

# U.S. Competition Policy ITU

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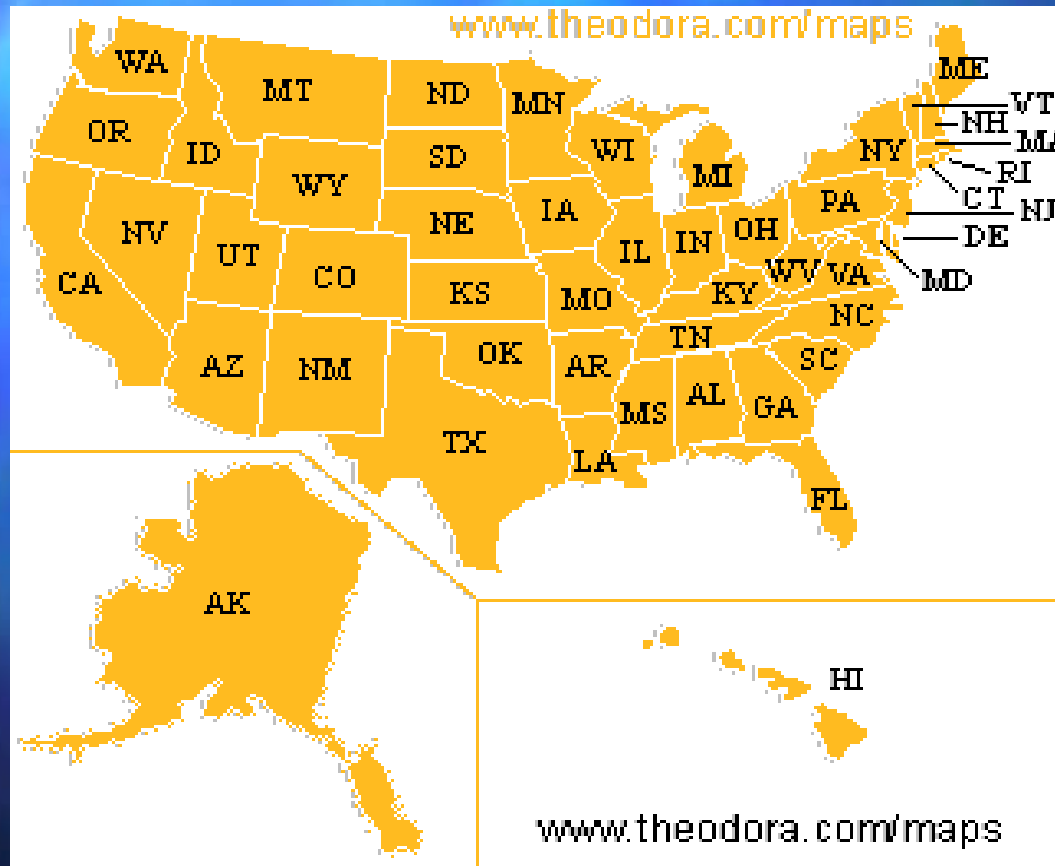
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Geneva, Switzerland

# The United States – Basic Facts



Population: 287.9 million  
(2002 estimate)

Area: 3.54 million square  
miles (app. 9.17 million  
square km)

