NOTE: *On the issues of enhanced 911 Services and Number Portability discussed herein, be aware that several states are now considering or have already established service requirements for colleges and universities.*

ACUTA Legislative and Regulatory Affairs Committee

Association of College & University Telecommunications Administrators (ACUTA)
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Analysis of the Telecommunication Act of 1996

The Telecommunication Act of 1996, signed into law on February 8, will dramatically transform the telecommunications industry and create significant new challenges for ACUTA members. This memorandum analyzes how the Act may affect institutional users of telecommunications services, such as colleges and universities. Part I of this memorandum reviews the likely benefits of the legislation; problem areas that appear to be minimized by the legislation, compared to earlier versions; and areas of remaining concern. Part II addresses several items of specific concern to colleges and universities.

THE TELECOMMUNICATIONS ACT OF 1996

Overview. The Act, as passed, is considerably improved from either the House or Senate bills. In general, the new legislation should promote effective competition in several industry segments while requiring implementation of relatively strict safeguards against cross-subsidization and anticompetitive conduct. In addition, the Act does not contain certain provisions that, in earlier drafts, created significant cause for concern. For example, it no longer authorizes the states to require private networks -- such as many colleges and universities have -- to contribute to universal service, and it provides defenses against liability for employers whose computers are used to transmit indecent or obscene material. Of course, some provisions continue to raise risks for ratepayers, including the scope of the universal service obligation.

The major benefit: new competition. The largest plus of the legislation from the user perspective is the prospect of effective new competition at several levels:

> **Long distance.** For in-region long distance services,1 BOC entry will be permitted within a state once the FCC finds (1) that a facilities-based local competitor exists, or that no request for interconnection by a competitor has been made within 10 months after enactment; (2) that the BOC is offering interconnection through a negotiated agreement or a generally available set of terms and conditions meeting the statutory "competitive checklist"; (3) that the BOC will comply with a separate subsidiary requirement and other safeguards; and (4) that entry will be in the public interest. The FCC must act on a BOC request for authority within 90 days. Depending on the BOC, and on the specific state involved, entry is likely within 1 to 2 years. As a result, ACUTA members should assume that long distance rates will decrease in the near future, with the most significant reductions affecting relatively short-haul services within each BOC's region.
> **Local exchange.** Upon enactment, the legislation preempts state and local restrictions on competition and sets forth a detailed set of conditions intended to assure that prospective local service providers can compete effectively. These conditions include requirements that local exchange carriers (LECs) unbundle the local loop, switching, and transport; allow interconnection at any technically feasible point at cost-based rates; provide number portability; provide access to rights-of-way; and permit dialing parity. Although the majority of states no longer prohibit competition, the Act should establish nationally applicable ground rules that expedite the development of local competition, while allowing individual states to supplement the national requirements. As competition

develops over the next two to five years -- first for large users in urban areas, and then for other customers -- ACUTA members should experience price reductions and improved service quality.

Video delivery services. By eliminating the restriction on telephone companies' providing cable television services in-region, the Act should unleash powerful competition against monopoly cable franchises in the next one to three years, depending on the area. While this new competition may be of most relevance to residential consumers, telcos that upgrade their networks to accommodate broadband video may be able to offer improved services to non-residential subscribers as well.

Ratepayer and competitive safeguards. Unlike certain prior versions of telecom reform legislation, the new Act imposes a fairly strict separate affiliate requirement on BOC provision of long distance, interLATA information services, electronic publishing, and manufacturing. The long distance and manufacturing separation requirement expires after three years, unless the FCC extends it. (The authority to extend the requirement is new to the conference bill; the Commission had no such discretion under earlier bills.) For interLATA information services and electronic publishing, the separate affiliate requirement applies for four years. The Commission likewise may extend the requirement for interLATA information services. In addition to the separate affiliate requirement, the legislation imposes restrictions on discrimination and cross-subsidization. Although the effectiveness of these safeguards will depend on the FCC's having the resources to enforce them, the legislation establishes a framework that, theoretically, at least, should minimize anticompetitive conduct.

Other significant benefits. In addition to the prospect of new competition, the legislation should benefit ACUTA members in several other respects:

CPNI. The legislation requires approval from customers of all sizes -- not just those with more than 20 lines, as under the Commission's current rules -- before a telephone company can use customer proprietary network information for anything other than providing the service from which the information was obtained

Pay-per-call. The legislation significantly tightens the loopholes in the current rules regarding use of 800 numbers for pay-per-call services. Although such uses are not prohibited entirely, the legislation requires detailed written subscription agreements or onerous disclosure requirements for use of a credit card, before charges can be imposed

Slamming. The legislation requires the carrier that "slams" a subscriber to pay the subscriber's desired carrier any charges associated with the subscriber's usage. The legislative history clarifies that the customer should be "made whole."

