Judicial precedent establishes that the Commission has no authority to recast the statutory language in order to forbear from enforcing Title VI against a LEC or any other entity that provides programming over its own wireline facilities. For example, the mandatory nature of the provisions of Title VI was directly at issue in American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) ("*ACLU*"). In that case, the Commission proposed its own definition of "basic cable service," even though the term already was defined in the statute. The court rejected the Commission's decision to adopt a definition that was facially inconsistent with the definition contained in the statute. As the court explained:

> [I]t seems unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.[22/]

Any remaining doubt about the applicability of Title VI to LEC provision of video programming is eliminated by looking at the ongoing efforts of Congress to rewrite the Communications Act. Two recent legislative proposals, one offered by Republicans and another offered by Democrats, contain amendments to Title VI that would permit LECs to provide video programming over facilities offered on a common carrier basis.[23/] That a statutory amendment is required to produce this result confirms that Title VI presently is the *only* regulatory regime for the provision of video programming over wired networks owned or controlled by the same entity. Accordingly, unless and until Congress changes the statute,

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22/ *ACLU*, 823 F.2d at 1567, n.32.

23/ *Telecommunications Competition and Deregulation Act of 1995*, Sen. Pressler Discussion Draft (January 31, 1995); *Universal Service Telecommunications Act of 1995*, Sen. Hollings Staff Working Draft (February 14, 1995).

the Commission has no discretion to decide that a telephone company providing video programming over its own facilities should be regulated as a Title II common carrier rather than a Title VI cable operator.

B. Permitting Telephone Companies to Exercise Control Over Video Programming is Inconsistent with the Commission's Own Explanation of Video Dialtone.

The statutory interpretation questions raised by telephone company provision of video programming are neither difficult nor novel because they already have been addressed by the Commission. When it first proposed the video dialtone concept, the Commission determined that a telephone company providing video dialtone transport would not be required to obtain a local cable television franchise because it would not be engaged in the transmission of video programming. *First Reconsideration Order*, 7 FCC Rcd at 5071. At the same time, however, the Commission also stated:

> It is our interpretation of the Act and its legislative history that Congress intended for an entity to be required to obtain a cable television franchise only when that entity selects or provides the video programming to be offered . . .

Id. at 5072.

On appeal, the view that a LEC providing video dialtone is not subject to the franchise requirements of the Cable Act was affirmed, because the LEC would not be engaged in the "transmission of video programming," a basic requirement for cable service plainly contemplated by the Act. In fact, the Commission's view was upheld <u>precisely because</u> the LEC would have no control over programming. Thus, the court concluded that a LEC acting "as a transparent conduit that enables its [programmer] customers to 'send or dispatch' video programming directly to subscribers," therefore would not be engaged in the transmission of programming. NCTA, 33 F.3d at 72.

The NCTA v. FCC court also found, however, that LECs providing video dialtone are necessarily prohibited from providing video programming directly to subscribers. NCTA, 33 F.3d at 72, *citing First Report and Order*, 7 FCC Rcd at 312. Any change in the video dialtone framework that permits the LEC to transmit its programming over its video dialtone network destroys the sole legal distinction exempting LECs from Title VI cable regulation. Because video dialtone is premised upon separation of the LEC's conduit functions from the transmission of its program content to subscribers, once that premise is changed or eliminated the legal basis for treating LECs as common carriers in their provision of video dialtone is vitiated.

NCTA v. FCC demonstrates that if the video dialtone rules the court reviewed had permitted LECs to program over their video dialtone networks the outcome would have been entirely different. The court relied on Commission representations that described the fundamental Title II nature of video dialtone. As the Commission explained to the court:

> An essential element of common carriage is an obligation to provide service 'to all people indifferently,' without exercising control over the content of the transmissions. In contrast, "cable operators exercise a 'significant amount of editorial discretion regarding what their programming will include.'" *The same service, therefore, cannot be both common carriage and a cable service regulated simultaneously under Title II and Title VI.*

NCTA v. FCC, Commission Brief at 24-25 (citations omitted and emphasis added).