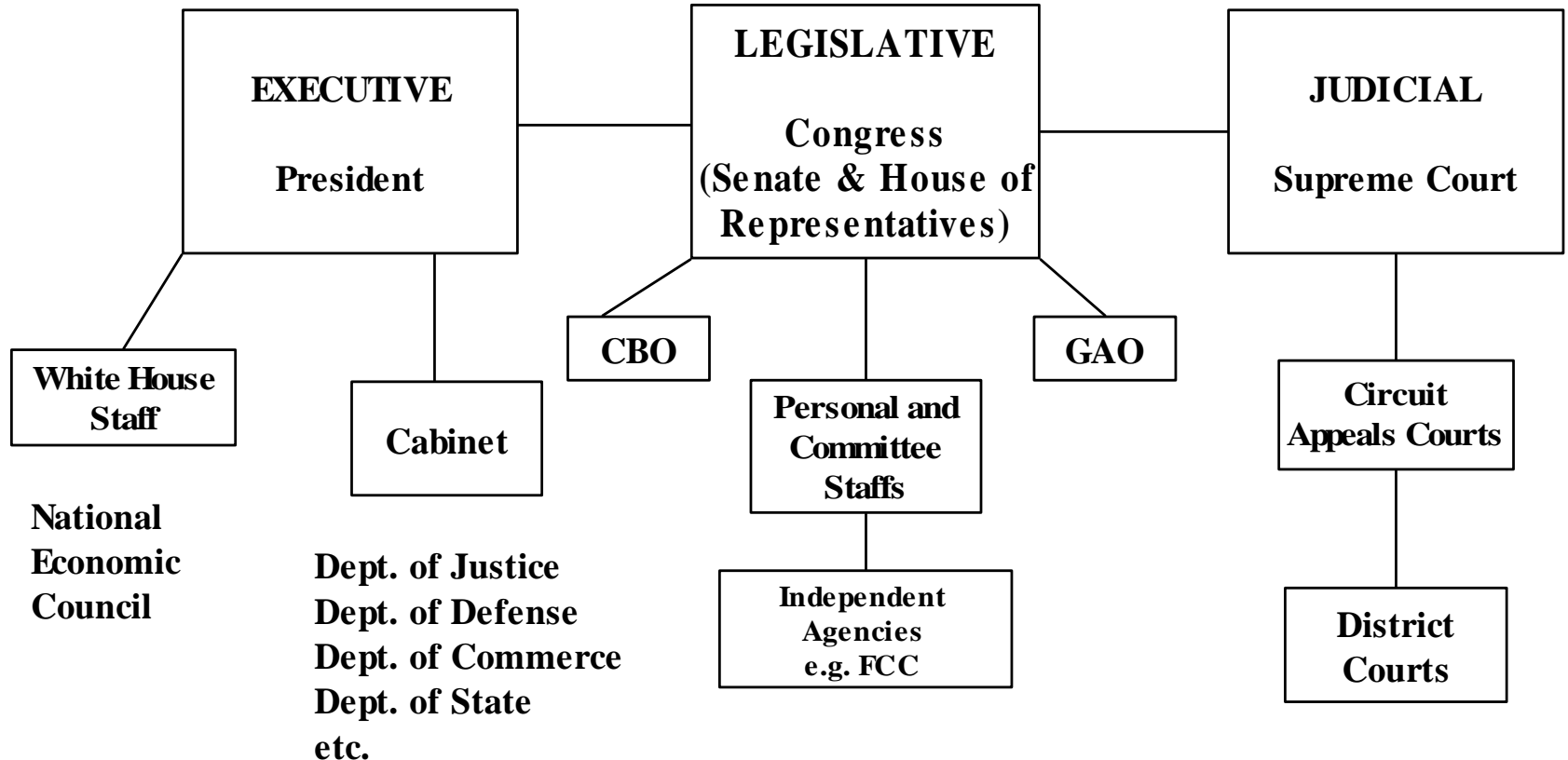
Median Household  
Income: \$42,148 (2000)

UN HDI rank: 6

# The United States – A Federal Republic

*Power is constitutionally divided between Federal and state governments, and among three co-equal branches of the Federal government.*

## BRANCHES OF U.S. GOVERNMENT



# Legal Framework for Competition

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*U.S. law includes both general competition laws and sector-specific laws and regulations*

- A. Antitrust law was first implemented between 1890 and 1914 to protect competition and prohibit use of market power to restrain trade
  - The Sherman Act (1890) prohibits trusts and monopolies, as well as collusion in restraint of trade.
  - The Clayton Act (1914) prohibits mergers or other combinations that substantially lessen competition, calls for advance review of deals.
  - Bell System Divestiture (1984)



## Legal Framework (Cont.)

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- B. State and Federal Governments Began sector-specific regulation of Telecommunications in the early decades of the 20<sup>th</sup> century.
- State governments began regulating telecommunications in their jurisdictions through public service commissions.
  - In the Radio Act of 1927, the Federal Government began licensing radiocommunications and broadcasting.
  - The Communications Act of 1934 set up the FCC, began comprehensive regulation of wireless and wired communications.
  - The Telecommunications Act of 1996 enshrined competition as a goal in all telecom markets.

# Government Players in Telecom Policy

*The U.S. Congress establishes telecommunications policy within the Federal government.*

## The Legislative Branch

- The House of Representatives (lower house) and the Senate (upper house) consider and adopt legislation directly affecting telecom issues (sector-specific) and regarding general competition (antitrust) issues.
- Congress has established an independent agency, the FCC, to enforce sector-specific laws and regulate telecom industry "in the public interest."
- The Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC) impact communications industries.

