Thus, today cable incumbents continue to deny their competitors access to this valuable programming. Indeed, less than two months ago, in its comments on the proposed Comcast and Time Warner acquisition of Adelphia, DIRECTV reiterated that incumbent cable operators have increased their efforts to take advantage of the "terrestrial loophole" to deny or restrict MVPD access to regional programming.[53] DIRECTV further explained that cable operators may now exploit their current position to obtain exclusive carriage agreements even with unaffiliated programmers.[54] In addition, both DBS providers have recently claimed that cable-owned programmers have adopted coercive pricing practices, requiring competitors to pay several times more per subscriber for programming than what they charge cable operators.[55]

Such anti-competitive practices by cable incumbents are likely to increase in both number and severity in light of imminent telco entry. Cable operators possess both the

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[53] *See* Comments of DIRECTV, Inc., filed in Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., MB Docket No. 05-192, July 21, 2005, at 13-26 ("DIRECTV Comments"). For example, DIRECTV notes that Comcast denies access to its Comcast SportsNet Philadelphia network by DBS operators. *Id.* at 16-17. Cox offers its Channel 4 San Diego only to cable operators. *Id.* at 17. In both cities, DIRECTV's market share is significantly lower than its national average. *Id.*; *see also* Comments of RCN Telecom Services, Inc., filed in Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., MB Docket No. 05-192, July 21, 2005, at 10-15 ("RCN Comments").

[54] For example, DIRECTV notes that Time Warner secured exclusive distribution rights to newly created Carolina Sports and Entertainment Television in Charlotte, precluding access by DBS competitors. DIRECTV Comments at 18.

[55] *See, e.g.*, Program Access Complaint, *Echostar Satellite L.L.C. v. In Demand, L.L.C.* (filed July 5, 2005); Program Access Complaint, *DIRECTV, Inc. v. In Demand, L.L.C.* (filed June 29, 2005); *see also* RCN Comments at 16-17.

ability and the incentive to preclude telcos from providing video programming at all. As DIRECTV recently explained:

> . . . as new entrants with no market share, the RBOCs are the most likely targets for abuse by dominant incumbents. . . . A cable operator with a regional monopoly would have the economic incentive to withhold affiliated [regional sports network] programming from an RBOC and would have to pay little compensation to an unaffiliated RSN to forgo the minimal affiliate and advertising revenues associated with the RBOC's relatively few subscribers.[56]

Moreover, as noted above, findings by the GAO and the Commission demonstrate that market entry by terrestrially based MVPDs causes cable operators to reduce their prices. Given their efforts to erect barriers to telco competition altogether, there is every reason to expect that cable operators will seek to forestall or minimize the competitive threat by denying telcos the programming that is essential to their ability to compete in the first place.

In light of these circumstances, SBC shares DIRECTV's concerns. As a new entrant in the market for video services, SBC's success depends critically on access to quality programming. Regional programming, in particular, is becoming more and more highly demanded by video subscribers.[57] The ability to deny or restrict access to such

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[56] DIRECTV Comments at 33-34.

[57] *See* Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2764 ¶ 15 (2005) ("Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDS. The *2004 Report* identifies at least 38 sports channels out of a total of 96 regional networks. Many of these networks are owned at least in part by MSOs. There are also 40 regional and local news networks that compete with local broadcast stations and national cable news networks. Many of these networks are owned at least in part by MSOs.").

programming on competitive rates, terms, and conditions is thus a potent weapon that incumbent cable companies can use to stifle competition.

Accordingly, SBC encourages the Commission to identify and implement ways of addressing this recognized and ongoing problem. As the Commission has noted, "the law of program access continues to be refined,"[58] and the Commission possesses a number of tools by which it can further that process. For example, in the Hughes/News Corp. proceeding, as the Notice indicates, the Commission established an expedited arbitration mechanism for aggrieved MVPDs that could not successfully negotiate terms for carriage of an RSN, and permitted the MVPD to continue to carry the RSN while the dispute was being resolved.[59] Given the continuing existence of such recognized problems, the Commission could initiate proceedings to explore whether it can and should adopt remedial schemes to promote video competition.

The Commission has ample authority to address the growing problem of incumbent cable operators preventing nondiscriminatory access to programming — the precise situation that led to the adoption of the program access provisions of the 1992 Cable Act. First, the Commission has "acknowledge[d] that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive

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[58] Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 ¶ 5 (1998) ("*Program Access Recon Order*").

[59] *See* Notice ¶ 18 n.13 (citing *Hughes/News Corp. Merger Order* ¶¶ 172-79).

