APPLICABILITY OF TITLE VI TO TELCO PROVISION OF VIDEO OVER IP

INTRODUCTION AND SUMMARY

Several Regional Bell telephone companies have announced plans to provide residential customers video programming services in their service areas using fiber to the premises (Verizon) or fiber to the node (SBC). SBC has said it will use Video-over-Internet Protocol technology, while Verizon's current plans call for an "RF overlay strategy for video as opposed to converting those signals to an IP format."[1] Both of these companies – along with BellSouth – have suggested they are not – or should not be – subject to the requirements of Title VI[2] that apply to cable television providers.

This memorandum demonstrates that IP video services proposed by these companies are clearly "cable services" and the facilities they use are "cable systems," making them "cable operators" subject to the regulatory scheme of Title VI. It also shows that *nothing* the Bell companies have proposed – video offerings, IP transmission, switching technology, interactive applications – is any different from what cable companies now provide or will provide in the near future. Cable operators provide video-on-demand services *now*. They employ IP technology in their systems *now* and are planning for more widespread deployment. They are testing switched digital video technology *now* and intend to deploy it as soon as possible. All of these "IPTV" features that the Bells tout – and which they argue exempt their video offerings

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[1] "Verizon Confirms RF Video Choice with Motorola Deal," TELEPHONY ONLINE, Oct. 26, 2004, *at* http://telephonyonline.com/access/web/telecom_verizon_confirms_rf/. BellSouth has suggested that it too is exploring delivery of video services. *See* "Three RBOCs Peel Back Covers Slightly on IP Video Plans," TELEPHONY ONLINE, Oct. 12, 2004, *at* http://telephonyonline.com/access/web/telecom_three_rbocs_peel/ ("BellSouth is setting up an aggressive plan and is in the midst of testing various technologies"); "Phone Giant Aims For Speed," ATLANTA JOURNAL-CONSTITUTION, Dec. 7, 2004, at F1 (BellSouth "announced field trials next year to deliver standard- and high-definition TV signals using Microsoft technology…."); KAGAN BROADBAND TECHNOLOGY, June 7, 2005, at 9 ("BellSouth . . . believes if it offers video exclusively via [Fiber to the Node] it is under no obligation to secure franchise rights.").

[2] 47 U.S.C. § 521 et seq.

from Title VI regulation – cable companies provide today or will provide in the near future.[3] And since those services are regulated under Title VI, the telephone companies' video offerings should be too. As NCTA has repeatedly argued, like services should be treated alike.[4]

Notably, in other contexts, regulatory "parity" is the Bells' theme. BellSouth, for example, has argued that "both law and policy require that competing providers be subject to the same obligations regardless of the technologies they use."[5] Verizon has struck the same theme, observing that "it would be irrational to impose disparate regulatory treatment on identical services which are offered in an identical manner, based solely on the identity of the service provider."[6] As Verizon's Tom Tauke has said: "It's not logical to treat different sectors of the communications marketplace differently based on what technology they use, when we're all

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[3] *See* "Cable Operators Rush Services To Keep Edge," WALL STREET JOURNAL, July 21, 2005, at B1.

[4] *See e.g.*, Letter from Neal M. Goldberg, NCTA General Counsel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, Attachment ("Working Toward A Deregulated Video Marketplace"), filed June 23, 2005.

[5] Petition of BellSouth Telecommunications, Inc., For Forbearance Under 47 U.S.C. § 1609(c) From Application of Computer Inquiry and Title II Common Carriage Requirements, WC Docket No. 04-405, Petition for Forbearance, filed Oct. 27, 2004, at 21. *See also*, Press Release, BellSouth Telecommunications, "BellSouth Says FCC Data Proves It Is Time for Regulatory Parity," (June 12, 2003), *at* http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=43228; Press Release, BellSouth Telecommunications, "BellSouth Supports Broadband Parity Bill Just Announced in Senate," (Apr. 30, 2002), *at* http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=40143. ("BellSouth today announced its support for legislation designed to bring parity to regulation governing cable and telephone company offerings of broadband service.").

[6] Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, WC Docket No. 04-242, Consolidated Reply of Verizon to Oppositions to and Comments on Petitions with Respect to Broadband Services Provided Via Fiber to the Premises, filed Aug. 2, 2004, at 5 (quoting WC Docket No. 04-242, Comments of Corning Incorporated, filed July 22, 2004. *See also*, John Thorne, Senior Vice President and Deputy General Counsel, Verizon, "The 1996 Telecom Act: What Went Wrong and Protecting the Broadband Buildout," at 39 (2001), *at* http://newscenter.verizon.com/policy/broadband/primer_c.pdf ("Congress, the courts, and even the Commission have consistently affirmed that it is the nature of a service, not its history or the character of the entity providing it, that determines the regulatory regime that should apply. . . . By regulating broadband differently depending on the wires used to deliver it, the Commission has again lost sight of this principle, despite its recognition that the 1996 Act is 'technologically neutral and is designed to ensure competition in all telecommunications markets.'"; "As a policy matter, this regulatory disparity is unjustifiable. Eliminating regulatory distinctions between incumbent telephone carriers, cable operators, and others – as the 1996 Act was intended to do – allows these providers not only to challenge one another in their traditional strongholds, but also to compete on equal terms in the creation and development of new markets, regardless of the technology they might use.").

delivering the same services."[7] SBC has perhaps said it most simply: "Companies that provide similar services should be regulated the same. There is no reason for treating them any differently."[8]

Verizon is seeking local franchises for such video deployments in a number of markets nationwide. It has successfully negotiated franchise agreements with a number of communities, in California, Florida, Texas and Virginia.[9] Nevertheless, Tom Tauke, Verizon's Executive Vice President of Public Affairs, has said: "Frankly, we don't believe that we should be having to seek franchises in order to offer video services to consumers."[10] As Brian Blevins, Verizon's director of external communications, said: "We feel we already have rights-of-way to construct networks."[11] Verizon has lobbied state legislatures in California, New Jersey, Texas, and

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[7] Remarks of Tom Tauke, to the U.S. Conference of Mayors, Washington, DC, Jan. 18, 2005, *at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=88898.

[8] Press Release, SBC Communications, Inc., "SBC Urges FCC To Enact Regulatory Parity For Broadband," Aug. 6, 2002, *available at* http://www.pressi.com/int/release/51170.html (Statement of SBC Senior Vice President-FCC Priscilla Hill-Ardoin). *See also*, Richard C. Notebaert, Chairman and CEO, Qwest Communications, Address to the Practising Law Institute, Dec. 2, 2004, *at* shttp://www.qwest.com/about/company/management/speeches/Practising_Law_Institute.pdf ("[T]he discrepancy of regulation between cable and telephony offers a clear example of what happens when government agencies persist in focusing their efforts on individual technologies. It is way past time for them to acknowledge that the world has changed, that there is no way they can keep pace with technology advances, and so it is far more appropriate for them to consistently regulate like services ...."; "Wouldn't it make more sense to treat cable modem and DSL as the competing services they are and regulate consistently across that category?"); "Round Table," PHONE+MAGAZINE, Apr. 2002, *at* http://www.phoneplusmag.com/articles/241round.html, (hosting a discussion of the FCC's NPRM reclassifying broadband services as information services and exempting them from common carriage regulation that included the following observation by Tom Amontree, USTA spokesman: "If they're able to pull this off, able to promote competitive and regulatory parity across all modes of broadband service delivery, we'll be pleased. We're looking for regulatory parity so that we can compete fairly with cable.").