# Government Players (Cont.)

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## **The Executive Branch**

- The Department of Justice (DoJ) enforces U.S. antitrust laws.
- The Department of Commerce (National Telecommunications and Information Administration) and the National Economic Council advise the President on telecom policy issues.
- The State Department and Office of the U.S. Trade Representative (USTR) represent U.S. telecom policy positions outside the U.S.



# Government Players (Cont.)

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## **The Judicial Branch**

- Federal District Courts (lower courts) hear claims of violations of antitrust laws and, in specific circumstances, claims involving sector-specific laws (e.g., the Communications Act, as amended by the Telecom Act).
- Federal Circuit Courts (appeals courts) may review FCC orders.
- The U.S. Supreme Court is the final arbiter of all legal disputes involving antitrust or sector-specific laws and regulations.



# Government Players (Cont.)

## State and Local governments

- State legislatures may enact laws governing telecom industry practices and services within their state borders.
- State telecom laws are implemented and enforced by public service commissions, which are generally multi-sectoral.
- State courts interpret and adjudicate claims based on state contract law and sector-specific statutes, subject to federal judicial review.
- Local governments may affect competition through franchising authority, wireless tower site permits or construction permits for cable conduits.

# How It Works – The Application of Competition Policy

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## Antitrust Enforcement

- Civil and criminal actions by the Justice Department or FTC may result in court judgments or consent decrees
- Merger reviews under the Clayton Act apply merger guidelines to gauge the effect of increased market concentration
- EchoStar and DirecTV
- America Online and Time Warner (FTC)

# How It Works – The Application of Competition Policy (Cont.)

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## The Application of Merger Guidelines and the Herfindahl-Hirschman Index (HHI) in Merger Reviews

- Defining the market
- Identifying market participants and likely entrants
- Determining market concentration using the HHI
- Determining the likelihood of coordination
- Conducting a market entry analysis
- Analyzing internal efficiencies
- Consideration of imminent failure



# How It Works – The Application of Competition Policy (Cont.)

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## Asymmetric Regulation by the FCC

*Sector-specific regulation in the U.S. has incorporated asymmetric treatment based on market power and essential facilities doctrines since the 1970s.*

- Computer II/ONA
- Dominant carrier regulation
- Streamlining
- Forbearance



# How It Works – The Application of Competition Policy (Cont.)

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## **The Asymmetric Framework of the Telecommunications Act**

- Promoting competition is a key, but not exclusive, goal of the Act
- Pro-competition mandates are applied asymmetrically
  - Interconnection and resale – all carriers
  - Unbundling, collocation, and resale at wholesale discount – incumbents
  - Section 271 checklist and Section 272 structural separation - BOCs

# 1996 Telecom Act Requirements

**All  
carriers**

**All LECs**

**Incumbent  
LECs**

**BOCs**

- 
- InterLATA prohibitions
  - Provision of interLATA services via separate affiliates
  - Duty to negotiate interconnection in good faith
  - Interconnection at any technically feasible point
  - Network unbundling (UNEs) at cost-based rates
  - Collocation
  - Infrastructure sharing
  - Cannot prohibit resale of services
  - Number portability
  - Dialing Parity
  - Access to rights of way
  - Reciprocal compensation for termination of calls
  - Offer interconnection
  - Coordinate for network compatibility
  - Provide access to disabled
  - Contribute to universal service fund based on interstate servicesx provided to end users

# How It Works – The Application of Competition Policy (Cont.)

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## FCC License-Transfer Proceedings (Merger Reviews)

- The FCC's standard is broader than the antitrust standard; not just competition, but all factors in the public interest are incorporated in its reviews.
  - In evaluating competition as a factor, FCC also undertakes market power analyses.
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- SBC acquisition of Ameritech
  - MCI merger with WorldCom



# Federal v. State Jurisdiction

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*In the U.S. regulatory framework, states regulate intrastate services, while the FCC regulates interstate services.*

- An “end-to-end” analysis is applied to communications to determine whether they cross state boundaries.
- On interconnection pricing, the FCC may set “guidelines” but the states set rates.
- Courts have ruled that states are “sovereign” within sphere of regulating purely *intrastate* services.
- States have role in implementing national policies; there is creative tension in dialogue with Federal government.



