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September 14, 2005

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: *IP-Enabled Services*
WC Docket No. 04-36

Dear Ms. Dortch:

Attached please find a copy of a document prepared by SBC entitled "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services," which sets forth in detail the reasons IP-enabled video services are not and should not be subject to the legacy franchise requirements of Title VI. In particular, it demonstrates that the services offered over SBC's Project Lightspeed network will not be "cable services" provided over a "cable network" as those terms are defined in Title VI.

If you have any questions, please do not hesitate to contact me.

Sincerely,

James C. Smith

CC: Chairman Kevin Martin
Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Michelle Carey, Sr. Legal Advisor
Russell Hanser, Sr. Legal Advisor
Jessica Rosenworcel, Sr. Legal Advisor
Scott Bergmann, Sr. Legal Advisor
Thomas Navin, Chief, Wireline Competition Bureau
Donna Gregg, Chief, Media Bureau
Samuel Feder, General Counsel

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

INTRODUCTION

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

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

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

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

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

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

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

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

[4] 47 U.S.C. § 521, *et. seq.*

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

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

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[5] 47 U.S.C. §§ 522(5), (6) and (7).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] 47 U.S.C. § 544(b)(1).

[24] *Id.* §§ 541(b)(3)(D), 531(b).

[25] *Id.* § 552(a)(2).

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

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

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

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

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

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

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

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

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

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

[30] 47 U.S.C. § 522(20).

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

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

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[31] 47 U.S.C. § 522(13).

[32] 47 C.F.R. § 79.1.

[33] 47 U.S.C. § 325.

[34] 47 U.S.C. § 554.

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

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

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

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

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

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

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

> (A) the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service[.][38]

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

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

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

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

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

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

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

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

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

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

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

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

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

[44] *Vonage Order* at ¶ 4.

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

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

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

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

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

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

Francisco that houses his family's digital pictures to display them on his customized photo channel; obtain Internet content (e.g., stock quotes, local weather, etc.) from a SBC Yahoo! Internet server in Los Angeles to be viewed on the TV screen; and communicate with control equipment in Topeka to update parental controls.

The *NCTA Memo* suggests nothing to alter this analysis. *First*, the *NCTA Memo* is built upon supposition, not a true understanding of SBC's service. Regarding the most fundamental component of IP-enabled video – its two-way nature – NCTA's equivocation is telling: "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*."[49] The import of this furtive hedge is that, in so far as the one-way transmission to subscribers *does not* characterize the service, it is *not* classified as a cable service.

But, it is precisely the two-way interactive aspect of the service that, from a Title VI classification perspective, distinguishes IP-enabled video from cable service.[50] And, it is what will allow SBC to provide unique features to its voice, video, and data services.[51] For example, SBC's network and service will be capable of allowing subscribers to tailor and manipulate much of the content they view. Eventually, this interactive two-way capability will allow SBC

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[49] *NCTA Memo* at 23 (emphasis added).

[50] *See, e.g.*, Peter Grant, *Air Battle: SBC vs. Verizon: The War of the TV Wannabees*, The Wall Street Journal, July 18, 2005 at R8 (". . . SBC is relying on the Internet technology with which viewers will request one channel at a time from servers, the same way Internet users access Web pages on their computers.")

[51] *Id.* ("Because of the technology it is using, SBC also will be able to much more easily integrate Internet and other TV services so customers will be able to, say, program their digital video recorders remotely over the Internet.")

to offer a service that will enable subscribers to (1) select different camera angles or audio feeds; (2) request additional content of particular interest to them, including "converged" Internet-sourced content that the customer can view and interact with on a real time basis while watching video programming content, such as obtaining sports score updates on screen from a secure network location with Internet-sourced data while a game is in progress; (3) use enhanced "picture-in-picture" and "mosaic" features for simultaneous viewing of multiple video streams; and (4) interact with "triggers" in video streams that would allow customers to vote in news polls and have collated voting data appear on screen in real time.[52] This new dimension of subscriber interaction—all of which is made possible by the fact that services are provided in the common IP format—goes well beyond that "required for the selection or use of . . . video programming or other programming service."[53] In addition, because voice, video and data will be offered over a converged IP-enabled network, each of those services ultimately will work together so that, for instance, an IP-enabled wireless phone could be used to remotely program a Digital Video Recorder ("DVR") or alter parental controls.[54]

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[52] SBC takes seriously the rights and interests of content owners. All programming arrangements and service components will, therefore, be a function of arrangements with content owners and applicable copyright protections.

[53] 47 U.S.C. § 522(6).

[54] NCTA's suggestion that SBC has argued in the past that the use of an IP backbone does not alter the nature of circuit-switched voice service is misleading at best (*NCTA Memo* at 5). SBC's IP-enabled video service does much more than employ IP transport; it utilizes IP technology end-to-end – including all the way to the subscriber – to enable a host of features that are not available over today's existing networks. Likewise, NCTA's reference to Ameritech's and SNET's obtaining of franchises in connection with their prior video deployments is wholly inapposite (*NCTA Memo* at 7). Those were deployments of traditional, one-way cable systems, not sophisticated IP-enabled broadband services and networks.

Second, the incumbent cable operators confuse the issue by claiming that they currently are providing on-demand services,[55] currently "employ" some IP technology in their systems,"[56] are "testing switched digital technology,"[57] and are "exploring the use of switched video."[58] Putting aside that much of what the cable incumbents say that they are going to do seems like ephemera,[59] NCTA's position is founded on a faulty premise, namely that cable incumbents will forever be subject to franchise regulation under Title VI regardless of the services they offer. This is not true. If the incumbent cable operators were to provide similar two-way interactive video services over a switched, IP-based architecture, then they too might have a viable claim that their services are not "cable services" subject to the franchising requirements of Title VI.

