Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

<u>INTRODUCTION AND SUMMARY</u>

The Commission initiated this proceeding to determine its authority to implement Section 621(a)(1) of the Communications Act, which provides that "a franchising authority … may not unreasonably refuse to award an additional competitive franchise." A review of the voluminous record in this proceeding reveals not a single instance in which any franchising authority has denied a single application for a competitive franchise in recent memory. Not one.

There is no factual basis for any FCC action here. Rather, the comments of the many municipalities participating in this proceeding show that they welcome competitive entry. Those comments also reveal that much of the delay in obtaining a franchise about which the telephone companies loudly complain is a problem of the telcos' own making.

In the absence of any evidence of refusals to grant telcos a franchise, it is no wonder that the telcos instead launch an assault on the franchising process generally. The telcos and their allies try to hijack this proceeding in an effort to end run the decades-long regulatory framework established by Congress. In particular, they urge the FCC to adopt a national policy that provides them total freedom to serve only self-selected areas of a community. They seek from the Commission special rules to provide them other significant advantages in providing cable service to those limited parts of a franchise area they choose to serve.

Granting telephone companies special favors to enter on different terms than incumbent cable companies will unfairly skew competition to the detriment of video customers. The telephone companies constitute some of the largest corporations in the United States, with market capitalization that dwarfs that of the cable industry. The telcos already enjoy significant governmental benefits, including access to funds to serve their entire area with telephone service. And there is certainly no reason to embrace a lop-sided regulatory approach based on their repackaged promises, for this proceeding, that doing so, and only doing so, would lead to accelerated broadband deployment. The telcos have been making these same empty promises for years in an effort to obtain regulatory favors throughout the country.

The cable industry, by contrast, has been at the forefront of providing new services to consumers without the benefit of government handouts. Cable operators have upgraded and built out their facilities to offer these new services throughout the communities they serve, even in the face of fierce competition from direct broadcast satellite ("DBS"). The cable industry is prepared to compete against the telco giants, too. But there is no factual, legal or policy reason why the FCC should act to tilt that competition in favor of the telephone companies. Telcos have, for the most part, sat on their hands for the ten years in which they have been free to offer video service. Their pleas for FCC help to expedite their belated entry ring hollow. The Commission should conclude this proceeding without granting relief that is neither justified by the record nor authorized by statute.

ARGUMENT

I. THE BELL COMPANIES HAVE NOT MADE A CASE THAT FRANCHISING AUTHORITIES ARE FAILING TO EXPEDITIOUSLY AWARD COMPETITIVE FRANCHISES

A. The Record Is Devoid of Any Evidence That Local Franchising Authorities Are Refusing to Award Additional Competitive Franchises

The Commission initiated this proceeding to examine the current ability of new entrants to obtain franchises.[1] When all is said and done, telephone companies have not provided a shred of evidence that they are unable to obtain competitive franchises. The Bell companies cannot point to a single instance of a franchise denial of recent vintage – or, short of that, a "constructive denial" of any request for a franchise.

In the years since adoption of the 1992 Cable Act, courts have adjudicated only a handful of cases arising under Section 621(a)(1).[2] A review of the record in this proceeding shows why. The comments of dozens of franchising authorities demonstrate that they welcome competition.[3]

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[1] Notice at ¶ 12 ("We request comment on the current environment in which would-be new entrants attempt to obtain competitive franchises.").

[2] *See generally* Comments of the National Association of Telecommunications Officers and Advisors et al. at 23 (noting there have "only been five reported cases that even involved claims that an LFA violated § 621(a)(1)'s 'unreasonable refusal' provision, in only two of these cases was a violation found, and in neither did the LFA even deny the franchise application.") (hereinafter "NATOA Comments").

[3] *See e.g.*, Comments of the City of St. Petersburg, Florida at 4; Comments of the San Mateo County Telecommunications Authority at 9 (noting that RCN provides competitive video service in their franchise area; "[i]f the incumbent telephone companies wish to match the terms of the incumbent cable TV operators, we welcome them to compete here."); Comments of Michigan Municipal League et al. at 63 ("municipalities in Michigan are beckoning competition with open arms. We are aware of no community that has denied a franchise nor refused to engage in franchise negotiations with any of those complaining of the current system. It is the complaining parties that have yet to take the time to seriously sit down with any municipalities and negotiate a franchise."); Comments of the Vermont Public Service Board and the Vermont Department of Public Service at 5 ("Vermont welcomes competition in the video programming services market. In fact, the State is no stranger to competitive cable systems."); Comments Submitted by Certain Florida Municipalities at 1 ("Based on the experience of the Florida Cities as well as other local governments in Florida, it is clear that the franchising process, however, has not deterred a franchised overbuilder or competitor. Several of the Florida Cities have in fact taken far-reaching steps to attract a competitor, only to find that potential competitors were not interested or unable to offer competitive service for business reasons.") Comments of the City of Seattle at 4 ("no applicant for a franchise has ever been denied the opportunity to serve in our community. In addition the City is actively pursuing competitive providers."). Comments of the City of Boston at 2 (describing meetings with Verizon to

In fact, many of those communities have encouraged the Bell companies to apply for a franchise, only to have been rebuffed by the phone companies.

It is no surprise that the telephone companies' comments in general can point to no franchise denials. This is particularly true for AT&T, which has refused to apply for local franchises based on its mistaken "belie[f] that its own IP-video service does not trigger local franchising requirements…."[4] Under these circumstances, it is no wonder that AT&T tries to shift attention from review of the evidence, proclaiming "there is no need to build any 'record' showing that LFAs [local franchising authorities] abuse their authority or intentionally thwart federal policies."[5]

Should they someday be denied a cable franchise, telephone companies have a means to redress unreasonable refusals to award a franchise through the judicial review Congress provided in the Cable Act.[6] But nothing presented in this record suggests that even if the FCC had some unstated authority under Section 621(a)(1), there would be any factual basis for acting here.

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discuss the potential for video franchising; "The City has attempted to educate Verizon about the informal and expedited franchising processes available in order to counter the erroneous perception cable franchise is somehow burdensome").

4 AT&T Comments at 3. SBC walked away from discussions with one town in Missouri – where it could have had a cable franchise "adapted to SBC's specific needs, and which could have been done in two or three months" – "because it was a cable franchise." SBC instead chose to "pursue preemptive legislation at the State and Federal level rather than meeting the same requirements as [the incumbent] meets." Comments of MO-NATOA at 34 (City of St. Charles, Missouri). SBC took a slightly different tack in Walnut Creek, California, refusing to enter into an agreement with the city and instead "su[ing] the City in federal court…." Comments of City of Walnut Creek, CA at 2.

5 AT&T Comments at 23.

6 47 U.S.C. § 541(a)(1) ("any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 for failure to comply with this subsection.").

B. Telephone Companies Can Obtain Franchises Without Significant Delay

Telephone companies have loudly complained about the time it takes to obtain local franchises. But while not instantaneous, the process can hardly be characterized as local franchising authority foot dragging. Instead, the record shows that LFAs are eager to accommodate competitors – and often times the phone companies themselves are responsible for a large part of whatever delay may occur at the local level.[7]

Verizon, for its part at least, has obtained dozens of local franchises. But its characterization of the time delay in negotiating is belied by the record. A review of its successes to date in obtaining franchises hardly supports the notion that it is subject to lengthy delays.

Even Verizon's own chart[8] shows that it was able to complete local franchise negotiations in 6 months or less in nearly a dozen communities. And many of those cases where Verizon alleges that negotiations took more than 6 months are based on a Verizon-defined – and unverified beyond Verizon's say-so – date that "Verizon initiated the franchise process."[9] When evaluated based on the date when Verizon actually formally started the franchise process – the application date – it appears that many of the franchises in fact were concluded much more expeditiously than Verizon claims. Attachment A compares Verizon's "start date" time lines for

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[7] BellSouth complains that it took on average 10 months to negotiate its franchises. BellSouth Comments at 11. However, those negotiations took place ten years ago – and BellSouth chose not to build its system even in some areas where it obtained franchises. *See* Comments of Lee County, Florida at 17 ("a number of years ago, BellSouth had obtained a number of cable franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable franchises.")

[8] Verizon Comments, at Attachment A.

[9] *Id*., O'Connell Declaration at 4.

locally-granted franchises with NCTA's calculations based on those franchise application dates that we were able to find. It shows in many cases that franchise grants proceeded much more quickly than Verizon admits. In fact, even since initial comments were filed, Verizon received six additional local franchises – on average, in a little more than a month.

Verizon Franchises Secured during the last 30 days			
Location	Date Applied For	Date Granted	Time to Acquire Franchise (in months)
Delaware City, DE	23 January 2006	27 February 2006	1.1
Valley, PA	5 December 2005	7 March 2006	3.0
Schwenksville, PA	12 January 2006	9 March 2006	1.8
Odessa, DE	6 February 2006	13 March 2006	1.1
Upper Nyack, NY	16 February 2006	16 March 2006	0.9
Lynnfield, MA	6 February 2006	20 March 2006	1.4

In any event, much of the reason for the duration of Verizon's franchise negotiations cannot be laid at the door of the franchising authority. As RCN's Comments suggest, "when it has truly wanted agreements, and has deployed the necessary resources, it appears that Verizon has been receiving local cable franchises quickly and with little difficulty."[10] Much of the delay in Verizon's negotiations is attributable to "Verizon … approaching local authorities with 'take it or leave it' deals."[11]

Several cities that are veterans of Verizon negotiations confirm that the telco itself has significantly contributed to much of any regulatory lag about which it complains. The Comments of several Maryland counties are instructive. They explain that "cable applicants' own internal bureaucratic machinery creates substantial delay, and imputing the resulting slowness to local franchising authorities would ignore the facts so as to upset the equities."[12]

10 RCN Comments at 5.

11 *Id*.

12 Comments of Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County at 41. The counties describe how "Verizon employs a 'two-tier' negotiating process, in which the

In fact, Verizon or other telephone companies could quickly and easily obtain franchises under streamlined procedures in several areas. Cablevision's comments show that in New York, "any new entrant that agrees to the franchise terms of an existing provider may bypass franchise negotiations entirely in that area and obtain a local franchise hearing in 30 days, and the municipality may grant the franchise at the conclusion of that hearing."[13] New Jersey law "limits the range of issues that can be negotiated in a franchise" and the state Office of Cable Television regulations "also require speedy municipal action on request for franchises."[14] Connecticut "requires just a single, statewide authorization in order to serve every resident in the State."[15] Virginia just recently passed cable franchising legislation that expedites consideration of franchises by local authorities, providing new entrants with the option to obtain an "ordinance franchise" if negotiations at the local level fail to result in a negotiated franchise.

The telcos, though, seem much more interested in complaining to Washington than in expending energy to obtain franchises and serve customers. The telcos' behavior in Texas is instructive. The ILECs since last September have been able to easily and quickly obtain state franchises that allow them to serve particular communities. But AT&T and Verizon have shown little interest in offering service there, either. Combined, they have only applied for franchises in

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Verizon representatives actually discussing franchise terms with local governments must clear even the smallest changes from the company's cookie-cutter Model Franchise Agreement with a mysterious 'committee' that never actually appears at the negotiating table. This bureaucratic approach introduces extensive delays into the process. Because it never actually deals with franchising authorities or participates in the give-and-take of negotiation, the Verizon 'committee' is an ivory-tower body that is insulated from real-world issues. It is thus encouraged to persist in unreasonable expectations and to make non-negotiable demands that bear little resemblance to the terms of any existing franchise agreement." *Id.* at 41-42. This experience was shared by other counties negotiating with Verizon. *See, e.g.*, Comments of Michigan Municipal League *et al.* at 14-15 n. 25.

13 Cablevision Comments at 10.

14 *Id.* at 11.

15 *Id.* at 12.

a handful of Texas communities, under the new law – a mere 42 out of more than 2400 franchised communities in the state.

In any event, the time spent *obtaining a franchise* cannot fairly be characterized as *delaying the provision* of service to consumers. NCTA's initial comments showed that Verizon, even after obtaining a franchise, is more often than not unprepared to roll out video service for many more months.[16] This is the case even though Verizon may have a head start in beginning its FiOS construction to offer voice and data service long before obtaining any local cable franchise.[17]

Even in those areas in Texas where Verizon has obtained a franchise, it has hardly begun offering service – and in many places serves no customers at all. As the attached chart shows,[18] more than three months after gaining a franchise Verizon still offers no service at all in thirteen communities, and has only partially deployed in five more locations. AT&T has applied in only twenty communities, and more than three months later is only offering service on a limited trial basis to *one* of those areas.

In short, in Texas and elsewhere throughout the country, the record does not support the claim that unreasonable delay on the part of franchising authorities in awarding franchises is impeding the entry of the telephone companies into the video business. Even if the franchise process does take some time, the FCC has no authority to undo Congress's decision in the 1984 Act, which set up the very framework to which the ILECs object. The massive campaign that

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16 NCTA Comments at 11-12.

17 *See* Comments of Leibowitz & Associates, P.A. at 18 ("it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains Franchise agreements, but there is no legal impediment to construct and begin deriving income from advanced systems while it negotiated video Franchise agreements with LFAs.")

18 Attachment B.

the ILECs have launched on Capitol Hill to completely overhaul the franchising process is evidence that they understand that only Congress can make the changes to the local franchising process that they desire.

The telcos' real complaint appears not to be the speed of negotiations but the need to obtain local franchises altogether. That complaint, however, has nothing to do with this proceeding. As described below, the FCC has no authority under the existing Act to grant the telcos relief from franchising.

II. THE CABLE ACT CANNOT BE READ TO PROVIDE TELCOS WITH UNFAIR COMPETITIVE ADVANTAGES OVER INCUMBENTS

NCTA's initial comments showed that Congress in Section 621(a)(1) specifically provided for judicial, not FCC, review of the reasonableness of franchising authorities' refusal to grant a competitive franchise. By establishing a judicial remedy, Congress meant to give the Commission no role in adopting across-the-board standards for determining the reasonableness or unreasonableness of franchising determinations in this area.

The phone companies, however, ignore the plain meaning of this provision. After all, as described above, they have *not* been denied a franchise in *any* community. No wonder, then, that the phone companies try to change the scope of this proceeding from a consideration of unreasonable denials of competitive franchises to a consideration of ways they hope the FCC will provide them with a competitive advantage to grease their entry into the highly competitive video marketplace.

Much of the telephone companies' arguments really takes issue with one of the fundamental purposes of the Cable Act: to "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are *responsive to the needs and interests of the local community*."[19] AT&T, for example, argues that "if national broadband and video competition policies are to be achieved, the Commission must impose some federal standardization and order on the franchising process."[20] But a debate about the merits of the decades-old decision to allow local franchising should be addressed to Congress, if anywhere; it has no place in this proceeding. The Commission cannot and should not usurp Congress' role in making these fundamental determinations about communications policy.

What is relevant here is the question of whether Congress, in adopting the 1992 Cable Act, meant to fundamentally change the role of LFAs in the franchise process. The Act, as described above, cannot be read to do so. Moreover, even if the FCC has some unstated authority to adopt rules governing franchising, it would still lack the authority suggested by the telcos to upend the local franchising process to provide telephone giants with lop-sided regulatory advantages not enjoyed by incumbents. To the extent the FCC finds that it has authority to determine that certain franchise requirements conflict with the Cable Act, it must apply that determination even-handedly to all cable providers.

A. The FCC Has No Authority to Relieve Telcos of Title VI Obligations

The telcos advance a variety of novel theories about why the FCC has authority to establish federal rules governing the terms and conditions of telco franchises. First, they argue that Section 621(a) itself provides that authority. Then they assert that the FCC has authority under the general provisions of the Act to adopt "binding and preemptive" rules. Finally, they argue that the Commission has authority to take steps to curtail LFA's franchising authority

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[19] 47 U.S.C. § 521(3) (emphasis supplied).

[20] AT&T Comments at 13.

based on other, non-Title VI provisions encouraging broadband deployment. As described below, none of these theories provides any legal basis for FCC action here.

1. The Commission Does Not Have Rulemaking Authority to Implement Section 621(a)(1)

The phone companies, citing *AT&T v. Iowa Utilities Board*,[21] argue that the FCC has broad rulemaking authority under the Communications Act. While that may be true generally,[22] that it is not the case here, as NCTA's initial comments made clear.[23] Contrary to Verizon's claim,[24] there *is* something "special" about the "unreasonable refusal" requirement insofar as it directs cases arising under that language to courts, not the FCC. As NATOA explains, "in light of [§ 635(a)'s statement of jurisdiction], there can be no question that Congress intended the courts to be the exclusive remedy for 'unreasonably refused' cable franchise applicants."[25] Any other reading would violate the plain meaning of the statutory language and would improperly render the judicial review provision superfluous:[26] "given that the courts already share concurrent jurisdiction with the FCC on many provisions in Title VI that are not listed in § 635(a), the only way to give § 635(a) any meaning at all is to give courts exclusive jurisdiction with regard to the three Title VI provisions it enumerates."[27] If Congress had intended to give

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21 525 U.S. 366 (1999).

22 Whatever rulemaking authority the Commission may have in the cable television area, that authority is unrelated to *Iowa Utilities Board*, which addressed the FCC's authority under Section 201(b) to regulate common carriers.

23 NCTA Comments at 22-23.

24 Verizon Comments at 22.

25 NATOA Comments at 8.

26 *Id*. at 8-9.