MVPDs from providing satellite cable programming."[60] It should take steps to clarify the circumstances under which section 628(b) would afford a remedy for such migration.[61] Moreover, while section 628 mandates program access rules for satellite-delivered programming, nothing in the language or purpose of that section bars the Commission from adopting rules dealing with other types of programming.[62]

The Commission has other sources of authority as well. For example, section 616(a)(2) of the Act directs the Commission to adopt regulations of program carriage agreements, and to ensure that cable operators do not prevent "video programming vendors" from distributing programming to other MVPDs — regardless of the method of such distribution.[63] Cable operators that establish regional programming distributors designed to exploit the "terrestrial loophole," or which otherwise pressure video programming vendors to offer them exclusive access or preferential pricing, violate Congress's intent in section 616. Likewise, given the time that has elapsed since the Commission committed to monitor program access difficulties and the continued examples of difficulties of the kind cited by DIRECTV, further proceedings should make clear that

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[60] Memorandum Opinion and Order, *Echostar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶ 13 (2000). The Notice seeks comments (at ¶¶ 18-19) on the extent of such migration.

[61] Indeed, the Commission has previously pledged to "continue to monitor this issue [*i.e.*, the migration of programming from satellite to terrestrial delivery] and its impact on competition in the video marketplace." *Program Access Recon Order* ¶ 71.

[62] This is in contrast with the statute at issue in *MPAA v. FCC*, 309 F.2d 796 (D.C. Cir. 2002), where Congress required the Commission to adopt captioning rules and, in the next section, required it to write a report on video description rules. Congress in section 628 expressed no opinion on access to non-satellite programming, which formed the context of the abuses before it at the time.

[63] 47 U.S.C. § 616(a)(2).

the prohibition on coercion of any video programming vendor (satellite or otherwise) to grant exclusivity rights will be interpreted broadly to include any exercise of market power to deny or restrict access to programming.[64] While the Commission originally decided (in 1993) that it would not develop specific indicia of coercive behavior,[65] the ensuing twelve years have allowed the Commission to develop a far more comprehensive understanding of the program access problems arising from the current position of cable incumbents.

Preventing abuses in the program markets critical to competitive MVPDs is consistent with Congress's intent. Indeed, Congress clearly envisioned that the Commission would pursue other means to foster the development of video competition, stating its "expect[ation that] the Commission [will] address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies," and stating further that "the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable[.]"[66] The Commission should

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64/ *See* 47 C.F.R. § 76.1301(b).

65/ *See* Second Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2648 ¶ 14 (1993).

66/ H.R. Rep. No. 102-862, at 93 (1992) (Conf. Rep.); *see also* 47 U.S.C. § 157(a) (citing the "policy of the United States to encourage the provision of new technologies and services"). The decisions in *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), and *American Library Assn v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), do not bar the Commission from expanding its program access rules. In *American Library*, the court held that the Commission sought to exercise authority over an area entirely outside of its jurisdiction. By contrast, Congress specifically contemplated that the Commission would exercise authority over cable and MVPD competition in general, and program access and carriage agreements in particular. As noted above, unlike in *MPAA*, Congress never spoke to the

initiate a proceeding to explore additional ways in which to enforce this mandate, and it should resolve that proceeding expeditiously so that these concerns that have been lingering for several years do not further impede the growth of video competition, particularly with the emergence of telco new entrants that the 1996 Act specifically sought to promote.[67]

Respectfully submitted,

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issue of impediments to access to non-satellite programming. Further, the rule invalidated in *MPAA* was a content-based regulation of speech. Nondiscriminatory program access rules could not be viewed as content-based.

[67] *See, e.g.*, H.R. CONF. REP. NO. 104-458, at 172, 177 (1996) (stating that the 1996 Act was intended to encourage competition in all markets, including specifically "[telephone company] entry" into video markets).

# THE IMPACT AND LEGAL PROPRIETY OF APPLYING CABLE FRANCHISE REGULATION TO IP-ENABLED VIDEO SERVICES

## INTRODUCTION

Over a year and a half ago, the Commission initiated a comprehensive proceeding to determine the regulatory framework that should govern all IP-enabled services. Although many at the time argued, and continue to argue today, that this proceeding should be confined and limited to the treatment of Voice-over-Internet-Protocol services, the Commission has appropriately resisted such calls to blindly perpetuate the siloed service categories associated with legacy regulation in the face of the reality of the converging communications marketplace. Instead, the Commission, purposefully and presciently, adopted a broader focus by explicitly encompassing all IP-enabled services. It did so because it recognized, correctly, that IP is the common technological denominator behind convergence and integration that will deliver enormous benefits to consumers.

With respect to one type of IP application – IP-enabled voice – the Commission already has acted decisively. In its *Vonage Order*, the Commission, by interpreting the statute in accordance with its role as the expert agency, rejected any notion that IP-enabled voice services are subject to myriad state and local "entry and certification requirements" that could "take months" and "introduce[] substantial delay in time-to-market."[1] Instead, the Commission found, these new services — including specifically those offered by *cable* VoIP providers — would be subject to a single federal regulatory scheme, not "multiple disparate" regulatory schemes by

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[1] Vonage Holdings Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 22404, 22416-17 ¶ 20 (2005) ("*Vonage Order*").

"more than 50 different jurisdictions."[2] Thus, while leaving open the questions of classification and the regulatory obligations of such providers for final resolution in this proceeding, the Commission confirmed that, under existing law, IP-enabled voice providers are not subject to legacy state and local entry regulation designed for incumbents.