This statement is consistent with the Commission's explanation in the video dialtone proceeding of how the video dialtone rules operate to insulate a LEC from becoming a cable operator. Specifically, the rules "separate control over the creation, selection and ownership of video programming from control over the facilities linking the program supplier and each of its individual viewers or subscribers."[24] For purposes of determining whether the LEC "controls" a video programmer, the rules provide that a LEC may not own more than a 5 percent interest in any video programmer carried on the service. 47 C.F.R. §§ 63.54(e)(1), 63.55.

The Commission's NCTA v. FCC brief also addressed a continuing concern regarding the prospect of dual regulation of LEC facilities and services under both Title II and Title VI. The Commission stated:

> When the Cable Act is viewed as a whole, it is clear that Congress limited the status of cable operator to those persons that themselves provide video programming.

NCTA v. FCC, Commission Brief at 41 (citations omitted).

The Commission also observed that a direct consequence of holding LEC video dialtone to be cable service would require the application of Title VI provisions "that cannot be applied rationally to video dialtone service" including, for example, mandatory access requirements. *Id.* at 27-28. The Commission's answer was to reaffirm that LECs providing video dialtone are not cable operators because they are precluded from selecting or providing the video programming to be transmitted over their facilities.[25]

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[24] *First Reconsideration Order* 7 FCC Rcd 5069, 5070 (1992). For precisely the same reason, in October of 1994 the Commission declined to allow anchor programmers on video dialtone networks. *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 260.

[25] Commission Brief at 30 citing *First Reconsideration Order*, 7 FCC Rcd at 5072; *Video Dialtone Order*, 7 FCC Rcd at 5817.

The NCTA v. FCC court upheld the distinction urged upon it by the Commission. The court stated:

> [S]tudy of the statutory scheme makes it quite clear that video dialtone service and cable service are very different creatures: video dialtone is a common carriage service, the essence of which is an obligation to provide service indifferently to all comers . . . [whereas] cable operators exercise a significant amount of editorial discretion regarding what their programming will include.

NCTA, 33 F.3d at 75.

The *Notice* fails to mention, much less analyze and acknowledge, the impact of permitting LECs to program over their video dialtone networks on the Commission's prior determination that to do so would be to provide cable service. Even more troubling, the *Notice* suggests that the Commission can fundamentally alter the video dialtone framework notwithstanding earlier Commission rulings, representations to the United States Court of Appeals and statutory requirements concerning the nature of video dialtone. Nevertheless, as the Commission found, and convinced the Court of Appeals, services are either Title II or Title VI and video dialtone is a Title II service only if the telephone company does not use the facility to provide its own programming. When the telephone company does provide programming directly to subscribers, the Commission has no choice but to regulate the service and the facility under Title VI.[26] In today's environment the ultimate "choice" will belong not to the Commission, but to the telephone company. It must decide at the outset whether it chooses to be a video dialtone provider or a cable operator; the regulatory

[26] The Commission may, of course, regulate the relationship between the telephone company and its video programming affiliate to ensure that telephone ratepayers do not subsidize the latter's business enterprises. *See Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984); *New York Telephone Co.*, 5 FCC Rcd 5892 (1990).

ramifications of that decision are fixed. As the Supreme Court has established, "the Commission's estimations of desirable policy cannot alter the meaning of the Federal Communications Act of 1934." *MCI v. AT&T*, 114 S.Ct. at 2233.

C. Failure to Regulate LECs that Provide Video Programming Under Title VI Raises Significant Constitutional Concerns

It is well-established that "federal statutes must be construed so as to avoid serious doubts as to their constitutionality . . . ."[27] Any interpretation of the Cable Act that requires a cable operator to comply with Title VI without requiring telephone companies to comply with Title VI when they provide the same service constitutes invidious discrimination in violation of a cable operator's First Amendment rights and its right to equal protection under the law. Assuming, *arguendo*, the Commission could ignore the clear dictates of Title VI as a matter of statutory interpretation, it would stumble upon the constitutional obstruction. To avoid the constitutional barrier, the Commission has no choice but to require LECs that provide video programming over a wireline facility to do so under the same Title VI regime as cable operators.