Forbearance from tariffs. The new law expressly authorizes the FCC to forbear from applying any section of the Communications Act, including the tariffing requirement. Assuming the Commission exercises this authority by prohibiting IXCs from filing tariffs -- as it likely will want to do -- service agreements between carriers and customers should be mutually enforceable, without the threat of unilateral changes being imposed by the carrier.

Problems probably avoided. Earlier versions of the legislation, both this year and in past years, contained several provisions that could have dramatically increased telecommunications costs or even exposed users to regulation or liability in certain circumstances. The new legislation appears to avoid most of these potential pitfalls, although a final judgment cannot be made until all the rules implementing the law have been adopted and interpreted.

Regulation of users. The definition of "telecommunications carrier" in the new law only encompasses providers of telecommunications service for a profit to the public or classes of the public. Accordingly, in contrast to previous telecom reform bills, the new law does not appear to raise a significant risk that users who seek to lease excess capacity on private networks to third parties will be considered common carriers subject to FCC

regulation. (The legislation does not alter the jurisdiction of state regulators, so any state would remain free to regulate such conduct.)

Regulation of information services. Earlier versions of the legislation -- most notably the Hollings bill, S.1822, from 1994 -- could have been interpreted as including some information services in the definition of "universal service," and therefore subjecting some information service providers (including ACUTA members) to regulation.

Contribution by private networks to universal service. The Senate bill, S.652, would have explicitly permitted the FCC and states to require private networks to contribute to universal service, even when those networks were entirely leased from common carrier already subject to universal service support obligations. The new law appears to allow the FCC to subject private networks to contribution requirements "if the public interest so requires." There is no equivalent provision applying to the states, so there is an argument that state regulators may not compel private networks -- such as colleges and universities -- to contribute directly to universal service.

Liability for obscene/indecent communications. The "Exon Amendment," as incorporated in S.652, would have held operators of computer networks liable for transmission of obscene or indecent communications, even if they had no knowledge and did not approve of such communications. The new legislation creates defenses for employers (who cannot be held liable unless they authorize or approve their employees to transmit obscene or indecent material) and network operators (who cannot be held liable for providing access to facilities or networks not within their control or for attempting in good faith to restrict access to obscene or indecent material). While these defenses may not be ironclad, they are a substantial improvement over the language in S.652.

Areas of concern. Notwithstanding the benefits discussed above, the legislation continues to include several provisions that raise potential concerns

Scope of universal service. Under the legislation, the FCC and states will jointly develop a new definition of universal service and a revised funding mechanism. If the scope of universal service is significantly expanded, the total contribution requirement could likewise increase. This could elevate rates by imposing new costs on service providers, and also could put pressure on the FCC to require private networks to contribute (which, as noted above, the Commission has authority to do). The universal service implementation proceedings at the Joint Board and FCC will be extremely important in determining the net effect of the new statutory requirement.

Effectiveness of safeguards. The FCC is facing an unprecedented expansion of its responsibilities at the same time that its budget is being cut. Because much of the task of implementing the competitive and ratepayer safeguards will fall to the FCC, there is a risk that an impoverished Commission would be unable effectively to discharge its duties.

Review of access rates. Beginning one year after enactment, LECs will be allowed to rate decreases with the FCC on 7 days' notice, and rate increases on 15 days' notice. This provision largely affect the LECs' interstate access rates, and does not apply to their state-tariffed intrastate rates. The shortened notice period may compromise the FCC's ability to assure that LEC access rates are just, reasonable, and non-discriminatory. In addition, any investigation into the lawfulness of LEC rates will need to be concluded in five months, rather than the fifteen months currently allowed. This, too, may put additional pressure on already strained FCC resources.

SPECIFIC ISSUES OF IMPORTANCE TO ACUTA MEMBERS

The following part of the memorandum responds to specific ACUTA inquiries regarding the classification of colleges and universities under the Telecommunications Act, and the potential implications if colleges and universities were considered LECs.

Local exchange carrier definition. You asked us to consider whether a university that provides telephone service using either a private branch exchange (PBX) or Centrex would be considered a local exchange carrier under the new legislation. As discussed below, there is a good argument that a university would not be considered a LEC under the legislation, regardless of the technology used to provide telephone service to students

The new legislation defines three classifications of carriers:

"telecommunications carrier," "local exchange carrier," and "incumbent local exchange carrier." The term *"telecommunications carrier"* describes the broad category of entities providing telecommunications services. The Act defines a *"local exchange carrier"* as any person that provides telephone exchange service or exchange access, except insofar as that person provides commercial mobile radio services. An incumbent LEC is defined as a LEC that, on the date of legislation's enactment, provides telephone exchange service in an area and is a member of the exchange carrier association, or any successor company. The legislation imposes particular requirements on each of these categories. For example, LECs must interconnect with other carriers, provide number portability, and provide reciprocal compensation to other LECs with whom they exchange traffic.

