and transition problems for its former subscribers.

Section 214 and its corresponding FCC rules do not apply to broadcast licensees and commercial mobile radio service (CMRS) providers. Broadcasters generally do not provide common carrier services and therefore are in no way subject to the common carrier regulation of Title II of the Act, whereas CMRS providers are common carriers. However, Section 332(c)(1)(A) of the Act gives the FCC authority to exempt CMRS providers from the common carrier regulations in Title II of the Act.[147] The FCC has implemented that authority to exempt CMRS providers from having to comply with Section 214.[148] CMRS providers, broadcasters and other radio licensees all utilize the electromagnetic spectrum to provide their services and, therefore, are all subject to regulation under Title III of the Act. As a result, the regulations governing their transfer of control and assignment of licenses are different from those governing the transfer of control of wireline common carriers or the assignment of their assets.

## D. Transfer and Assignment Provisions

### 1. *Transfer of Title II Domestic Common Carrier Assets (Lines)*

In addition to restricting discontinuance of common carrier service, Section 214 of the Act prohibits common carriers from acquiring or operating any telephone line or line facilities unless and until they obtain an FCC "certificate that the present or future public convenience and necessity require or will require" the operation of the line.[149] The FCC has inter-

[147] 47 C.F.R. § 332(c)(1) (2003).

[148] *Id.* § 20.15(b)(3)(2004). Section 214 does apply to common carriers using spectrum for fixed wireless provisioning of telecommunications service, such as LMDS. *See* In re Forbearance from Applying Provision of the Communications Act to Wireless Telecommunications Carriers, *First Report and Order*, 15 FCC Rcd. 17414, 17425-426, ¶¶ 25-26 (2000).

[149] 47 U.S.C. § 214(a) (2005).

preted this provision so that any acquisition of assets requires FCC domestic Section 214 approval for the transfer of assets, regardless of whether discontinuance approval also is required.[150]

The FCC's rules also allow a domestic carrier to provide the FCC *pro forma* post-transfer notice in situations where the carrier undertakes a corporate restructuring, reorganization or liquidation of internal business operations that does not result in a change in ultimate ownership control of its lines or authorization to operate. This includes "transfers in bankruptcy [cases] to a trustee or to the carrier itself as a debtor-in-possession," discussed in greater detail in Section III.E.1. below.[151]

In *pro forma* instances where "transfer does not result in a change of ultimate ownership or control, the domestic carrier need only notify the FCC no later than 30 days after control" is transferred to a trustee under chapter 7, a debtor-in-possession under chapter 11 or any other party pursuant to any applicable chapter of the Bankruptcy Code.[152] The notice must be sent in duplicate to the Secretary of the FCC in letter form and include specific background information on the parties. A single letter may be filed for multiple transfers of control.[153] In instances where discontinuance of service is present, the FCC will consider the *pro forma* notice requirement fulfilled if the carrier files a discontinuance request within 30 days of the transfer of assets in bankruptcy. The FCC defines "control" in these instances as including actual working control and not just majority stock ownership. Moreover, control is not limited to direct control, but includes indirect control, such as that exerted through intervening subsidiaries.[154]

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[150] *See* 47 C.F.R. § 63.01 (2006); Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations, *Report and Order*, 17 FCC Rcd. 5517, 5533, ¶ 31 (2002) (Domestic Section 214 Streamlining Order).

[151] 47 C.F.R. § 63.03(d)(1) (2006).

[152] *Id*. § 63.03(d)(2).

[153] *Id*. The letter must contain the information listed in paragraphs (a)(1) through (a)(4) in Section 63.04 of the rules. *Id*. § 63.04(a)(1)-(a)(4).

[154] *Id*. § 63.03(d) n.1 (defining "control").

### 2. *Transfer of Title III Spectrum Licenses*[155]

Although Section 214 and its corresponding FCC rules do not apply to CMRS providers, another set of regulatory requirements exists for the transfer of Title III radio licenses.[156] Section 310(d) of the Act enables the FCC to oversee the conveyance of radio service licenses and ensure that the licensed spectrum is put to its most efficient use. Section 310(d) reads in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the [FCC] and upon finding by the [FCC] that the public interest, convenience, and necessity will be served thereby.[157]

Under this provision, all radio service licensees must seek and obtain FCC consent before assigning or transferring control of FCC-issued licenses or permits. This applies to all transactions involving an assignment or transfer of control and it applies equally to wireless telecommunications providers (*i.e.*, CMRS providers), broadcasters and other radio service licensees.