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[27] *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *see also Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 604 (11th Cir.), *cert. denied*, 113 S.Ct. 182 (1992) (court should avoid interpretation of Cable Act which "raises serious constitutional problems or results in an unconstitutional construction").

1. Disparate Regulatory Treatment of Cable Operators and Telephone Companies that Provide the Same Service Violates the First Amendment.

It is now well-established that cable operators, like newspaper publishers and broadcasters, are engaged in "speech under the First Amendment." *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991); *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). A law that singles out the press, or certain elements thereof, for special treatment "poses a particular danger of abuse by the state," *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), and is consequently "always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2458 (1994).

Discriminatory burdens on First Amendment rights typically have been subject to strict scrutiny, requiring the government to show that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. Thus, when a challenged regulation discriminates between similarly situated First Amendment speakers, the Supreme Court has ordinarily subjected the regulation to strict scrutiny, even if the regulation is content-neutral.[28]

These concerns are even more pronounced if the government is given the power to discriminate between First Amendment speakers in the same medium. The

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[28] *See Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592; *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (discriminatory classification "must be narrowly tailored to serve a compelling governmental interest").

"potential for abuse" present in giving the government the discretion to require a cable operator, but not a telephone company, to comply with Title VI regulatory requirements (for example, obtaining a municipal franchise) is no less than in giving the government the discretion to require one organization to get a parade permit to march down Pennsylvania Avenue, but not another. The "potential for abuse" in recognizing that the government has such power to discriminate between First Amendment speakers is so great "that no interest . . . can justify the scheme." *Minneapolis Star*, 460 U.S. at 592. Accordingly, the Commission cannot choose to regulate telephone companies under different statutory requirements than it applies to cable operators.

2. Disparate Regulatory Treatment of Cable Operators and Telephone Companies that Provide the Same Service Violates the Equal Protection Clause.

The equal protection component of the due process clause of the Fifth Amendment places the same limits on the exercise of federal power that the equal protection clause of the Fourteenth Amendment places on the exercise of state power. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The guarantee of "equal protection under the laws" requires, in essence, that similarly situated persons be treated similarly. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

"Under equal protection doctrine, differential treatment of parties is constitutional only if adequately related to a sufficient governmental interest." *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1340 (D.C. Cir. 1985). If the differential treatment burdens the exercise of a fundamental right, such as free speech, it is subject to strict standards. *Plyler v. Doe*, 457 U.S. 202, 216-17 n.15 (1982); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

In cases involving disparate treatment of First Amendment speakers, "First Amendment claims are obviously intertwined with the interests arising under the Equal Protection Clause." *Arkansas Writers' Project*, 481 U.S. at 227 n.3. Under the strict scrutiny standards applicable to the equal protection clause, the government must show (as it must in the First Amendment area) that the classification is "necessary" to the achievement of a "compelling state interest" if it is to be upheld. *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *see also Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) (striking down ordinance that prohibited all picketing on school grounds except for labor picketing). To date, the Commission has not suggested any reason for subjecting LECs and cable operators to different regulatory regimes when they provide the same service, let alone a "compelling" reason that could withstand judicial scrutiny.[29] Consequently, unless and until the statute is amended, the Commission must regulate both telephone companies and cable operators under Title VI when they provide video programming directly to subscribers.

III. TELEPHONE COMPANY PROVISION OF VIDEO PROGRAMMING AND VIDEO FACILITIES SHOULD BE REGULATED EXCLUSIVELY UNDER TITLE VI.

As demonstrated throughout these comments, a telephone company that provides video programming directly to subscribers is a cable operator and must be regulated

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[29] The Commission's failure to articulate any standard or set of objective criteria in order that entities might judge whether their activities fall within Title II or Title VI also presents the prospect of the Commission's actions being declared void for vagueness.

pursuant to Title VI. Beyond this, the Commission asks whether it also should permit or require LECs to offer service as common carriers pursuant to some or all of Title II. *Notice* at ¶¶ 10-13. Once the LEC's provision of video programming falls under the auspices of Title VI, the Commission cannot also contemplate regulating aspects of those services under Title II or under some form of Title II/Title VI hybrid without risk that telephone company ratepayers will not be burdened with LEC video dialtone investments. Nor would such an uncertain environment promote the Commission's ultimate goal of facilities-based competition for all telecommunications services.