27 *Id*.

the FCC a role in this area, it would have done so directly, as it has in other areas of the Cable Act.[28]

The telcos try to argue that the judicial review provision only narrowly applies. Verizon tries to claim that "denial" of a competitive franchise (for which Congress established a judicial remedy) differs from a "refusal to award" a competitive franchise (for which Verizon claims the FCC has preemptive and binding authority).[29] Not surprisingly, Verizon can cite to nothing to support this fundamental misreading of the statute. But even if the plain meaning of the two sentences is ambiguous, that does not mean that the FCC has power to adopt the rules the telcos advocate. Rather, Section 635(a) requires "any final determination made by a franchising authority under Section 621(a)(1)" to be brought to court. Thus, a "refusal to award" or a "denial," even if they meant something different, would both be final determinations subject to Section 635(a) and lead to the same place: the courthouse, not the Portals.

The telcos' argument suffers from an additional flaw. Even if the telcos are correct that the FCC has some authority to address unreasonable refusals to award a franchise, no LFA *has* refused to award a competitive franchise. AT&T and USTA, therefore, try to argue that even *granting* a competitive franchise (if it contains terms the telcos consider unreasonable) means the same thing as *refusing* to award a franchise, and that the FCC has authority to step in.[30] But this argument, too, fails. In the first place, the telco in this situation has presumably agreed to the franchise,[31] or its application would have been denied – in which case it could appeal. Since the

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[28] *See* Comcast Comments at 28.

[29] Verizon Comments at 23 n.23.

[30] USTA Comments at 14; AT&T Comments at 36.

[31] This differs, then, from *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998), on which the telcos seek to rely. In *Tribune*, the FCC imposed conditions on the grant of the license.

FCC lacks authority to adjudicate *denials* of second franchise applications, the agency certainly lacks authority in the event of a *grant* of a second franchise.

2. The FCC Has No Authority to Preempt In This Area

The telephone companies also urge the Commission to not only "interpret, construe, and enforce" Section 621(a)(1), but also to use its purported preemption power to declare invalid a number of standard franchise provisions.[32] As NCTA's initial comments explained, though, preemption is only permitted under Section 636 where those provisions are *inconsistent* with the Cable Act.[33] The Bell companies have failed to identify any inconsistency between these typical franchise provisions and the Cable Act. The Act expressly *allows* local franchising authorities to enforce a variety of obligations through a franchise, and any denial of a franchise on grounds of failure to comply with lawful provisions would be entirely reasonable.[34]

Verizon also argues that the FCC must preempt "whenever separation [of interstate and intrastate aspects is] not practical…."[35] The telco argues that "video services – particularly when offered over a national broadband network that supplies multiple services, including services like high-speed Internet access and voice-over-IP, that the Commission already has ruled are inseparably interstate services – cannot be parceled meaningfully between interstate and intrastate components."[36] But this interpretation, too, fundamentally misconstrues the Act. Congress long ago found that multichannel video was an interstate service, but determined that a

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32 Verizon Comments at 23-26; AT&T at 44, 67-68. For example, AT&T proposes that the FCC preempt build out requirements as per se unreasonable, and rule it is unlawful to require competitive franchises to require PEG access facilities, certain I-Nets and customer service requirements.

33 NCTA Comments at 23-24.

34 *See* discussion of build out and level playing field requirements, *infra*.

35 Verizon Comments at 23.

36 *Id*. at 26.

uniform national scheme administered through local franchising was the appropriate regulatory framework. Verizon simply ignores the history, intent, and structure of the Cable Act.

3. LFAs are Not Limited to PEG and Financial, Technical, and Legal Qualifications in Reviewing Second Franchise Applications

Verizon also claims that Section 621(a)(4) "expressly delimits the grounds on which an LFA may refuse to grant a competitive franchise, and establishes the outer metes and bounds of legitimate LFA discretion when reviewing a franchise application."[37] Verizon alleges that an LFA may refuse to grant additional franchises only on two limited grounds – the failure to provide adequate assurance that the new entrant (1) will provide PEG capacity, facilities, or financial support, or (2) has the financial, technical or legal qualifications to provide cable service.[38] And it proposes that "any demands or conditions that go beyond these factors should be deemed per se unreasonable."[39]

While admittedly breathtaking for its originality, this highly selective interpretation of the appropriate grounds for denying a franchise conflicts with the terms of the 1992 Cable Act. First of all, Verizon's reading ignores choices Congress made and incorporated in Section 621 and elsewhere in Title VI. Economic discrimination ("anti-redlining") is but one example. Section 621(a)(3) provides that "in awarding a franchise *or franchises*, a franchising authority *shall* assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group

[37] *Id*. at 13.

[38] *Id*.

[39] *Id*. at 10.

resides."[40] Under Verizon's statutory construction, though, LFAs would be powerless to consider failure of a second franchise to comply with this fundamental obligation.

Other provisions of Title VI would also be superfluous under Verizon's bizarre construction.[41] Congress in 1992 amended the Act to expressly allow franchising authorities to "establish and enforce" customer service requirements and "construction schedules and other construction-related requirements, including construction-related performance requirements."[42] Congress also retained Section 636(a), which provides that "nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, of franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title." Verizon provides no evidence that in enacting Section 621(a)(4) in 1992, Congress meant to override the remainder of the statutory scheme applicable to cable franchising to provide a competitive leg up to new entrants.

Rather, the plain language of the Act shows that when Congress meant to lighten the regulatory load on telephone company entry into cable, it made that clear in an express manner, as described below. The 1992 Act amendment to Section 621 stands in sharp contrast. At the time of the 1992 Act's amendment, telephone companies were barred from providing cable service except in narrowly-circumscribed areas. Congress and the FCC had viewed telephone

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40 (Emphasis supplied). Thus, Qwest is off the mark in arguing that "there is nothing in the statutory language that implies or states that a second or third wireline franchise must duplicate the service of the incumbent…. Instead, the statute says that the LFA is tasked, as it should be, with ensuring that the fundamental universal service principle of service by at least one provider is adhered to." Qwest Comments at 22. The reference to "franchise or franchises" plainly shows that Congress meant that anti-redlining authority applies to each of the franchise applicants, not just the first franchise.

41 Even Verizon implicitly is forced to concede its argument may prove too much. It acknowledges that "the Cable Act may require a provider to do certain things, such as pay franchise fees," but argues that those "obligations exist apart from the franchise process and are not a permissible basis for denying a competitive franchise so the provider may enter the market." Verizon Comments at 13.

42 Section 632(a)(1) and (2).

companies as posing such a significant threat to the development of a competitive video marketplace that they were kept out of the cable business in their own service area even as competition to cable was being encouraged. This threat was based on the telcos' anticompetitive behavior regarding pole attachments and the difficulty newcomers would face were the dominant communications providers in each community allowed to enter.[43]

When Congress lifted the ban in 1996, telephone companies were provided four options for entering the cable business. If they chose to enter as an open video system, then Congress expressly provided for streamlined regulation: only specific parts of Title VI apply to OVS providers.[44] By contrast, if they chose to enter as a cable system, telcos were subject to the requirements of Title VI.[45] Thus, when Congress intended to subject new entrants to reduced regulatory requirements, including the local franchising process, it made its intent explicit.[46] Congress evidenced no interest in freeing telephone companies that chose to enter the market as cable operators from any of the traditional requirements that apply to any other cable operator, regardless of whether they were first into the market or last.[47] The Commission has no authority to rewrite the Act to provide that relief.

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[43] *Final Report and Order*, 21 FCC 2d 307 (1970) (FCC bans cross-ownership between cable and telephone facilities within the same service area).

[44] 47 U.S.C. § 653.

[45] *Id.* § 651(a)(3).

[46] Congress did the same in the telephony area, explicitly imposing differing requirements on incumbent local exchange carriers and new entrants in the voice market. *Compare id.* § 251(b) ("Obligations of All Local Exchange Carriers") *with id*. § 251(c) ("Additional Obligations of Incumbent Local Exchange Carriers").

[47] RCN has entered the market subject to reduced regulatory requirements as an OVS provider. As RCN notes, "instead of working with the tools provide by Congress in the 1996 Act, and after negotiating only a small handful of cable franchises with local jurisdictions, the RBOCs have immediately demanded sweeping, nationwide regulatory relief. This demand for special treatment should not be countenanced." RCN Comments at 7.

4. Section 706 Provides No Independent Authority to Act

The telephone companies also claim the FCC has authority to act under Section 706. As the Commission has held, however, Section 706 does not provide independent authority to take any regulatory action.[48] Rather, other provisions of the Act must be employed once Section 706 is invoked. In any event, NCTA's initial comments showed that to the extent Section 706 has any bearing on this proceeding, the FCC has consistently found that advanced telecommunications capability *is* being deployed in a reasonable and timely manner.[49]

AT&T, though, argues that local franchising is a "regulatory impediment to broadband infrastructure deployment"[50] and therefore the FCC must step in to establish new federal rules for telco providers to, among other things, exempt them from any build-out obligations.[51] The telco threat to hold their deployment of broadband hostage to the grant of regulatory favors is a well-worn tactic. Time and again government has succumbed to this line, granting breaks to the Bells in the hope that they would speed the local introduction of broadband.[52] There is no cause to do it here.

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[48] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Reconsideration*, 15 FCC Rcd 17044, 17047-48 (2000); In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order*, 13 FCC Rcd 24011, 24044-24047 (1998).

[49] NCTA Comments at 26.

[50] AT&T Comments at 13.

[51] *Id*. at 15. *See also* Comments of BellSouth Corp. at 23-24.

[52] As Comcast notes, "they have already received, on multiple occasions, the expansive regulatory relief they said was necessary to accelerate the deployment of broadband." Comcast Comments at 35.

Telephone companies are not entitled to new regulatory incentives to induce them to live up to their decade-long promises to roll out broadband throughout their service areas.[53] Competition and fair rules should be all that is necessary to incent telephone companies to enter the vibrant video marketplace.

5. Telcos' Existing Rights-of-Way Authority Cannot Substitute for the Cable Franchise

Telcos argue that their existing authorized access to rights-of-ways and easements over public and private property to provide telecommunications service obviate the need for a cable franchise. This argument would be without merit even if telcos had access to all of the rights-of-way they need for delivering their IPCable services, which may not be the case at all.[54] When Congress passed the 1984 Cable Act and through amendments in 1992 and 1996, it established a comprehensive scheme, detailing rights and responsibilities of both cable operators and franchising authorities. These rights and responsibilities reflect Congress's understanding that the provision of cable service in a community was more than a mere transmission activity that takes place in a right-of way. Instead, Congress recognized that a franchised cable operator provides services that affect communities in significant ways; that, to some extent, franchising authorities should ensure that certain "social" responsibilities are met; and that franchising authority powers were to be limited as well.

This can be gleaned from examining the purposes of Title VI, outlined in Section 601. In establishing the nation's cable communications policy, Congress wanted to "assure that cable

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[53] Comcast points out that "if one accepts their claim that their ability to broadly deploy broadband Internet access service depends upon their ability to roll out cable services, it is astonishing that they would demand 'relief' from build-out and antidiscrimination requirements in light of an Administration's firmly stated goal that such broadband-based services should be available to all consumers, not just the well-to-do…." *Id.*

[54] "SBC Plans a Network Overhaul," Broadcasting & Cable, November 29, 2004, at 23. ("SBC…will spend nearly $4 billion digging up roads to lay ADSL2 fiber….").

communications provide and are encouraged to provide the widest possible diversity of information, sources and services to the public."[55] This was not done with the intention that incumbent cable operators would provide services exclusively. To the contrary, Section 601(6) indicates that one of the purposes of Title VI is to "promote competition in cable communications." Taken together, those sections reveal that Congress intended a competitive environment for cable franchising and that each competitor, including telcos providing cable service, would be subject to Title VI.

Moreover, if franchising were not required, there would have been no reason to amend the statute – the statute which, among other things, requires cable operators to obtain local franchises – in 1996 to allow telcos to be cable operators in their existing territories subject to Title VI requirements. That requirement would have been redundant and telcos would not have needed a franchise if their (erroneous) theory that they already have access to rights-of-way to provide service were correct.

In addition to the fact that certain franchise obligations, such as build-out requirements, serve important social interests that cannot be achieved via mere permits to use rights-of-way for telephone service, even where telcos already have obtained permission to use the rights-of-way to build telephone facilities, local franchise authorities still need the authority to address and resolve any problems arising out of the construction of video facilities in the rights-of-way. Local franchise authorities cannot assume that the telcos' prior experience providing telecommunications service obviates the type of local oversight typically provided in cable franchises. The telcos will be operating a new network with new facilities including new, five-foot tall pedestals as well as cabinets that impose added burdens on local rights-of-way to launch

[55] 47 U.S.C. § 521(4).

a new service they have never before constructed.[56] Cable franchise agreements give local franchise authorities the power to oversee and manage the rights-of-way to protect public safety and community aesthetics and welfare. Without that protection, local franchise authorities may lack the necessary authority, in response to a natural disaster, safety hazard, network malfunction, homeowner objection, or other unanticipated event, to force the telcos to take steps which ensure that their facilities do not harm public safety or community welfare. Existing telecommunications authorizations may not protect local governments and their citizens to the same manner and extent as typically found in a cable franchise.

In sum, Title VI comprises a comprehensive scheme for companies that operate cable systems. Some benefits flow to the cable operator, and some flow to the franchising authorities; some are specifically directed to customers of these providers. This careful balance of rights and responsibilities applies to any provider of cable service over a cable system. The mere fact that a company – whether a telco or a bank ATM network – may have a right-of–way to operate a business in a community says nothing about that company’s compliance with Title VI. One can reasonably debate whether some provisions in Title VI have outlived their usefulness, given the way cable service and video competition generally have developed. But that is a debate that applies to all providers of service, incumbents and newcomers alike. It is not a discussion that should be used to benefit only one class of provider.

6. Cincinnati Bell’s Claim that its Video Service is Not Subject to Title VI is Irrelevant to this Proceeding and, in any event, is Wrong

Cincinnati Bell argues that its proposed video service is not subject to the Title VI franchising requirement because (1) it purportedly will not use the public rights-of-way and

[56] *See e.g.*, Comments of Cablevision Systems Corporation at 15 (showing picture of five-foot tall, two-feet deep boxes Verizon placed just inches above ground in a footpath).

therefore is not as "cable system," and (2) its proposed "two-way" service is not a cable service.[57] As Cincinnati Bell acknowledges (at 4), "the Commission did not seek comment on [the] regulatory classification of video programming provided over an ILEC's [incumbent local exchange carrier's] existing DSL structure," so its arguments are beyond the scope of this proceeding and are hardly a "logical outgrowth" of this proceeding which is premised on the applicability of Title VI – and particularly Title VI's franchising provisions – to telco-provided video. Nevertheless, we briefly address those arguments, lest they be taken more seriously than we believe they deserve to be.

For its first contention, ignoring the extremely limited holding of the case, Cincinnati Bell erroneously relies on the Commission's decision in *Entertainment Connections, Inc,* 13 FCC Rcd 14277 (1998)("*ECI*") for the proposition that "even if [a video provider's] underlying leased facilities use public rights-of-way, the lessees of such facilities do not themselves use public rights-of-way" and therefore the facilities do not constitute a "cable system." Cincinnati Bell then claims that its video service does not use the public rights-of-way because it has created a separate video programming distributor subsidiary ("CBE") which will lease capacity from the its telephone company subsidiary ("CBT"). It therefore concludes that its video "service does not use public rights-of-way despite the fact that the underlying transmission facilities owned by CBT do occupy the public rights-of-way."[58]

But *ECI*, which the Commission explicitly limited to the unusual facts of that case, will not support such a far-reaching conclusion. In *ECI*, the Commission made clear that its decision was predicated on the specific fact situation presented to it – particularly that the video program

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[57] Cincinnati Bell Comments at 4-6. AT&T makes the latter point in passing that it "will not be providing 'cable service' over 'cable systems' as those terms are defined in the Communications Act." AT&T Comments at 3.

[58] Cincinnati Bell Comments at 6.

distributor was leasing facilities that used public rights-of-way from an unaffiliated entity. As a result, 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) there is capacity to serve several other programming providers; and (vii) ECI has committed to make its drops available to other programming providers.[59]

Cincinnati Bell's arrangement hardly meets these strict criteria, particularly the first requirement since both CBT and CBE are subsidiaries of Cincinnati Bell. As a result, the *ECI* case is not support for applying the "private cable" exception to Cincinnati Bell's proposed service.[60]

Cincinnati Bell next argues that its service is not a "cable service" because of its purported "two-way characteristics"[61] and because its service "offers a degree of subscriber interaction and a capacity for two-way transmission that places it well beyond the meaning of the term "cable service."[62] This is the same argument that SBC (now AT&T) has been peddling

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[59] *ECI*, 13 FCC Rcd at 14311, ¶ 73 (1998).

[60] In a case that did not come before the Commission, a court decided that a provider of video programming was not a "cable operator" where it leased facilities from an affiliate and those facilities used the public rights-of-way. *City of Austin v. Southwestern Bell Video Servs., Inc.*, 193 F.3d 309 (5th Cir. 1999). But in that case the court did not weigh the factors the Commission had enumerated in explaining the limitations of its *ECI* decision – indeed, the majority did not even cite the *ECI* case. More significantly, as the dissent points out, the court assumed, for the sake of discussion, that the facilities at issue "constituted a cable system." *Id*. at n 7. Moreover, the court made clear that the parent of both affiliates at issue – the equivalent of Cincinnati Bell in this instance – might well be subject to the franchising requirement. *Id.* at n.9. As a result, *ECI* remains the relevant FCC precedent and Cincinnati Bell's proposed scheme clearly does not meet the *ECI* criteria.

[61] Cincinnati Bell Comments at 7.