[9] "Herndon Lets Verizon Offer Cable," WASHINGTON POST, July 20, 2005, at D5; "Verizon Seeks Break from Cable's Rules; Lobbying in Calif., N.J." INVESTORS BUSINESS DAILY, Mar. 11, 2005, at A4; "Verizon Gets Florida Franchise," MULTICHANNEL NEWS, May 23, 2005, at 12.

[10] "Verizon to FCC: No Franchise Required: Telco Argues That Its Video Offering Shouldn't Entail Local Regulation," MULTICHANNEL NEWS, Aug. 9, 2004, at 30.

[11] "Telco Franchise Issue Lingers," MULTICHANNEL NEWS, Nov. 1, 2004, at 6.

Virginia for changes in their laws that would replace city-by-city franchise agreements with one state-wide application.[12]

SBC has also suggested that it does not need to seek local franchises – and that it is not bound by other Title VI requirements – because of the nature of its deployment (*i.e.*, using IP technology, switched broadcast video, etc) and for other reasons as well. As SBC spokesman Dave Pacholczyk has said: "The basic premise here is that this is different from cable. This is an IP-based service."[13] In testimony before Congress, Lea Ann Champion, SBC Senior Executive Vide President of IP Operations and Services, stated: "In short, we are not building a cable network, nor do we have any interest in being a cable company offering traditional cable service. Instead, we intend to offer customers a new total communications experience . . . ."[14] And Dorothy Atwood, SBC's Senior Vice President of Regulatory Policy, has argued: "A franchise obligation is right for the first provider . . . . But when you are talking about competitive alternatives, you want to encourage that investment."[15]

In fact, the video services that phone companies plan to provide, including those employing IP technology (hereinafter "IPCable"),[16] are subject to all of the requirements of Title

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[12] "Telcos Are Timed Out in Texas," MULTICHANNEL NEWS, June 6, 2005, at 6.

[13] "Telco Franchise Issue Lingers," *supra*, note 5, at 6.

[14] Testimony of Lea Ann Champion, Senior Executive Vice President of IP Operations and Services, SBC, before the U.S. House Energy & Commerce Committee, Apr. 20, 2005, as quoted in Press Release, SBC, IP-Based TV Will Revolutionize Entertainment (Apr. 20, 2005) *at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21649. Of course, that same month, she told Business Week Online that: "in our initial launch, we will include *the basic [TV] content that customers expect*, in addition to offering genre-specific tiers that customers can bolt on to their primary channel lineup. There will also be access to video-on-demand options and three tiers of Internet access. "SBC's Interactive TV Roadmap," BUSINESSWEEK ONLINE, Apr. 6, 2005, *at* http://www.businessweek.com/technology/content/apr2005/tc2005046_2979_tc206.htm (emphasis added).

[15] "The Fiber Optic Quagmire: The Baby Bells Want to Enter Cable's Market – Without Paying the Same Fees," BUSINESS WEEK, Dec. 6, 2004, at 42.

[16] While Verizon has said IP is not in its current plans, we include it in this analysis as an IPCable provider because of the prospect it will eventually employ IP in its delivery of video, as press reports suggest. *See* "Air Battle:

VI of the Communications Act. IPCable programming is predominantly a one-way transmission of *"video programming"* and therefore is a *"cable service."* Likewise, the IPCable delivery system is a *"cable system,"* and the IPCable provider is a *"cable operator."* *The bottom line*: As proposed by various phone companies, the use of IP in the delivery of video programming does not change the regulatory status of the provider, its services, or its facilities. They are all properly subject to Title VI[17] and, among other things, must comply with Title VI franchising requirements.[18]

TELEPHONE COMPANIES ARE FREE TO COMPETE WITH CABLE ON A LEVEL REGULATORY PLAYING FIELD

At the outset it is important to note that telephone companies have the statutory choice to provide video to customers in ways that carry none of the obligations of cable operators if they do not want to comply with those obligations. Some history on this development is instructive.

Prior to the enactment of the Telecommunications Act of 1996, telephone companies, with limited exceptions, were generally prohibited from providing video programming directly to subscribers within their telephone service areas. The general prohibition was adopted by the

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SBC vs. Verizon: The War of The TV Wannabes," WALL STREET JOURNAL, July 18, 2005, at R8, R11 ("Verizon plans to switch over to the Internet technology in the future."); "Motorola Nabs Verizon Contract," CED BROADBAND DIRECT, Oct. 26, 2004, *at* http://www.cedmagazine.com/cedailydirect/2004/1004/cedaily041026.htm. ("[I]t's expected that [Verizon] initially will use an RF overlay to deliver video over fiber, and then migrate later to an IP-based service").

[17] In another context, the Bells have argued that adding some IP to telephone service that is functionally no different from traditional interexchange service is an irrelevant distinction for purposes of regulation. *See* Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Opposition of SBC Communications, Inc., at 3, 7 filed Dec. 18, 2002 ("The use of an IP backbone, without more, cannot justify an exemption from access charges." "[T]he configuration of AT&T's phone-to-phone IP telephony services is virtually identical to the configuration of other IXC services that use the circuit-switched network."); Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Opposition of Verizon at 5, filed Dec. 18, 2002 ("There is no justification for favoring IP technology over every other phone-to-phone voice telephony technology in the way AT&T suggests.")

[18] Of course, as a new entrant, a telco video provider will face a lighter regulatory regime than will the incumbent cable operator.

FCC in 1970,[19] following findings that telcos had engaged in anticompetitive practices with respect to providing access to their utility poles. The general prohibition was codified by Congress as part of the 1984 Cable Act.[20]

However, even under the telco-cable prohibition, telcos were never prohibited from offering "channel service," an arrangement under which they provided video facilities as common carriers to unaffiliated entities that dealt directly with subscribers in the offering of cable services. In addition, while generally prohibiting telco/cable cross-ownership, the 1984 Cable Act provided an exception to the rule in underpopulated areas.

In 1992, the Commission established Video Dialtone service, under which telcos were authorized, subject to Title II regulation, to offer a basic common carrier platform capable of accommodating multiple video programmers. Phone companies were also allowed to offer enhanced and other non-regulated services subject to regulatory safeguards. Consistent with the 1984 Cable Act, the Commission prohibited companies offering Video Dialtone from providing video programming to subscribers, either directly or through an affiliate. But the telcos were permitted to enter into relationships with programmers on their platforms on a contractual, non-common carrier basis, which had not been permissible before.

The 1996 Act repealed the 1984 Act's telco/cable cross-ownership prohibition, the Video Dialtone framework, and the requirement that a phone company obtain authority under Section 214 prior to constructing cable facilities. The 1996 Act offered phone companies four ways in which to enter the cable business.

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[19] Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307, *modified*, 22 F.C.C. 2d 746 (1970), *aff'd*. General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[20] 47 U.S.C.A. § 533(b).

-- Telcos may provide transmission of video programming on a common carrier basis (subject to Title II requirements as with channel service).

-- Telcos may undertake radio-based video operations, such as MMDS (subject to Title III requirements).