A. Title VI Regulation of LECs that Provide Video Programming Ensures that the Costs of Video Facilities Are Recovered from Video Customers.

As a result of the court cases holding the statutory cross-ownership provision unconstitutionally broad, virtually every telephone company that desires to provide programming to subscribers in its telephone service area can obtain a cable franchise and provide service as a cable operator.[30] Curiously, none of the telephone companies that have won such lawsuits have pursued this right which they fought so hard to obtain. Rather, they have looked to provide video programming under Title II, pursuant to regulatory requirements recently described by the Chairman of Bell Atlantic as "arcane, burdensome and costly."[31]

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[30] See FCC Public Notice, "Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems," FCC DA 95-520, released March 17, 1995.

[31] Letter from Raymond W. Smith, Chairman of the Board and Chief Executive Officer, (continued...)

Given Bell Atlantic's continuing complaints regarding the regulatory burdens to which it has been subjected by the Commission, it is curious that the company is willing to tolerate these self-proclaimed tortuous requirements rather than simply provide service as a cable operator in accordance with its representations to the United States District Court in Alexandria.[32] Although Mr. Smith would have the Commission believe Bell Atlantic will abide by these regulatory adversities so that it can "provide an affordable network to a host of small programmers," the facts are otherwise. Nothing in Title VI would prevent or impair Bell Atlantic from providing access to small programmers if it were sincerely interested in doing so.[33] To the contrary, access to third party programmers is mandated by Title VI and encouraged by Commission policy.[34]

The Joint Parties believe there is some other reason that explains the nearly uniform LEC decision to pursue Title II regulation. The most likely explanation is found in

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[31] (...continued)
Bell Atlantic Corporation to Reed E. Hundt, Chairman, Federal Communications Commission at 1 (March 7, 1995) ("Smith Letter").

[32] *Chesapeake and Potomac Telephone Co. v. United States*, 830 F.Supp. 909, 911 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994).

[33] Moreover, Bell Atlantic's video dialtone tariff for Dover plainly shows that Bell Atlantic has no intention whatsoever of making video dialtone a service that caters to small programmers. Bell has proposed a rate structure and rate levels that result in a small stand-alone programmer paying a per-channel rate that is 10 times higher than the rate charged to a large program packager. *See Bell Atlantic Telephone Cos. Tariff F.C.C. No. 10 (Transmittal No. 741)*, Petition of the Joint Parties to Reject or, in the Alternative, to Suspend and Investigate Bell Atlantic's Video Dialtone Tariff (filed February 21, 1995) ("Joint Parties Petition to Reject").

[34] The Commission's rules on commercial leased access to cable systems dictate maximum fees by category of program service that may be charged to access users, including fees for part-time use.

the Commission's accounting rules. Under the Commission's Part 64 cost allocation rules, 47 C.F.R. §§ 64.901-904, telephone companies are required to allocate costs between regulated and nonregulated businesses pursuant to fully allocated costing principles.[35] The Part 64 rules are intended to achieve two objectives: (1) identification of the costs of nonregulated services; and (2) separation of the costs of nonregulated services from regulated services. As the Commission stated in the *Joint Cost Order*:

> The proper purpose of our cost allocation rules is to make sure that *all* of the costs of nonregulated activities are removed from the rate base and allowable expenses for interstate regulated services.[36]

Under the Part 64 rules, each carrier is required to file a Cost Allocation Manual ("CAM") that provides a detailed explanation of the procedures that will be