That same conclusion – that current law does not envision that IP-enabled voice services be forced into a legacy service category and shackled with traditional economic and entry regulation – applies with equal force to the other VoIP – Video-over-IP. Just as voice-VoIP is transforming the paradigm of person-to-person communications, video-VoIP promises to do the same for video-based communications. As more and more providers are poised to bring much-needed competition and innovative services to the video market, it is now just as critical, as it has been for IP-enabled voice, for the Commission to ensure that the regulatory regime governing IP-enabled video facilitates, rather than impedes, competitive entry and new investment.

As with the *Vonage Order*, Commission need look no further than the terms of the Act to reach such a conclusion.[3] Title VI of the Act – otherwise known as the Cable Act[4] – includes both legacy cable provisions, such as legacy franchising requirements, as well as provisions designed more broadly to apply to all multichannel video program distributors. The cable franchise provisions apply specifically to "cable operators" that provide "cable services" over

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[2] *Id.* at 22426-27 ¶¶ 35-36; *see also id.* at 22425 ¶ 32 (noting that its preemption ruling extends to cable operators that provide VoIP).

[3] There is no doubt the Commission has the authority under the Act to interpret the definitions in Title VI and thus determine the applicable scope of Title VI's legacy franchising provisions. *See City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999), *cert. denied*, 531 U.S. 825 (2000).

[4] 47 U.S.C. § 521, *et. seq.*

"cable systems." Those three key terms, moreover, are defined very precisely by reference to particular technologies and system architectures used to distribute video programming. Thus, cable service is limited to "one way transmission" of video programming to subscribers, "cable systems" are limited to transmission facilities designed to provide such one-way transmissions, and "cable operators" are narrowly defined as providers of such service using such systems.[5]

IP-enabled video services quite clearly fall outside the legal framework bounded by these distinctly defined terms. Legacy cable systems are inherently one-way closed transmission systems, designed to broadcast all video channels simultaneously to every household and business connected to those systems. In contrast, advanced broadband networks used to deliver IP-enabled video services, such as SBC's Project Lightspeed, are two-way networks that involve regular communication and interaction with customers in the delivery of video services, and are based on a client-server architecture similar to the architecture used by customers to access the Internet. In that architecture, and in contrast to a traditional cable system, a customer's set-top equipment must be in constant communication with the network. Moreover, these switched, point-to-point, IP networks are purposefully designed and ultimately capable of allowing customers to access a wide variety of video and other content on an on-demand basis. Accordingly, based on the specific terms of the Cable Act, it is a relatively straightforward determination that, as a legal matter, IP-enabled video networks such as Project Lightspeed are not "cable systems" designed to provide "cable services" and are thus not subject to the legacy cable regulations in Title VI that apply to "cable operators."

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[5] 47 U.S.C. §§ 522(5), (6) and (7).

There is nothing revolutionary about such a conclusion. In this very proceeding, incumbent cable operators have argued passionately that existing layers of legacy regulation should not be applied to new, advanced services: "[t]h[e] local layer of regulation makes no sense when—as here—new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, *without imposing any additional burden on rights-of-way*."[6] Moreover, these cable incumbents draw no distinction between various types of IP-enabled services: "In light of the competitive environment, the premise of *any* regulatory framework should be to refrain from imposing *any regulation on IP-enabled services* unless such regulation is deemed essential to protect the public interest."[7]

In the end, these questions implicate not just video competition, but rather one of the most important public policy challenges of the day – broadband deployment. Telcos deploying new IP-enabled broadband networks must be able to provide video-VoIP as part of their integrated suite of IP-enabled services in order to justify the significant investment associated with these new networks. Without the ability to capture the potential revenue streams associated with video-VoIP, sinking large investments into new, broadband, IP networks is untenable. But, application of traditional franchise regulation originally designed for the monopoly characteristics of the cable market that existed at the time the Cable Act was enacted could suffocate this nascent telco competition before it can gain momentum. And without telcos

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6 Comments of NCTA, *IP-Enabled Services*, filed in WC Docket 04-36, May 28, 2004, at 21 (emphasis added).

7 Reply Comments of Cablevision Systems Corp., *IP-Enabled Services*, filed in WC Docket 04-36, July 14, 2004, at 2 (emphases added).

investing in these new broadband wireline-based networks, the natural and rapidly ongoing shift to a converged communications marketplace, characterized by innovative new services, lower prices and multiple providers, will hit a major roadblock. As a result, the stakes simply could not be higher.[8]

## I. IP-ENABLED VIDEO PROVIDERS WILL BE IMPEDED IN THEIR ABILITY TO BRING COMPETITION TO THE VIDEO MARKET IF THEY ARE INCORRECTLY TREATED AS CABLE OPERATORS.