-- Telcos may operate Open Video Systems ("OVS"), effectively avoiding the federal requirement to obtain a local cable franchise, so long as they offered up to two-thirds of the available video channels to unaffiliated entities. (A federal appellate court subsequently held that the federal statute did not bar cities from requiring an OVS operator to obtain a local franchise pursuant to state statute.)[21]

-- Finally, the statute made clear, by adding Section 651(a)(3)(A) to the Communications Act, that *"[t]o the extent that a common carrier is providing video programming to its subscribers in any manner other than [via radio, as a common carrier or OVS provider]... such carrier shall be subject to the requirements of [Title VI]."* [22] That is, the telcos' only other option was to provide video programming as a cable operator subject to Title VI.[23]

Given this history and current law, it is clear that today telcos may offer video programming in multiple ways to their customers, and many have or do. For example, Ameritech, SNET and others have all operated under Title VI franchises, as do most other wireline providers. All options carry some regulatory obligations; all are more advantageous than those which apply to all incumbent cable operators under Title VI. Indeed, even when telcos provide video programming as cable operators under Title VI, in most if not all instances, they are the fourth or fifth multichannel video provider in a market and will therefore be able to meet the "effective competition" test under the statute and FCC rules. As a result, they are not subject to basic tier rate regulation, uniform pricing of services and associated requirements.

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[21] City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999).

[22] 47 U.S.C. §571(a)(3)(A)(emphasis added).

[23] A common carrier facility used to provide solely "interactive on-demand" service is not a "cable system" and therefore a telco provider of such services is not a "cable operator" under Title VI.

IP VIDEO CONTENT AND FACILITIES ARE MATERIALLY THE SAME AS CABLE SERVICES AND CABLE SYSTEMS

To understand why the video services and facilities the telcos have proposed subject them to Title VI regulation, it is important to describe those services and facilities in some detail. In its simplest form, IPCable service is a video service delivered via broadband facilities using Internet Protocol. It can be provided over cable modems, DSL or other broadband facilities and it can be provided by the facilities-based provider (cable operator, phone company) or a third-party (or "over the top") provider making use of another's broadband facilities.

The video service provided can be called (1) "*IPCable Basic Service*" (equivalent to today's expanded basic service of broadcast stations and cable networks that deliver between 25-100 cable channels) or (2) "*IPCable Video on Demand (VOD) Services.*" The latter include VOD services similar to those provided over cable systems today as well as (a) a "*Cached Internet Movie Service*" (such as MovieBeam) where new movies are downloaded to a storage device periodically and customers can watch only movies preloaded to that device, or (b) "*Streaming Video on Demand Service*" (such as MovieLink) where the subscriber downloads movies on-demand from a list of titles, and must wait a (relatively) short period of time before viewing. In this paper, we use the term *IPCable VOD* to refer to the VOD services proposed by SBC and Verizon. Both *IPCable Basic Service* and *IPCable Video on Demand Service* are, from the customer's perspective, just like the cable programming delivered by cable operators today. For purposes of this memorandum, we will use the term "IPCable" to describe the telephone companies' video efforts; it encompasses the two categories described above.

Both Verizon and SBC have consistently described the *content* of their services in terms of traditional cable services, regardless of the "bells and whistles" surrounding that content. For

example, a November, 2004 UBS conference panel concluded, "[w]hile fiber deployments will enable telcos to offer wireless applications and a host of interactive features, it'll be simple video service that draws subs away from cable and DBS over the next 5 years."[24] Bob Ingalls, President of Verizon's retail markets group, told the conference, "the reality here is that for the next several years the focus is still going to be video . . . . The core market is the TV market, not people trying to integrate several devices."[25] Similarly, Microsoft TV group marketing manager Ed Graczyk "conceded that the most crucial factor for the telcos will be to offer a video service comparable to cable. 'The telcos have a great opportunity to leapfrog cable and satellite,' he said."[26]

These offerings are functionally equivalent to cable services offered by cable operators.[27] Since December, Verizon has negotiated numerous carriage agreements with a variety of familiar cable networks, including A&E Television, Discovery Networks, Showtime, NBC Universal Cable, NFL Network, and Starz Entertainment.[28] It has also announced the launch of several newer networks, including Varsity TV, the Gospel Music Channel, the Soundtrack Channel, and Spanish-language soccer channel GolTV.[29]

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[24] "Brave New World? Bells & Whistles Won't Trump Video," CABLEFAX, Vol. 15, Issue 225, Nov. 19, 2004.

[25] *Id.*

[26] *Id.* In the same vein, SureWest Vice President and CTO Bill DeMuth told the gathering that the "real game" will be played out between cable and telcos. *Id.*

[27] In at least some markets, Verizon is seeking local franchises and has had to reveal some information about its offering in its franchise applications. SBC, by contrast, has apparently not decided whether to seek local franchises for its IP Cable offering. *See* "Comcast Asks to Set Rates," DALLAS MORNING NEWS, Dec. 9, 2004, at 1D (quoting an SBC spokesman as saying, "We are not building a broadcast cable network, and it should not be subject to traditional cable franchise requirements.").

[28] Press Release, Verizon, "Verizon Signs Additional Programming Deals for FiOS TV," (Apr. 29, 2005), *at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=90898.

[29] *Id.*

In addition to carrying familiar cable program networks, Verizon has indicated it will carry local broadcast channels. The application for a cable franchise that Verizon submitted in Beaumont, California, contained a tentative channel lineup that included the most popular cable programming services as well as local broadcast channels.[30] It appears that local broadcast stations will be available in all communities Verizon intends to serve, since a Verizon spokesman reported that "the company's video offering will be basically the same in all markets."[31] In this regard, the *Wall Street Journal* reported that Verizon "plans to sell a package that includes most of the local TV stations and their news shows, just like cable TV offer . . . ."[32]

SBC has announced that it will aggregate content at two national "super headends" and forty regional hubs, which will store and distribute video-on-demand "and other content."[33] At least one analyst has pointed out, however, that the Bells' video offerings cannot be financially viable unless they offer local broadcast television and other standard cable programming, "such as The History Channel and CNN, the many movie channels, and the premium movie services."[34]

To the extent SBC and Verizon are planning to distinguish themselves from cable operators' service offerings, it is mainly in packaging. The companies have also claimed that they will provide greater interactivity, although traditional cable operators have also begun to offer such capability to their digital subscribers.

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[30] "Verizon has Pay-TV Pacts in Place Elsewhere," ST. PETERSBURG TIMES, Dec, 13, 2004, at 3D ("The lineup [in the tentative list of channels for the Beaumont franchise] looked similar to a cable company's channel menu, including local broadcast channels; standard cable TV channels such as CNN, ESPN and MTV; premium movie channels like HBO and Cinemax; foreign-language programming; and high-definition TV channels.").

[31] "Verizon to Offer Package for TV," SARASOTA HERALD-TRIBUNE, Dec. 11, 2004, at A1.

[32] "Showdown of the Giants," WALL STREET JOURNAL, Nov. 8, 2004, at B1.

[33] "SBC Takes a Hybrid Path Toward Video; Telco's Approach to Account for Mulitple Formats," MULTICHANNEL NEWS, June 6, 2005, at 43.

[34] "With Respect to Content, Part 2," TELEPHONY ONLINE, Aug. 21, 2002, *at* http://analystscorner.telephonyonline.com/ar/telecom_respect_content_part_2/.