[62] *Id*. at 9.

before the FCC and in various jurisdictions across the country with respect to its video service.[63] Cincinnati Bell's arguments are no more persuasive than were SBC's. And, since the issue of the regulatory classification of SBC's video service is not at issue in this proceeding and, in any event, has been addressed elsewhere by NCTA, we will incorporate by reference our previous filings on that issue. They demonstrate that SBC's proposed video service (just like Cincinnati Bell's) is a "cable service" provided over a "cable system" making the ILEC a "cable operator" and requiring that it obtain a franchise before providing its video service.[64]

7. Commenters' First Amendment Arguments are Irrelevant to the Commission's Review of the Franchising Process

It is beyond dispute that cable operators engage in activities that "plainly implicate First Amendment interests."[65] NCTA has long been a strong advocate for cable operators' First Amendment rights, and will continue to defend those rights for *all* cable operators. That said, the telcos' First Amendment arguments[66] are misplaced here.

To the extent that Verizon complains about the constitutionality of particular provisions of Title VI, the FCC is not the proper forum. The Commission cannot declare an Act of

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63 *See e.g.*, AT&T Comments at 3; State of Connecticut, Department of Public Utility Control, *DPUC Investigation of the Terms and Conditions Under Which Video Products May Be Offered By Connecticut's Incumbent Local Exchange Companies*, Docket No. 05-06-12, Brief of the Southern New England Telephone Company d/b/a AT&T Connecticut, February 27, 2006; *Pacific Bell d/b/a SBC California v. City of Walnut Creek*, No. C054723, Complaint for Declaratory Judgment and Injunction; Petition for Mandamus, at 17-19 (Second Claim for Relief) (N.D. Cal., filed November 17, 2005).

64 *See* Letter from Neal M. Goldberg, NCTA to Donna Gregg, Chief, Media Bureau, WC Docket No. 04-36 ("IP-Enabled Services"), July 29, 2005 (attaching Memorandum on the "Applicability of Title VI to Telco Provision of Video over IP" ("NCTA July, 2005 Memorandum")); Response of the National Cable & Telecommunications Association, WC Docket No. 04-36, November 1, 2005 (both attached hereto as Attachment D).

65 *City of Los Angeles v. Preferred Communication, Inc.*, 476 U.S. 488, 494 (1986).

66 *See* Verizon Comments at 17, 42-51.

Congress unconstitutional – only courts can.[67] And if there are First Amendment issues with franchising, those constitutional issues would apply to all cable operators, not just the ILECs.

Indeed, the only legitimate First Amendment issue with which the Commission should be concerned would arise if the FCC were to treat incumbents and ILECs differently for purposes of franchising. Regulations that discriminate among different speakers present serious First Amendment[68] and Equal Protection concerns.[69] As the Supreme Court has put it, laws that "single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State and so are always subject to at least some level of heightened First Amendment scrutiny."[70] There would be no justification for leaving incumbents subject to more onerous terms than their telephone competitors.

B. Build-Out Requirements In Second Franchises Are Reasonable Under Section 621

Even assuming, *arguendo*, that the FCC has some authority in this area, the FCC could not, consistent with the Cable Act, provide the telephone companies with the relief they desire. The telcos for the most part complain about provisions that the Cable Act expressly permits. In particular, inclusion of build out requirements in awarding additional franchises by definition would not be "unreasonable."

The Cable Act provides that "in awarding a franchise, the franchising authority … shall allow the applicant's cable system a reasonable period of time to become capable of providing

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[67] *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

[68] *See, e.g.*, *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 659 (1994) ("regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns"); *Rosenberger v. Recotros & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("government regulation may not favor one speaker over another").

[69] *See, e.g.*, *Arkansas Writers' Project, Inc., v. Ragland*, 481 U.S. 221, 227 n.3 (1987); *Ruggiero v. FCC*, 317 F.3d 239, 247 (D.C. Cir. 2003).

[70] *Turner*, 512 U.S. at 640-41.

cable service to all households in the franchise area."[71] The FCC's Notice tentatively concluded that it would "not be unreasonable for an LFA, in awarding a franchise" to allow a reasonable period of time to build-out to all the households in the franchise area.[72]

The telephone companies, however, would like the Commission to ignore the plain meaning of this provision. They would have the FCC twist the provision beyond recognition to actually "prohibit LFAs from conditioning the grant of a competitive franchise on compliance with any build-out conditions."[73] AT&T claims that this provision "operates only to limit the power of LFAs to impose unreasonably short deadlines in circumstances where the build-out requirement itself can be justified as reasonable."[74] Thus AT&T proposes that the Commission find *per se* unreasonable "requirements that condition competitive entry on the applicant's pre-commitment to provide wireline service to all, or any subset, of the households within the municipality (build-out conditions)."[75] Verizon argues that the FCC must give the telephone companies total freedom to define their own franchise area and any build-out requirement should apply only within the confines of that telco-determined boundaries.[76]

These arguments turn Section 621(a)(4) inside out. The plain meaning of this provision is that it would *not* be unreasonable, for purposes of Section 621(a)(1), for an LFA to require build-out to all households in the franchise area. While Section 621(a)(4) can be read to impose limits on LFA discretion with respect to the *timing* allowed for build-out schedules, nothing

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71 Section 621(a)(4).

72 NPRM at ¶ 20.

73 AT&T Comments at 47.

74 *Id*.; *see also* Verizon Comments at 44-45.

75 AT&T Comments at 43.

76 Verizon Comments at 39. *See also* BellSouth at 32.

suggests that it was meant to provide the FCC with any authority to restrict the discretion of LFAs to require build-out.[77]

The telephone companies go one step further, stretching the provision's meaning beyond any recognition in arguing that it somehow evidences congressional intent to authorize *new entrants* to devise their *own* cherry-picked franchise area. They contend that Congress intended to allow competitive providers to have complete latitude to serve whatever area they choose – and that *that* area is what Congress meant by the "franchise area."[78] But even assuming, *arguendo*, that Section 621(a)(4) does not by itself impose a universal service obligation throughout the franchise area, nothing about the Act suggests that Congress ever intended the *applicant* – rather than the franchising authority – to determine the boundaries of the franchise area.[79]

a. Build-out Requirements Protect Against Redlining

Since 1984, anti-redlining has been a bedrock regulatory principle in the provision of cable television service.[80] This requirement goes hand in glove with build out provisions incorporated in the 1992 Cable Act.

[77] The FCC's 1990 Report, on which Verizon argues Congress relied on adopting this provision (Verizon Comments at 14-15), recommended only that there be an "initial, *time-limited* suspension of any '*universal service*' obligation." Cable Television Service (Competition and Rate Deregulation Policies), 67 RR 2d, 1771, 1779 (1990) (emphasis supplied).

[78] Verizon Comments at 45.

[79] Verizon argues that the "franchise area" and the LFA's jurisdictional boundaries mean two different things. Id. at 45. But Verizon ignores that other Cable Act sections use the term "franchise area" in a way that suggests that a "franchise area" in fact means something much different than – and may be larger than – the cable system's self-defined service area. *See* 47 U.S.C. Section 533 (cross-ownership restriction applied "in any *portion* of the *franchise area* served by that cable operator's cable system"); 47 U.S.C. Section 623(e) (definition of effective competition) (MVPDs offer service to at least 50 percent of households "in the franchise area").

[80] Comcast Comments at 22 -23.

Comments of civil rights groups in this proceeding demonstrate that service to all members of the community is a critical concern. As the Comments of the Minority Media and Telecommunications Council ("MMTC") and other civil rights groups make clear, "as part of their original franchise agreements with MVPDs, many LFAs fashioned buildout schedules that require service to all sectors of the community as a way of satisfying the federal mandate to prohibit redlining."[81] And it is not necessary to prove discriminatory intent, as MMTC shows, in order to justify imposing prophylactic protections against redlining: "the purpose of anti-redlining protections is to prohibit economic discrimination and promote universal service, irrespective of the causes of unequal service."[82] These interests are just as applicable – if not more so – to new entrants. MMTC explains that "despite the good intentions of some current media and telecommunications executives, there is no historical basis for assuming that redlining will not occur amongst new entrants in the multichannel video market" and that "[n]ew entrants can also cream-skim and leave the incumbent with what both the incumbent and the new competitor perceive (correctly or not) to be low-value customers."[83] In fact, "in particular, new entrants may use buildout as both a method and proxy for redlining."[84]

The telephone companies profess that they will not engage in redlining of their cable services – and hence urge a "trust me" approach.[85] But that is not what Congress determined would be the approach for *any* provider of cable service, incumbent or newcomer. And some comments suggest that there may be reason to doubt any promises in this area made by telco

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81 MMTC Comments at 10.

82 *Id*. at 12.

83 *Id*. at 13.

84 *Id.* at 14.

85 *See*, *e.g.*, AT&T Comments at 54.

entrants. With no build-out obligation, history suggests that the telephone companies may choose not to serve the entire community.[86] Moreover, even AT&T's comments show they have no intention to build out their advanced network to all of even their existing telephone footprint.[87]

b. Telephone Companies Should Not Be Able to Cherry Pick Communities

The phone companies also try to gain sympathy for their campaign of only selectively providing service in a community by claiming that build out requirements unreasonably act as a barrier to their entry into the cable business.[88] It is passing strange that the largest communications companies in the country see build out as a barrier and seek relief from Washington, whereas cable incumbents and overbuilders, all much smaller capitalized at the time they entered the market, have accepted build out as part of the franchise process.[89] Telephone companies, moreover, have been provided significant governmental benefits to construct a ubiquitous telephone network on the backs of telephone ratepayers. They have been

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86 Comments of Miami-Dade County at 4 (County removed build-out requirements on Bell South in "an effort to promote competition"; "even after nine years of operating without a full build-out requirement, BellSouth currently provides cable television service to less than 6,000 subscribers. This is true even though BellSouth's franchise permits them to construct and provide cable services through the County's franchise areas.")

87 *See* AT&T Comments at 45 ("AT&T … currently plans to offer broadband and video broadly to the vast majority of its telephone customer base *through a varying mix of wireline and wireless technologies*.") (emphasis supplied); id. at 55-56 (AT&T plans to launch project Lightspeed in some areas and provide Dish Network satellite programming to other neighborhoods).

88 Verizon Comments at 39 (complaining that new entrants must "build out and provide service to all households within the incumbent's service area rather than defining and building out its own service area"); AT&T at 44 ("the purpose and demonstrated effect of [build out] requirements is to deter entry altogether by substantially inflating the up-front and ongoing costs of entry.")

89 Charter's Comments (at 3) explain that "contrary to the ILEC's claims, Charter's current franchise obligations were not imposed in competition-free zones, with infinite 'green field' opportunities. Charter's franchise requirements were imposed in a competitive market, and under Title VI … Charter's investment was made with the understanding that the Title VI regime would apply to anyone else who decided to undertake the significant investment and risk, like Charter had."

granted rights of way to serve everyone in a community. They should not be allowed to pick and choose where to upgrade those facilities free from government oversight.

As the local governments put it, "it is difficult to see what policy would be served by allowing the ILEC to do with cable service what it cannot do with telephone service: selectively and discriminatorily favor some of its existing customer base over others."[90] Verizon "fails to mention … that they are already universal providers of telephony service under Title II in these very same communities. Therefore, they already have an infrastructure, as well as service and administrative support capable of meeting any perceived obstacle."[91] In fact, the telephone giants have significant advantages in coming into a market where they have an existing customer base and brand recognition. As one city explained, "Verizon as a telephone company has facilities in place which may tend to give Verizon a competitive advantage over prospective entrants which do not have such facilities in place."[92]

The telephone companies raise several arguments about why they should be entitled to these special breaks that, upon examination, are simply red herrings. For example, Verizon raises the prospect that some LFAs might "force a provider like Verizon to build facilities outside of its traditional telephone service area."[93] But Verizon does not identify a single community by name that has imposed any such requirement. And it appears to be unlikely to frequently occur in any event, as NATOA notes: "the number of places where that is true is not

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[90] NATOA Comments at 38.

[91] Comments of the City of Boston, Massachusetts at 3.

[92] Comments of the City of St. Petersburg, Florida at 8.

[93] Verizon Comments at 40. *See also* AT&T at 49 (describing potential for "incomplete overlap" between existing telephone networks and municipal boundaries).

significant at all. And even where that occurs, there is no evidence that LFAs are in the habit of insisting that ILECS build out areas outside their local service areas."[94]

The real issue, of course, is the telephone companies' efforts to avoid providing cable service in the areas where they *do* provide telephone service. Verizon tries to make much about its "wire center" configurations and claims that its wire centers may not correspond to political boundaries.[95] But this is really much ado about nothing. Verizon essentially is arguing that it should not have to build out an entire community but simply build out whichever wire centers it chooses. There is no technical barrier to providing cable service through other wire centers to the remainder of the community – just a business reason why Verizon would prefer not to. The 1992 Cable Act through Section 621(a) (4) already provides Verizon with assurance that it will not have to build out the entire community – or all its wire centers – overnight. Whatever circumstances might require individualized arrangements are reasons why Congress left local authorities in charge of the local process – and are not a reason for the FCC to develop across-the-board rules.

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94 NATOA Comments at 34 n. 37. ILECs perpetuate a myth that the cable industry would require an ILEC to deploy its video services beyond its voice service territory.   *See, e.g.*, Verizon Comments at 40 ("LFAs, often at the urging of incumbent cable operators, routinely require Verizon to … build-out and serve the *incumbent's* entire franchise area or even the LFA's entire jurisdiction…."); AT&T Comments at 59 ("Regulatory symmetry requires that telephone carriers be allowed to provide video service without building out to match the entire customer base of the incumbent cable operators."); USTA Comments at 22 ("Cable system operators argue that it is only fair that competitors should have to offer service to all of the same areas where they operate…."); Qwest Comments at 2 (Incumbent operators "argue for …requirements that new wireline entrants duplicate, or largely duplicate, the facilities and service area of the incumbent…"); Cincinnati Bell Comments at 10 (Cincinnati Bell's most significant objection to the franchise requirement is the almost certain condition that [it] build-out its network to provide service to all subscribers located in an LFA's jurisdiction."). Whatever its value as a debating point, the fact is that the cable industry has not sought such a requirement, as even Verizon belatedly recognizes. Verizon Comments at 40. The Bells long ago built out their networks nearly ubiquitously within their service areas. No one is asking them to build out a "new" network beyond that footprint; the issue is whether they should make *upgrades* to their existing networks in a manner that is equitable and nondiscriminatory.

95 *Id*.

C. Level Playing Field Provisions are Not Unreasonable

The telcos also target level playing field requirements, arguing that the FCC must preempt these state and local requirements. NCTA's initial comments explained how Congress gave the FCC no authority to do so in the 1992 Cable Act.[96] Nor does the telco approach – in which ILECs would be subject to reduced obligations in the provision of cable service – make sense as a policy matter. As Comcast explains, "it is difficult to see how treating ILECs and cable operators equally under a level-playing field statute would be 'inconsistent' with the Act. Ensuring that 'like services are treated alike' is a principle that the Commission has repeatedly endorsed."[97]

Notably, in other contexts, regulatory "parity" is the Bells' theme, as NCTA has previously pointed out.[98] 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."[99] 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,

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96 NCTA Comments at 29 n.62. *See also* Comcast at 36 ("The Supreme Court has made it clear that, if Congress intends to preempt a power traditionally exercised by a state or local government, it must be 'unmistakably clear' that such is its intention. There is no such clear statement of congressional intent.")

97 *Id*. at 38-39.

98 *See NCTA July, 2005 Memorandum* at 2-3.

99 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.").

based solely on the identity of the service provider."[100] 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 delivering the same services."[101] AT&T (then 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."[102] Except here, apparently.

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[100] 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.").

[101] 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.

[102] 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* http://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.").

1. Cable Operators Offer Voice Services Under Substantially the Same Regulatory Framework as ILECs

Incumbent local exchange carriers ("ILECs") contend that "regulatory symmetry"[103] requires that build out and other requirements that were imposed on cable operators not be imposed on them because cable operators and others faced reduced regulatory requirements when they entered the voice market. For example, USTA argues, "[c]able operators are not subject to build-out requirements when they offer telecommunications or other voice services in competition with LECs; why shouldn't LECs be afforded the same treatment when they seek to compete with cable companies?"[104] While superficially appealing, this argument is meritless. The fact is cable operators offer voice service under substantially the same framework as ILECs.

At the outset, it is important to note that, as a practical matter, cable CLECs deploying new Voice-Over-Internet-Protocol ("VoIP") telephone service serve their entire franchise areas, just as we would expect ILECs would serve their entire service areas when they roll out video service. Cable operators generally provide their new digital phone service over the same upgraded broadband facilities that they use to provide video and Internet service. Because cable operators are already required by their *video* franchises to deploy those upgraded facilities essentially throughout their franchise areas, their new digital phone services will be similarly deployed throughout all neighborhoods in their franchise areas.

To the extent ILECs provide similar VoIP services, they are (and should be) subject to the same requirements as cable companies and others who provide such services. In this regard, cable operators have made clear that "like services should be treated alike" by submitting to the FCC proposals for a regulatory framework for VoIP services that treats all facilities-based

[103] AT&T Comments at 59.

[104] USTA Comments at 22.

providers of such services alike.[105] To the extent cable providers of digital phone services are subject to a "light" regulatory touch, so too should ILEC and other providers of such services.

And when cable companies – and other competitive local exchange carriers – entered the voice market by providing circuit-switched phone service, they complied with substantially the same regulatory framework as do ILECs. Claims that cable got a regulatory break entering the phone business are false. For example, in this proceeding, Verizon submitted a Declaration from Thomas Hazlett in which Hazlett claims that '[c]able operators are not subjected to the regulatory requirements shouldered by incumbent local exchange carriers … when they (the cable operators) provide local phone service. The ILEC is subject to extensive universal service requirements, interconnection, and retail rate regulations, for instance, that are not imposed on the cable TV entrant" offering telephone service.[106] In fact, cable operators entering the telephony market were (and are) subject to substantially the same requirements applicable to ILECs.