The Cable Act's promise of deep and wide competition in the MVPD market has not been fulfilled. More than twenty years since the Cable Act was passed, cable incumbents remain the primary players by a wide margin.[9] Notwithstanding the introduction of DBS service, which has made some inroads, the cable incumbents' hold is substantial enough that even in recent years, they have been able to steadily increase their rates. In fact, their prices have risen over

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[8] In anticipation of offering its IP-enabled video service in the State of Texas, SBC will file with the Texas Public Utility Commission its application in compliance with Texas Senate Bill 5 ("Act Relating to Furthering Competition in the Communications Industry") and obtain a "state-issued certificate of franchise authority." In effectuating the mandates of the federal Act, including Title VI, the Texas law establishes a framework that encourages investment in broadband and IP networks and technologies, fosters the development and offering of innovative, next-generation consumer services, and minimizes regulatory barriers to entry that could not properly be applied to new entrants. Accordingly, SBC's compliance with the Texas law is entirely consistent with the arguments in this submission – as well as its other offerings in this proceeding – advocating for a regulatory regime that creates the proper incentives for new entry and investment. And, consistent with the Texas law's express recognition of its ability to do so, SBC will continue to seek clarity of its legal and regulatory obligations and advance its position that IP-enabled video services should be free from all franchise and entry-barrier regulations under Title VI.

[9] *Annual* Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, MB Docket No. 04-227, App. B, Table B-1 (rel. Feb. 4, 2005) ("*Eleventh Video Competition Report*") (reporting that as of June 2004, cable incumbents controlled 71.62% of the video distribution programming market).

three times as fast as the Consumer Price Index ("CPI").[10] Not surprisingly, the Commission's own analysis reveals that this trend is most exaggerated in markets in which the cable incumbents face no effective competition.[11] And that trend continues: 2005 has already seen another round of price hikes.[12]

Telco new entrants to this market are uniquely positioned to disrupt this competitive inertia. In 2003 the Government Accountability Office ("GAO") found that the rates of cable incumbents facing competition from a *wire-based* video provider (not a DBS service) are approximately *15 percent lower*.[13] A 2004 GAO report similarly found that the entry of a broadband service provider offering video service "induce[s] incumbent cable operators to

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[10] U.S. General Accounting Office, *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 20 (Oct. 2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename= d048.pdf&directory=/diskb/wais/data/gao ("2003 GAO Report") (finding that cable rates have increased approximately 40% over a five-year period compared to the approximately 12% increase in the Consumer Price Index); *see also, e.g.*, Reinhardt Krause, *Cable, Phone Race Hits New Gear*, INVESTOR'S BUSINESS DAILY, July 8, 2005, at A4 (noting that cable modem fees average $10-$15 more per month than average DSL fees).

[11] *See, e.g.*, *Eleventh Video Competition Report* ¶¶ 26, 27 (rate hikes of 5.6%, compared to CPI increase of 1.1% over the same period).

[12] *See, e.g.*, Tony Gnoffo, *Dissecting Comcast's Rate Hikes*, PHILADELPHIA INQUIRER, Mar. 13, 2005, *available at* 2005 WLNR 3875285 (discussing rate hike taking effect in March and noting "[f]or Comcast's customers, rate increases have become an annual affair. Their regularity and steep trajectory — about 6 percent a year since 2001 — have been a sore point."); *Charter to Increase Some Rates Starting Next Month*, KALAMAZOO GAZETTE, Feb. 11, 2005, *available at* http://www.mlive.com/news/kzgazette/index.ssf?/base/news-12/1108138819196880.xml; Greg Edwards, *Comcast Raising Cable Rates*, RICHMOND TIMES-DISPATCH, Dec. 7, 2004 (Comcast has announced rate increases for its Richmond customers ranging from 5.9% to 9.9% for standard analog service); Peter J. Howe, *Comcast Will Raise Cable Rates in January*, BOSTON GLOBE, Nov. 24, 2004; Carolyn Said, *Comcast to Raise Prices by 6 Percent Jan. 1*, SAN FRANCISCO CHRONICLE, Nov. 25, 2004; John Cook, *Comcast Plans to Raise Cable TV Rates*, SEATTLE POST INTELLIGENCER, Nov. 24, 2004.

[13] 2003 GAO Report at 3, 10. *Accord*, S. 1349, 109th Cong., 1st Sess. § 2(3) (2005) (citing GAO finding).

respond by providing more and better services and by reducing rates and offering special deals."[14] The Commission itself has reported that, when a cable operator faces competition, "it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming."[15] Moreover, this future wire-based competition is right around the corner. In order to compete with the cable incumbents as they quickly deploy voice services using VoIP and gain ground in the critical broadband "triple play" market for voice, video, and data services,[16] local exchange carriers across the country are pursuing video strategies using a variety of advanced network architectures and technologies, including those capable of providing IP-enabled voice, video and data services. These carriers include not only the BOCs but also a number of smaller carriers.[17] Local exchange carrier provision of advanced video services thus offers real hope of fulfilling the Act's promise of video competition.

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[14] U.S. General Accounting Office, Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets, at 12 (Feb. 2004); *see also id.* at 15 (finding that "the monthly rate for cable television service was 41 percent lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30 percent lower when compared with their matched markets").