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[35] "The principal methodology we are adopting here is known in the economics literature as an attributable cost method of fully distributing costs. It allocates overhead costs in proportion to the costs that can be directly attributed to various services. *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, Report and Order, 2 FCC Rcd 1298, 1313 (1987) ("*Joint Cost Order*"), *aff'd, Southwestern Bell Telephone Co. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[36] *Joint Cost Order*, 2 FCC Rcd at 1304 (emphasis added). The fact that LECs now are regulated under price caps does not eliminate the importance of properly separating the costs of regulated and nonregulated businesses. Under the current price caps regime, improper cost allocation could, for instance, result in an incorrect calculation of a carrier's price cap index. *See* 47 C.F.R. § 61.45(d)(1)(v). (PCI adjustment for allocation of regulated and non-regulated capital cost.) Moreover, the Commission has had occasion recently to reiterate the centrality of the separation function to the Commission's mission. *See Order to Show Cause*, BellSouth Operating Companies, AAD 93-148, FCC 95-74, released March 3, 1995 at ¶ 2. "Our ability to carry out these obligations is impaired if we cannot rely upon the information that carriers are required to submit about the costs of their operations and their allocations of those costs, or if those allocations are made improperly. As the telecommunications marketplace continues to diversify, with carriers providing more and more nonregulated services, our enforcement of accounting safeguards will become even more important if we are to continue to protect ratepayers from being overcharged for interstate services."

employed to allocate various types of costs between regulated and nonregulated services. 47 C.F.R. § 64.903. Carriers also are required to have annual audits performed by an independent auditor to demonstrate that they are in compliance with the procedures outlined in their CAMs and with the Commission's rules. 47 C.F.R. § 64.904.

The Part 64 rules separate costs of regulated services from costs of nonregulated services, but they do not separate costs among regulated services. Consequently, a carrier's decision to provide video transport as a regulated service (under Title II) or a nonregulated service (under Title VI) will determine the accounting treatment of its investment in video facilities. When a telephone company or its affiliate is permitted to offer video programming (*i.e.*, provide cable service) over a common carrier video distribution facility, the telephone company's programming arm will not bear the full share of the costs of the video facilities because the price cap "new services" test applies. This results in ratepayers bearing a substantial portion of the cost of LEC video dialtone networks since the price cap "new services" test requires that video dialtone rates be set to recover only the direct costs of video dialtone plus some "reasonable" portion of overhead. *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 346. Because the Commission has stated that this reasonable portion of overhead can be less than the fully allocated cost attributable to the video facility, some portion of the overhead that would be recovered from video customers (or telephone company shareholders) under the Part 64 rules, is instead left on the carrier's regulated books to be recovered from regulated telephone customers.

The fallacy in the Commission's current treatment of video dialtone investments is that video dialtone is not simply another regulated telephone service offered over the existing telephone network. Video dialtone is a service that is "fundamentally different" than traditional telephone services. Smith Letter at 2. This is particularly true if the telephone company also provides programming over the facility. Given the differences between video services and traditional telephone services, LEC video services and the facilities over which those services are provided should be accounted for as if they were nonregulated services, *i.e.*, consistent with the Commission's legal obligation to regulate these services under Title VI.

By treating all facilities operated by a telephone company/programmer as cable facilities, the potential cross-subsidy problem identified above could be minimized. Under the Commission's Part 64 procedures, *all costs* associated with the video facilities would first be recorded pursuant to Part 32 of the rules, and then removed from regulated accounts by placing them into the non-regulated category, *See* 47 C.F.R. § 64.901, thereby eliminating questions regarding how the costs of video facilities should be allocated. While cost allocation will still be required, it will be made more accurate and much easier by requiring it to be done before the jurisdictional separations calculations, rather than subsequently. This will reduce the prospect of cross-subsidization and other anticompetitive abuses.[37]

This treatment is entirely consistent with the Commission's previous treatment of LEC ventures into the cable market. For example, in granting GTE a waiver of the cross-ownership prohibition and authority under Section 214 to build and operate video facilities in Cerritos, California, the Commission stated:

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[37] Particularized safeguards will be necessary regardless of how telephone company programming is implemented, but requiring all telephone companies that provide programming to operate under Title VI alone will make those safeguards more effective.