Among many other requirements, cable telephony providers were required to obtain authorization from the state to provide services; must charge just, reasonable and non-discriminatory rates; resell their services upon request; pay intercarrier compensation; comply with extensive billing, reporting and recordkeeping requirements; and comply with rules regarding number portability. Of particular note, cable operators providing traditional voice

[105] *See* Comments of the National Cable & Telecommunications Association, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, filed May 28, 2004 ("*NCTA IP-Enabled Services Comments*"); *see also* National Cable & Telecommunications Association, *Balancing Responsibilities and Rights: A Regulatory Model for Facilities-Based VoIP Competition*, at http://www.ncta.com/pdf_files/whitepapers/VoIPWhitePaper.pdf (Feb. 2004) ("*NCTA VoIP White Paper*").

[106] Hazlett Declaration, n. 26.

service comply with all "social" obligations applicable to incumbent telephone providers, including E911, CALEA, privacy, slamming, and access for persons with disabilities. Significantly, and contrary to the Verizon/Hazlett claim, cable voice providers do contribute to the universal service fund. Indeed, the cable industry has recognized that such contributions are the type of "social obligation" that should remain applicable to providers of voice service using VoIP technology.[107]

2. The ILEC "Regulatory Symmetry" Argument Ignores Significant Differences Between Cable Operators and ILECs in Providing Their Traditional Services

To be sure, there were (and are) some differences in the regulatory treatment of CLECs and ILECs, but those grew out of the ILECs' unique position with respect to competitors in the voice market and their ability to inhibit the development of competitive services. For example, unlike the case with new competitors in the video business, competitive voice providers cannot compete effectively without interconnecting their facilities with those of the incumbents and, in some cases, having access to certain ILEC network elements. Hence the requirements that ILECs have interconnection responsibilities that are not imposed on CLECs, and, in some instances, requirements that they provide access to unbundled network elements where competition would otherwise be impaired. Notably, Congress specifically created this particular asymmetry, distinguishing between ILECs on the one hand, and *all* CLECs, not just "cable TV entrant[s]," on the other.[108] But other than regulations requiring ILECs to provide interconnection and access to unbundled network elements under certain circumstances, the only significant difference between regulations applicable to cable companies' telephone affiliates and to the

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[107] *See* NCTA IP-Enabled Services Comments at 15-19; NCTA VoIP White Paper at 21-26.

[108] *See* 47 U.S.C. § 251(b) and § 251(c).

incumbent voice providers was that the cable voice providers, like all other competitive voice providers, were not subject to rate regulation of their telephone rates. But, of course, telephone companies providing video service will enjoy a similar exemption from economic regulation of their cable services.

One area of asymmetric ILEC-CLEC regulation is where ILECs have traditionally been required to "build out" their networks throughout their service areas as "carriers of last resort," while CLECs do not have similar obligations. As noted above, ILECs argue that, by the same token, they should not be required to build out throughout a local franchise area even though the incumbent cable operator may have been required to do so.[109] What the ILECs conveniently forget – or purposely ignore – is that the expense of their voice "build out" requirements were shouldered by their captive rate-of-return ratepayers in the first instance, and, more significantly by telco contributors to the universal service funds – including their CLEC competitors – who provided USF funds for ILECs to build in high-cost areas and provide service to low-income subscribers through the Link-Up and lifeline programs.[110] We doubt ILECs want to achieve symmetry by subsidizing incumbent video providers for purposes of having them be providers of last resort to low-income video customers.

III. VERIZON'S ECONOMIC ANALYSIS GROSSLY OVERSTATES THE SUPPOSED COSTS – AND IGNORES THE BENEFITS – OF REQUIRING TELEPHONE COMPANIES TO COMPLY WITH EXISTING FRANCHISE REQUIREMENTS

The telephone companies contend that requiring them to comply with the same franchising requirements as existing cable operators deters and delays their entry into the video

[109] *See, e.g.*, AT&T Comments at 59; USTA Comments at 22.

[110] *See e.g.*, 47 C.F.R. §§ 54.301-54.316; 36.601-36.631 (High Cost Support); 47 C.F.R. §§ 54.11-416 (Link-Up); 47 C.F.R. §§ 54.401-54.440 (Lifeline).

marketplace; and as a result consumers across the nation will pay a substantial price. Verizon has enlisted economist Thomas Hazlett to measure and demonstrate this supposed consumer welfare losses.

NCTA asked economists Stanley M. Besen and John R. Woodbury of CRA International to examine Hazlett's analysis. Besen and Woodbury found that the Hazlett analysis grossly overstates the costs to consumers of requiring entrants to comply with the same process and requirements as their existing competitors.[111] First, it is based on plainly erroneous factual assumptions regarding: (1) the extent to which franchise requirements delay actual deployment and offering of video services by the telephone companies; and (2) the extent to which cable prices are already constrained by competition.

The second error is, while arguing that telcos should not be subject to the same obligations as cable operators to build out and serve entire communities, Hazlett's calculations assume that the telcos *will* serve virtually all households throughout the nation and that all consumers will be the beneficiaries of their head-to-head competition. Finally, by focusing *only* on the supposed price reductions that would result from such head-to-head competition, the analysis ignores the countervailing adverse effects of regulating providers of like services differently.

A. The Verizon Study Overestimates the Effects of Franchising on Deployment of Telco Video Service

The Verizon analysis takes an implausibly simplistic approach to estimating the effects of franchising on the deployment of video services by telephone companies. Specifically, Hazlett compares the deployment rate for franchised cable systems between 1976 and 1990 with the

[111] *See* Declaration of Stanley M. Besen and John R. Woodbury, attached to these reply comments as Attachment C ("Besen and Woodbury").

more rapid deployment rate for (unfranchised) cable modem service between 1997 and 2005. He then attributes the difference entirely to the effects of cable franchise requirements and projects that requiring telcos to comply with current Title VI franchise requirements will similarly slow down deployment of telco cable systems.

As Besen and Woodbury show, there were a number of significant factors other than the franchising process that affected the deployment rate of cable service between 1976 and 1990.[112] These other factors did not affect deployment of cable modem service and will not affect deployment of telco cable systems. One such factor: cable service consisted of a much less robust set of programming services during much of that earlier period, with much smaller revenue-producing potential, than is currently the case. Hot products deploy fast; less compelling products deploy more slowly.

In 1976, cable was still largely a provider of retransmitted broadcast signals in communities where over-the-air availability and reception was inadequate. Regulations designed to protect broadcasters prevented cable operators from providing first-run movies and sporting events, and satellite-delivered programming was still just a gleam in Ted Turner's eye. In this environment, as Besen and Woodbury point out, cable's appeal was obviously limited, and the pace of cable's deployment was relatively slow. That pace did not begin to increase until the disappearance of the FCC's restrictive regulations and the advent of satellite-delivered program networks in the early 1980s. None of these factors affecting the rate of deployment had anything to do with the franchising process.

Even after cable systems were deployed throughout the nation, cable operators continued to upgrade their systems to provide more channels and services. During the past decade, faced

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[112] *See* Besen and Woodbury, ¶¶ 12-18.

with competition from two large national DBS companies, cable operators invested more than $100 billion to make virtually all their systems capable of providing digital services. This enabled them to provide many more channels of programming and to offer new digital video services, such as video on demand and digital video recording. It also enabled them to provide new non-video services, such as high-speed Internet service and VoIP telephone service.

Thus, digital broadband services like cable modem service were deployed rapidly because they were piggy-backed on deployment of cable service upgrades, which were compelled by existing marketplace demand and competition. Unlike cable operators, who began deploying their systems at a time when marketplace demand and potential revenues for the services they offered were limited, telephone companies will deploy their new broadband facilities into a marketplace for video programming and high-speed Internet service that has already been primed and developed by cable operators. Unlike cable operators, who had to invest in and create programming to fill even their 36-channel systems, telephone companies are entering a marketplace where hundreds of program networks compete for available channels on cable systems.

In other words, telephone companies today face a marketplace that more closely resembles the marketplace in which cable broadband facilities during the last decade than the marketplace in which cable operators built their systems in the 1970s and early 1980s. The slower rate of deployment during the earlier era had little to do with the cable franchising process, and that process will do little to slow down telco deployment now.

Moreover, as Besen and Woodbury note, Hazlett's analysis assumes that during the entire time that it takes to obtain a franchise, consumers are denied competitive telco video service that would otherwise already be available to them.[113] This, too, is wrong. The telephone companies have barely begun to deploy broadband facilities throughout the nation, and they cannot deploy their facilities overnight. They ought to be able to coordinate their deployment plans and their franchise applications in a manner that minimizes or eliminates any delaying effects of the franchise process – just as Ameritech was able to do ten years ago.

As Besen and Woodbury explain, "if, for example, ILECs anticipate that the franchising process will take one year, they can apply for a franchise one year before the date at which they expect to be able to provide service. If they were to do so, *the franchising process would not delay the introduction of service at all*."[114] Even if the telephone company would be ready to provide service before the franchise process was completed, the delay would not consist of the entire length of the franchise process but only that portion that exceeds the time that it takes for the telco to be ready to go.

As described *supra* and as we showed in our initial comments, the telephone companies' deployment schedules are not, in fact, being significantly delayed by the franchising process. Indeed, in many instances, they have obtained franchises long *before* telcos were ready to launch their video service.[115] To the extent that a significant portion of the deployment of broadband facilities to be used for voice, data and video services may not need to await the grant of a cable franchise, it does not appear that the telcos' deployment of such facilities is being significantly disrupted or delayed by the franchising process.

[113] *Id.*, ¶¶ 27-31.

[114] *Id.*, ¶ 29 (emphasis in original).

[115] *See* NCTA Comments at 11.

Finally, as Besen and Woodbury point out, it may in many cases be the telephone companies' own conduct – and their insistence on terms and conditions more favorable than those imposed on existing cable operators – that extends the length of the franchising process.[116] In such cases, it is the telcos themselves that are delaying the supposed benefits of their entry. Moreover, as discussed below, the disparate regulatory treatment that they seek would itself distort the competitive marketplace in a way that would undermine any benefits that might otherwise result from additional competition.

B. The Verizon Study Overstates the Likely Effect of Telco Competition on Prices

Hazlett's analysis not only overstates the extent to which the franchising process is likely to delay deployment of telco video service. It also overstates the effect of such delay, if it were to occur, on prices paid by consumers. First, the analysis assumes that where telco video service is available, prices for cable service will be at least 15% lower than where such service is unavailable. Second, it assumes that telephone companies are planning to deploy video service throughout all the nation's communities. Neither assumption is valid.

1. There Is No Basis to Assume That Telco Entry Will Result in Significant Price Reductions

In 2004, after the Government Accountability Office study reported that prices in its sample of markets were lower where there was wireline competition than where there was not, wireline overbuilders raised the same point in the Commission's video competition inquiry[117] and in Congress. NCTA systematically demonstrated why it was wrong. Since the telcos were not interested in the issue until recently, we summarize our analysis here once again.

[116] *See* Besen and Woodbury, ¶ 31.

[117] *See* Comments of Broadband Service Providers Association and Comments of RCN Telecom Service, Inc. in MB Docket No. 04-227 (July 23, 2004).

GAO's study was based on only *six* overbuild systems – approximately 1.5% of all overbuilds. It compared the prices of the overbuilders and the competing cable systems in those communities with the prices of cable operators in six "similar" communities in which there was no overbuild competition. NCTA, however, conducted a more comprehensive study, which examined *all* of the *433* communities with identifiable overbuild systems.

Steven S. Wildman, Professor of Telecommunication Studies at Michigan State University, analyzed the results of NCTA's survey. He concluded, in a white paper submitted to Congress and to the Commission, that although prices were sometimes lower in overbuild communities,[118] the lower prices should not be viewed as more "competitive" prices than those in the non-overbuild communities. As he noted, "[a] close look at overbuilders and the communities they serve shows that it would be imprudent to use prices in these communities as benchmarks for evaluating prices in other cable communities."[119]

The NCTA study showed that there were anomalous circumstances in virtually all the overbuild communities that made their rates artificially low. In a number of communities, the low rates charged at the time of the study turned out to be unsustainable; the overbuilder either quickly raised rates or went out of business. As Wildman (and GAO) explained, many overbuilders simply underestimated the extent of competition in the video marketplace. They assumed that what the telcos are now arguing was true – that incumbent cable operators were charging monopoly prices, and that overbuilders could profitably compete and capture customers

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118 The FCC's price surveys are also sometimes cited as evidence that systems facing wireline competition charge lower prices. But these surveys, like the GAO study, are generally based on "list prices," which do not reflect the promotional pricing and the prices offered for bundled video, voice and Internet combinations, which are widely available in today's marketplace, where, wholly apart from wireline video overbuilders, cable operators face vigorous video competition from two national DBS providers.

119 Steven S. Wildman, "Assessing the Policy Implications of Overbuild Competition," Attachment A to NCTA Reply Comments in MB Docket No. 04-227, at 27.

with lower prices. But it turned out that the incumbents' prices had been challenged by vigorous competition from DBS.

As a result, overbuilders who sought to price profitably below the cable operators' prices found that their prices were too low to cover their costs and could not be sustained for more than an introductory period. Many therefore either failed or, before long, had to raise their prices to levels comparable to incumbent operators. As Professor Wildman explained, "Because market prices frequently rebound to higher levels once entrants' initial price-cutting strategies have run their course, it is important that prices in markets with recent entry not be used as competitive benchmarks for prices in other markets."[120]

NCTA's study found that some overbuilders were, in fact, able to sustain rates lower than most incumbent cable systems. But this was only because they had bought their systems – at pennies on the dollar – *from* overbuilders that failed. When companies purchase systems for much less than what it cost to build them, they can sustain prices that reflect this discount. But, as Wildman explained, these prices are not indicative of what an economically efficient incumbent or new cable operator facing marketplace competition would or should charge.[121]

Wildman found other reasons why overbuilders' prices were sometimes artificially lower than the prices charged by incumbent cable operators. For example, in some overbuild communities, overbuilders do not have the same franchise requirements as the competing incumbents. In particular, many were allowed to engage in "cream skimming," serving only high-density areas that are less costly to serve on a per-household basis. We explained in our

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[120] *Id.* at 11.

[121] Ironically, many of these systems with lower prices were purchased at heavily discounted prices from SBC after it purchased Ameritech and decided to exit the video business. Encouraging large ILECs to invest billions in new facilities so that they might fail and sell their systems at pennies on the dollar results in enormous waste and

initial comments in this proceeding,[122] and Besen and Woodbury further explain,[123] why such rates by those overbuilders then (or by telcos now) should not be viewed as more "competitive" and desirable.

The NCTA study also revealed that many overbuilders were municipally owned or owned by cooperatives and operated on a *not-for-profit* basis. Others owned by utilities or are affiliated with a local telecommunications company could be cross-subsidized by the regulated utility's ratepayers. In the end, Wildman found that in 428 of the 433 identifiable overbuild communities – 99% – anomalous circumstances like those described above explained their artificially low prices.

One additional point: overbuilds were found to exist in only 433 cable communities nationwide. But in virtually all of the 33,485 cable communities nationwide, consumers have at least two strong competitive DBS alternatives to their cable system. It makes much more sense to view the prices charged in *those* communities as "competitive," in light of the anomalous circumstances in the small number of overbuild communities.

2. Hazlett's Calculations Are Based on Deployment of Telco Video Service To All Television Households, But the Telcos Do Not Intend To Provide Such Universal Service

Hazlett's calculation of the supposed cost to consumers of the franchise process erroneously assumes not only that telco deployment of video service will be delayed, and that such delay will cause consumers to pay higher prices throughout the period of delay. It also assumes that telcos intend to deploy their cable service ubiquitously throughout all communities

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misallocation of economic resources and would hardly be a beneficial way to reduce cable prices, even if cable operators did not already face strong competition from DBS.

[122] *See* NCTA Comments at 15-19.

[123] *See* Besen and Woodbury, ¶¶ 48-50.

throughout the nation, so that virtually all MVPD households will suffer from this delay. This assumption is likewise clearly erroneous.

As the telcos' filings in this proceeding make clear, they have no intention of building out their systems to serve most households in a community unless they are forced to do so by franchising authorities. Thus, as Besen and Woodbury explain, "Hazlett is counting as a source of consumer welfare gains the acceleration of service to households *who may never receive the service at all*. If, for example, the change in franchise requirements accelerates service to only half of all U.S. households, and all of Hazlett's other assumptions are accepted, the estimated consumer welfare gains would be only half as large as those he projects. If the assumed acceleration of service delivery affects only households that will never receive the service, there will be no welfare gains at all."[124]

In other words, even if Hazlett were correct that the franchising process would delay deployment of telco service to residents of areas that the telcos want to serve, it will not delay deployment to residents in areas that they do *not* want to serve. Subjecting telcos to the franchising process and to buildout requirements will bring telco competition to those residents *sooner* than would otherwise occur.

Hazlett erroneously views the "delay" in serving the 60% of households that the telcos have no intention of serving as imposing a *cost* on those consumers. But to the extent that the franchise process requires telephone companies to serve those households, he should view this as a *benefit* to those consumers, which offsets any supposed costs of franchise delays.

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[124] *Id.*, ¶ 20 (emphasis in original).