[15] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, MB Docket No. 03-172, ¶ 11 (rel. Jan. 28, 2004); *see also id.* ¶ 127.

[16] *See* David Koenig, *Big Telcos Frustrated in Bid to Challenge Cable TV Head-On*, ASSOCIATED PRESS, May 31, 2005 (noting J.D. Power & Associates analyst's observation that the "only option the phone companies have to survive is to offer the same bundles" as cable, which includes video).

[17] *See, e.g.*, *Cincinnati Bell Inc. Investor Meeting — Final*, FD (FAIR DISCLOSURE) WIRE, June 16, 2005 (Cincinnati Bell contemplating launch next year); Carol Wilson, *Indies bulk up to compete*, TELEPHONY ONLINE, June 28, 2005 (Wabash Mutual Telephone is deploying a FTTP network that may begin serving customers in August 2005; Consolidated Telecommunications Co. plans to complete a fiber

It is clear from their public pronouncements, however, that a number of franchising authorities (often threatened or encouraged by incumbent cable operators) seek to subject all video services offered by new entrant telecommunications carriers to incumbent cable franchising requirements,[18] even though imposing such requirements would serve as a prohibitive barrier to entry for new entrant video providers. This was not the case when these requirements were first imposed on the cable incumbents. At that point, a cable franchise and its associated obligations were not an impediment, but a way in the door: Incumbent cable systems developed on a city-by-city, franchise-by-franchise basis, and were subject to little or no competition as they built out and slowly expanded their footprints, but today's new entrants cannot compete effectively using that cable deployment model. Broadband networks are designed and deployed on a region-wide basis, rather than assembled from many different local

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network by 2008); *Company proposes new technology delivery system*, ASSOCIATED PRESS STATE & LOCAL WIRE, July 19, 2005 (iTown Communications Inc. plans to build fiber networks to provide video and other services); Ken Kerschbaumer, *Telco TV: Smaller is Quicker; Two Southern phone companies are almost ready to deliver video*, BROADCASTING AND CABLE, June 13, 2005, at 28 (Farmers Telephone Cooperative and Progressive Rural Telephone will offer video over existing copper phone lines "[w]ithin a matter of months").

[18] *See SBC's IP-Based Video Subject to Franchise Rules, Say City Lawyers*, COMMUNICATIONS DAILY, Dec. 22, 2004, *available at* 2004 WLNR 14533191 (municipal lawyers indicated that if SBC does not seek franchises, "there is going to be a battle"); Dinesh Kumar, *Cable to Fight Bell Attempts to "Circumvent" Local Franchising Laws*, COMMUNICATIONS DAILY, Jan. 20, 2005, *available at* 2005 WLNR 2777224 (quoting an NCTA spokesman as saying, "Municipalities have said that if SBC does start delivering video service in a given community without having a franchise they would take action[.]"). One source has reported that representatives from the National League of Cities, the National Association of Counties, and the U.S. Conference of Mayors met earlier this year at the National Cable and Telecommunications Association's Washington headquarters to discuss the possibility of forming a united front against telephone companies that seek to offer video services. Ted Hearn, *Cable to Cities: Let's Parley*, MULTICHANNEL NEWS, Jan. 31, 2005, *available at* 2005 WLNR 1428369 (quoting one source as saying that "cable's outreach recalled the old political axiom, '[t]he enemy of my enemy is my friend'").

cable systems. Competition also takes place at the national or regional levels. It is critical that a new entrant develop a sizeable, region-wide network; otherwise, it will not be able to secure advertising dollars and negotiate reasonable programming contracts — which of course in turn will affect its ability to attract subscribers.[19] But deployment of new, region-wide cable systems from scratch would involve the negotiation of literally *thousands* of new franchising agreements. For example, SBC's initial Project Lightspeed deployment—reaching 18 million residential customers within three years — encompasses some 2,000 municipal franchise areas. The negotiation of each of these franchises can be protracted, taking at least several months to more than a year, thus inevitably making region-wide entry a long-term process.[20]

As the cable incumbents have surmised, "[t]he extensive review and, in some cases, the protracted period for completion of the steps involved in granting a franchise . . . may deter competitive entry rather than promote and facilitate it."[21] The longer the delay, the higher the

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[19] *See* Jay Sherman, *Telcos Lack Video Numbers; VOD Spirit Is Willing, but Bottom Line, Subs May Be Weak*, TV CURRENTS, Apr. 25, 2005.

[20] *See, e.g.*, Koenig, *supra* note 15 (franchise process can take 6 to 18 months); Tom Johnson, *Verizon Rollout Raises Hackles*, Newark Star-Ledger, Mar. 13, 2005, *available at* 2005 WLNR 3907819; Harry Berkowitz, *Verizon's Cable Dreams: Telephone giant must woo communities one by one for licenses to offer TV services*, NEWSDAY, June 27, 2005, *available at* 2005 WLNR 10173524 (representative of cities notes that for some, "[i]t could be a matter of months or it could be a matter of years"). This is in contrast to the very straightforward state-wide certification process generally required for cable incumbents to become CLECs and the lack of any certification requirements for cable incumbents to offer VoIP services.