# Is the Justice Department a Regulator?

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- The FCC operates largely in an *ex-ante* manner, while antitrust enforcement is largely applied *ex-post*.
- DoJ is a “watchdog,” intervening only when necessary to correct market malfunctions.
- FCC is a “sheep dog,” directing the market toward outcomes mandated by Congress.
- Merger reviews get close to overlap, but are performed using different standards for potential outcomes.

# The Result: Telecom Competition in the U.S.

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## The First 100 Years

- Emergence of AT&T, 1876 to 1893
- Survival of the fittest in a jungle of overhead lines, 1893 to 1920s
- Rise of the regulated “natural monopoly,” 1920s to 1970s
- Divestiture and the growth of competition in long distance and CPE markets

# The Result: Telecom Competition in the U.S. (Cont.)

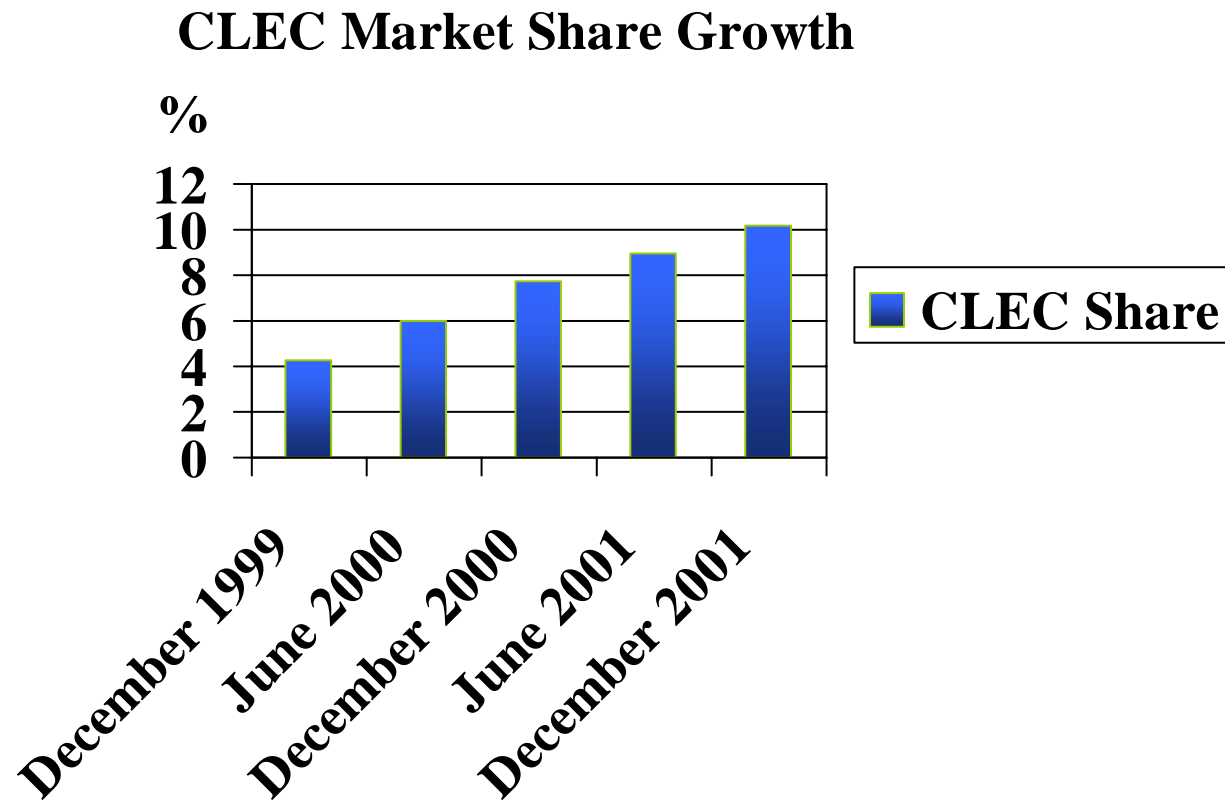
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## The Current Status of Competition

### *Local Services*

- CLECs provide nearly 20 million switched access lines (2001)
- Number of lines grew 14% in second half of 2001.
- Residential and small business customers remain a minority (48.3%) of CLEC customers.
- Coaxial cable lines used for telephony only reached 1% in 2001.
- Assessment: local voice competition growth remains incremental.