C. The Telco Studies Fail To Take Into Account the Costs To Consumers of Regulating Like Services Differently

In NCTA's initial comments, we submitted an economic analysis of the potential adverse effects on consumers of regulating new telco entrants differently from existing cable operators. That analysis, by Michael Baumann of Economists Incorporated,[125] showed that existing cable operators who are required to build out and upgrade their systems throughout entire communities generally must subsidize service in the higher-cost, lower-revenue producing areas that they might not otherwise serve with revenues from the lower-cost, higher-revenue producing areas. Allowing telephone companies to cherry-pick and serve only the lower-cost, higher-revenue areas would undermine the ability of existing operators to continue subsidizing their service in the areas that the telephone companies choose not to serve.

As Baumann pointed out, the precise consequences would depend on the circumstances. To meet competition in the areas served by the telcos, existing operators might raise prices in the higher-cost area unserved by the telcos. But that could be counterproductive and impossible, both because of the competitive availability of the two national DBS services and because the higher prices may simply cause customers to stop purchasing service. Therefore, operators might instead be forced to reduce expenditures on service and upgrades in the higher cost areas unserved by the telcos. Or, they might even be forced out of business altogether in some communities.

Besen and Woodbury confirm that, in these circumstances, something will have to give – to the detriment of some, or possibly all, cable customers. And, as they point out, Hazlett's analysis of the costs to consumers of imposing franchise and buildout obligations on new telco

[125] M. Baumann, "The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television," attached to NCTA's initial comments as Attachment B.

entrants completely fails to account for the countervailing costs of *not* imposing such requirements.[126]

Those costs to consumer welfare are not limited to higher prices, or reduced service, to consumers in the areas unserved by the telephone companies. They also include the loss to consumers of services that franchising authorities deem to be in the public interest, even if they might not be provided in the absence of a franchise obligation to do so. And they include the cost of "inefficient entry."

As Besen and Woodbury explain, "Hazlett's prescription would place the cable operator at an artificial competitive disadvantage in its rivalry with the new wireline entrant. In these circumstances, the entrant would be able to attract subscribers even if it were a less efficient provider of video services."[127] There is a cost to tilting the scales in a way that makes winners of less efficient competitors: "Franchise obligations that increase the costs of the cable operator but not those of the ILEC entrant would send the wrong economic signals to new entrants by making profitable what otherwise might be uneconomic and inefficient entry."[128]

This would "result in video services being produced at a higher-than-necessary resource cost."[129] And like the other adverse economic effects of asymmetric regulation on consumers, this "resulting loss in economic welfare is nowhere addressed in Hazlett's analysis."[130]

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[126] *See* Besen and Woodbury, ¶¶ 48-50.

[127] *Id.*, ¶ 48.

[128] *Id.*, ¶ 50.

[129] *Id.* , ¶ 49.

[130] *Id.*, ¶ 48.

CONCLUSION

The FCC initiated this proceeding to determine the facts behind telco allegations that the cable franchising process was unreasonably and unlawfully slowing their entry into video. This docket has offered a forum to back these public claims with record evidence. The telcos have failed.

Verizon has yet to show a single instance of a franchise denied. And in many cases the franchise was granted months before Verizon was ready to offer service. Its economic analysis fails to justify its claims about how entry will reduce prices and ignores the record established in other proceedings on overbuilder effects. AT&T has declined to participate in franchising altogether, thereby adducing no evidence for the FCC to even consider.

The FCC lacks a record to take any action to relieve telcos of franchising requirements. Accordingly, the Commission should not proceed further in this docket.

Respectfully submitted,

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March 28, 2006

Attachment A

Comparison of Verizon Timeline for Franchise Granted with NCTA Timeline Based on Application Date

Telco	City	State	Verizon	NCTA
Verizon	Keller	Texas	9 months	8 months
Verizon	Sachse	Texas	5 months	2 months
Verizon	Westlake	Texas	8 months	Not available
Verizon	Wylie	Texas	6 months	Not available
Verizon	Columbia	Maryland	8 months	8 months
Verizon	Ellicott City	Maryland	8 months	8 months
Verizon	Fairfax (County)	Virginia	6 months	2 months
Verizon	Fairfax (City)	Virginia	2 months	3 weeks
Verizon	Herndon	Virginia	10 months	4 months
Verizon	Quantico	Virginia	3 months	Not available
Verizon	Falls Church	Virginia	17 months	3 weeks
Verizon	Temple Terrace	Florida	8 months	6 months
Verizon	Manatee	Florida	10 months	9 months
Verizon	Hillsborough County	Florida	10 months	10 months
Verizon	Bradenton	Florida	9 months	Not available
Verizon	Beaumont	California	5 months	3 weeks
Verizon	Hermosa Beach	California	10 months	9 months
Verizon	Apple Valley	California	8 months	4 months
Verizon	Murrieta	California	7 months	7 months
Verizon	Massapequa Park	New York	5 months	Local: 1 month State: 4 months
Verizon	South Nyack	New York	15 months	Local: 1 month State: 4 months
Verizon	Nyack	New York	15 months	Local: 1 month State: 4 months
Verizon	Woburn	Massachusetts	9 months	5 months
Verizon	Reading	Massachusetts	6 months	5 months
Verizon	Hulmeville	Pennsylvania	4 months	Not available

Attachment B

Attachment B
Telco Roll-out Under Texas Franchises

Telco	City	Date Franchise was Granted	Number of Days between Franchise Granted and Video Deployment (as of March 28, 2006)
Verizon	Sachse	December 6, 2004	394
Verizon	Westlake	January 10, 2005	359
Verizon	Wylie	January 25, 2005	344
Verizon	Keller	February 1, 2005	233
Verizon	Allen	October 21, 2005	158+
Verizon	Coppell	October 21, 2005	158+
Verizon	Denton	October 21, 2005	158+
Verizon	Double Oak	October 21, 2005	158+
Verizon	Garland	October 21, 2005	158+
Verizon	Hebron	October 21, 2005	158+
Verizon	Highland Village	October 21, 2005	158+
Verizon	Lucas	October 21, 2005	158+
Verizon	Parker	October 21, 2005	158+
Verizon	Plano	October 21, 2005	158+
Verizon	Rowlett	October 21, 2005	158+
Verizon	Southlake	October 21, 2005	158+
Verizon	St. Paul	October 21, 2005	158+
AT&T	Alamo Heights	November 11, 2005	137+
AT&T	Balconews Heights	November 11, 2005	137+
AT&T	Castle Hills	November 11, 2005	137+
AT&T	China grove	November 11, 2005	137+
AT&T	Cibolo	November 11, 2005	137+
AT&T	Converse	November 11, 2005	137+
AT&T	Garden Ridge	November 11, 2005	137+
AT&T	Hill Country Village	November 11, 2005	137+
AT&T	Holloywood Video Service Park	November 11, 2005	137+
AT&T	Kirby	November 11, 2005	137+
AT&T	Leon Valley	November 11, 2005	137+
AT&T	Live Oak	November 11, 2005	137+
AT&T	Olmos Park	November 11, 2005	137+
AT&T	Schertz	November 11, 2005	137+
AT&T	Selma	November 11, 2005	137+
AT&T	Shavano Park	November 11, 2005	137+
AT&T	Terrel Hills	November 11, 2005	137+
AT&T	Timerwood Park	November 11, 2005	137+
AT&T	Universal City	November 11, 2005	137+
AT&T	Windcrest	November 11, 2005	137+
Verizon	Colleyville	October 21, 2005	76
Verizon	Grapevine	October 21, 2005	76
Verizon	Murphy	October 21, 2005	76
Verizon	Carrollton	October 21, 2005	61 (partial deployment)
Verizon	Fort Worth	October 21, 2005	61 (partial deployment)
Verizon	Flower Mound	October 21, 2005	61 (partial deployment)
Verizon	Irving	October 21, 2005	61 (partial deployment)
Verizon	Lewisville	October 21, 2005	61 (partial deployment)
AT&T	San Antonio	November 11, 2005	"Controlled Market Entry"

shaded areas = service has been rolled out
unshaded areas = no service is being provided

Attachment C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of: Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

DECLARATION OF STANLEY M. BESEN AND JOHN R. WOODBURY

(March 28, 2006)

I. Qualifications

1. My name is Stanley M. Besen. I am a Vice President at CRA International, Washington, DC, and have consulted to many companies in the telecommunications and information industries. I have served as a Brookings Economic Policy Fellow, Office of Telecommunications Policy, Executive Office of the President (1971-72); Co-Director, Network Inquiry Special Staff, Federal Communications Commission (1978-80); Co-editor, *RAND Journal of Economics* (1985-88); Senior Economist, RAND Corporation (1980-92); and a member of Office of Technology Assessment Advisory Panels on Communications Systems for an Information Age (1986-88) and Intellectual Property Rights in an Age of Electronics and Information (1984-85). I currently serve as a member of the Editorial Board of *Economics of Innovation and New Technology*. I have taught at Rice University (1965-1980) where I was the Allyn M. and Gladys R. Cline

Professor of Economics and Finance; Columbia University (1988-1989) where I was the Visiting Henley Professor of Law and Business; and the Georgetown University Law Center (1990-1991) where I was Visiting Professor of Law and Economics. I hold a Ph.D. in Economics from Yale University (1964).

2. My name is John R. Woodbury. I am a Vice President at CRA International, Washington DC. I am an expert in the economics of antitrust and regulation and have provided expert testimony, litigation support, and economic consulting services to a large number of clients in the telecommunications industry. I recently filed declarations before the Federal Communications Commission ("FCC") that considered the competitive effects of the FCC's current regulatory regime on special access rates and evaluated whether any competitive issues were raised by the merger of Sprint and Nextel. At the FCC, I served as a senior economist on the Commission's Network Inquiry Special Staff (1979-80) and as Chief of the Economics Division of the then Common Carrier Bureau (1980-82). I subsequently served as Vice President for Research and Policy Analysis at the (now) National Cable & Telecommunications Association (1983-85). In addition to being a Brookings Economics Policy Fellow, I have also been Associate Director for Special Projects in the Bureau of Economics and Assistant Director for Rulemaking in the Bureau of Consumer Protection, Federal Trade Commission. I currently serve on the editorial board of the *Antitrust Source*. I hold a Ph.D. in Economics from Washington University (St. Louis).

3. We have published widely on telecommunications economics and policy. Our publications on television economics include: *Misregulating Television: Network*

Dominance and the FCC, University of Chicago Press, 1984 (with T.G. Krattenmaker and A.R. Metzger); "Rate Regulation, Effective Competition, and the Cable Act of 1992," *Hastings Communications and Entertainment Law Journal*, 1994; "Vertical and Horizontal Ownership in Cable TV: Time Warner-Turner (1996)," in J. E. Kwoka and L.J. White, *The Antitrust Revolution*, Scott, Foresman, (with E.J. Murdoch, D.P. O'Brien, and S.C. Salop) 1998; and "The Determinants of Network Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power," *The Bell Journal of Economics*, Autumn 1983 (with G.M. Fournier).

II. Summary and Conclusions

4. We have been asked by the National Cable & Telecommunications Association to evaluate the claims made by Thomas W. Hazlett in this proceeding.[1] Specifically, Hazlett argues that local cable franchising requirements "impose substantial barriers to entry... [that] are an obstacle to achieving greater competition in the provision of multi-channel video service."[2] Therefore, he argues, these requirements should not be imposed on Verizon and other incumbent local exchange carriers (ILECs), or fewer requirements should be placed on them than are placed on cable operators.[3] Hazlett also purports to estimate the consumer

[1] Declaration of Thomas W. Hazlett, filed February 13, 2006 (hereafter "Hazlett Declaration").

[2] Hazlett Declaration, ¶3.

[3] Hazlett is not entirely clear on this point. At some places, he seems to suggest that local exchange carriers would accept at least some of the same regulations that are imposed on cable operators, but he does not indicate which regulations would be acceptable and which would not.

welfare gains that, he claims, would result if ILEC entrants were not subject to the same franchise requirements as their cable rivals.[4]

5. Hazlett's estimates of the gains to consumers from relieving Verizon and other ILECs from franchise requirements are, to say the least, unconvincing. His calculation of the increase in the rate at which ILECs would offer video services as a result of relaxed franchise regulations is based on a comparison of cable's offering of video and broadband services, implicitly and inappropriately attributing the entire difference in the rates at which these services were offered to the difference in regulatory regimes. In addition, Hazlett relies on estimates of the effect of ILEC entry on video service prices that ignore, or do not adequately account for, the fact that Direct Broadcast Satellite (DBS) entry has already occurred.

6. Moreover Hazlett's estimates are based on the assumption that ILECs will offer video services to virtually all U.S. households. However, the build out is likely to be much less extensive -- some analysts have estimated that it will reach only half of all U.S. households. Thus, Hazlett is counting as a source of consumer welfare gains the acceleration of service to households *who may never receive the service at all*. If all of Hazlett's other assumptions are accepted, but service delivery is accelerated to only half of U.S. households, the welfare gains will be only half as large as those that he presents. If Hazlett's assumed acceleration of service delivery affects only households that will in fact never receive the service, there will be no welfare gains at all.

[4] Hazlett Declaration, Exhibit 1.

7. Hazlett also overstates the delay caused by the regulatory process because he implicitly assumes that ILECs do not apply for franchises until they have completed the installation of the fiber that is needed to provide video services. Even an extended regulatory process may not delay the introduction of video service because the ILECs can anticipate, and take into account, the length of the process in their planning and building process. These, and other, shortcomings suggest that Hazlett has significantly overstated the welfare gains from relieving ILECs from the obligations of the franchise process.

8. It is also important to observe that a very large portion of the gain in consumer surplus that Hazlett claims would result from ILEC entry into the provision of video service would, according to his estimates, occur *even if there were no change in the franchise process*. In particular, according to Hazlett's Table 1, more than 80 percent of the present value of consumer surplus that Hazlett estimates for his "Alternative Case I" is also present in the estimate for his "Base Case." [5] Thus, only a relatively small fraction of the (unreliably estimated) gains to consumers as calculated by Hazlett can be attributed to reduced delay in awarding franchises to ILECs.

9. In addition, Hazlett has not offered the Commission a balanced perspective. Even if the franchise process were to delay ILEC entry, asymmetric franchising requirements, i.e., requiring only cable operators to bear the costs of satisfying local franchising obligations, could jeopardize their ability to meet their

[5] The calculation is ($76.1 billion/$92.0 billion) = ($134.1 billion/$162.3 billion) = 82.7 percent.

obligations. Moreover, exempting ILECs from these requirements would provide them with an artificial competitive advantage, one that could permit them to attract subscribers even if they were less efficient than cable operators in supplying video services.[6]

10. Finally, although we believe that Hazlett has overstated the benefits of relieving Verizon and others of franchise requirements, we do not claim that entry by ILECs into the provision of video services would necessarily be undesirable nor that, as a general principle, entrants should be required to demonstrate that their entry in and of itself would provide benefits to consumers. We do claim, however, that ILECs should not be given an artificial competitive advantage by relieving them of regulatory requirements that cable operators are forced to accept. Moreover, where, as in this case, would-be entrants seek relief from requirements to which their competitors are subject, their claims of consumer benefits deserve special scrutiny.

III. Hazlett's Estimate of the Consumer Gains from Asymmetric Franchising Regulation Are Unconvincing

11. Hazlett purports to estimate the consumer welfare gains that would result from the changes in the regulatory regime that he proposes. That estimate relies on a number of critical assumptions, including his assumptions regarding the time path of homes passed by the ILEC if it must seek approvals from franchise authorities, the time path if the ILEC is exempt from the franchising process, and the reduction in the prices of cable service that would result from ILEC entry. As we

[6] It is more than a bit ironic for Verizon to ignore this point since it has forcefully argued against policies that would facilitate CLEC entry that, in its view, would encourage less efficient providers to enter.

discuss below, flaws in each of these assumptions make Hazlett's analysis unreliable as a basis for making critical regulatory policy decisions.

a. The Pace of Cable Video Service Entry is a Poor Benchmark

12. Hazlett's analysis rests on, among other things, the implicit assumption that the difference between the pace at which cable television video service became available to U.S. households between 1976 and 1990 and the rate at which broadband cable service became available to U.S. households between 1997 and 2005 is *completely* explained by the difference in franchise requirements for the two types of service.[7] However, many factors other than the franchise process explain the difference in the way these two services were diffused to U.S. households.

13. In particular, the growth of cable, at least through the period through 1982, was limited by a host of factors, including importantly FCC regulations that severely limited the video services that cable systems could offer to their subscribers. One of us, writing in 1981, noted that:

> In the 1970's, [cable's] growth slowed somewhat as the industry expanded to more than 14 million subscribers or nearly 20 percent of all television households. Most of these subscribers are still located outside the major markets, however, due to the quality of off-the-air television service in the larger cities, the FCC policy of limiting distant-signal imports into these markets, and important restrictions (now removed) on programming

[7] Actually, Hazlett is not as precise as this in describing this assumption. First, he states: "Given that a large majority of cable television systems were built with local franchises, their historical growth pattern *incorporates delays from* the franchising process." (Hazlett Declaration, Attachment B, p. 2, emphasis added). Second, he assumes that "the competitive build-out will follow the historical path of cable modem (broadband) deployments in the U.S., which *is a useful model for* unencumbered telco entry into video." (Attachment B, Exhibit 1, p. 3, emphasis added.) By the time he performs his calculations, however, "incorporates delays from" and "is a useful model for" have been transformed into the sole basis for the difference between the two situations.