> In addition, to assure that any short-fall in recovery of General's investment will be borne by its stockholders, the Bureau instructed General to follow the accounting methodologies adopted in the *Joint Cost Order* . . . and to treat all costs associated with the Cerritos project as unregulated activity costs. Thus, we will require General and GTE to follow the accounting rules adopted in the *Joint Cost Order*.[38]

Application of Part 64 cost allocation principles to LEC video facilities also is consistent with the Commission's treatment of cable operators. Under the Commission's interim cost of service rules, cable operators are required to separate non-cable costs and revenues pursuant to Part 64 principles. 47 C.F.R. § 76.924(e), (f). Thus, costs and revenues associated with regulated telephone services are separated from the costs and revenues of regulated cable services. It would be unfair and illogical not to require telephone companies to comply with the same cost allocation principles when they provide services other than regulated telephone services.[39]

B. Title II Regulation of LECs that Provide Video Programming Would Hinder the Development of Facilities-Based Competition for All Telecommunications Services.

Although the Commission established the video dialtone concept in an effort to promote competition in the video market, this is not the only market in which the Commission hopes to promote competition. It is indisputable that the telephone companies

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[38] *General Telephone Company of California*, Memorandum Opinion, Order and Authorization, 4 FCC Rcd 5693 (1989). An additional important accounting safeguard appropriate there and here as well is the conditioning of Section 214 grants to prohibit the inclusion of costs of construction or operation of any LEC cable system from any regulated rate base or as an operating expense without express prior Commission authorization.

[39] *See* Reply Comments of Bell Atlantic, MM Dkt. 93-215, CS Dkt. 94-28, Aug. 1, 1994 at 13-16 (proposing use of telephone cost allocation rules for cable operators).

that seek to enter the video programming market also are monopolists in the local exchange market. Assuming *arguendo* that the statute does not dictate a regulatory course the Commission must pursue, public policy concerns with regard to how to regulate LECs that provide video programming necessarily would need to take into account the effect a given policy would have on the development of facilities-based competition in the local exchange market.

Common sense dictates that a LEC that can provide both video and telephone services has a competitive advantage over a cable operator that is precluded from providing local exchange service. Consequently, until local exchange competition is legally, technically and economically feasible, the Commission must be sure that it does not adopt a regulatory regime that gives LECs any *additional* artificial competitive advantages beyond the advantages they already posses by virtue of their local exchange monopoly.

Allowing LECs to provide video programming under a Title II regulatory regime or a concocted hybrid Title II/Title VI regime would provide just such an additional competitive advantage by enabling LECs to offer video service at subsidized rates. As described above, this result occurs because of the Commission's decision to treat video dialtone as just another telephone service and not to require LECs to recover the fully allocated cost of the video facility from their video customers. In addition, telephone companies would have a further advantage if they were not regulated under Title VI because efficiencies that might be available to a LEC that does not have the burden of local regulation of its video services.[40]

The logic of regulating cable operators and telephone companies under the same statutory regime is particularly compelling when the services that are provided are virtually identical. The type of services that LECs so far have proposed to provide offer on video dialtone facilities are almost exclusively one-way video programming services.[41] Moreover, the telephone companies consistently have told the Commission that the only way such an offering has any potential to be economically viable is if it is offered through a package of programming that resembles traditional cable service.[42] The type of "enriched video common carriage" that the Commission envisioned requires delivery of digital video signals to end users, a function which "has been delayed due to the lack of availability of commercially-available digital set-top boxes and other technical problems.[43] Even if telephone companies one day have the technical ability and the economic willpower to offer a true common carrier service, there simply is no legal or factual basis for regulating any

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[40] A LEC operating without local franchise obligations, for example, would not face the inefficiencies imposed on cable operators by a variety of disparate local franchise obligations addressing customer service, operational and other such standards.

[41] *Bell Atlantic Telephone Cos.*, Tariff F.C.C. No. 10, Transmittal No. 741.

[42] See e.g., Ameritech's Petition for Reconsideration and Clarification of the Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at 2, CC Docket No. 87-266 (filed January 11, 1995).