## Local Service (Cont.)

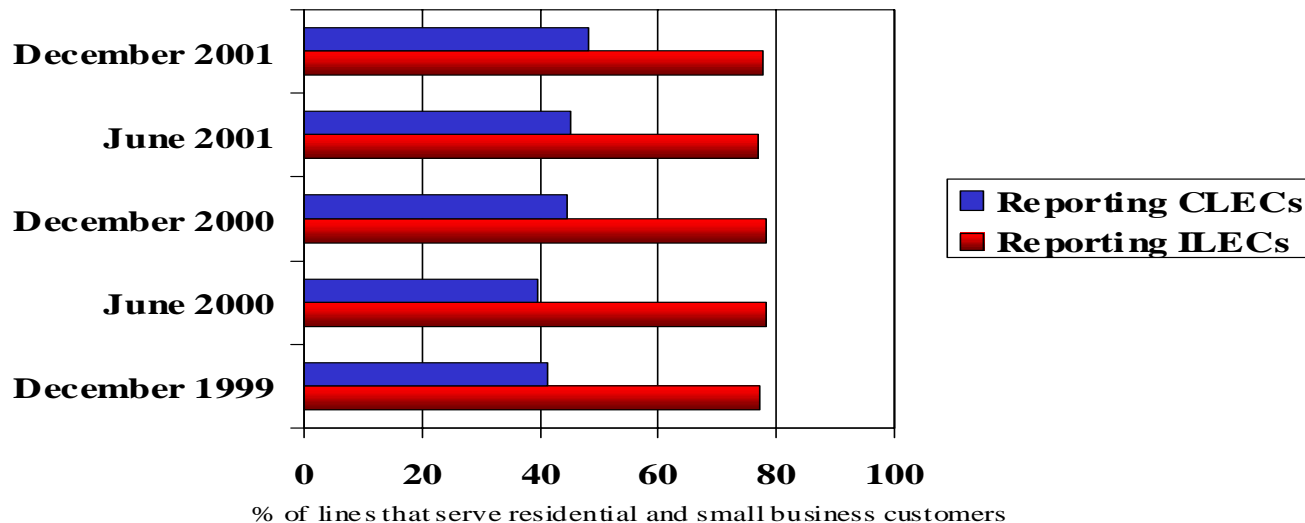




## Local Service (Cont.)

*The percentage of CLEC lines that serve residential and small business customers has risen to nearly 50%.*