> which could be offered on a per-program or per-channel basis.[8]
>
> The 1972 [FCC] cable rules continued to inhibit large-market cable growth because the limitations upon imported distant signals were sufficiently severe to make cable an unattractive option for most consumers. In 75 of the largest 100 markets, cable systems could have offered no more than the local stations plus two imported signals and they were not free to choose even these….Only when more diverse offerings became available in greater quantity and at a reasonable cost could these large-market systems hope to have something to offer potential subscribers.[9]

14. Thus, a key factor limiting cable's growth during this period was the lack of access to programming that subscribers might value, especially in the larger television markets. Indeed, as restrictions on programming were gradually lifted, operators began to apply for franchises in increasing numbers. Again, as one of us wrote at the time:

> In virtually every major market…there is considerable interest in accelerating the franchising process as the major cable companies and local groups eagerly press for the right to begin construction of systems offering the rapidly expanding array of cable services.[10]

15. In 1976, the beginning of the period analyzed by Hazlett, there were two basic cable program services and two cable pay program services. At that time, 77% of all cable operators offered fewer than 12 channels of programming and 88% offered fewer than 20 channels. By 1987, the number of program services had increased to 76 and only 35% of cable operators offered fewer than 20 channels. By the beginning of 2004, cable subscribers had available to them over 200

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[8] S.M. Besen and R.W. Crandall, "The Deregulation of Cable Television," *Law and Contemporary Problems*, Winter 1981, pp. 79-80.

[9] Ibid, pp. 107-108.

[10] Ibid, p. 110.

channels on average (73 analog and 150 digital) and by year-end 2004, the number of program services had risen to 390. It is no surprise, then, that restrictive regulations that limited the availability of alternative programming served to slow the pace of growth of the cable industry. Increases in program availability increased the profitability of providing cable service and that, in turn, increased cable industry investment.

16. The FCC's programming restrictions were not the only factor inhibiting the growth of the cable industry in the period examined by Hazlett. For example, writing in 1997, Hazlett noted: "Cable television reregulation in October 1992 succeeded in constraining subscriber bills….Yet, the growth rate of basic cable television subscribership fell sharply during the period of rate reductions."[11] Hazlett apparently found that the pricing constraints on cable operators during the period of "reregulation" adversely affected the quality of their program offerings and thus led to a reduction in the rate of growth of cable subscribership. Although most cable systems had already been built by this point, so that rate regulation affected subscribership but had little effect on homes passed, had rate regulation been imposed earlier, Hazlett would have had to conclude that cable rate regulation (which existed from the early days of the cable industry through at least 1984 before reregulation in 1992) would have adversely affected the incentive to build out new cable systems.

17. In addition, cable franchisees were required to acquire the necessary rights of way as well as to acquire pole-attachment rights in order to provide video services.

[11] T.W. Hazlett, "Prices and Outputs Under Cable TV Regulation," *Journal of Regulatory Economics*, 1997, p. 173.

Indeed, overcoming ILEC resistance to providing the new cable operators with access to rights of way and to the ILEC telephone poles at reasonable fees was a significant hurdle for the new cable franchisees and likely slowed the pace of their growth. By contrast, Verizon and other ILEC entrants will face no rights-of-way obstacles or pole-attachment constraints.

18. In short, attributing the slow pace of growth in cable homes passed entirely to delays in the franchising process is misleading. Other significant factors contributed to that delay and some of these factors—the limited availability of programming, rate regulation, rights-of-way negotiations, and pole-attachment frustrations—will not be factors in ILEC entry. As a result, using the homes-passed history of the cable industry to predict the pace of homes passed by ILECs under the current franchising framework is likely to underestimate significantly the pace at which ILEC entry will occur even if the franchise process is unchanged.

19. In this regard, it is worth noting that Figure 2 in Attachment B of the Hazlett Declaration relies on Lehman Brothers' estimates of actual and estimated homes passed by ILEC competitors for the period 2004-2007. This Figure suggests that the trajectory of homes passed by ILECs between 2004 and 2007, *under the current franchising regime*, is significantly more rapid than would be predicted using the history of the growth in cable homes passed.

20. Finally, Hazlett's calculations assume that telcos would offer video service to 98% of all U.S. households by 2020 under a relaxed regulatory regime[12] and his

[12] Hazlett Declaration, Attachment B, p. 3.

Figure 2 suggests that the vast majority of U.S. households would have access to telco video services by 2010. Indeed, Hazlett specifically observes that his result "derives from the *difference* in consumer gains between a *nationwide* build-out with and without reforms that effectively streamline competitive entry."[13] However, the assumption of a nationwide build out is substantially at odds with estimates of some financial analysts. For example, Bernstein Research notes that "the telcos have indicated that they are unlikely *ever* to reach this majority [60% of U.S. households] with fiber."[14] Similarly, a presentation to investors by SBC/at&t indicates that SBC/at&t plans to offer video to 90% of "high value" consumers, 70% of "medium value" consumers, and 5% of "low value" consumers.[15] Thus, Hazlett is counting as a source of consumer welfare gains the acceleration of service to households *who may never receive the service at all*. If, for example, the change in franchise requirements accelerates service to only half of all U.S. households, and all of Hazlett's other assumptions are accepted, the estimated consumer welfare gains would be only half as large as those he projects. If the assumed acceleration of service delivery affects only households that will never in fact receive the service, there will be no welfare gains at all.

b. Broadband Deployment is not Comparable to Video Deployment

21. In estimating the gains to consumers from exempting the ILECs from any franchising obligations, Hazlett assumes that if ILECs were exempt from any franchising regulations, the growth in homes passed by the ILEC could be

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[13] Hazlett Declaration, note 74, second emphasis added.

[14] "The Dumb Pipe Paradox (Part II): Patchwork Pipes", February 28, 2006, emphasis in original.

[15] "Project Lightspeed: SBC Communications Conference Call" (November 11, 2004), slide 14, http://www.comsoc.org/oeb/Past_Presentations/SBC_Nov04.pdf .

predicted by the growth in homes passed by cable modem service. Hazlett offers no reason to believe that cable modem service and multichannel video service are sufficiently comparable—except for the difference in franchising regimes—to justify his assumption.

22. Indeed, the factors explaining the growth of cable modem service are sufficiently diverse that assuming that all of that growth is due to the absence of any franchising requirements is almost certainly unfounded, and therefore using that growth path to predict the time path of homes passed by ILECs to provide video service in the absence of any franchising requirements is likely to be misleading. The result is to overstate the consumer gains from accelerating the franchise process.

23. Cable operators upgraded their existing cable infrastructure (albeit, a substantial upgrade) to offer cable modem service. They did not construct entirely new cable systems, as was the case in the early deployment of cable systems. Thus, deployment of cable broadband services would be expected to be faster than cable's initial deployment of video services irrespective of the differences in the franchise process.

24. Moreover, the demand for broadband service has been driven by the exponential growth in computer-equipped households and businesses, in Internet access, and in Internet sites that could be accessed. In contrast to the supply-side constraints on the growth of cable video distribution arising from the lack of content availability, the amount of accessible content on the Internet was substantial at the time cable operators began deploying cable modem service.

25. A third factor that helped spur cable modem deployment at the beginning of its history was the slowness of the ILECs to offer a competitive broadband service. By contrast, ILECs will face intense competition from cable and DBS video providers and can be expected to grow more slowly as a result.

26. For at least these reasons, Hazlett's reliance on the history of cable modem deployment to predict the pace of ILEC video entry under relaxed franchise regulation is misplaced. If anything, relying on the cable modem history as a guide to ILEC video growth will overstate, perhaps substantially, that growth. Using the difference between this flawed "but-for" cable modem history benchmark and the flawed cable video history benchmark to infer the effect of franchising delay will significantly overstate the gains to consumers from franchise-free ILEC entry.

c. Hazlett Has Overstated the Delay Caused by the Regulatory Process

27. Hazlett provides data that suggests that the average delay in awarding an overbuilder franchise is about one year.[16] If that is the case, a somewhat better, but far from perfect, approach to assessing the cost of delay would be either to assume that the franchise process displaced the video service diffusion rate forward by one year, or that it would have displaced the cable modem service diffusion rate backward one year. Under either assumption, the estimated consumer gain from accelerating the franchise process would be substantially less than Hazlett obtains when he compares the quite different diffusion rates of cable video and cable modem service.

[16] Hazlett Declaration, ¶ 10.

28. However, even this approach, which is essentially the one taken by Ford and Koutsky,[17] overstates the delay caused by the regulatory process. Assuming that a regulatory delay of one year displaces the time path of the ILEC build out by one year ignores the fact that an ILEC can accelerate the pace of its build out once it receives a franchise.[18] If that were to occur, the loss in consumer surplus in the "out years" may be substantially smaller than calculated by Hazlett.

29. In addition, the approach taken by Hazlett implicitly assumes that ILECs do not apply for a franchise until they have completely constructed the fiber plant required to provide video service. However, if, for example, ILECs anticipate that the franchising process will take one year, they can apply for a franchise one year before the date at which they expect to be able to provide service. If they were to do so, *the franchising process would not delay the introduction of service at all*. Even if the franchise process were to take somewhat longer than expected, the relevant delay would not be the entire length of the franchise process but only the length of the unanticipated portion of the process. In short, the length of the franchise process is likely to be greater than, perhaps much greater than, any service delay caused by that process, and it is the latter that is relevant for evaluating the effects on consumers of exempting the ILECs from the franchise process.

30. Of course, the franchise process may be shorter than the period required to construct a video system. In such cases, unless the ILECs begin construction

[17] George S. Ford and T.M. Koutsky, "'In Delay There Is No Plenty': The Consumer Welfare Cost of Franchise Reform Delay," Phoenix Center Policy Bulletin No. 13, January 2006. Many of the flaws in the Hazlett analysis, discussed in the text below, apply as well to this paper.

prior to *applying* for a franchise, they will be unable to offer service even after they *receive* the franchise. In Beaumont CA, for example, Verizon was awarded a franchise only 19 days after it applied for one but an additional 462 days passed before it began offering video service.[19] Clearly in this case, the delay in offering service was attributable not to a lengthy franchise process but to Verizon's failure to have begun construction in a timely manner or to arrange for the timely availability of video services. In such cases, Hazlett's approach obviously overstates the consumer gain from relaxed franchise regulation. Moreover, even in cases where the franchise process was more time consuming, there have still been substantial additional delays in offering service after the franchise was awarded. For example, in Herndon, VA, where it took 133 days for Verizon to obtain a franchise, it took an *additional* 125 days before Verizon began to offer service.

31. Finally, the ILECs may be somewhat in control of the length of the franchise process itself. It seems likely, for example, that much of the observed length of the process has resulted from the unwillingness of the ILECs to accept the same requirements as the cable operator against whom they will compete. If that is the case, it is unseemly for the ILECs to complain about how long it takes to obtain a franchise if their own behavior is responsible for extending the length of the franchise process.

[19] Comments of NCTA, MB Docket No. 05-311 (February 13, 2006), Attachment A.

d. Hazlett's Estimate of the Price Reduction from Accelerated ILEC Entry is Questionable

32. A key component of the gains estimated in the Hazlett declaration is an assumption about how far prices would fall as a result of new ILEC entry. Hazlett claims that competition in the provision of multichannel video services "has been shown to lower quality-adjusted prices by 15% or more"[20] and that, therefore, this estimate can be used to assess the effect on prices of relaxing franchise requirements on ILEC overbuilders. However, some of the studies on which Hazlett relies for the estimate were for periods before the entry of DBS and therefore are likely to overstate the effect on prices of still another entrant. Moreover, even where the presence of DBS is taken into account, these studies do not necessarily correctly measure the incremental effect of wireline entry. Finally, there are other more general reasons to be skeptical of these estimates.

33. Emmons and Prager (1997), which Hazlett cites as support for one of his estimates of the effect of competitive wireline entry, analyzed data for 1983 and 1989.[21] Because both of these years precede the period of significant entry by DBS providers, the Emmons-Prager study cannot possibly measure the effect of the addition of a wireline carrier into a market already served by DBS, and it does not claim to do so.

34. Although the GAO (2003) study, which Hazlett also cites, does attempt to take the presence of DBS providers into account, the manner in which it does so *assumes* that the effect of competitive wireline entry is the same regardless of the

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[20] Hazlett Declaration, ¶3.

[21] W.M. Emmons III and R.A. Prager, "The Effects of Market Structure and Ownership and Prices and Service Offerings in the U.S. Cable Television Industry," *Rand Journal of Economics*, Winter 1997, pp. 732-750.

extent of DBS competition.[22] That is, because the GAO study treats the effects of DBS and wireline competition on cable prices as additive, it ignores the fact that any incremental effect of wireline entry is likely to be smaller where DBS competition already exists. In order to measure the separate effect of wireline entry, one would, for example, need to estimate an equation in which there are variables for: (1) only wireline overbuilders; (2) only DBS; and (3) wireline overbuilders and DBS. The effect of wireline entry in areas already served by DBS would be the difference between the coefficients of (2) and (3). The GAO study does not make this distinction.

35. The importance of the distinction is underscored by the extent to which many cable operators are deemed already to face effective competition under the FCC rules because DBS penetration in their franchise areas exceeds 15%. Indeed, DBS subscribers account for nearly 25% of television households nationwide, which suggests that the DBS penetration rate is even higher in many franchise areas.

36. In addition, the failure to account adequately for system differences may have biased the results on which Hazlett relies. For example, the FCC claimed to have found that overbuilding led to a reduction in basic cable rates of about 17 percent. In particular, the Commission conducted a series of statistical analyses in which it attempted to measure the difference in rates charged by otherwise identical competitive and non-competitive systems. It initially found that the "competitive

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[22] United States General Accounting Office, *Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, October 2003. In this study, DBS competition is measured not by the presence or absence or DBS rivals, but by the DBS penetration rate.

differential" was approximately 10 percent.[23] Subsequently, it revised its statistical approach and concluded that the differential was 17 percent.[24] The FCC then used this finding as its basis for "reregulating" cable by requiring cable systems that were not subject to "effective competition" to roll back their rates by the same percentage.

37. The Commission's analysis involved estimating a single equation for all systems. That is, the Commission implicitly assumed that the effect on cable rates of the number of channels, the number of satellite services and, importantly, the magnitude of the competitive differential is the same for all cable systems. However, the effect of any one or all of these variables on subscriber rates may depend on the number of subscribers served by the system, a source of potential error in the Commission's estimates.[25] In fact, when we re-analyzed the Commission's data and allowed for differences among cable system size

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[23] The details underlying this analysis appear in Federal Communications Commission, Appendix E -- Survey Results and Technical Appendix to Report and Order and Further Notice of Proposed Rulemaking In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Adopted: April 1, 1993 (hereafter, "Appendix E").

[24] The details underlying this subsequent analysis appear in Federal Communications Commission, Appendix C to Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Adopted: February 22, 1994 (hereafter, "Appendix C"). The rates being analyzed in this Order and that in the previous note are somewhat different. In the earlier Order, the Commission defined rates as service and equipment revenues per channel per basic subscriber. In the more recent Order, rates are defined as service and equipment revenue per basic subscriber. For ease of exposition, we refer to both of these as the "rates."

[25] One reason for focusing on subscriber size-related differences is that systems with more subscribers (or homes passed) tend to have different costs than other systems. (See, for example, Bruce M. Owen and Peter R. Greenhalgh, "Competitive Policy Considerations in Cable Television Franchising," *Contemporary Policy Issues* (v. 4, 1986), pp. 69-79, and Eli Noam, "Economies of Scale in Cable Television: A Multiproduct Analysis," *Video Media Competition* (New York: Columbia University Press, 1985), ed. Eli Noam, pp. 93-120.) Although the Commission included the number of subscribers as an explanatory variable in its equation, its specification implicitly assumed that the relationship between rates and other variables, such as the effectively competitive differential or the number of satellite services, is the same regardless of the number of subscribers.

categories, we found that only three of the estimated competitive differentials, those for the three smallest categories, were statistically significant at the confidence level employed by the Commission. Most subscribers are served by larger systems *for which we found that the estimated differential was not significantly different from zero.*[26]

38. Finally, the fact that the universe of overbuild systems is very small and idiosyncratic undermines any confidence that one might otherwise have in estimates of the effect of overbuilding on cable prices. Only a handful of markets are served by a wireline overbuilder.[27] In addition, Wildman found that some of these rival systems were municipally-owned systems; some did not have to serve the entire franchise area, and so received favorable regulatory treatment; and many were characterized by a high failure rate.[28] Thus, using such an idiosyncratic sample of overbuild systems to predict what cable rates might be following more "typical" overbuild entry, may be misleading. [29]

[26] For more details on this and other criticisms of the FCC's analysis see S.M. Besen and J.R. Woodbury, "Rate Regulation, Effective Competition, and the Cable Act of 1992," *Hastings Communications and Entertainment Law Journal*, 1994.

[27] The previously-cited GAO study (p. 9) noted that wireline overbuilders were in only 2% of all markets. Of course, nearly all cable households are passed by the two DBS services.

[28] Steven S. Wildman, Michigan State University, "Assessing the Policy Implications of Overbuild Competition" (February 9, 2004).

[29] Hazlett assumes, without comment or justification, that the discount rate that should be applied in calculating the present value of the benefits of accelerating the franchise process is 5 percent. However, if one were to use a more plausible discount rate of 10 percent, the dollar value of these benefits would be substantially smaller, even if all of Hazlett's other assumptions were accepted. By way of an illustration, if there are two infinite series, one growing at 2 percent and the other growing at 1 percent, the difference between the present values of the two series is more than 80 percent smaller when the series are discounted at 10 percent than when they are discounted at 5 percent. As a result, Hazlett's estimate of the consumer welfare gains from accelerated ILEC entry is highly sensitive to the discount rate that is employed.