[43] *Application of U S West Communications, Inc.*, File No. W-P-C 6868, Request for Extension and Contingent Request for Special Temporary Authority at 3 (filed March 8, 1995). Bell Atlantic also has stated that its digital facility in Dover is "not ready for prime time." Mark Berniker, *Bell Atlantic Cancels Video Network Deal with AT&T*, Broadcasting and Cable, February 20, 1995 at 10.

portion of a LEC's video programming services, or the facilities used to provide those services, under Title II or under an as yet undefined Title II/Title VI hybrid.[44]

C. Title II Regulation of LECs that Provide Video Programming Eviscerates the Statutory Role of Local Franchising Authorities.

Both the statutory provisions of Title VI and its legislative history reveal that local franchising authorities have an important role in the regulation of entities that provide video programming over wireline facilities. Section 621(b) provides that no cable operator can provide cable service without a local franchise. 47 U.S.C. § 541(b). The Cable Act also provides local franchising authorities the power to regulate basic service rates and to require an operator to provide capacity on the cable system for municipal use. 47 U.S.C. §§ 543, 531. As the legislative history states:

> The ability of a local government authority to require particular cable *facilities* (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to meet the needs of each community.[45]

A decision by the Commission to regulate the provision of video programming by LECs under Title II or a hybrid Title II/Title VI regime completely obliterates the power of the local franchising authority to require the telephone company to tailor the system to

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[44] One of the difficulties which has confounded realization of the Commission's initial objectives with regard to video dialtone has been the absence of concrete service proposals and/or technological innovations befitting the somewhat vague video dialtone parameters. Crafting specialized regulations in so uncertain an environment, assuming it was possible to do so, would be unwise.

[45] Report of the Committee on Energy and Commerce accompanying the Cable Communications Policy Act of 1984, H.R. 98-934 at 26, 98th Cong., 2d Sess., *reprinted in*, 1984 U.S.C.C.A.N. 4655, 4663 (emphasis added).

meet the needs of the community. While the local franchise requirement has been side-stepped under a video common carriage model, this basic form of local involvement cannot be avoided when LECs begin to provide programming. When the Commission approved applications filed by Ameritech, for example, to build facilities in five of its largest markets, the local communities in those markets had no ability to "require particular cable facilities" that might meet the needs of the community. Nor do the local communities have any ability to require Ameritech to provide channels for public use or to impose any of the other requirements with which cable operators must comply because Ameritech is not providing programming. Significantly, while Ameritech has yet to file a video dialtone tariff, the tariff filed by Bell Atlantic for its Dover system demonstrates that video dialtone service likely will be far too expensive for a local government to afford comparable channel capacity that is provided to those governments by local cable operators.[46/]

Moreover, application of the Title VI franchise requirement to telephone companies is not a duplicative requirement, notwithstanding the court's dicta in NCTA. Although LECs do have access to rights of way for their provision of *telephone* service:

> It is ludicrous to assume that an 1890 right-of-way grant to build a local telephone system provides a community adequate protection in 1995 in the face of these construction projects.[47/]

[46/] Joint Parties Petition to Reject at 18.

[47/] *See* Letter from Victor Ashe, President, United States Conference of Mayors, to Reed E. Hundt, Chairman, Federal Communications Commission (January 10, 1995).

In sum, Congress has determined that local communities must have a role in the franchising and regulation of entities that provide video programming over wireline facilities.[48] The Commission should not, indeed cannot, ignore that determination and permit telephone companies to provide video programming under a regulatory regime based on Title II, or a hybrid of Title II and Title VI, that eviscerates the role of the local community.

D. Title VI Regulation of LECs that Provide Programming Presents No Obstacle to Development of New Common Carrier Services.

A continuing complaint of the telephone companies is that the regulatory requirements of Title II, such as Section 214 certification and tariff filing, present a "barrier to the introduction of new services." Smith Letter at 1. To the extent these complaints go to the *procedural* problems that have developed as a result of a lack of specific requirements for approval of video dialtone proposals, this may be true.[49] Indeed, the Common Carrier Bureau recently responded to some of these concerns in adopting guidelines for Section 214

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[48] In a recent speech to the National Association of Counties, Chairman Hundt reportedly observed that "burdensome franchise obligations" could slow video dialtone competitive initiatives that will bring "the information highway to every house" if they are not impeded by overzealous local regulators looking for new sources of revenue. See Telecommunications Reports, March 13, 1995 at 24.