### Growth in CLEC Residential and Small Business Lines

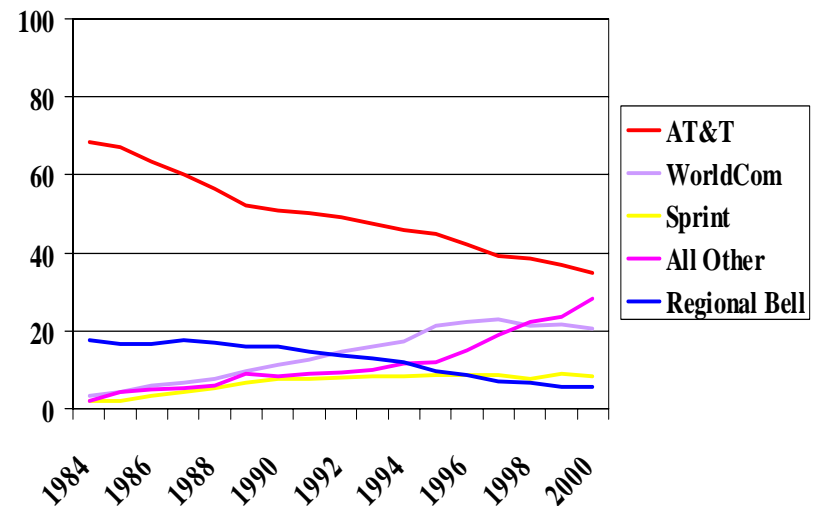


Source: FCC

# Long Distance Service

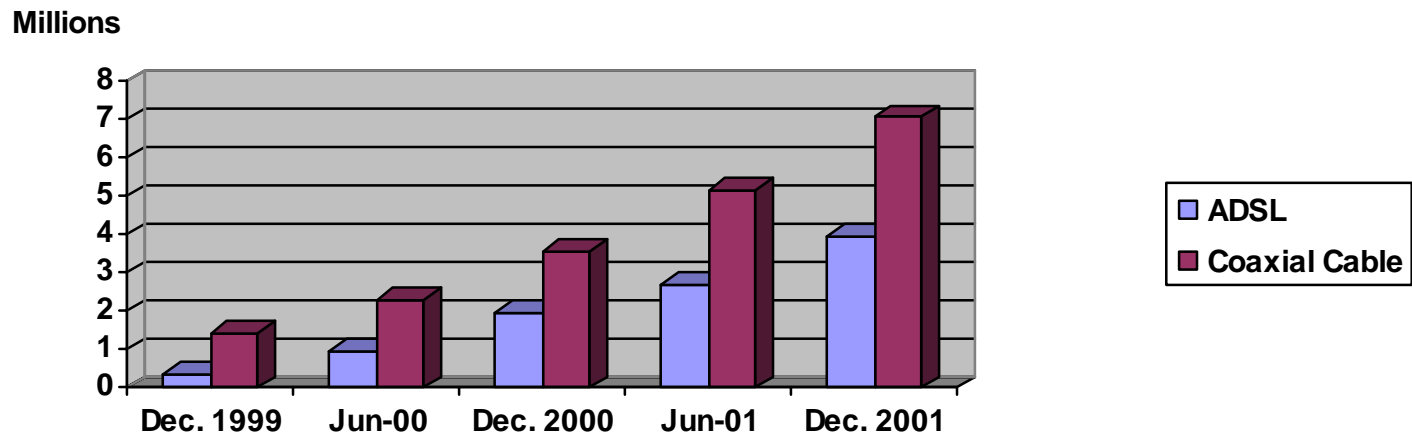
- More than 780 companies are classified as toll carriers, but the largest three remain AT&T, MCI and Sprint.
- Long distance is a stagnant market segment, due to rising Internet, VOIP and wireless use.

