

## EXPLANATION OF STAND ALONE LEGISLATION APPROACH

If legislation amends the Communications Act, then it may potentially be impacted or affected by the **plenary authority** given to the FCC in Sections such as 4(i) authorizing the FCC to “perform any and all acts, make such rules and regulations and issue such orders... as may be necessary...” or Section 201(b), authorizing the FCC to “prescribe such rules and regulations as may be necessary in the public interest to carryout the provision of this Act.” Justice Scalia in **AT&T v. Iowa Utilities Bd.**, for instance, cited the Section 201(b) language as giving the FCC authority over intrastate matters normally reserved to the States. Justice Scalia reasoned that because the 1996 Act was added to the 1934 Act as an amendment, the 1996 Act’s provisions were made subject to this plenary authority. Stand alone legislation avoids this concern.

Second, stand alone legislation avoids the definitional problems that have confounded the FCC and States in implementing the Communications Act of 1934 (e.g. enhanced versus basic service in **Computer Inquiries I, II and III**). These definitional problems were not remedied by the Telecommunications Act of 1996 (Title I Information Service versus Title II Telecommunications Service).

Third, stand alone legislation would not be bound by the vast array of court or FCC decisions interpreting extant provisions of the Communications Act of 1934, as amended. There is thus a clean slate and existing provisions of the Communications Act enacted for totally different eras could not be used to undermine the provisions of the new law. To ensure this result the Ensign bill in Section 3(1), entitled “**Applicability of the Communications Act**”, provides that: “*Except as provided in this Act, any conduct, service or service provider shall on or after the date of enactment of this Act, be subject to the requirements of this Act, if such conduct, service or service provider was before the date of enactment of this Act, subject to--*” Titles I( Information services and providers),II( common carriers, telecommunications services and carriers) VI Cable operators and services and section 332(commercial mobile radio services and providers) and an equivalent State common carrier law. The bill does not affect other Titles of the Communications Act such as Title III, IV, V, or VII. For example Title III related to broadcasting and radio spectrum matters continues to apply as to their spectrum use, but this authority under Title III cannot be used to bootstrap common carrier by for instance conditioning radio licenses or the transfer of radio licenses to require providers to comply with common carrier type regulation. It also does not affect the penalties Title V, so if you violate the Ensign Act provisions the FCC can penalize the offending party by means of those provisions

In practical terms, this means that all of the regulatory requirements found in the Communications Act respecting the narrowband, broadband, wireless Internet access and video issues shall, to the extent that they are addressed in the Ensign legislation, be rendered inoperative. Certain Sections of the Communications Act are by Section 3(4) specifically carried forward and the terms of those provisions shall continue to apply such a 224(pole attachments)and 229 (CALEA).