SBC Chief Technology Officer Christopher Rice explained that "[t]here are a lot of things – customized channel lineups, multiple camera angles for sporting events, instant channel change, picture-in-picture that will enable you to quickly switch among [windows], video-on-demand from a virtually unlimited library of content . . ., niche things like European soccer, Argentine soccer, things from around the globe that you cannot get otherwise."[35] And SBC's Chairman and CEO Edward Whitacre had similar thoughts: "The little I know about it, there really is a mass array of content that you'll be able to see. Pretty much whatever you want to look for."[36] In fact, some reports say that "[a]ll [SBC] IP-TV programs will be delivered as video-on-demand – consumers request a program from a central server and it is delivered immediately."[37]

However, "SBC has been saying different things about its Internet-protocol television (IPTV) to different audiences. As the company has suffered policy and public-relations setbacks, it has changed its message to suit its needs."[38] In particular, "[a]t the June SuperComm telecommunications conference in Chicago, a company executive dismissed the *a la carte* approach to a content-centered audience while a higher-level group president promoted that model for a group of policy officials."[39]

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[35] "SBC Aims for 'Disruptive' Model for Delivering Video Over Fiber," TELECOMMUNICATIONS REPORTS, Dec. 1, 2004 (second brackets and ellipses in original).

[36] "Meet the New TV Guy," WALL STREET JOURNAL, Nov. 23, 2004, at B1, B5.

[37] "SBC to Start Project to Send TV Over Lines," N. Y. TIMES, Nov. 17, 2004, at C1, C3.

[38] "SBC Voices Two Approaches to Web-Based Video," THE NATIONAL JOURNAL'S TECHNOLOGY DAILY, PM EDITION, June 20, 2005, *at* http://www.nationaljournal.com/pubs/techdaily/pmedition/tp050620.htm.

[39] *Id.* (quoting SBC Vice President Jeff Weber as describing SBC's proposed HD and DVR services and concluding "[w]hich is different than saying we are going to do something crazy like a la carte or something that is completely and totally disruptive in the marketplace.... We can't because our content providers won't allow it, and I'm not sure it would make sense even if they did.")

Similarly, Verizon's chief executive Ivan Seidenberg explained his video aspirations: "Platforms that will make a big difference to the customer will be interactive . . . . Customizing it, so that you're not requiring people to buy 50 channels or 500 channels, I think we can add a degree of control for the customer. We think we can be one of the only ones to do all the things the customer wants and do them well."[40] Therefore, while the telcos propose to add a number of interactive features to traditional cable programming, at bottom, the content is familiar cable content.

The physical platforms used by the telcos to provide IPCable also mimic traditional cable platforms. As noted above, Verizon intends to run fiber all the way to the premises to deliver its services, while SBC has a fiber to the node (or neighborhood) plan, using copper wire for the last mile to the customer's home. Both approaches are virtually identical to the way traditional cable delivers its signals to the home, *i.e.*, by running a combination of fiber optic and coaxial cable plant pursuant to local rights-of-way regulation. Indeed, Bruce Swail, general manager of the telecom access group of Motorola which has contracted to sell video headend equipment and set-top boxes to Verizon, has said that "what Verizon will install will look a lot like what's seen in a typical cable system."[41] Other vendors have said that Verizon "is looking at creating one national super headend, which will send signals from national networks like [CNN] and ESPN to Verizon headends in local markets [although] [s]ome satellite receiving capability might still be necessary in local markets . . . ."[42] Swail also said that "[w]hile the forward path will be very similar to

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[40] "Taking on No. 1," BOSTON GLOBE, Nov. 22, 2004, at F1, F5.

[41] "Motorola Confirms Verizon Video Buy," MULTICHANNEL NEWS, Nov. 1, 2004, at 6.

[42] *Id.*

cable's, the return path will be all-digital . . . . That will give Verizon switched digital video capabilities."[43]

The switched nature of its IPCable service is also touted by SBC as a characteristic distinguishing the service from traditional cable. The telco describes its "IP Switched Video" service as one where a "[set-top box] only receives a single video channel at a time and displays it on the TV. The data stream for this single video channel is requested by the [set-top box] to the network. Channel changes are performed by the network at the request of the [set-top box]."[44] As reported in a trade publication:

> Content will be shipped over SBC's national fiber backbone to 40 video hub offices across the country, where VOD content will be stored, local content inserted and interactive applications launched. The local plant will include 140 video-serving offices to distribute the service. SBC will run fiber to nodes that are within 3,000 feet of consumers' homes.
>
> Video will be switched from those node locations across traditional copper wire to the home, where SBC will install home gateways and set-top boxes. The fiber build will pass 17 million homes, and SBC plans another 1 million homes using fiber-to-the-premise technology in new housing developments and certain multiple-dwelling-unit areas.
>
> That strategy differs sharply from that of Verizon Communications Inc., which has launched a FTTP build in many markets, although at a slower pace than SBC envisions.[45]

But neither IP nor switching makes a difference on the regulatory character of the service. A video service need not be IP-based to employ switched video, and cable operators are

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[43] *Id.*

[44] SBC *ex parte* presentation, Letter from James K. Smith, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-29, 04-36, and 03-211, Attachment at 7, filed Oct. 8, 2004. *See also*, "Microsoft Lands 'Lightspeed' Berth," MULTICHANNEL NEWS, Nov. 22, 2004, at 3 ("The switched-video nature of the architecture would allow subscribers to assign their own program lineup....").

[45] "SBC's Coming at Lightspeed," MULTICHANNEL NEWS, Nov. 15, 2004, at 1.

themselves exploring the use of switched video to conserve bandwidth.[46] And IP is increasingly common in the cable industry transmission platform.[47]

Thus, SBC's claim that "IPTV far exceeds what's delivered in the market today"[48] merely emphasizes more rather than less use of IP technology and switched broadcast video. It says nothing about underlying fiber (or hybrid fiber) facilities, and those facilities are little different from the infrastructure long supporting traditional cable system operations.[49] And, as we show below, those facilities are "cable systems" under the relevant Title VI definitions, making them subject to Title VI "cable" regulation.[50]

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[46] *See* "Cable Operators Rush Services To Keep Edge," WALL STREET JOURNAL, July 21, 2005, at B1 (Comcast, Time Warner, and Cox "are all moving quickly to develop a new 'switched' way of transmitting signals to customers' sets that greatly increases the selection of channels and other features they can offer."); "Inside Time Warner's SBV Trial," MULTICHANNEL NEWS, June 27, 2005 at 53; "Time Warner Cable is Switching Up" MULTICHANNEL NEWS, May 30, 2005, at 41 ("Time Warner Cable says it plans to roll out switched broadcast video technology in several markets this year, and eyes a potential 2006 national roll out."). "Time Warner Cable Boosting Capacity of Network," AUSTIN AMERICAN-STATESMAN, July 7, 2005 at C1. ("The cable operator will install the new system over the next nine months to enable rapid switching among many program streams...")

[47] "Selling IP Video," CED MAGAZINE, June 28, 2005, *at* http://www.cedmagazine.com/ced/2005/0605/06b.htm. ("While IP video delivered all the way out to the subscriber may be a daunting task, many cable operators are looking to the technology for core transport."); KAGAN BROADBAND TECHNOLOGY, June 7, 2005, at 1 ("The advantages of having hybrid fiber-coax plan upgraded to 750 MHz or higher are clear, providing greater flexibility of high-def content, on-demand menus and simulcast delivery as well as IP-based services ...."). *See also*, KAGAN BROADBAND TECHNOLOGY, Dec. 6, 2004, at 6 (estimating 30 million cable homes passed by IP-enabled phone service by the end of 2004).