There are exceptions, however, to the general rule set forth in Section 310(d). As explained in greater detail below in Section III.E.3., the FCC does not require pre-approval of certain *pro forma* and involuntary transactions, such as the conveyance of a Title III license to a debtor-in-possession or bankruptcy trustee, before they are consummated. Rather, the FCC simply requires post-completion notice of such transfers.

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[155] Title III governs broadcast and wireless licenses as well as other types of communications.

[156] Title III also governs the licensing and transfer of broadcast authorizations.

[157] 47 U.S.C. § 310(d) (2005).

## E. Duty to Provide Service on Nondiscriminatory Terms: 47 U.S.C. §§ 201 and 202

Section 201 of the Act requires interstate common carriers to furnish communications services upon reasonable request at just and reasonable prices, terms and conditions. Section 202 prohibits unreasonably discriminatory practices in the provision of communications services. Under these provisions, no applicant for telecommunications services may be given preferential treatment or subjected to unjust discrimination. The FCC expects common carriers to make all efforts to comply with these rules. The requirements can be stringent. For example, common carriers must continue to provide service while waiting for disposition of a complaint or litigation regarding a customer's questionable claim of right to service, or risk FCC sanction.

Sections 201 and 202 of the Act lay the foundation for the universal service policy of Section 254. Universal service is designed to make available basic residential service at a reasonable price to all Americans. Under this provision, carriers cannot discriminate against rural or high-cost end-users, or in favor of urban or low-cost end-users. The FCC has adopted universal service regulations pursuant to Section 254 to ensure that potentially unprofitable customers are not priced out of basic telephone service. Section 251 extended these requirements, see Section II.F., *infra*, to expressly encompass carrier interconnection in order to promote local competition. Unreasonable discrimination against competitive carriers in the provision of communications services is unlawful.

The policy of designating ILECs as the "carrier of last resort" also protects potentially disfavored end-users. A local exchange carrier designated as the "carrier of last resort" must make service available throughout its designated service area. This policy is a state regulatory concept, but it applies in the federal context as well. Carriers of last resort may also be limited in the amount they can charge, the terms and conditions of their

service and quality standards, and on how and when they can exit a market. Regulators use this designation to ensure that no potentially disfavored end-users are abandoned.

The duties of a carrier of last resort to the debtor, its successors and its end-users have come into conflict with provisions of the Bankruptcy Code, most notably the right of a debtor to reject executory contracts with the service provider under Section 365. The dispute between Verizon and IDT Winstar, a purchaser of assets in bankruptcy, illustrates the potential conflict between Sections 201 and 202 of the Act and Section 365 of the Bankruptcy Code.

In the spring of 2001, Winstar filed for bankruptcy under chapter 11. Following an unsuccessful attempt to reorganize, Winstar began to liquidate its assets. IDT Winstar bid $42.5 million for Winstar's assets, and the two companies entered into an asset purchase agreement. Among the assets were executory contracts with ILECs as to which Winstar owed roughly $13 million. However, negotiations between IDT Winstar and the ILECs over the contract debt failed.

IDT Winstar filed an emergency petition with the FCC claiming that the ILECs threatened IDT Winstar's customers with disconnection if IDT Winstar did not assume the debt on the contracts. According to IDT Winstar, the ILECs threatened that, unless IDT Winstar agreed to pay them the sums owed by Winstar, they would disconnect the circuitry[158] in their control that connects the Winstar network to the ILEC network, leaving IDT Winstar in the position of a new customer ordering service with regard to reconnection to the ILEC network. This, IDT Winstar argued, would create an unspecified blackout period for IDT Winstar's customers. IDT Winstar asked the FCC to, among other things, declare any disconnection to be a violation of Sections 201 and 202 of the Act and the FCC's public interest policy against customer service disruption.

[158] A circuit is a physical path through which the electric currents comprising a telephone call pass.