IV. Hazlett's Analysis Ignores the Economic Effects of Imposing Franchise Requirements Only on the Cable Operator

39. Hazlett argues that the requirements of the current franchising system "act as significant entry barriers to new entrants."[30] He then argues that if wireline entrants into the provision of multichannel video services were not required to abide by such requirements, the costs of their entry would be reduced and entry would occur more rapidly. As already noted, he concludes that the resulting increase in competition faced by cable systems would lower prices to consumers and increase consumer welfare.[31]

40. Hazlett's analysis is incomplete because he ignores the effect of asymmetric regulation on the ability of cable operators to bear the costs of their franchise obligations. Cable operators have agreed to bear these costs in return for the right to supply video service to customers in their franchise areas. The costs of meeting franchise obligations, which include requirements to build out the entire franchise area, to provide PEG channels, and to provide broadband service to schools and libraries, are recovered through the revenues received from cable subscribers. If wireline entrants were to begin competing for these same subscribers without bearing these costs, they would likely siphon subscribers from

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[30] Hazlett Declaration, ¶8.

[31] Hazlett suggests that there is precedent for not imposing the same regulations on entrants as on cable operators so as to advance competition: "The ILEC is subject to extensive universal service requirements, interconnection, and retail rate regulations, for instance, that are not imposed on the cable TV entrant" offering telephone service. (Hazlett Declaration, footnote 26) In fact, contrary to Hazlett's claim, cable telephony subscribers do pay a tax to support the ILEC's provision of universal service. Moreover, there would be no reason to impose the same interconnection and retail rate regulations on cable TV entrants into the provision of local telephone service since they do not have the substantial market power and control over the critical local exchange access services that the ILECs possess.

cable operators, impairing the ability of these operators to meet their franchise obligations.[32] [33]

41. Hazlett is certainly aware of the fact that customers of CLECs as well as those of ILECs are taxed to support the telephone industry's universal service obligation. If only customers of the ILECs were taxed, this would reduce the resources available to support this obligation, as the ILECs have long contended.

42. Municipalities have their own version of the universal service obligation that they have imposed on cable operators. As a condition for providing service, cable systems are typically required to have the cable plant pass most or all homes in the franchise area, i.e., they must "build-out" the cable system throughout the entire franchise area. In general, one would expect that the cable investment required to serve some homes in the less densely-populated sections of the franchise area will be significantly greater than the investments needed to serve more densely-populated sections.[34] Cable operators will make these investments

[32] In a recent report to the FCC, Michael Baumann raised some of the issues discussed in the text here and in the subsequent text. He concludes in particular that "if a regulator allows entry by competing firms that are not subject to the same regulation as the incumbent, such asymmetric entry may severely reduce the incumbent's ability to abide by its franchise requirements." Michael Baumann, Economists Incorporated, "The Adverse Effects of Asymmetric Build-Out Requirements in Cable Television" (September 14, 2005), Comments of NCTA, MB Docket No. 05-255, September 19, 2005, Attachment A.

[33] Although some costs of complying with franchising requirements may have already been sunk by the cable operator, numerous other costs have not been sunk, including network maintenance costs, system upgrades, and support for public, educational, and governmental access channels. Moreover, as Hazlett observes (note 25), DBS operators are not required to obtain local franchises or comply with franchise requirements, which also threatens the ability of cable operators to maintain the subsidies required by their franchise obligations. As DBS becomes even more of a competitive force, municipalities may have to re-consider how the costs of these obligations should be recovered, in much the same way as the FCC and states reconsidered alternative means of financing the ILECs' Universal Service Obligation in the face of competitive telco entry.

[34] This is just one example of the factors that could affect the relative profitability of serving different sections of the franchise area.

only if they can expect to recover their costs. Their ability to do so would be substantially compromised if only they were required to bear these costs.

43. Hazlett argues that imposing the same build-out requirements on new wireline entrants "acts as a direct tax on competitive entry, thereby reducing such entry and depriving consumers of its considerable benefits" and that requiring symmetric compliance with build-out requirements "is inconsistent with promoting competitive entry."[35] Among other reasons, he asserts that the build-out requirements imposed on cable operators have not required a "universal" build-out.[36] Our view is not that new wireline entrants should be subjected to more onerous requirements than cable operators, but only that they meet the same requirements, and thus bear their share of the costs, of satisfying them.[37]

44. Hazlett also argues that if symmetry is maintained with respect to build-out requirements, the provision of PEG channels, and the construction of networks for municipal governments, the costs that would have to be incurred by a new wireline entrant are "less affordable to a firm that anticipates competitive profits than for a firm earning a monopoly return." [38] As we have already noted, cable operators face substantial competition from DBS operators, so they are unlikely to be earning monopoly returns. More importantly, this claim is inconsistent with Hazlett's claim that ILEC entry will significantly reduce the rates for video

[35] Hazlett Declaration, ¶14 and ¶15.

[36] Hazlett Declaration, ¶ 16.

[37] It seems highly unlikely to us that cable operators would be successful in convincing municipal authorities to impose more onerous conditions on their wireline rivals than those to which they themselves are subject.

[38] Hazlett Declaration, ¶19.

services. If that were to occur, cable operators' returns would be reduced but they would still be subject to the same regulatory requirements as they were previously.

45. Indeed, cable operators may be unable to cover all of their costs if, as Hazlett claims, they would be forced by competition to accept large rate reductions. That is, they might be unable to "afford" the costs of meeting their franchise requirements, *but only because they face a rival that does not have to meet the same requirements*. In the long-run, they may be forced to exit even if they are the more efficient service providers. Although franchise requirements may increase the costs of entry, they also increase the costs of the cable operators with whom the ILECs wish to compete. Cable operators will be less able to pass these costs on to subscribers if their ILEC competitors do not bear the same costs.

46. Hazlett contends that the cable industry's claim "that [if] a given franchise is profitable only with legal barriers protecting the incumbent from an entrant… the reverse is also true. That is to say that if the competitive entrant is subjected to regulatory obligations that are profitable only for sole franchisees, the potential rival will be deterred" from entry."[39] The question, of course, is not whether regulatory obligations are "profitable." If they were, there would be no need to require them. The question is whether the costs of meeting them can be recovered, and this is less likely to be the case if these costs are imposed on cable operators but not on ILEC entrants.

[39] Hazlett Declaration, ¶21.

47. Notwithstanding Hazlett's argument that imposing the franchise requirements on new entrants is anticompetitive, he does suggest that some requirements—PEGs, must-carry, or customer-service rules—can be imposed on a uniform, nationwide basis (p. 17). He also suggests that such requirements should be "modest," although he does not offer any basis for distinguishing between the obligations that should be imposed on the ILECs and the additional obligations that should be borne only by the cable operator. However, even with uniform nationwide requirements, cable operators in areas with more stringent requirements than those imposed nationally would still face the same types of artificial competitive disadvantages that we have discussed above. Finally, it is interesting to note that Hazlett's views on the benefits of asymmetric franchising regulation stand in stark contrast to arguments Verizon and other ILECs have made in other venues for symmetric regulation. For example, BellSouth has argued that "both law and policy require that competing providers be subject to the same obligations regardless of the technologies that they use." [40] In addition, a Verizon executive recently noted that "It's not logical to treat different sectors of the communications marketplace differently based solely on what technology they use, when we're all delivering the same services."[41]

[40] 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 October 27, 2004, p. 21.

[41] "Cable Operators Rush Services to Keep Edge," *Wall Street Journal*, July 21, 2005, p. B1.

V. Asymmetric Regulation Would Invite Inefficient Entry

48. Hazlett's prescription would place the cable operator at an artificial competitive disadvantage in its rivalry with the new wireline entrant. In these circumstances, the entrant would be able to attract subscribers even if it were a less efficient provider of video services. The resulting loss in economic welfare is nowhere addressed in Hazlett's analysis.

49. Abiding by its franchise requirements elevates a cable operator's costs. This could permit an ILEC with higher costs than the cable operator but without the same franchise obligations to offer the same video service at lower prices, or to offer better service at the same price. That, in turn, would permit the ILEC to attract subscribers that it would not be able obtain but for the regulatory disadvantage faced by cable operator. Asymmetric franchising regulation thus provides erroneous entry signals that could result in video services being produced at a higher-than-necessary resource cost.

50. In sum, the asymmetric franchising regulation proposed by Hazlett would create a price umbrella for inefficient entrants. Franchise obligations that increase the costs of the cable operator but not those of the ILEC entrant would send the wrong economic signals to new entrants by making profitable what otherwise might be uneconomic and inefficient entry. Hazlett has not has accounted for this cost in his analysis.[42]

[42] Although the cost of inefficient entry may be mitigated if the cable operator is permitted to respond by lowering its prices, that would still adversely affect the operator's ability to meet its franchise obligations.

Attachment D

NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
NEAL M. GOLDBERG GENERAL COUNSEL
1724 MASSACHUSETTS AVE N.W. WASHINGTON, D.C. 20036-1903
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July 29, 2005

Ms. Donna Gregg
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-36 ("IP-Enabled Services")

Dear Ms. Gregg:

On June 22, 2005, Daniel Brenner, Senior Vice President, Law and Regulatory Policy of the National Cable & Telecommunications Association ("NCTA"), Michael Schooler, NCTA Deputy General Counsel, and I met with you and members of your staff to discuss issues raised in the above-referenced docket.

In that meeting we discussed the Petition for Declaratory Rulemaking filed by SBC Communications, Inc. ("SBC") on February 5, 2004. We reiterated the views in our comments filed in the above-referenced docket that (1) the Commission should focus on IP voice services in that docket; (2) there is virtually no record in that docket on which to base a decision on the regulatory framework for IP video services; and (3) the IP video services proposed by SBC fall squarely within existing definitions of Title VI.

It was suggested at that meeting that a submission detailing the reasons why the IP video services proposed by SBC and other telephone companies are subject to Title VI would be useful. Attached is a Memorandum which addresses that issue. This Memorandum demonstrates that IP video services proposed by these companies are Title VI-defined "cable services" and the facilities they propose to use are "cable systems," making them "cable operators" subject to Title VI's regulatory scheme.

If you have any questions, please contact me.

Sincerely,

/s/ Neal M. Goldberg
Neal M. Goldberg

Attachment

cc: Marlene Dortch (for inclusion in WC Docket No. 04-36)
Tom Navin
Deborah Klein
Bill Johnson
Rick Chessen
Mary Beth Murphy
Natalie Roisman
John Norton
Barbara Esbin

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.

<u>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</u>. 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 <u>THE SAME AS CABLE SERVICES AND CABLE SYSTEMS</u>

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."

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[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

[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)

[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.

[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.*"

[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

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36

RESPONSE OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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November 1, 2005

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36

RESPONSE OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby responds to SBC's *ex parte* filing entitled "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services."[1] SBC's *ex parte* responded to an earlier NCTA filing in this docket which demonstrated that, as a matter of law, SBC's proposed video service is subject to the requirements of Title VI of the Communications Act.[2]

I. INTRODUCTION AND SUMMARY

Much of the SBC *ex parte* filing reprises policy arguments intended to justify the award of unwarranted regulatory advantages over existing cable operators. Those claims have already been thoroughly addressed and rebutted, most recently by NCTA in its Reply Comments in the Video Competition Notice of Inquiry.[3] We confine this response to SBC's newly-articulated legal theories. Those legal theories are as flawed as SBC's policy arguments. Under existing

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[1] Letter to Marlene H. Dortch, Secretary, FCC, from James C. Smith, WC Docket No. 04-36, Sept. 14, 2005.

[2] "Applicability of Title VI to Telco Provision of Video Over IP," Attached to Letter from Neal M. Goldberg, NCTA, to Donna Gregg, Chief, Media Bureau, WC Docket No. 04-36, July 29, 2005 ("NCTA Legal Memorandum").

[3] Reply Comments of NCTA, MB Docket No. 05-255 (filed Oct. 11, 2005). NCTA has fully explained that, contrary to SBC's arguments, obtaining local franchises will not impede SBC's entry into video; that there is no need to give SBC unfair regulatory advantages in order to boost competition in an already competitive marketplace; and that reliance on "pre-existing" rights of way as a method to end-run franchising is not supportable.

law, SBC will be a cable operator providing cable service over a cable system, and hence subject to the requirements of Title VI applicable to – and adhered to by – all providers of cable service, large and small, existing operators and new entrants.

In its filing, SBC attempts to explain why, in its view, telephone companies that distribute multichannel video programming to subscribers over wires using public rights-of-way are not subject to the Title VI regulatory regime. SBC bases its case against the need to comply with cable franchising and other obligations primarily on its announced plans to use Internet protocol ("IP") technology and switched architecture to provide multichannel video programming. As explained below, incorporating these technical and design elements – features which cable operators are deploying today or plan to deploy – into SBC's system architecture does not create a loophole that would allow SBC to ignore the Title VI requirements that apply to any other provider of multiple channels of video programming by wire.

First, SBC has purposely chosen to say almost nothing about what its service will look like because it knows that it is no different in any statutorily significant way from what traditional cable operators do and will be doing. SBC will be providing mostly traditional linear programming services in real time. As was recently noted, "[i]n the near term, SBC's video service won't look very different than plain old cable service."[4]

[4] "SBC Climbs the Video Mountain," *Special Report*: Telco IPTV, MULTICHANNEL NEWS, October 17, 2005, at 41. If and when SBC rolls out its service, "'it's not going to have all the future entertainment kind of stuff – some of which we've talked about, some of which frankly the technology is there to do...' says Microsoft TV director of marketing Ed Graczyk, whose company is supplying the software that will make SBC's video product tick." *Id.*

In this sense, the service is "hypothetical" since it hasn't been deployed and may never be.[5] The Commission faced similar circumstances in denying a recent SBC petition seeking forbearance from Title II requirements for its "IP Platform Services." Among other reasons given for denying the petition, the Commission observed that granting it might lead to other petitions "posing hypothetical questions regarding real or imagined services."[6] In that case, the Commission noted that "while [SBC's] IP networks are not imaginary or theoretical, the company has yet to roll them out to consumers."[7] The same can be said for its video plans.[8]

But, in another sense, the elements of the proposed SBC service – with its IP-based transmission, switched digital video, and interactive application elements – are not hypothetical, because those features are being deployed by cable operators today. As noted in the NCTA Legal Memorandum, cable operators are employing IP technology in their systems, deploying switched digital technology, and offering interactive operations *now*.[9] But that is yet another reason demonstrating that SBC's *proposed* service is no different – and should be subject to the same

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5 *See* Testimony of Scott Cleland, Chief Executive Officer, Precursor, Before the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights, October 19, 2005. ("We have been questioning SBC's commitment to video because we have not seen much hard evidence that video is a true competitive priority outside of their press releases. There has been little hard evidence that they are seriously spending or digging to fiberize for video a la Project Lightspeed.")

6 Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, 20 FCC Rcd 9361, 9365 (¶ 11 and note 27).

7 *Id.* at note 27.

8 *See* "SBC Climbs the Video Mountain," *Special Report*: Telco IPTV, MULTICHANNEL NEWS, October 17, 2005, at 41 ("The product hasn't yet been field tested with consumers.")

9 NCTA Legal Memorandum at 1, 13-14. *See e.g.*, "Who's calling? Just check the television screen," SAN ANTONIO EXPRESS-NEWS, September 29, 2005 ("Time Warner next month will flash caller ID on customers' TV screens when they get a phone call.... The on-screen caller ID concept is something San Antonio-based SBC has touted as a perk of the video-over-Internet television service it plans to launch….."); "Time Warner Boosting Capacity of Network," AUSTIN AMERICAN-STATESMAN, July 7, 2005, at C1 ("Time Warner Austin is installing new video switching technology to bolster the capacity of its Central Texas cable network."); "Inside Time Warner's SBC Trial," MULTICHANNEL NEWS, June 27, 2005, at 53 ("Time Warner Cable said it planned to roll out switched broadcast video in several markets this year, with full MSO deployments scheduled for 2006 and 2007. *See also*, note 33, *infra*.

regulatory regime – as cable operators deploying or planning to deploy the features SBC touts in its paper.

Second, SBC is wrong in arguing that Section 651 of the Communications Act does not limit telephone companies to only four entry options: common carriage, OVS, wireless or Title VI cable operations. It presents no evidence that Congress permitted any further options such as it proposes, nor could it because none exists.

Third, SBC will be providing "cable service" as defined in Title VI. SBC's relies on the fact that it proposes to use "switched" service, purportedly taking it out of the definition of "cable service." But the "switched" nature of its proposed service does not take it outside of the definition of a Title VI cable service, which includes "subscriber interaction ... required for the selection or use" of video programming. Nor does the proposed "integration" of services to be offered by SBC change the fact that it will be offering cable service as at least one of those services. Whatever else it may say, it is clear that SBC will be offering linear video programming channels to subscribers, just as cable operators do today.

Fourth, SBC will be providing a cable service over a Title VI "cable system." SBC's proposed facilities are not exempt from the definition of "cable system" on the theory that they will be used "solely to provide interactive on-demand services." SBC's service, even as proposed, will not consist *solely* of interactive on-demand service since at least some, if not most, of its programming will be "prescheduled by the programming provider."

II. SBC WILL BE PROVIDING "CABLE SERVICE" OVER A "CABLE SYSTEM"

A. Congress Opened the Way for Telco Entry into Video and Delineated its Regulation in Section 651

NCTA's July 29, 2005, filing detailed the four ways Congress specifically envisioned for phone companies to enter the video business. SBC now argues that these provisions were not intended to be the exclusive means for regulating video programming provided by a telephone company. It argues that it can be a multichannel video programming distributor ("MVPD") subject only to those parts of Title VI that apply to MVPDs *other* than cable operators.