[48] "SBC's Coming at Lightspeed, *supra* note 39, at 1.

[49] Time Warner Cable recently announced the launch of an IPTV trial in its San Diego division. As described in an FCC filing, the service, called "TWC Broadband TV," "will enable existing video customers to view video programming on a broadband connected Windows PC within their home." Letter from Susan Mort, Counsel, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, filed July 7, 2005. ("*Time Warner ex parte*"); "TV Goes to PC in San Diego," MULTICHANNEL NEWS, July 18, 2005, at 8.

[50] As the *Time Warner ex parte* made clear: "The fact that TWC Broadband TV is an IP-enabled simulcast of TWC's traditional video service underscores the importance of like services being regulated in a similar manner. It would make little sense for a consumer to receive traditional cable service in one room of their house and IP-enabled video service in another, and have those two outlets be subject to different terms of regulation."

AS A MATTER OF LAW, TELCO IPCABLE IS SUBJECT TO TITLE VI

A. Title VI Definitions Are Critical in Determining IPCable's Regulatory Status

The Communications Act and FCC regulations determine the regulatory treatment of IPCable. In particular, the key definitions are (1) "cable operator,"[51] (2) "cable system,"[52] (3) "cable service"[53] and (4) "video programming."[54] Those terms trigger most of the regulatory responsibilities of cable operators. In particular, because an IPCable provider is a *"cable operator,"* certain statutory or regulatory requirements apply to it, including the requirements that it obtain a local franchise, avoid "redlining," and pay franchise fees.

The starting point for analysis is Section 651(a)(3)(A) of the Communications Act, which establishes the way telcos may provide video. It states "[t]o the extent that a common carrier is providing video programming to its subscribers in any manner other than [via radio under Title III or as a common carrier under Title II] . . ., *such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . . .*" This

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[51] "[T]he term 'cable operator' means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(5).

[52] "[T]he term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility systems." 47 U.S.C. § 522(7).

[53] "[T]he term 'cable service' means – (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6).

[54] "[T]he term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

provision makes clear that the Bells' delivery of video programming via IPCable is and *must be* subject to Title VI – since it is video delivery that is not covered by the other three entry means, namely radio, common carrier, or OVS. An examination of the terms of the Act and the nature of the IPCable service and facilities shows that the critical Title VI definitions and requirements are met and therefore subject telco-provided IPCable to Title VI requirements, including franchising. Even if the phone companies claimed that they were not subject to Title VI, that would still mean that they have to provide video programming pursuant to one of the other options under Section 621. There is no "fifth" option under that provision.

B. "IPCable Content is "Video Programming"

First, the content delivered by a phone company IPCable provider is "video programming" under the Act. This is critical to concluding that the companies' video service is a "cable service." While SBC seems to have conceded as much, an examination of the relevant terms and precedent confirms this view.[55]

"Cable service" is defined in the Act as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service," and "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." IPCable content meets the first prong (i), namely "video programming."

[55] In seeking relief from a Texas PUC separate corporate affiliate requirement applicable to certain telephone companies providing "video programming services," SBC conceded that (1) the definition of the term "video programming" under the relevant Texas statute "is identical to the definition in the Cable Act," and (2) "SBC Texas plans to provide video programming as [the Texas statute] defines the term." PUC of Texas, Docket No. 31282, SBC Texas' Petition for Waiver of Separate Video Programming Affiliate Requirements at 3, (June 24, 2005) ("*SBC Texas' Waiver Petition*"). Verizon made a similar concession in filing a similar petition. *See* note 89, *infra*.

The term "video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[56] A number of FCC Orders have addressed the meaning of "video programming" and lead to the conclusion that IPCable – including *IPCable Video on Demand* – constitutes "video programming."

Video Dialtone Orders. In its *Video Dialtone Order*,[57] the Commission clarified the definition of "video programming" for purposes of the then existing cable-telco cross-ownership prohibition which used identical language. It interpreted the phrase "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" to mean "programming comparable to that provided by broadcast television stations in 1984 [when the Cable Act was passed]."[58] It also opined that "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming' for purposes of the statutory [cross-ownership] prohibition."[59] The key to the FCC's severability analysis is whether the video service involves "complex viewer interaction." If it does, then it is not within the definition of video programming. If it does not, then it is within the definition.

Under this approach, "IPCable Basic Services" plainly are "video programming." They entail no viewer interaction, and, as the "equivalent to today's broadcast and premium cable

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[56] Whether IPCable content is "video programming" has consequences separate and apart from whether IPCable content may constitute a "cable service." For example, the term video programming dictates whether the terms of Section 651 (which, as noted above, limits a telco's options in providing "video programming") apply, and the term is also used to describe the type of programming to which the leased access and program access rules apply.

[57] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Rulemaking*, 7 FCC Rcd 5781 (1992)("*VDT Order*").

[58] *Id.* at 5820-21, ¶ 74.

[59] *Id.* (emphasis added).

services," they constitute "programming comparable to programming provided by a television broadcast station [in 1984]," in the words of the *Video Dialtone* order.

The same holds true for "on demand" services the Bells have said would be provided over their IPCable platforms – the types of services we have designated "*IPCable Video On-Demand Services*." In its *Video Dialtone Reconsideration Order*,[60] the Commission addressed whether on-demand programming constituted prohibited "video programming" for purposes of the cable-telco cross-ownership prohibition. In its initial *Order*, the Commission had recognized that "many of the video services that could be provided over a video dialtone network involve a high degree of interactivity that would enable the subscriber to tailor the video images to his or her specific requests." It noted that "Congress intended for video services involving such complex viewer interaction generally to fall outside the scope of 'video programming,' since they would not be comparable to the programming provided by broadcast stations and others in 1984."[61]

However, the Commission went on to "stress . . . that some elements of an interactive video service may be deemed to be 'video programming' if these elements can be readily separated from the interactive service and provided as independent video programming comparable to that carried in 1984."[62]

The Commission then observed:

> Thus under our interpretation, the offering of a shopping service comparable to a "video catalogue" whereby the consumer can electronically request specific information and order goods and services would not constitute prohibited video programming, even if the service incorporated video images. In such a case, the video images would not be severable from the interactivity. On the other hand,

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[60] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 – 63.58, *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994)("*VDT Recon. Order*").

[61] *VDT Order* at 5821, ¶ 75.

[62] *Id.*

> simply enabling the consumer to order a product electronically would not alter the nature of the underlying video programming, such as the home shopping programs carried by cable and broadcast stations in 1984. We also conclude that programming that includes multimedia graphics and information services that incorporate video images generally would not be video programming because the video images are not severable from the program service.[63]

In a footnote, the Commission further explained:

> Similarly, the mere inclusion of some interactive capability would not be sufficient to transform other video programming into non-video programming and thereby escape the statutory cross-ownership ban.... *For example, the inclusion of capability to choose among several camera angles of a video sporting event would not permit the telephone company to also provide the underlying video programming. Similarly, offering the consumer the capability to replay portions of a video program in slow motion or to fast forward will also not alter the conclusion that the underlying material constitutes prohibited video programming.* The telephone company could, however, provide the functionality that would allow the customer to engage in such manipulation of and interaction with the video programming.[64]

On reconsideration, NYNEX and BellSouth argued that video-on-demand services should not constitute "video programming" and took issue with the Commission's severability analysis. The Commission, however, reaffirmed its previous holding that video-on-demand programming could be separated from the functionality used to assess the programming and that VOD was "video programming."[65] Observing that "offering a consumer the ability to choose among several camera angles in viewing a sporting event, or to replay or fast-forward portions of a video

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[63] *Id.* at 5822 ¶ 76.

