

**CLARIFYING THE JURISDICTION OF
THE FEDERAL COMMUNICATIONS COMMISSION**



Over the years, we have seen a number of instances where the Federal Communications Commission's ("FCC") jurisdiction over a particular matter has been ambiguous or challenged. This has made it evident that Congress must be clear and coherent about the FCC's jurisdiction. Without a clear delineation of the FCC's jurisdiction, the public is left with either bad or inconsistent policy-making or left with inaction as stakeholders spend years debating over the FCC's jurisdiction. Consequently, there are four jurisdictional areas in particular that need prompt attention.

First, one area where clarity is needed is the FCC's jurisdiction to ensure an open and non-discriminatory broadband network. The FCC has adopted already some principles for the rules of the road - to ensure that users have access to lawful content, applications, and devices. However, some have suggested that this policy - which has not been codified into a rule - does not provide the FCC any jurisdiction to impose penalties on providers who may block or throttle applications. Indeed, some have suggested the FCC has no jurisdiction to adopt even rules that would address discriminatory behavior. Congress could adopt legislation to clear this up, which could be done in a number of ways. For instance, Congress could amend the Telecommunications Act to specifically state that information services are subject to the interconnection and nondiscrimination requirements of Sections 201 and 202. This would be similar to the action Congress took in the case of commercial mobile services, where Congress amended Section 332 to specify that cellular phone service was subject to Section 201.

Second, clarity regarding the FCC's jurisdiction over access to video programming is also needed. Section 628, which provides the FCC with jurisdiction over promoting video com-

petition and diversity, promulgates the “minimum contents of regulations” that the FCC can adopt. However, the FCC has acted in a manner, and parties have often argued, that essentially these minimum regulations are exclusive and the FCC has no jurisdiction to adopt additional regulations, despite market behavior harming the public interest. Congress could make it clear that the use of “minimum” does not preclude the FCC from adopting additional rules that would promote competition and diversity.

Third, the Commission’s jurisdiction over adopting rules which would mandate video description was also challenged, despite the fact that it was evident the Commission did have the authority to adopt closed captioning rules. The Court ultimately found the Telecommunications Act did not provide the FCC with authority to mandate video description rules, though the FCC did have jurisdiction over mandating closed captioning rules. This inconsistency should also be cleared up by Congress, which can overrule the case *MPAA v. FCC* and specify that the FCC does have the jurisdiction and discretion to adopt video description rules.

Finally, the Commission’s jurisdiction to review forbearance applications that have been granted should also be addressed. “Forbearance” refers to a provision, added to the Communications Act in 1996, giving the FCC the authority to decline to apply existing regulations when certain conditions relating to consumer protection and competitive developments are met. However, the statute does not provide a mechanism where the FCC can reevaluate the decision, especially in cases where there is evidence that grant of the application is not in the public interest. A review mechanism would also be useful in instances where the petition has been “deemed granted.” The statute provides that a petition filed with the FCC seeking forbearance “shall be deemed granted” if the Commission does not deny the petition within a fifteen month window, which allows the forbearance to take effect without any formal vote or supporting record.