Long Distance Market Shares  
1984 - 2000



# Broadband Access

High-Speed Cable Modem, ADSL Lines  
(Over 200 kbps in at Least One Direction)



## Percentage Change

Dec. 2000 - June 2001

ADSL 36%

Coaxial 45%

June 2001-Dec. 2001

ADSL 47%

Coaxial 36%

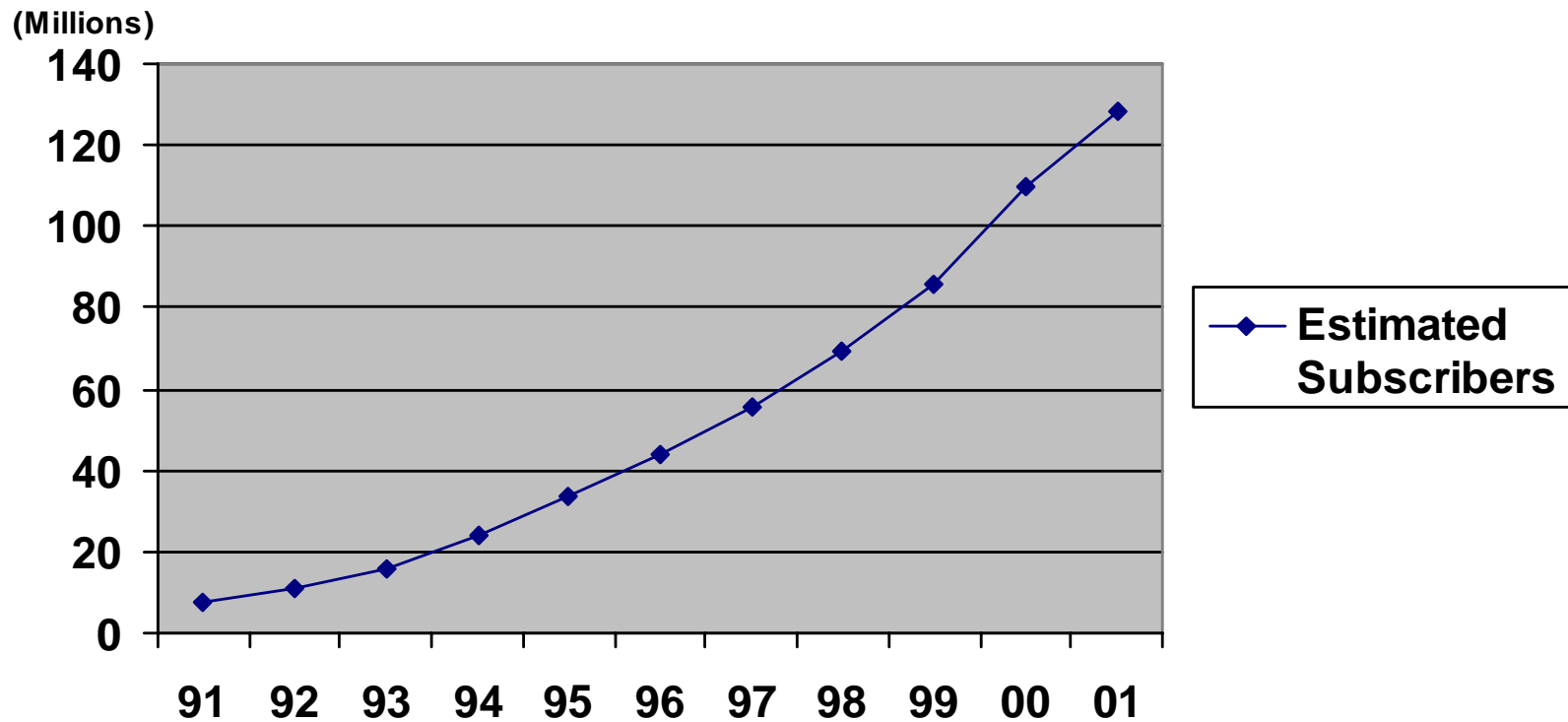
## Broadband Access (Cont.)