[64] *Id.* at 5822, n.195 (emphasis added).

[65] The Commission made clear that a video service can constitute "video programming" without also being a "cable service." In other words, while VOD might be considered "video programming," the interactive functionality in VOD may take it out of the definition of cable service since that definition requires, among other things, the "*one-way transmission* to subscribers of video programming." As the Commission noted (albeit before the 1996 "or use" amendment), "Congress emphasized that services enabling subscribers to interact with or manipulate information typically would not be considered cable service." It emphasized that its decision "does not address whether a program service with sufficient interactivity to remove it from the scope of cable service nonetheless could have a severable programming component comparable to the programming offered by broadcast stations in 1984." *VDT Order* at 5821-22, n.194.

program, does not change the nature of the underlying material," it concluded: "[W]e do not believe that the level of subscriber control over video-on-demand images is such as to render the service more comparable to a gateway service than a traditional video programming service."[66]

Based on the FCC's VOD analysis, content the telcos propose to provide on demand constitutes "video programming" for purposes of the "cable service" definition. And the fact that that content is delivered using IP technology does not change that result.

On the occasions the Commission has addressed the question of IP video, it has limited its analysis to whether "Internet-delivered" video to computers constitutes "video programming." "IP" in these contexts is all about the technical *quality* of the video being provided over a traditional Internet connection, *i.e.*, whether it was comparable to (or better than) the quality of the video delivered over television stations in 1984. In each instance below the FCC determined that "video provided over the Internet" was not comparable to 1984 broadcasts. But the key point for regulatory classification purposes is that telco use of IP technology will result in video comparable to (or better than) that provided by broadcast stations in 1984. Suffice it to say that the IPCable content to be offered by telcos will certainly be of "broadcast quality." A telephone company's video offerings could not be competitive if the quality of its IPCable services is less than "broadcast quality." Accordingly, the cases below should be limited to their facts – video delivered over the Internet to computers, not the type of IP-based video proposed by the Bell companies.

Video Competition Reports. Since at least 1998, the Commission has sought comment about the status of "video provided over the Internet" in its Annual Video Competition Inquiries.

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[66] *VDT Recon. Order* at 296-97, ¶¶ 110-11. In response to the BellSouth and NYNEX VOD arguments on reconsideration, NCTA argued that VOD should be deemed "video programming" since "subscriber interaction,

In each report to date, the Commission has concluded that "video provided over the Internet has largely been of less-than-broadcast quality."[67] For purposes of this analysis, the FCC has focused on "frame-per-second delivered, the size of the viewing area, the relative ease of use by the consumer, consumer habit, the type of programming offered and the relative availability of the programming."[68] As noted above, if the Bells were delivering their content over the Internet to PCs or even to TVs, this conclusion might raise the question whether the *quality* of their IP-delivered video is such that it cannot be considered to be "video programming" within the meaning of the statute. However, from the descriptions of the services to be provided over IPCable, the Bells are not planning to deliver the type of Internet, Web-based video which was the subject of the FCC Annual Video Competition Reports. Rather, it is clear that the quality of the services the Bells plan to deliver over their fiber networks is at least comparable to broadcast quality video.

OTARD Order. In 1998, the Commission was asked to rule that devices that receive "video programming viewable on a computer screen" were subject to Section 207 of the 1996 Telecommunications Act dealing with "Over-the-Air Reception Devices (OTARD)." In the course of that rulemaking, commenters argued that "video programming includes all information (*e.g.*, information received over the internet) that is commonly viewed on the video screen (including computer monitors)."[69] The FCC rejected that view, holding that the record did not

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such as the ability to fast-forward or rewind a program *or choose the time in which to view it*, does not transform the underlying nature of that program." *Id.* at 296, ¶ 108 (emphasis added).

[67] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, 19 FCC Rcd 10909, 10932, ¶ 74 (2004).

[68] *Id.* at 10932-33, ¶ 75.

[69] Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices, Television Broadcast Service and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 13 FCC Rcd 18962, 18987, ¶ 55 (1998).

show that the described video-related services were comparable to those provided by a television broadcast station. Again, this conclusion has little bearing on the types of services the Bells indicate they intend to offer which do not include the types of Internet-based information that was the subject of the OTARD proceeding.

Closed Captioning, V-Chip, EAS Orders. The Commission reached similar conclusions in orders dealing with closed captioning, the V-Chip and the Emergency Alert System. In its closed captioning order, the Commission conspicuously omitted reference to Internet-delivered video ("streaming media") as being "video programming" subject to the closed captioning rules, although it noted the growth of "video like programming" on the Internet.[70] Similarly, when applying its V-Chip rules, the Commission has said that its rules "were not intended to apply to computers receiving video transmissions over the Internet or via computer networks."[71] Finally, the Commission distinguished Internet-delivered programming from video programming for purposes of applying EAS requirements, albeit because most of the Internet-delivered material was data as opposed to video programming of any sort.[72]

None of the factors the Commission relied upon to exclude Internet-based video from the definition of video programming applies to *IPCable Basic Services* or *IPCable VOD Services* as

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[70] Closed Captioning and Video Description of Programming, *Report and Order*, 13 FCC Rcd 3272, 3385, ¶ 249 (1997).

[71] Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, *Report and Order*, 13 FCC Rcd 11248, 11260, ¶ 34 (1998).

[72] Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System, *Second Report and Order*, 12 FCC Rcd 15503, 15522, ¶ 38 (1997). In a related decision, the Commission concluded that ISP Internet access service (including streaming video) does *not* constitute "video programming" for purposes of the leased access rules. Rather than premising that decision on the "quality" of the video being provided, however, it focused on the array of services, including data services, provided by ISPs, most of which were not contemplated by the leased access rules and were not encompassed by the term "video programming." Indeed, the Commission cautioned that "we might face a different set of issues if IVI or another ISP proposed to utilize leased access capacity for the provision of a service comprised wholly of video programming available via the Internet." Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet

proposed by SBC over its IPCable facilities and by Verizon over its RF-based fiber plant. To the contrary, both of these services will be "video programming" services because they constitute "programming comparable to that provided by a broadcast television station in 1984."

Consistent with the holding of the *Video Dialtone Order*, such programming includes on demand programming which, as proposed by the Bells, seems plainly severable from any interactive functionality (*e.g.*, different camera angles). And, as noted below, the use of IP technology does not change this result because the relevant factors in identifying video programming are the nature and picture quality of the programming, not the means of delivery.

Not only does SBC's and Verizon's content constitute "video programming," but also the IPCable content – particularly on-demand services – also constitutes "cable services." In particular, IPCable video on demand services' interactivity does not to take it out of the "cable service" definition requirement of "one-way" transmission of video programming.

C. IPCable Content is a "Cable Service"

As noted above, "Cable Service" is defined in the Act as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service," and "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." Since IPCable content is "video programming," it is also likely to be classified as a "cable service" in so far as "one-way transmission to subscribers" characterizes the service.

Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act, *Memorandum Opinion and Order*, 15 FCC Rcd 3247, 3253-54, ¶ 13 (2000).

Some may argue that some IPCable on-demand programming includes sufficient interactivity to take it out of the definition of "cable service," even if it does not take it out of the definition of "video programming."[73] This is not the case.

First, the 1996 addition of "or use" to the statutory "cable service" definition supports the view that some interactivity, even in VOD programming, is part of the definition of "cable service." As the legislative history of that provision makes clear, the "or use" language was added "to reflect the evolution of cable to include interactive services . . . ."[74] The minimal interactivity for VOD service as currently constituted or as proposed by the Bells is subsumed by the "or use" language. In fact, VOD likely met the pre-1996 "cable service" definition since it involved "subscriber interaction ... required for the selection of such video programming." Under either reading, the subscriber interaction involved in VOD is consistent with the definition of "cable service."

Second, in its 2002 *Cable Modem Declaratory Ruling*, the Commission made clear that the critical element in determining whether a service is a cable service despite some two-way elements is (1) whether the operator maintains control in selecting and distributing content to the subscriber and (2) the content be made available to all subscribers generally.[75] That description tightly fits the proposed IPCable services to be provided by the Bells – even the VOD services.[76]

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[73] As the Commission observed in its *Video Dialtone* Orders, a service can constitute "video programming" without being a "cable service," since "cable service" requires (at least predominantly) the "one way transmission to subscribers."

[74] H.R. REP. NO. 104-458, at 169 (1996).

[75] Inquiry Concerning HighSpeed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4836-37, ¶ 67 (2002) (declaring that even with the addition of the term "or use" to the definition of cable service, the FCC "believe[s] that the one-way transmission requirement in that definition continues to require that the cable operator continue to be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally").

[76] If IPCable is not "video programming," it might be an "other programming service," which is defined as "information that a cable operator makes available to all subscribers generally." Recall that the term "cable

Contrary to some suggestions, IPCable is not an "interstate *information* service."[77] That characterization misstates the 2004 *Vonage* ruling.[78] There the Commission declared that the Vonage Voice over Internet Protocol ("VoIP") *voice* service was an interstate service and thus would preempt any inconsistent state or local regulation.[79] In that decision, the Commission enumerated a number of characteristics of other VoIP services that would be similarly subject to federal, rather than state or local, jurisdiction. One key characteristic was that a service "includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities, *even video*."[80]

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service" means – "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." But in its *Cable Modem Declaratory Ruling*, the Commission noted that "other programming service" is described in the legislative history of the 1984 Act as "non-video information" having the characteristics of traditional video programming. *Id.* at 4834-35, ¶ 63. Under that reading, video provided over IP would not be "other programming" and hence potentially a cable service under that prong of the definition, since it is video and not "non-video information."

[77] "Bells' Strategy of Video Services May Run Into Local Roadblocks," INVESTOR'S BUSINESS DAILY, Nov. 16, 2004, at A1 ("SBC claims 'IP video' services should be defined as an 'information service'..."). *See* Petition of SBC Communications, Inc. For a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-36, Petition of SBC Communications, Inc., For a Declaratory Ruling, filed Feb. 5, 2004. The Commission has encouraged interested parties to file any comments related to this petition in its IP-Enabled Services docket (WC Docket No. 04-36). *See Public Notice*, WC Docket No. 04-29, DA 04-899 at 1, n.2 (Mar. 30, 2004).

[78] Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, *Memorandum Opinion and Order*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*"), *appeal pending*, Nat'l Ass'n of State Util. Consumer Advocates v. FCC, No. 05-71238 (9th Cir. filed Feb. 22, 2005).

[79] "IPTV's in Vonage Order: FCC Ready to Block State Regulation," MULTICHANNEL NEWS, Nov. 22, 2004, at 48 ("The FCC order...stated clearly that IP video is a service that the agency was prepared to shield from non-federal regulation").

[80] *Vonage Order*, at 22424, ¶ 32 (emphasis added).

Read in context, the reference to "video" in the *Vonage* decision can only mean possible ancillary video features of Vonage-like services like video email or video teleconferencing. The reference can not be taken as a Commission decision to declare all IP video services to be interstate information services. In any event, even the *Vonage* decision did not address the regulatory classification for Voice over Internet Protocol services – let alone Video over Internet Protocol services. The *Vonage* order addressed who has jurisdiction over the IP voice services, *i.e.*, who decides the nature of the regulation for such services, regardless of how they are classified. It is erroneous to read the reference any other way, particularly since the existing "cable services" definition accounts for the type of video services proposed by the Bells as Congress recognized in adding "or use" to that definition.

In summary, it is clear that (1) IPCable programming is "video programming"; (2) the interactivity required for accessing IPCable is merely "subscriber interaction" required for the selection or use of such video programming; and therefore, (3) the service would remain essentially a "one-way transmission to subscribers" over which the provider retains control and, as a result, (4) would be a "cable service."

Not only is IPCable service "video programming" and a "cable service;" an IPCable provider meets the definition of a "cable operator," because it provides "cable service" over a "cable system."

D. <u>An IPCable Provider Provides Cable Service over a "Cable System"</u>

The term "cable operator" means "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." Because, as already

shown, an IPCable provider is providing "cable service," the critical issue in determining whether he is a "cable operator" is whether he is providing that service over a "cable system." The definition, in relevant part, reads:

> The term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services . . . .

Telephone companies intend to provide their video services over the fiber networks or hybrid fiber-copper networks that they propose to build for video and other broadband services or even over existing broadband facilities, which can – and likely will – provide traditional video services before migrating to IP-delivered services. Such facilities – like comparable cable broadband facilities which deliver cable modem service and traditional video services – constitute the key feature of a "cable system," *i.e.*, "a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." The addition of IP as a transmission technology does not alter the nature of the "closed transmission paths" over which IPCable content will be delivered and is not relevant to the classification of a network as a "cable system" to the extent it is used to transmit video programming directly to subscribers.

Indeed, in a related context, the Bell companies argued – and the FCC held – that when AT&T provides telephone service that is functionally no different from traditional interexchange service, the fact that a portion of the call is routed in IP format over AT&T's Internet backbone is an irrelevant distinction for purposes of regulation. In that case, the use of IP in the middle of the transmission does not affect the functional characteristics of the service in any way that warrants different regulatory treatment.[81]

Furthermore, the two potentially relevant exceptions in the "cable system" definition do not apply to IPCable. The first (the so-called "private cable" exemption in subsection (B)) excepts from the definition of a "cable system" a facility that serves subscribers without using the public rights-of-way. Based on all public reports to date, telco facilities-based IPCable providers will use public rights-of-way to deliver their services since they will use either their existing broadband networks or newly built "wired" networks for such delivery. Indeed, as one industry participant said of SBC's plan: "It's going to be tough . . . . Cutting through the streets and getting right of access to the street can be complicated."[82] Verizon's build-out has already provoked some controversy over its construction and use (or misuse) of the public rights of way.[83] Therefore, the "private cable" exception does not apply.

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[81] Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, *Order*, 19 FCC Rcd 7457, 7465, ¶ 12 (2004).

[82] "SBC Plans a Network Overhaul," BROADCASTING & CABLE, Nov. 29, 2004, at 23 ("SBC ... will spend nearly $4 billion digging up roads to lay ADSL2 fiber....").