The ILECs responded with a counter petition requesting that the FCC issue a declaratory ruling clarifying that: (i) the Act does not except carriers from the rights afforded by Section 365 of the Bankruptcy Code, (ii) attempts to substitute a purchaser's name for the debtor's name in executory connection contracts constitute "an assignment or transfer" subject to assumption of outstanding indebtedness under the ILECs' tariff and (iii) CLECs must notify customers of possible discontinuance of service related to bankruptcy proceedings.[159] The ILECs and IDT Winstar subsequently notified the FCC that they had settled their dispute.[160] Nevertheless, the issues are likely to arise again in future cases. As of this writing, the FCC has not yet announced its interpretation of the intersection between the obligations under Sections 201 and 202 of the Act and the process set out in Section 365 of the Bankruptcy Code.

### F. Provisions Concerning Interconnection Agreements: 47 U.S.C. §§ 251, *et seq*.

Section 251 obligates telecommunications carriers to interconnect their networks and prohibits them from installing network features, functions or capabilities that inhibit the coordination of technologies.[161] Congress implemented this provision to guard against unfair competition by carriers refusing to connect with competitors or excluding competitors by installing technology that is incompatible with outside networks or systems. Section 251 also obligates nonrural ILECs to negotiate interconnection agreements with other telecommunications providers in good faith, provide interconnection with their local exchange networks for any telecommunications provider that requests it, provide such access in a nondiscriminatory fashion at just and reasonable rates, offer its telecom-

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[159] Comments and Counter Petition of Verizon submitted in Winstar Commc'ns, LLC Emergency Pet. for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services, WC Docket No. 02-80 (filed Apr. 29, 2002).

[160] Winstar Communications, LLC Emergency Petition for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services, WC Docket No. 02-80, at 1 (filed Jan. 2, 2003).

[161] 47 U.S.C. § 251 (2005).

munications services for resale at wholesale rates, provide reasonable public notice of changes affecting use of their networks and provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements.[162]

The conflict between IDT Winstar and the ILECs discussed in Section II.E., *supra*, also extended to Section 251 of the Act. IDT Winstar argued before the FCC that it not only has the right to reject Winstar's interconnection agreements and refuse to cure defaults under Section 365 of the Bankruptcy Code, but also has the right to "reasonably request" that its name be substituted on the rejected interconnection agreements and to continue the former Winstar services under its name. IDT Winstar asserted that any reclamation of the circuits for failure to cure would constitute rejection of a reasonable request for interconnection in violation of Section 251 and would also violate FCC policy concerning disruption of service to customers and competition. The ILECs responded that they were merely asserting their rights to cure under Section 365 of the Bankruptcy Code, their filed tariffs and their agreements.

The parties settled their dispute prior to any resolution of the substantive issues. See Section II.E., *supra*. Thus, the potential conflict between Section 251 of the Act and Section 365 of the Bankruptcy Code remains unresolved.

### G. Provisions Concerning Fraud

In recent years, there have been a number of high-profile instances of telecommunications companies whose financial managers have engaged in fraud.[163] The FCC's authority to address fraud in the telecommunications industry is limited. The FCC can pursue enforcement when persons

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[162] *Id*. Rural telephone companies, however, are generally exempt from the obligations of Section 251(c) unless a State commission finds that the three-pronged test contained in Section 251(f)(2) has been met. *Id.* § 251(f). With a rural exemption, a ILEC need only comply with Section 251(b). *See id.*

[163] *See, e.g., United States v. Ebbers*, 2005 WL 22878 (S.D.N.Y. 2005); *United States v. Rigas*, 258 F. Supp. 2d 299 (S.D.N.Y. 2003).

subject to FCC regulation willfully or repeatedly fail to comply substantially with either the terms of their authorization, the provisions of the Act or the FCC's rules.[164] Thus, the FCC does not have general jurisdiction to take enforcement actions against managers who engage in fraud, unless such fraud constituted a violation of the Act or FCC rules. The FCC has not passed any rules specifically addressing the types of frauds that have led to telecommunications bankruptcies. However, the Act provides a private right of action for individuals alleging that they have been financially harmed by a common carrier by authorizing them to file suit in federal district court or file a Section 208 complaint at the FCC.[165]

Any allegations of fraud may become an issue in determining whether an entity has the requisite character to hold an FCC license. When a licensee requests FCC permission to transfer a license under Section 310(d) of the Act, the FCC must determine, as a threshold matter, whether the assignor and assignee meet the requisite qualifications to hold an FCC license.[166] While the FCC generally will not re-evaluate the qualifications of the assignor,[167] it may designate the issue of the assignor or assignee's character for hearing if the issue is raised to a sufficient extent in petitions.[168]

## H. State Regulations[169]

### 1. *Introduction*

Telecommunications carriers are also subject to regulation at the state

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164 47 U.S.C. § 503(b)(5) (2005).