[21] *See* Petition of the Town of Clarkstown (Rockland County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Services, Case No. 05-V-0059 at 3 (N.Y. Pub. Svc. Comm'n May 20, 2005); *see also, e.g.*, Order Granting Waiver, *Petition of the Village of Tarrytown (Westchester County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service*, Case 04-V-1462 (N.Y. Pub. Serv. Comm'n Feb. 9, 2005); Order Granting Waiver, *Petition of the Town of Orangetown (Rockland County) for a*

barrier to entry becomes: The cable incumbents become more entrenched and tie up more subscribers with triple play offerings, and new entrants remain stalled in a cycle where they cannot successfully secure programming or subscribers. In the words of a leading cable analyst, "There's a first-mover advantage, and the cable companies are very aware of this."[22]

But delay is not the sole impediment to competition created by incumbent franchising requirements. Largely set up in an era of monopoly providers of video services, the franchising laws permit franchising authorities to demand a host of requirements that could radically change the financial calculus for telecommunications carrier network deployment — a calculus based on being the third or fourth video programming distributor in the market. For example, through the franchising process, the laws permit franchising authorities to impose on incumbent cable companies "requirements for facilities and equipment;"[23] require the dedication of capacity on any "institutional network" for the benefit of the municipality;[24] set unspecified "construction-related requirements;"[25] and impose build-out requirements and schedules that may be especially difficult for a new entrant to meet before it has begun to attract consumers and earn revenues. While many of these requirements would be completely redundant for a new entrant — municipalities should not, for example, need capacity on a duplicative institutional network —

*Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service*, Case 04-V-1591 (N.Y. Pub. Serv. Comm'n Mar. 16, 2005).

22 Sanford Nowline, *SBC is forced to slow down on video services*, SAN ANTONIO EXPRESS-NEWS, June 28, 2005, at 1E, *available at* 2005 WLNR 10211036 (quoting Jeff Kagan).

23 47 U.S.C. § 544(b)(1).

24 *Id.* §§ 541(b)(3)(D), 531(b).

25 *Id.* § 552(a)(2).

the cable incumbents have threatened legal action against franchising authorities that seek to ease the way for new franchises for telecommunications carriers by tailoring them to reflect reasonable differences between the entrenched cable incumbent and the new telco entrant.[26]

On top of all that, franchising obligations may differ from municipality to municipality, making it not only enormously expensive but entirely impractical for new entrants to quickly build out a region-wide network. As Representative Markey observed in the early stages of the drafting of the 1996 Act, "[t]o require telephone companies to restructure their networks in order to respond to each community's requirements would effectively balkanize today's regional networks, raising costs to consumers and delaying the arrival of new, advanced services."[27] Addressing the difficulties of having to comply with fifty different state requirements, Commissioner Abernathy has raised essentially the same concern: "How can new entrants introduce services nationally when they have to navigate a maze of different and potentially inconsistent state regulatory requirements, ranging from entry regulations, tariffing requirements,

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[26] *See, e.g.*, Linda Haugsted, *Regulation Machinations*, Multichannel News, Feb. 21, 2005, *available at* 2005 WLNR 2770949; Bobby White, *A Fiber-Optic Tangle*, FORT WORTH STAR-TELEGRAM, Feb. 13, 2005, *available at* 2005 WLNR 2033498 (Charter Communications warned Keller, Texas, that if the town "approves the Verizon franchise as proposed, Charter will have no choice but to pursue all available legal remedies."); Dinesh Kumar, *Cable to Fight Bell Attempts to "Circumvent" Local Franchising Laws*, COMMUNICATIONS DAILY, Jan. 20, 2005, *available at* 2005 WLNR 2777224 (quoting an NCTA spokesperson as stating that "[c]able has made it clear that it would 'use its resources' to oppose efforts to avoid Title 6 regulation" on the part of phone companies like Verizon or SBC). Of course, such actions by the incumbent cable operators should come as no surprise. They are merely the more recent incarnations of the regulatory and legal tactics employed by the incumbent cable operators to impede the entry of cable overbuilders. *See, e.g.*, Hazlett, *Predation in Local Cable TV Markets*, 15 The Antitrust Bulletin 609 (1995). Indeed, as a cable overbuilder intending to compete against incumbent cable operators, Ameritech faced similar lawsuits that slowed down and altered the course of franchise negotiations.

[27] 140 CONG. REC. 5204, 5240 (1994).

network reliability rules, and so forth?"[28] This problem is magnified exponentially when a provider is faced with potentially thousands of different local requirements. Indeed, as Senator Ensign recently put it: "[I]t makes no sense having 30,00 local cable-franchise authorities continuing to issue video franchises as if they were in a monopoly situation."[29]

In short, there are real consequences to applying an anachronistic regulatory regime to those new entrants that are willing and able to inject much needed competition into the video market. Ensuring that regulation does not stand in the way of this competitive promise is an appropriate matter for the Commission's attention in this proceeding.