[83] "Fiber Optimism: Verizon Embarks on an Ambitious Cable Network, But What Does It Mean For You?," SARASOTA HERALD-TRIBUNE, Feb. 16, 2005, at A1 ("Verizon workers and contractors have hit things before. They ran into dozens of utility lines in Hillsborough County, raising the ire of residents and slowing down the installation process.").

If phone companies were to disaggregate ownership and control of the facilities used to provide IPCable, as SBVS did in Austin[84] and ECI did in Michigan,[85] and another entity provided the only facilities that "used" the public right-of-way, the private cable exception might be relevant as it was in the *City of Austin* and *ECI* cases. However, there are a number of reasons why that result is unlikely. First, public reports to date do not suggest that the telcos intend to employ such an arrangement. Second, in Texas both SBC and Verizon petitioned the state PUC to *eliminate* an existing rule that would subject their video services to a separate corporate affiliate requirement, arguing, among other things, that providing video services through a single entity will be more efficient and economical, and permit them to compete more effectively with cable operators.[86] Third, the announced strategy of the telcos is to compete with a self-provided bundle and not depend, as they do now with DBS providers, on a separate entity furnishing video service. Finally, and most important, in the *ECI* case, the FCC tightly circumscribed the use of the "private cable" exemption and warned Multichannel Video Program Distributors ("MVPDs") of the limits of its decision.

> [W]e caution other MVPDs that the instant decision is expressly limited to the facts before the Commission as presented by ECI. In this regard, we note that: (i) there is absolute separation of ownership between ECI and Ameritech and there is nothing more than the carrier-user relationship between them; (ii) ECI's facilities are located entirely on private property; (iii) Ameritech provides service to ECI pursuant to a tariffed common carrier service; (iv) Ameritech has no editorial control over the content of ECI's programming; (v) the facilities primarily used by Ameritech to provide service to ECI were not constructed at ECI's request; (vi)

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[84] City of Austin v. Southwestern Bell Video Servs., Inc., 193 F.3d 309 (5th Cir. 1999) ("*City of Austin*") (deciding case in which video provider SBVS leases SWBT video trunk lines which are on public rights-of-way).

[85] City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999) ("*ECI*") (deciding case in which video provider ECI leases Ameritech video trunk lines which are on public rights-of-way).

[86] Petition for Waiver of Separate Video Programming Requirements, PUC of Texas, Docket No. 29879, *Final Order* (Oct. 18, 2004) (granting Verizon petition); *SBC Texas' Waiver Petition*, *supra*, note 55.

there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.[87]

As a result, the "private cable" exception would not apply to facilities-based telco IPCable providers.

The second relevant exception from the definition of "cable system," subsection (C), is also inapplicable. It covers "a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services."

Even if telco facilities delivering IPCable are "common carrier" facilities in part, they would also likely be "used in the transmission of video programming directly to subscribers," thus bringing them back within the definition of a cable system "*unless the extent of such use is solely to provide interactive on-demand services.*" The term "interactive on-demand service" means "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, *but does not include services providing video programming prescheduled by the programming provider.*" This phrase was added to the definition of "cable system" by the 1996 Telecommunications Act and has virtually no legislative history explaining its intent or meaning.

The Bells, particularly SBC, tout their systems as being capable of using switched video but that type of service does not fit the 1996 "interactive on-demand" exception to the cable system definition. First, that exemption requires that a common carrier provider use video

[87] Entertainment Connections, Inc., Motion for Declaratory Ruling, *Memorandum Opinion and Order*, 13 FCC Rcd 14277, 14311, ¶ 73 (1998).

facilities "solely" for interactive on-demand services. It is unlikely that all of the Bells' video offerings will be of an on-demand nature, particularly carriage of local broadcast signals that a video provider needs to provide in order to be competitive. "[T]o be competitive with cable, SBC will want to offer a service that for most viewers is a traditional video service.... Viewers may want interactivity in watching sports but they will likely watch sit-coms, dramas, news and other programming as the broadcasters and cable channels present it."[88]

More fundamentally, the exemption requires that the services cannot include "video programming prescheduled by the programming provider." At least some of the "on-demand" line-up described by the Bells – even if delivered over a switched network – appears to be the type inevitably "prescheduled by the programming provider," such as ESPN sports or CNN news. The Bells may offer an on-demand scenario where a customer may choose from a menu of programming on a per channel or per program basis. Such a regime, in and of itself, does not eliminate "prescheduling" by such programming providers. Therefore, the Bell's video offerings would be ineligible for the "interactive on demand" exemption in the cable system definition. In any event, the Bell companies would still be offering "video programming" (since that is part of the definition of "interactive on-demand service") which would have to be offered via one of Section 651's options.

Because neither exception applies, the telco facilities over which are delivered telco-provided IPCable services meet the definition of "cable system" in the Act.

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[88] "Differing SBC, Verizon Fiber Video Plans Face Unbundling, Franchise Issues," LEGG MASON RESEARCH REPORT, Nov. 23, 2004, at 3.

E. An IPCable Provider is a "Cable Operator"

Not only is an IPCable provider providing "video programming" and "cable service" over a "cable system," but the provider is also a "cable operator" because it "directly or through one or more affiliates owns a significant interest in such cable system, or . . . otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." As noted above, all public reports suggest that the telcos do not plan to disaggregate ownership and control of component elements of the facilities used to provide IP video service (as was the case with SVBS and SWBT in the *City of Austin* case and ECI and Ameritech in the *ECI* case). Thus, the "significant ownership interest" requirement in the cable operator definition seems easily met.[89]

F. IPCable Providers Are Subject to Title VI

The analysis above has demonstrated the following:

- *IPCable Basic Service* is both "*video programming*" and a "*cable service.*" Its technical quality – particularly as proposed to be delivered by the Bells – will be comparable to that of broadcast television in 1984.

- *IPCable VOD Service* is "*video programming*" as well as a "*cable service.*" To the extent there is interactivity involved in this service, it will not take the offering out of the definition of "cable service."

- Telephone company facilities used to provide IPCable are "*cable systems*" and they do not qualify under the exception for facilities used solely for "interactive on-demand services."

- Telco IPCable providers who use their own facilities to deliver IPCable services are "*cable operators.*"

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[89] Verizon has conceded that it is a "cable operator" since it intends to provide video programming over a cable system. *See* PUC of Texas, Docket No. 29879, Verizon Petition For Waiver at 2 (June 22, 2004) ("In its provision of cable service, Verizon will be a 'cable operator' under the Cable Act.... [It] will provide video programming over a cable system").

Consequently, as a matter of law, phone companies providing IPCable are subject to Title VI requirements.

CONCLUSION

Telephone companies already have four options if they want to provide video programming. Section 651 of the Communications Act makes clear that if they choose not to provide video programming via radio, as a common carrier, or OVS provider, then the fourth category applies and they are subject to the provisions of Title VI as cable operators. And as demonstrated above, telcos providing IPCable services meet the critical definitions of Title VI. Their program offerings are "*video programming*" as well as "*cable services;*" those services would be provided over a "*cable system,*" and they would be "*cable operators,*" – all subject to Title VI requirements. If there are to be changes to the regulatory structure for multichannel video, they must occur in Congress and they should treat like services alike.

National Cable & Telecommunications Association
July 2005