165 *Id.* § 207 (2005).

166 *Id.* § 310(d) (2005); *see, e.g.*, VoiceStream Wireless Corp., PowerTel, Inc., *Mem. Op. and Order*, 16 FCC Rcd. 9779, 9790-91, ¶ 19 (2001).

167 Rainbow DBS Co. LLC, *Mem. Op. and Order*, 20 FCC Rcd. 16868, ¶ 14 (2005).

168 *Id.*

169 Requirements surrounding bankruptcy, discontinuance, transfers of control, issuance of new securities, and deposit requirements vary widely from state to state. Moreover, individual state Public Utility Commissions (PUCs) staffs have significant discretion in how they interpret various statutory provisions and rules. As a result, a telecommunications carrier contemplating reorganization should consult with the relevant PUCs early to ensure that it understands its obligations under the rules.

level. Thus, a telecommunications carrier must comply not only with the federal statutory and regulatory obligations explained above, but also with the specific regulations of the states in which the carrier provides service.[170] In addition to the federal requirement in Section 214 that carriers coordinate discontinuation of service with state governments, carriers also are subject to a wide array of state statutes and regulations placing restrictions and obligations on their ability to discontinue service, assign and transfer their assets, and issue new stock. Below are some examples of state restrictions and obligations from around the country. As an additional aid to understanding, Appendix E contains a summary of relevant requirements in six representative states.[171] It should be noted that state Public Utility Commissions (PUCs) generally have broad latitude to interpret their authority under their governing state statute. As a result, any attempt to interpret how to comply with state laws and PUC rules should begin with independent research into the actual practices of a state PUC in addition to a review of the relevant statutes.

### 2. *Notification of Bankruptcy*

Filing for bankruptcy is often the first outward sign that a carrier's ability to continue service to its customers is threatened. A significant number of states request that a bankrupt carrier submit, at a minimum, a courtesy notice alerting the PUC that the carrier has filed for bankruptcy.[172] While there is no formal notice requirement in the statutes and administrative codes of some of these states, PUC officials indicated that this informal courtesy notice helps them prepare to handle the other applications and filings required for corporate reorganization and the sale of assets that usually follow the filing of bankruptcy petitions.

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[170] Title III of the Communications Act grants the FCC absolute jurisdiction over the regulation of the electromagnetic spectrum, preempting the states' ability to regulate in this field. As a result, the states have no jurisdiction over broadcasting. However, Title II of the Act leaves the states with limited jurisdiction over intrastate common carrier activities, enabling the states to regulate certain intrastate aspects of CMRS providers and other wireless telecommunications providers.

[171] These states include California, Florida, New York, Ohio, Pennsylvania and Texas.

[172] States requesting a courtesy notice include Colorado, Georgia, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, Texas and West Virginia.

A number of states require that a carrier file a formal notice with the state after filing for bankruptcy. Three such states, Missouri, Pennsylvania and Wisconsin, require that a carrier report its bankruptcy filing to the PUC within 10 days of the filing.[173] In Pennsylvania, a carrier must seek approval of the reorganization plan, and the PUC will make a finding and certify approval or disapproval of the plan to the bankruptcy court. Iowa and New York also require that the PUC approve any reorganization of a telecommunications carrier.[174]

### 3. *Discontinuation of Service*

Discontinuation or interruption of service is of primary concern to state regulators when a telecommunications carrier files for bankruptcy. The overwhelming majority of states have their own version of Section 214 of the Act, which restricts telecommunications carriers' ability to abandon or discontinue service. These restrictions are grounded in the public interest implications of discontinuing or interrupting service. Those implications include leaving customers without service and reducing competition in the relevant market. Such concerns also serve as the basis for the other restrictions and requirements states impose upon carriers when they file for bankruptcy, seek transfers of control or issue new stock.

Like Section 214, most of the state provisions restricting discontinuation and interruption of service only permit disruptions of service after the carrier has acquired approval from the state PUC. The requirements of the approval process vary widely among the surveyed states. However, most states require some type of application requesting PUC approval to discontinue or interrupt service.