## II. ONLY PROVIDERS THAT OFFER "CABLE SERVICE" OVER A "CABLE SYSTEM" ARE SUBJECT TO INCUMBENT FRANCHISE REGULATION.

Despite attempts by commenters and detractors to conflate the issues, the precise legal question implicated by telco entry into the video market is not whether these providers will be subject to Title VI. They will be. Certain of the content offered in connection with the IP-enabled video service that SBC will offer, for instance, will likely qualify as "video programming", *i.e.*, "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[30] Accordingly, in offering its IP-enabled video service, SBC, for one, will be a multichannel video programming distributor ("MVPD"), which is defined as "a person . . . who makes available for purchase, by subscribers

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[28] Kathleen Abernathy, *From VOIP to EOIP: Implications for Policymakers*, National Summit on Broadband Deployment, at 5 (Oct. 25, 2004), *available at* http://hraunfoss.fcc.gov/ edocs_public/attachmatch/DOC-253718A1.doc.

[29] Ted Hearn, *Ensign Backs Bells on Franchising*, MULTICHANNEL NEWS, June 27, 2005.

[30] 47 U.S.C. § 522(20).

or customers, multiple channels of video programming."[31] As such, it will be subject to the regulatory scheme contained in Title VI that applies to MVPDs. The obligations applicable to MVPDs are not insignificant and include, by way of example, compliance with closed-captioning mandates,[32] retransmission consent rules,[33] and equal employment opportunity standards.[34] Thus, the precise question is whether an MVPD is offering a "cable service" over a "cable system," as those terms are uniquely defined in Title VI. If the service is not a "cable service" or the distribution network does not meet the criteria for a "cable system," the franchise mandate of Title VI simply does not apply to the provider.

In this regard, it has been argued that Title VI, specifically 47 U.S.C. § 571, forces a telecommunications carrier to offer video service only as a common carrier, a radio based operator, an open video system operator, or a cable operator.[35] That is simply not true. Nothing in that provision expressly limits the provision of video programming by a telecommunications carrier to these four means. Just as the Commission has declined to interpret the reference in the provision to "common carriers" and "telephone companies" as prohibiting non-LECs from being

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31 47 U.S.C. § 522(13).

32 47 C.F.R. § 79.1.

33 47 U.S.C. § 325.

34 47 U.S.C. § 554.

35 "Applicability of Title VI to Telco Provision of Video over IP," *attached to* Letter of Neal M. Goldberg to Ms. Donna Gregg, July 29, 2005, Docket No. 04-36 at 6-7 ("NCTA Memo").

OVS providers,[36] there is no reason for the Commission to interpret the enumeration of the four means of providing video services as being the *only* means by which telecommunications carriers may do so. Indeed, nothing in the sparse legislative history of section 571 indicates that Congress intended that provision to limit the provision of video services by telecommunications carriers to the four means enumerated in the provision.

Moreover, section 571 is designed to place *limits* on the regulation of video services provided by telecommunications carriers and to spare them from being treated as cable operators. It would be fundamentally antithetical to that clear policy objective to construe the provision to restrict the manner in which telecommunications carriers may provide video service. Finally, by its own terms, § 571(a)(3)(A) merely provides that if a common carrier is not providing video over a radio-based system or by common carriage (and also is not an OVS provider), "such carrier shall be subject to the requirements of this title." It does not provide that such a carrier is, therefore, necessarily a "cable operator." SBC, for one, has not taken the position that, in offering IP-enabled video, it is not subject to any of the requirements of Title VI. To the contrary, as discussed above, SBC accepts that, as a MVPD, it is subject to those obligations in Title VI applicable generally to other MVPDs. It is not, however, subject to those obligations in Title VI applicable to "cable operators" that provide "cable service" over "cable systems."[37]

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[36] Implementation of Section 302 of the Telecommunications Act of 1996, *Second Report and Order*, 11 FCC Rcd. 18223, 18235-6 ¶ 17 (1996)("Second OVS Order").

[37] The incumbent cable operators admit that "a video service can constitute 'video programming' without also being a 'cable service.'" *NCTA Memo* at 19 n.65, 25 n.73 (citing *Video Dialtone* orders); *see also Second OVS Order* at 18234 ¶ 15 ("We do agree with the National League of Cities, et al. that Congress did not intend the terms to be precise synonyms. Rather, 'providing video programming' may or

### A. SBC's Interactive, IP-Enabled Video Service Is Not a "Cable Service."

Under the Act, a "cable service" is defined as

(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[.][38]

Network architecture and technology are fundamental to the determination of whether the distribution of video programming is cable service under Title VI. Incumbent cable service is a one-way service. On a cable system, the totality of available traditional video programming is simultaneously transmitted, *i.e.* broadcast, to all households connected to the system, and it is the tuners built into customers' set-top equipment that select the appropriate channel to display on each customer's televisions. Cable systems are thus fundamentally one-way, passive distribution systems.[39]

IP-enabled broadband networks are quite different: SBC's Project Lightspeed network, for instance, entails a switched, two-way, client server architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time. In contrast to the passive, all-at-once broadcast model of cable systems, this switched system involves regular two-way communication and interaction between individual subscribers and the network;

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may not be synonymous with 'providing cable service,' depending upon who owns the transmission facilities *and the manner in which video programming is provided.*")(emphasis added). The dissertation in the *NCTA Memo* about the classification of IP-video as video programming is thus unremarkable and plainly not dispositive as to the main issue at hand: whether IP-enabled video is cable service under Title VI.