[49] It would be disingenuous of the LECs, however, not to acknowledge that the blame for these problems does not lie exclusively with the Commission or its rules. As Michael Katz, the Commission's Chief Economist, recently stated, "when the FCC asks questions, they are not rhetorical. Applicants are expected to answer, if not the first time, at least by the second." *Technologists Blame Technology for Interactive TV Delays*, Communications Daily, February 21, 1995 at 4.

applications.[50] If telephone companies provide video programming solely under Title VI, these procedural barriers to the introduction of new services may be reduced considerably.

Moreover, regulating some or all of the facilities transmitting telephone company programming under Title II is not essential to ensuring that unaffiliated programmers have access to a LEC's video facility. Under Title VI, the telephone company/programmer would continue to have an obligation to make leased access facilities available under the provisions of Title VI. 47 U.S.C. § 532. Given the stated capacities of the systems that telephone companies have proposed to build, there should be ample capacity available for leased access. Regulating LECs under Title VI also would ensure that the program access provisions of the 1992 Cable Act would apply to the programming interests held by the LECs, which are significant.[51]

Requiring telephone company programmers to operate exclusively under Title VI will not prevent the development of broadband common carrier services. Cable operators have the same incentives as telephone companies to develop innovative common carrier services, notwithstanding the fact that the facilities they use to provide video programming are regulated under Title VI. If telephone companies develop new common carrier services,

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[50] Common Carrier Action, *Common Carrier Bureau Provides Guidance on Video Dialtone Applications*, Report No. CC 95-18 (rel. March 10, 1995). Several of the Joint Parties previously have suggested that generic guidelines also are necessary for Part 69 waivers and video dialtone tariffs.

[51] *CBS's Stringer Named to Head RHC Programming Venture*, Communications Daily, February 24, 1995 at 1 ("Three RHCs gave credibility to their new video programming company Thursday by announcing that Howard Stringer will leave his post as president of CBS Bcst. Group to run their company starting March 1. Bell Atlantic, NYNEX and Pacific Telesis unveiled $300 million venture October 31 designed to compete in development of entertainment programming").

they can assign the facilities and personnel used for those services to the common carrier side of the ledger.[52] Moreover, the specifics of appropriate allocations can best be addressed in light of particular services, because the requirements for each service are likely to vary. Because many of these services are likely to focus on business markets, it also is possible that there will be very little overlap between the Title VI programming services provided to residential customers and the primary broadband common carrier services. This is another reason to address these issues only in the context of specific service proposals.

VI. CONCLUSION

As a matter of law, telephone companies that provide video programming to subscribers over wireline facilities are cable operators providing cable service. As such, they must comply fully with Title VI requirements. Any attempt by the Commission to rewrite video dialtone to contain a LEC programming element is doomed to failure because the Commission cannot modify the application of the statute.

As a matter of policy, the Commission should recognize that the LEC video dialtone proposals fall far short of its vision of broadband switched networks capable of delivering instantaneous dial up video services from a multiplicity of programmers. The LECs have proposed and will build broadband networks that mimic cable systems. Because of current accounting rules, a Title II or hybrid regulatory approach would facilitate LEC cross subsidy of its programming ventures by telephone ratepayers. While over the long term "true" video dialtone may emerge, the Commission should not foster a regulatory

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[52] *See* 47 C.F.R. § 64.902(b)(4).

framework that skews or even preempts the possibility of facilities-based competition between LECs and cable operators. Accordingly, the Commission's goal of fostering telecommunications competition should be given precedence over reformulating and promoting a distorted version of a video dialtone platform with LECs as programmers.

Respectfully submitted,

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JONES INTERCABLE, INC.
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March 21, 1995

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 19th day of May, 1995, I caused a copy of the foregoing "REPLY COMMENTS OF COMCAST CORPORATION" to be sent via hand delivery to the following:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
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The Honorable James H. Quello
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The Honorable Andrew C. Barrett
Commissioner
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