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[173] *See* MO. CODE REGS. ANN. TIT. 4, § 240-3.565(1) (2005); 52 PA. CODE § 1.61(b) (2005) (also requiring that notice be sent to the Pennsylvania Consumer Advocate); WIS. STAT. ANN. § 196.79 (West 2005) (requiring notice of reorganization). Virginia requires a competitive local exchange carrier (CLEC) filing for bankruptcy to file a written notice with the PUC within 7 days of the filing of the bankruptcy petition. Virginia also requires the bankrupt CLEC to provide the Virginia Corporation Commission with a copy of the bankruptcy petition and any reorganization plan. *See* 20 VA. ADMIN. CODE § 5-423-70 (2005).

[174] IOWA CODE § 476.77 (2005); N.Y. PUB. SERV. LAW § 101-a (McKinney 2005).

While the information required in the application varies from state to state, states generally employ a public interest standard in determining whether to approve a request to discontinue or interrupt service. Generally, PUCs use the discretion built into the "public interest" standard to prohibit the proposed discontinuation if it would leave consumers with no viable service alternative or dramatically reduce competition. In addition to the impact on consumers, PUCs consider the applicant's attempts to sell and provision the service to consumers, whether the service can be provided profitably[175] and the applicant's attempts to secure alternative service for its customers. Many states require that the PUC issue a public notice inviting public comment on an application for discontinuation. Many states also provide for administrative hearings; some require hearings when an interested or affected party files in opposition to the initial application, while others leave it to the PUC's discretion.

In contrast to the states that require PUC pre-approval of discontinuation, a significant minority of states allow the carrier simply to provide the PUC with notice of its plan to discontinue service. For example, Michigan presumptively approves proposed discontinuations of service unless affected persons file their opposition with the state PUC, thereby precipitating a hearing.[176] Similarly, New Hampshire excuses certain carriers (*i.e.*, competitive carriers) from its approval requirement, allowing them to provide the PUC and their customers with notice instead.

*4. Transfer of Control*

The state regulatory requirements for the transfer of control of a telecommunications carrier vary widely. Some of the surveyed states have no formal requirements and ask only that the PUC receive notice of the pro-

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[175] North Carolina and Ohio explicitly require that the PUC consider profitability in deciding whether to allow discontinuation of service. *See* N.C. GEN. STAT. § 62-118 (2005); OHIO REV. CODE ANN. § 4905.21 (2005).

[176] *See* Michigan Telecommunications Act, MICH. COMP. LAWS § 484.2313 (2005); N.H. PUC R. § 431.14 (West 2005).

posed change in the carrier's ownership. In other states, notice of a transfer is statutorily required. In most states, however, a carrier must first obtain approval before executing a transfer of control.

In states requiring PUC pre-approval of a transfer of control, the application and approval process ranges from the informal and uncomplicated to the lengthy and burdensome.[177] In most of the states requiring pre-approval of transfers of control, it is a blanket requirement, while a few others only require approval of transactions involving certain types of carriers.[178] In addition, the complexity and duration of the approval process is not always clear from the statute or rules and often is left to PUC staff discretion. This regulatory uncertainty is another reason why a carrier entering bankruptcy should coordinate with the relevant state PUCs as early as possible.

States also regulate the assignment of assets, which include facilities and, in some states, authorizations and licenses. While the process and specific requirements vary between states, the assignment of assets in bankruptcy reorganization is subject to the same basic process required at the federal level and described in Section II.D.1., *infra*.

### 5. *Issuance of Securities*

The state regulatory requirements applicable to telecommunications carriers seeking to issue new stock, bonds, notes or other forms of indebtedness also vary widely. The majority of states require PUC pre-approval of plans to issue securities. Among those states requiring PUC approval

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[177] West Virginia requires that applications be submitted on the form provided by the PUC rules, while other states, such as Texas, provide a list of general requirements that must be included at a minimum.

[178] New Hampshire exempts from the approval requirement competitive local exchange carriers and competitive toll providers with less than a 10 percent share of toll revenue in New Hampshire, though carriers must still comply with New Hampshire's slamming and cramming rules in any merger, transfer or reorganization. *See* N.H. REV. STAT. ANN. § 374:22-o (2005). Rhode Island only requires the state PUC to approve transactions between two public utilities. *See* R.I. GEN. LAWS § 39-3-24 (2005).

before the issuance of new securities, several limit that restriction to securities or other debts payable more than 12 months from their issuance.[179] In a minority of states, there are no formal requirements.