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- The FCC defines high-speed access lines as those with a capacity of more than 200 kbps in at least one direction.
- Accelerating broadband network deployment is a top priority for the FCC and Congress.
- Wireless access strategies (fixed wireless and satellite) have struggled in the U.S. market; interest rests increasingly with unlicensed WLAN opportunities (e.g. 802.11b/Wi-Fi.)



# U.S. Mobile Market Growth, 1991-2001



# Mobile Services (Cont.)

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- Mobile data services are a small, but growing market (8-10 million users)
- Wireless carriers are migrating through “2.5G” technologies
- The U.S. has struggled to define spectrum for 3G, but recently allocated two paired blocks of 45 MHz at 1.7 GHz and 2.1 GHz
- Delay in allocation and licensing ironically let U.S. avoid 3G auction bubble.

# Intermodal Competition

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- The U.S. is seeing increased blurring of competitive lines among market segments
  - Broadband Internet access competition between telephone and cable TV
  - Voice competition between wireless and wireline carriers.
- The convergence of competition has complicated U.S. regulatory categories and led to calls for “regulatory parity.”

# Current Competition Policy Issues in the U.S

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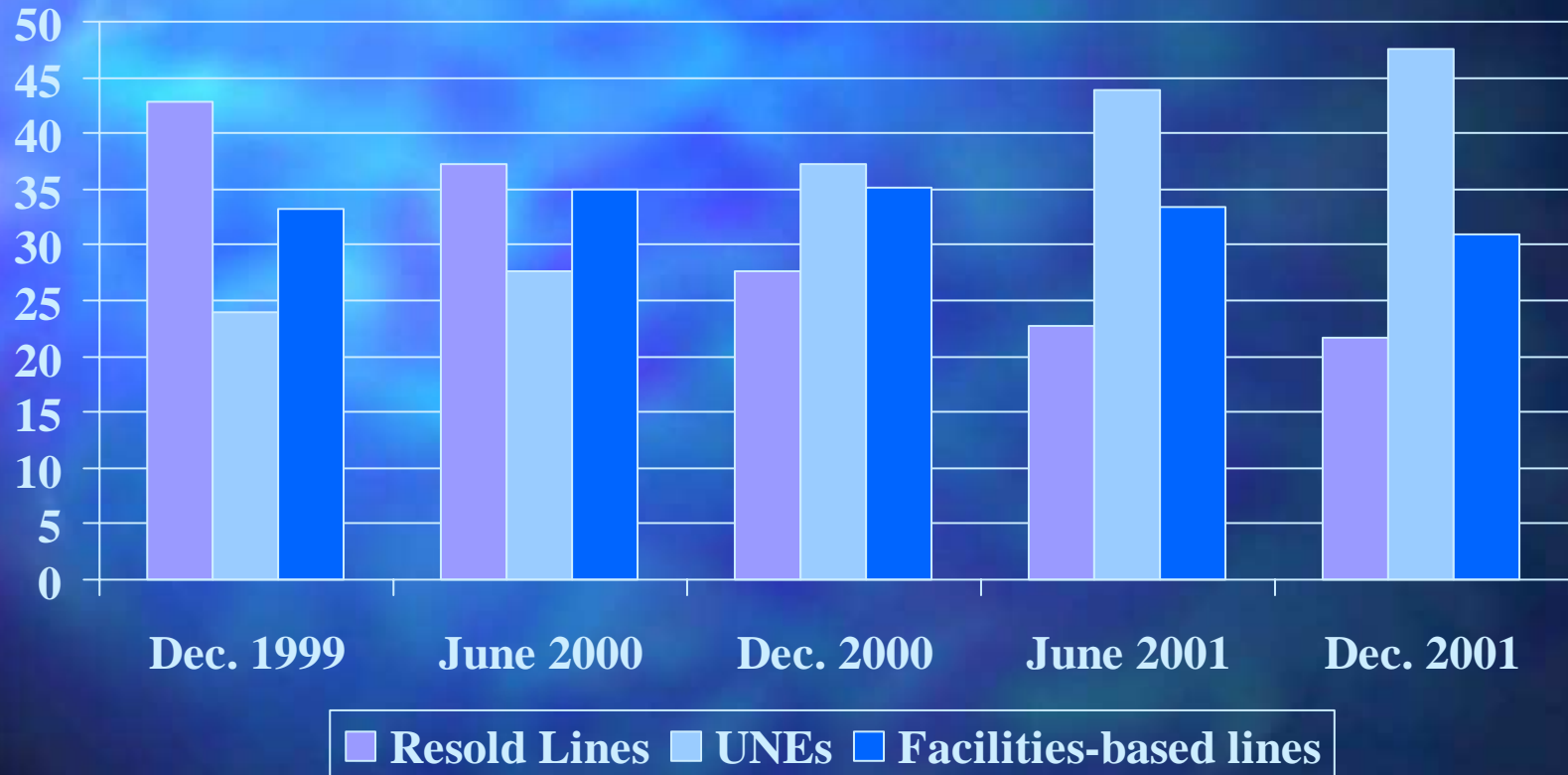
## *The Referendum on Network Unbundling*

- Incumbent and competitive local exchange carriers are locked in a battle over the “unbundled network element platform” (“UNE-P”)
- Incumbents believe the FCC has erred in the past by designating unnecessary UNEs, thus undercutting incentives to invest in competitive networks.
- Competitors and states believe UNE-P availability is needed to encourage market entry and consumer choice.
- A federal court has remanded the FCC’s unbundling and “line-sharing” orders.



# Competition Policy Issues (Cont.)

% of lines



Source: FCC

# Broadband Rollout

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*The FCC is examining several ways to possibly reduce regulation of incumbents' broadband network offerings, in an effort to spur accelerated roll-out.*

- Incumbent carriers are calling for deregulation and regulatory parity, arguing that current policies constitute a disincentive to investment.
- Competitors and cable TV companies believe deregulation will lead to leveraging incumbents' local market power into broadband, IP networks.

# Universal Service

*The FCC is facing growing questions regarding the overall level of the universal service burden, the cost of administering the USF, and the method of levying the contribution amounts.*

- The projected total of USF costs for the fourth quarter of 2002 is \$1.586 billion, or \$6.34 billion, if annualized.
- Carriers face a growing number of legal challenges based on allegations of “overcharging” to collect contribution amounts
- The FCC is considering proposals to revamp the collection system by basing it on “connections” rather than on revenues.
- Questions have been raised regarding fairness of contribution levels assessed on wireless carriers.



# Conclusions

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- U.S. competition policy was not created, it evolved
- Because of the nature of divided government, multiple agencies have roles to play, within multiple jurisdictions
- U.S. competition policy balances *ex ante* rulemaking and *ex post* law enforcement.
- The U.S. system is based on rule of law and legal precedent, not short-term political shifts.



# Challenges

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- The need to avoid administrative overlap in applying competition policy
- The need to coordinate and avoid tension among different policy players within the federal government and between federal and state governments
- Managing policy formulation and implementation amidst constant litigation and judicial review
- Keeping sight of, and marking progress toward, policy goals amidst the complexity of governmental processes