A reasonable interpretation of the Act's *"local exchange carrier"* definition, in light of prior use of that term, is that a university using either a PBX or Centrex service should not be considered a LEC. When Congress defined *"local exchange carrier"* in the new legislation, it incorporated an existing definition of *"telephone exchange service,"* which had previously been used to describe a local exchange carrier.*2* Although the courts and the Federal Communications Commission have defined *"telephone exchange service"* in various contexts, no precedent holds that a university is a provider of such service. Furthermore, there is little evidence in the legislative history to suggest that Congress sought to change substantially previous interpretations of the term *"local exchange carrier."* Therefore, a strong argument exists suggesting that the new definition of *"local exchange carrier"* does not intend to include universities as local exchange carriers when they were not defined as such under prior law.

This interpretation is buttressed by the fact that a university probably would not be considered a telecommunications carrier under the new law. Although not explicitly stated in the new law, a logical reading of the legislation suggests that, to be a LEC, an entity must first satisfy the general definition of *"telecommunications carrier."3* That definition encompasses *"providers of telecommunications service for a fee to the public or classes of the public,"* but explicitly excludes aggregators of telecommunications service, as already defined in the Communications Act.*4* It is well established by the Federal Communications Commission that a university is an "aggregator" of telecommunications service when it provide telephone service to its students using a PBX or a Centrex.5 It follows, therefore, that a university should not be considered a telecommunications carrier, and thus, should not fall within the Act's definition of a LEC.

Enhanced 911 service. You asked us to consider whether the legislation would compel a university deemed a LEC to offer E-911 service behind its PBX. The legislation does not create an obligation on a university (whether or not deemed a LEC) to offer E-911 services behind its PBX. However, the FCC is considering a PBX operator's obligation to provide E-911 service in an ongoing rulemaking proceeding. In that proceeding, the Commission's proposed rules would require compatibility of PBX equipment with enhanced 911 systems. We understand that the Commission may seek further comments, possibly delaying any final decision into the Fall.

Number portability. Finally, you inquired whether the number portability requirement in the legislation requires a university to allow students to retain their existing telephone

number when moving to a location off-campus; and whether a student or a university "owns" the telephone number assigned to a student while that student lives in university housing. The legislation would not compel a university (whether or not considered a LEC) to provide a student with the same telephone number when that student moves from a university campus to an off-campus location. Rather, the legislation defines "number portability" as the ability of a telephone subscriber, when switching service providers, to retain an existing telephone number at the same location. The FCC, however, has on ongoing number portability proceeding that may eventually require some degree of geographic number portability. It will not be possible to assess the impact of any Commission rules on universities and colleges until those rules are finalized.

Although the legislation does not address the question of "ownership" rights in telephone numbers, the Commission has, in several proceedings, characterized telephone numbers as a public resource that is neither the property of the subscriber nor the carrier. Similarly, LEC and IXC tariffs generally state that the subscriber has no proprietary interest in its telephone numbers. In light of this characterization, it is unlikely that either a university or a student would be considered to have an ownership interest in a telephone number assigned to a student while that student is living in university housing

We hope this analysis proves helpful. Please feel free to call us if you have any questions.

1 - In-region services include interLATA services originating within a state served by a particular BOC, 800 services terminating in such a state, and private line services connecting out-of-region and in-region points, where the in-region customer selects the IXC. The BOCs may provide out-of-region and "incidental" services upon enactment. Incidental services include many interLATA information services and long distance services offered to cellular, paging, or PCS subscribers.

2 - See, e.g., 47 C.F.R. 61.3(r) (1994) (defining a local exchange company for tariff purposes as a telephone company that provides telephone exchange service).

3 - Such a reading is plausible because requiring that a LEC should also meet the definition of a "telecommunications carrier" would avoid subjecting LECs to potentially inconsistent regulations.

4 - Section 226 of the Communications Act defines an "aggregator" as any person who makes telephone service available to transient users or to the public using operator services.

5 - The Commission has specifically concluded that colleges and universities fall within the definition of an "aggregator." See, e.g., Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2744 (1991) (Report and Order); see also Petition for Clarification Regarding Operator Service Providers, 8 FCC Rcd 1781 (1993) (Memorandum Opinion and Order)