But there is no such loophole. A subsection of Section 651 entitled "Cable Systems and Open Video Systems"[10] provides that a telephone company entering the video business on any basis other than as a common carrier or radio-based provider will be regulated as *either* a cable system or OVS provider: "to the extent that a common carrier is providing video programming to its subscribers *in any manner*" (other than a radio-based or common carriage system), it is "subject to the requirements" of Title VI (unless it is an OVS system).[11]

SBC seems to believe that is can define itself as an "MVPD" subject to certain provisions of Title VI while avoiding regulation as a "cable system" under that title.[12] But this is an attempt to manufacture a new regulatory appellation out of whole cloth. Virtually every Title VI obligation (other than those that expressly apply to OVS or LECs) applies to entities that are

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[10] 47 U.S.C. § 571(a)(3).

[11] *See* Entertainment Connections, Inc, 13 FCC Rcd 14277, 14298 (1998) ("Section 651 of the Communications Act sets out four options for the provision of video programming services provided by common carriers"), aff'd sub nom City of Chicago v. FCC, 1999 F. 3d 424 (7th Cir. 1999), petitions for rehearing denied, 2000 U.S. App. LEXIS 4449 (7th Cir. 2000); *see also* Metropolitan Fiber Systems/New York, Inc., 12 FCC Rcd 3536, 3555 (1997)(Cable Service Bureau)("[T]he 1996 Act eliminated video dialtone as a common carrier offering and set out four options for video programming services provided by telephone companies").

[12] SBC e*x parte* at 14 ("[S]BC accepts that, as a MVPD, it is subject to those obligations in Title VI applicable generally to other MVPDs"). It lists as those obligations compliance with closed captioning, retransmission consent and EEO requirements. *Id.* at 13.

cable operators or providing cable service or using cable systems.[13] SBC offers a handful of examples of requirements applicable to all MVPDs, but either they are not found in Title VI or they apply only to cable operators: closed captioning mandates are found in Title VII (Section 713); retransmission consent requirements are found in Title III (Section 325); and EEO mandates in Title VI expressly apply to entities "engaged primarily in the management or operation of any cable system." Fundamentally, this is an attempt by SBC to avoid all of the obligations of Title VI while preserving a benefit available to non-cable operator MVPDs – access to vertically integrated satellite programming under Section 628. In legal parlance, this is called "having your cake and eating it too." In summary, SBC presents no evidence – nor could it – that Congress' decision in Section 651 to subject telephone companies to Title VI (if they did not choose one of the other three options) meant that they should have none of the obligations but all of the benefits of that provision.[14]

B. SBC Will Be Providing Cable Service Under Title VI

Even assuming *arguendo*, that Section 651 is at all ambiguous about the intended regulatory treatment of telcos' video service, SBC's arguments about why it cannot be regulated as a cable operator under Title VI are without merit. SBC asserts that, while it will be providing

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[13] The only Title VI requirements that apply to MVPDs generally are Section 616 (program carriage agreements) and Section 629 (competitive availability of navigation devices).

[14] The Act's treatment of OVS provides additional evidence that Congress did not intend to permit telcos to evade essentially all of the regulatory obligations in Title VI. Using the traditional tools of statutory analysis, which include examination of the statute's text, legislative history, and structure, as well as its purpose, is instructive. *See* Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (1997). For example, Section 653 was added along with Section 651 in the 1996 Act. Under Section 653, in exchange for relinquishing control over two-thirds of the activated channel capacity and taking on certain other obligations that differ from those that apply to cable operators, *see* 653(b)(1), Open Video Systems are deemed eligible for "reduced regulatory burdens" and subjected to a subset of the Title VI provisions that apply to cable operators. This construct would make no sense if Congress intended to allow the telcos to obtain much more substantial relief from cable operator regulations than was given to OVS providers without having to do any of the things required of OVS providers. SBC's approach would give it, not "the best of both worlds," but "better than the best of both worlds."

multichannel video programming service, it will not be providing "cable service"[15] to its customers. It rests this interpretation on the "switched" nature of its proposed video programming, which it alleges takes it outside the "one-way transmission" element of the cable system definition.[16] SBC also maintains that it will be providing other "applications" over the same facility that will utilize IP technology, which, it suggests, somehow immunizes its video service from cable regulation.[17] As NCTA's Legal Memorandum explained, though, "neither IP nor switching makes a difference in the regulatory character of the service."[18]

As an initial matter, SBC cannot describe what its service looks like, because it is not yet deployed, except in press releases. While SBC criticizes NCTA's memo as being "built upon supposition,"[19] it is difficult to do anything but "suppose" when SBC's own filing is replete with caveats and hedges about the nature of its service offering.[20] Under these circumstances, it is a waste of the Commission's time to address the questions raised by SBC about modifying its

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15 "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.

16 SBC *ex parte* at 15.

17 *Id.* at 20.

18 NCTA Legal Memorandum at 13.

19 SBC *ex parte* at 19. Without a trace of irony, SBC elsewhere asserts that "much of what cable incumbents say they are going to do seems like ephemera." *Id.* at 21.

20 *See*, *e.g.*, *id*, at 12 ("Certain of the content offering in connection with the IP-enabled video service that SBC will offer, for instance, will *likely* qualify as 'video programming'")(emphasis supplied); *Id.* at 17 ("Even though some features of IP-enabled video will have the look and feel of standard cable services…, the service predominantly is something else. SBC's service involves interactive features that go beyond those 'required' simply to access channels. It is *designed ultimately* to permit all end users to tailor much of the content and viewing experiences….")(emphasis supplied); *Id.* ("Project Lightspeed video … *ultimately* is designed to permit end users to connect to the Internet…."); *Id.* at 19 ("*Eventually*, this interactive two-way capability will allow SBC to offer a service that will enable subscribers … [to have] a new dimension of subscriber interaction.")(emphasis supplied).

regulatory regime to accommodate a service that it is barely able to define, let alone deploy.[21] Even if SBC's proposed service capabilities are ever deployed, nothing it has described to date takes it outside the definition of "cable service."

For example, SBC tries to make much of its plan to use a "switched" service by which a customer receives only the particular program he chooses at a given time. But that does not transform a "one-way" transmission into a two-way, wholly unregulated service, as SBC claims. In arguing that its switched system "involves regular two-way communications and interaction between individual subscribers and the network,"[22] it presents a distinction without a difference. As a practical matter, an SBC customer will not know that he is "interacting" with the SBC network when he is switching channels; surfing channels on the SBC network will be no different than surfing channels on a competing cable system. In either case, when the button for a channel change is pressed on the remote, the new channel is what will be delivered to the viewer's television set. The service the SBC customer supposedly will get appears to be the same thing that today's cable customer gets – delivery in real time of a single linear channel to a television set.

As a legal matter, this functionality fits squarely within the definition of "cable service" which has always included "subscriber interaction ... required for the selection" of video programming even if it is otherwise transmitted to subscribers on a "one-way" basis.[23] As the

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[21] *See, e.g.*, Petition of SBC Communications Inc. for Forbearance From Application of Title II Common Carrier Regulation to IP Platform Services, 20 FCC Rcd. at 9365 (refusing to rule on "hypothetical questions regarding real or imagined services").

[22] SBC *ex parte* at 16.

[23] 47 U.S.C. § 602(6)(B).

legislative history of the Cable Act makes clear, a simple menu selection from an SBC-provided line-up of linear program channels – which is all that an SBC customer would be doing by changing channels – does not remove the transmission of video programming from the definition of "cable service."[24]

This conclusion is bolstered by Congress' decision in the 1996 Act to broaden the definition of "cable service" to include interaction required to "use" as well as "select[]" video programming. The addition of "use" was intended to reflect the "evolution of cable to include interactive services such as game channels and information channels" and to make clear that subscriber interaction required for the use of "video programming" is cable service.[25] The definition of "cable service" as amended by the 1996 Act plainly encompasses the type of interactivity that SBC says its system will offer.

Commission precedent is consistent with this view. The Commission's *2002 Cable Modem Declaratory Ruling* explained that the components of an interactive *cable* service are: (1) operator control in selecting and distributing content to the subscriber and (2) availability of content to all subscribers generally.[26] SBC's hypothetical service – were it ever to be deployed – would satisfy these criteria. So far as can be gleaned from SBC's filings, it intends to negotiate programming contracts with video programming providers and to choose which programming content to make available to its customers.[27] In this respect, it is no different than any other cable operator who selects the array of video services to offer its customers. And SBC's customers

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[24] H. Rep. No. 98-934, 98th Cong. 2d Sess. 43 (1984).

[25] H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 169 (1996).

[26] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4836 (2002).

[27] *See, e.g.*, SBC Comments, MB Docket No. 05-255 at 19-20 ("SBC is currently in the midst of negotiations – and hopes it will be able to enter into commercial arrangements – for access to programming.").

will be no different than any other cable customers in choosing from that video programming lineup though interaction with the system.

SBC admits that, as to its video product, "some features of IP-enabled video will have the *look and feel of standard cable services*..."[28] But it argues that some services that it may "eventually" or "ultimately" make available to subscribers will transform its offering into predominantly something other than traditional cable service.[29] And SBC says that "ultimately" its service might permit "end users to tailor much of the content and viewing experiences, or engage in transactions."[30] Were that day ever to arrive, perhaps SBC would have some basis to ask the Commission to consider whether its service is something other than cable service. But for now, things that "eventually" or "ultimately" might happen are no basis for Commission action.

SBC concedes that "all programming arrangements and service components will... be a function of arrangements with content owners and applicable copyright protections."[31] SBC also describes various possible interactive uses of its system – such as selecting different camera angles, requesting additional information while watching a television show, using enhanced picture-in-picture, or using interactive "triggers."[32] There is nothing inherently transformative, or especially innovative, about these types of services, which have been in development for years[33] and which have never been viewed as inconsistent with the definition of "cable service."[34]

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28 SBC *ex parte* at 17 (emphasis supplied).

29 *Id.* (*citing Cable Modem Declaratory Ruling* at ¶68).

30 *Id.*

31 *Id.* at 20 n.52.

32 *Id.* at 20.

33 For example, Cablevision currently offers many of these features. *See* http://www.io.tv/index.jhtml?pageType=enhanced_tv (describing some of the interactive features offered over

SBC also argues that "voice, video and data will be offered over a converged IP-Enabled network,"[35] and suggests that the use of IP-enabled video somehow warrants different treatment than any other video programming. But SBC's potential incorporation of IP technology into its system architecture, and its bundling video with other products, does not alter the regulatory treatment of the underlying video programming service.[36]

Both the Communications Act and FCC precedent express a strong preference for technology-neutral approaches to regulatory decisions.[37] Verizon agrees with this view as well. *See* Verizon Comments, MB Docket No. 05-255, at 28 (Sept. 19, 2005) (stating that "the fact that a service is or is not IP-based has little bearing" on whether it is subject to franchising requirements under the Communications Act).

Cablevision's network, including multiple camera angles selected by the subscriber and ability to request information about content and engage in transactions).

[34] *See e.g.*, Application for Consent to Transfer Control of Licenses from Comcast Corp. and AT&T Corp., 17 FCC Rcd. 23246 at ¶ 18 (2002) (describing Comcast's interactive television experiments); Non-discrimination in the Distribution of Interactive Television Services Over Cable, 16 FCC Rcd. 1321 (2001) (Notice of Inquiry on Interactive Television Services).

[35] SBC *ex parte* at 20.

[36] SBC attempts to blur the difference between Internet-based video providers, like Akimbo and MovieLink, and its own facilities-based, wireline video services and claims NCTA's argument would lead to web-based video services being regulated under Title VI. *Id.* at 21-22. But NCTA never made such an argument. We merely noted in passing that, from a customer's perspective, the *content* provided by those web-based services is similar to the content delivered by cable systems. NCTA Legal Memorandum at 8. SBC will not be offering an Internet-based video service, nor, as far as has been disclosed, will its video service touch the public Internet. Rather, it will be using a wired network using public rights-of-way, and apparently, intends to use IP merely as a transmission method to distribute video over its proprietary network.

[37] The most recent example of the Commission's commitment to "treating like services alike" and not to discriminate on the basis of technology appears in the *Wireline Broadband Order*. There, the Commission spoke of "regulating like services in a similar functional manner," and "seeking to create a regime that is technology and competitively neutral." It also emphasized the need to focus on "the nature of the service being offered to consumers," not "the type of facilities used," and how "regulat[ing] like services in a similar manner" promotes market-based investment decisions, not ones driven by regulatory disparities. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, released September 23, 2005, at ¶¶ 1, 3, 16 n.44, & 45.

Moreover, what SBC appears to be describing is far from a fully integrated offering. It seems likely that SBC will offer subscribers a choice of voice, wireline telephone, data, and wireless services in combination or on a standalone basis. Consequently, a subscriber that only takes SBC's basic video offering will not have access to any of the voice and data applications SBC describes. The likelihood of such a result for a substantial number of SBC's customers reinforces rather than mitigates the applicability of the regulatory regime carefully established by Congress. So the presumed "integration" of services to be offered by SBC does not change the fundamental fact that it is offering cable service as one of its services.

Finally, whatever the regulatory status of SBC's proposed interactive features may be, the additions of these drawing board bells and whistles to its video offerings cannot change the fact that SBC in the main will still be providing linear video programming channels to subscribers, just as cable operators do today. Nothing about the interactive applications that SBC described can justify reading out of the Cable Act the requirements to obtain a franchise, comply with the must-carry laws, and adhere to the other requirements that apply to any other cable operator who provides multiple channels of video programming to customers.[38]

[38] SBC also tries to find support for its position in the FCC's *Vonage Order*, 19 FCC Rcd. 22404 (2005). SBC *ex parte* at 18-19. But its reliance is misplaced. The *Vonage Order* addressed jurisdiction over IP *voice* services (and only a limited subset of those), not all IP-enabled services. The FCC's passing reference to "even video" in that decision (*Vonage Order*, 19 FCC Rcd. at 22424) was in the context of reference to *ancillary* video features of Vonage-like services (*e.g.*, video e-mail or video conferencing). There is no support for SBC's broader reading of the Order (SBC *ex parte* at 18) as preempting state regulation of "*any* other IP-enabled service" with particular characteristics. *See also* NCTA Legal Memorandum at 24-26.

C. SBC Will Be Providing Cable Service Over a Cable System

In addition to arguing that it is not providing "cable service," SBC asserts that it will not be distributing its video programming over a "cable system."[39] Among other things, it claims that its facility falls outside the definition of a "cable system" because it allegedly fits within the exemption applicable to common carrier facilities used to transmit video programming "*solely to provide interactive on-demand services.*" Importantly, the statute defines "interactive on-demand services" to mean "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.*"[40] SBC cannot shoehorn its cable services into this exemption.

First, SBC does not even pretend to demonstrate that its facilities will provide *solely* interactive on-demand services.[41] It concedes that its ability to offer "interactive on-demand" services will depend on its contractual arrangements with programming providers, but it does not suggest that the programming will in fact be any different than what is offered by traditional franchised cable operators.[42] And if SBC intends to retransmit the signal of any television broadcast station pursuant to the copyright compulsory license, that programming is clearly prescheduled by the broadcaster, not SBC. Indeed, SBC would lose the compulsory license if it

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39 SBC *ex parte* at 23.

40 47 U.S.C. § 522(12) (emphasis supplied).

41 SBC apparently takes the view that *all* of its video programming services qualify as "interactive on-demand services" since all channels will be delivered on a switched basis – *i.e.*, only when subscribers ask the network for them. This is a strained reading of the statute. Since all channels in a switched environment are delivered to subscribers in this fashion, it seems unlikely Congress would have added the phrase "on an on-demand, point-to-point basis" unless it meant to distinguish between different types of programming. The most logical reading of the statute – and one that is consistent with industry practice – is that the statutory provision was distinguishing between on-demand and linear programming. Since SBC will be offering linear programming and not solely on-demand content, this exemption is inapplicable to its core video programming service.

42 SBC *ex parte* at 24-25 and note 70.

did *not* transmit this programming on the schedule constructed by the broadcaster.[43] *All* linear programming channels are, by definition, "prescheduled" by the programmer (that is, if the viewer tunes to the local CBS affiliate at 7 p.m. on Sundays, she will receive *60 Minutes*). SBC cannot reconcile its intention to carry linear broadcast and cable networks, all of whose programming is prescheduled by the program provider, with its assertion that it offers only "interactive on-demand" services.

As a last resort, SBC claims that all that matters for regulatory purposes is its system architecture.[44] But, the Act contains no suggestion that the provisions of Title VI that apply to a telephone company magically fall away based on some other theoretical technical capabilities of its cable system. The focus on the exception to the definition of a cable system is whether "the facility *is used* in the transmission of video programming directly to subscribers"[45] and not on whether it *can* be used for something else that is not being provided to customers.

CONCLUSION

For the foregoing reasons and for the reasons explained in NCTA's July 29, 2005 Legal Memorandum, what SBC describes as its proposed video service will be a "cable service" provided over a "cable system" by a "cable operator." Just like all other cable operators, SBC is subject to requirements such as franchising, mandatory carriage, and the host of social obligations contained in Title VI. To the extent that SBC wishes to avoid those requirements, Congress has given it other explicit alternatives: common carriage, OVS and wireless. SBC's

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[43] 17 U.S.C. § 111. To qualify, a cable system must simultaneously retransmit the programming transmitted by a broadcast station. *Id.*, § 111(f).

[44] SBC *ex parte* at 25 and note 70.

[45] 47 U.S.C. § 522 (7)(c).

tortured effort to wring a new regulatory category out of the Act simply will not withstand scrutiny.

If Congress determines there is a need to revisit Title VI to take account of growing competition, it can do so. And if it does so, we believe a comprehensive review of the entire regulatory regime – as it applies to existing operators, overbuilders, and phone companies – is in order. What is out of order is SBC's effort to make the Commission complicit in its efforts to undermine the intent of Congress.

Respectfully submitted,

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