*6. Deposit and Cut-Off Requirements*

Many states regulate a carrier's ability to require deposits from customers as a condition of providing service and the procedures carriers must follow before cutting off customers for nonpayment. Some states address the procedures that telecommunications utilities must follow when it is another telephone utility whose bill is delinquent. In Maryland, for example, if a telephone utility fails within 30 days to pay an undisputed bill to a utility providing an underlying telephone facility or resold service, the underlying utility must notify the Maryland Public Service Commission (PSC). The PSC may then find the telephone utility in jeopardy of discontinuing service, which would require notice to customers or require the telephone utility to provide periodic reports demonstrating that it is financially capable of continuing to provide service without interruption.[180] Pennsylvania requires a local exchange carrier to issue a default notice and then wait at least 30 days prior to sending a termination notice to a wholesale carrier customer.[181] Mississippi's rules, on the other hand, impose a "good faith" requirement on negotiations between ILECs and CLECs arising from billing disputes.[182]

Some states also regulate the ability of carriers to obtain deposits from current and existing customers. In Oklahoma telecommunications service providers may require a deposit from new residential customers who have previously had delinquent accounts or as a condition of continuing service for end-users when undisputed charges have become delin-

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[179] *See, e.g.*, N.H. REV. STAT. ANN. § 369.1 (2005); OHIO REV. CODE ANN. § 4905.40(c) (West 2005); R.I. GEN. LAWS § 39-3-15 (2005).

[180] MD. CODE REGS. 20.45.04.14 (2005).

[181] 52 PA. CODE § 63.303-304 (2005).

[182] 26-000-005 MISS. CODE R. § 5 (Weil 2005).

quent.[183] For business customers, Oklahoma permits providers to request a deposit if credit "has not been established to the satisfaction of the telecommunications service provider."[184] Illinois limits the amount of deposit that can be collected by a carrier to two months payment for residential customers and four months payment for business customers.[185] In Washington, a LEC may require business customers to pay a deposit of two months actual usage, a figure that can be increased by the LEC if the business customer's usage increases.[186] In other states, regulations permit LECs to seek deposits from customers based on increased usage or excessive toll.[187]

Likewise, some states impose restrictions on the ability of carriers to disconnect customers' service. In Rhode Island, a telephone utility must provide written notice to customers at least 5 days before discontinuing service for nonpayment.[188] In Indiana, a carrier may not disconnect service to a wholesale carrier customer until 30 days after providing the wholesale customer with the PUC written notice.[189] In Mississippi, an ILEC must provide a CLEC at least 30 days notice prior to discontinuance, and a CLEC must provide its end-user customers at least 60 days notice prior to discontinuance.[190] In Wyoming, no provider may disconnect service to a customer until such provider has provided 7 days written notice to such customer.[191] If, however, the customer is a CLEC that also provides Internet service, Wyoming requires that the carrier provide at least 14 days notice prior to disconnection.[192]

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[183] OKLA. ADMIN. CODE § 165:55-9-14 (2005).

[184] *Id*. § 165:55-9-11.

[185] 83 ILL. ADMIN. CODE, tit. 83 § 735.120 (2005).

[186] WASH. ADMIN. CODE § 480-120-123 (2005).

[187] *See, e.g.,* ALA. PUB. SERV. COMM'N GEN. R. 8 (2005), *available at* http://www.psc.state.al.us/; 291 NEB. ADMIN. CODE § 5-002.19C (2005).

[188] 90-030-001 R.I. CODE R. § II.6.b (2005).

[189] 170 IND. ADMIN. CODE 7-6-3(e) (2005).

[190] 26-000-005 MISS. CODE R. § 5(D) (Weil 2005).

[191] WY. ADMIN. CODE § 504(c) (2005).

[192] *Id*. § 504(c)(iii)(A).

In most instances, however, the state regulations will act as a floor but will not govern the relationship between each carrier and its customers. Rather, the carrier's applicable tariff will govern the terms and conditions of service, including disconnection and the collection of deposits. State commissions typically have the authority to review and reject the terms, rates and conditions of a carrier's tariff.