[38] 47 U.S.C. § 522(6) (emphasis added).

[39] Of course, the incumbent cable operators also offer limited stores of video content that is transmitted to individual subscribers on an on-demand basis.

nothing is sent to the customer until the customer communicates and interacts with the IP-enabled network and requests specific content.[40] Moreover, because other applications provided over the network will be IP-based, subscribers will be able to tailor and integrate much of the voice, video and data content.

This integrated suite of IP-enabled services cannot properly be viewed as a traditional "cable service." In its *Cable Modem Order*, the Commission recognized that "Congress emphasized that services enabling subscribers to interact with or manipulate information typically would *not* be considered cable service."[41] In determining, for example, that cable modem services should not be classified as a "cable service," the Commission noted that the "phrase 'one-way transmission to subscribers' in the definition reflects the traditional view of cable as primarily a medium of mass communication, with the same package or packages of video programming transmitted from the cable operator and available to all subscribers."[42] And

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[40] *See, e.g.,* Peter Grant, *Phone Companies Using Microsoft Hit TV Service Snags*, The Wall Street Journal, June 24, 2005 at B1 ("The Internet technology that phone companies are relying on transmits TV signals much differently than that used by satellite and cable operators, which send home all TV channels all the time. The telecommunications TV services will turn television viewing into more like using the Internet. When a viewer wants a program, he will call it up the same way he accesses Web pages, with phone company computer servers individually delivering each show requested.")

[41] Second Report and Order, *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, 5821 ¶ 75 n.194 (1992) (emphasis added). *Accord, NCTA Memo* at 24 n.73.

[42] Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4826 ¶ 47 (2002) ("*Cable Modem Order*"), *aff'd, National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

it also held that a service is not a cable service simply if some parts of it have such characteristics, if it is "predominantly" something else."[43]

Even though some features of IP-enabled video will have the look and feel of standard cable services (much like voice-VoIP resembles circuit-switched telephony in some ways),[44] the service predominantly is something else.[45] SBC's service involves interactive features that go far beyond those "required" simply to access channels.[46] It is designed ultimately to permit all end users to tailor much of the content and viewing experiences, or engage in transactions. Project Lightspeed video, and the fuller suite of IP-enabled services of which it is a part, ultimately is designed to permit end users to connect to the Internet, access stored files such as email, voicemail, or directory information, route communications, and use their television sets to aggregate content and screen calls in a manner customized to the end user's preferences. Indeed, SBC's IP-enabled video service is designed to place the subscriber at the command center of a sophisticated array of services and content that can be manipulated and individualized to meet the tastes and needs of each individual member of the subscriber's household. Such interactivity clearly was outside the bounds of what Congress considered "cable service" in the 1984 Cable Act or in the Act's subsequent amendments. Congress noted that, "[i]n general, services

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43 *Id.* at 4837-38 ¶ 68. *Accord, NCTA Memo* at 24 n.73.

44 *Vonage Order* at ¶ 4.

45 As the Seventh Circuit has held, "exemption from local franchise requirements of some technology which does, in fact, provide cable programming is not a novel or a static one. Nor does the ever-evolving technology allow the boundaries to always be clear and distinct." *City of Chicago*, 199 F.3d at 433 (7th Cir. 1999), *cert. denied*, 531 U.S. 825 (2000)

46 This is true, moreover, whether or not content owners permit SBC to offer *programming* on an a la carte basis. *NCTA Memo* at 11.

providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data ***would not*** be cable services," and it made clear that it generally intended that "interaction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information would not fall under the definition of cable service."[47]

Indeed, SBC's IP-enabled video service and other video distribution services that entail the same or similar features fall squarely within the Commission's analysis in the *Vonage Order.* There, the Commission preempted state regulation of Vonage's VoIP service, and further determined that *any* other IP-enabled service with the following basic characteristics would likewise not be subject to state regulation: (1) a requirement for a broadband connection from the user's location; (2) a need for IP-compatible CPE; and (3) service functionality that "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.*"[48] SBC's IP-enabled video service meets all these criteria. First, it requires a broadband connection. Second, it requires CPE in the form of a new IP-compatible set-top box. Third, it involves the significant integration of various features. At the same time, over the same broadband pipe, and using the IP-enabled video CPE, a user in Dallas will be able to command a video hub office in Chicago to send him a live feed of programming; direct a server in San

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[47] House Rep. No. 98-934, at 42-43 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4679, 4680 (emphasis added).

[48] *Vonage Order* at ¶31 (emphasis added).