In the end, the paradigm that the cable incumbents propose would extend franchise regulation to virtually any provider of video services and thereby have far-reaching and negative consequences for the development of and continued innovation in advanced video services. According to the NCTA, any video service delivered over broadband, whether offered by a

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[55] *NCTA Memo* at 1.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] For instance, NCTA makes much of the increasing use of IP transmission in the cable platform. *NCTA Memo* at 14 n. 47. IP transport, alone, does not enable interactive, integrated features at the user level. Likewise, Time Warner Cable's "IPTV" trial in San Diego is not similar to the type of IP-enabled video service that SBC will deploy. Letter from Susan Mort, Counsel, Time Warner, to Marlene Dortch, Office of the Secretary, FCC, WC Docket No. 04-36 at 1 (July 7, 2005). That trial simply permits viewers to receive on their computer a "video simulcast" that is exactly the same programming they already receive over their television screen. Indeed, Time Warner executives view the PC as "just another outlet for video programming in the home." Ken Kerschbaumer, "TV on the PC Gets Real," *Broadcasting and Cable* (August 8, 2005), at 21.

facilities-based provider or a provider simply making use of another's facilities, would be just like cable programming, making the provider subject to the same franchise obligations as an incumbent cable operator.[60] Likewise, not only basic services, but also all forms of on-demand services would also be subject to cable franchise regulation.[61] Thus, the incumbents have set their sights on not just the telcos, but also the various independent providers, such as Internet video providers Akimbo, Netflix, MovieLink, and CinemaNow, not to mention a growing worldwide population of individuals offering Internet-based video services that grow technically more sophisticated and bandwidth-intensive all the time and, thus, increasingly rely on deployment of more advanced broadband networks.[62] In the world advocated by the cable incumbents, then, an Internet-based ("over the top" in NCTA parlance) video provider in Stockholm will have to obtain city-by-city franchise agreements before offering such a Web-

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[60] *NCTA Memo* at 8.

[61] *Id*.

[62] *See, e.g.*, Peter Grant, *Cable Operators Rush Services To Keep Edge*, WALL ST. J., July 21, 2005, at B1(describing offerings by start-ups like Akimbo, DaveTV, and Brightcove Networks); Kevin Maney, *Netflix Plans Blockbuster Future of Serving Movie Watchers*, USA TODAY, June 15, 2004; Scott Moritz, *Netflix, TiVo Plan Leaves Viewers Hanging*, THE STREET.COM, Oct. 1, 2004; AP Online, *TV May Soon Beam from Cell Phone Screens*, COMMUNICATIONS MOSAIC, Jan. 7, 2005 (noting that SmartVideo Technologies Inc. recently announced deals to deliver television programs from ABC News, CNBC, MSNBC, and The Weather Channel to cell phones equipped with Microsoft Corp.'s Windows Mobile operating system); Kathryn Balint, *For television via Internet, future is now*, SAN DIEGO UNION-TRIBUNE, July 13, 2005, at C1 (describing Time Warner Cable's service allowing customers to watch television over their computers' high-speed Internet connection as a "nationwide first for a cable company"); *see also* Jefferson Graham, *Websites Act More Like TV To Keep Users "Tuned In,"* USA TODAY, June 16, 2005, at 1B, *available at* 2005 WLNR 9530948; Nick Wingfield & Ethan Smith, *Apple Looks to Sell Videos — and Maybe iPods to Play Them*, WALL ST. J., July 18, 2005, at B1 (discussing Apple's possible plans to offer video service over iPods).

based service. Such cannot be the regulatory framework envisioned by Congress – and it certainly is not one that the Commission should validate.[63]

B. SBC's Service Is Not Delivered over a "Cable System."

SBC's planned IP-enabled video service also takes SBC outside the definition of "cable operator" for the independent reason that the service will not be provided over a "cable system," as defined by the Act.[64] First, a "cable system" is defined by the Act as a "facility . . . that is designed to provide cable service."[65] As discussed above, Project Lightspeed is designed to provide a very different service than incumbent "cable service." By definition, then, this network cannot be a "cable system."

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[63] NCTA seems to justify its startling policy overreach on the grounds of achieving "regulatory parity." *NCTA Memo* at 1-3. This is a red herring. The cable incumbents embrace their articulated brand of parity – new entrants treated just like the incumbents – only when it serves their specific competitive position in the market. They have argued passionately that Voice-over-IP new entrants – cable included – should face no legacy telephony regulation, even though, as the Commission itself has recognized, VoIP does in some ways resemble circuit-switched telephony. And this is the correct position, and one that SBC and other telcos support. But, now that VoIP has been freed from state entry regulation and their sinecure in the video market is threatened by determined new entrants, the cable incumbents have changed their tune, and argue that some unbounded notion of parity mandates that all new entrants into the video market should face the same legacy entry regulation that the cable companies did when they entered the market as monopoly providers. The Commission should, however, reject this posturing for what it is: The "rank, crass hypocrisy" of a legacy provider about to be jarred by the rumble of competition. Steve Forbes, *Fact and Comment*, Forbes.com (09.19.05), *available at* http://www.forbes.com/forbes/2005/0919/031.html).

[64] 47 U.S.C. §§ 522(5)-(6); 541(b)(1). With respect to the distribution of broadcast signals, SBC's actual service offering will be in compliance with applicable carriage and retransmission arrangements with broadcasters.

[65] *Id.* § 522(7).

In addition, the Act specifically provides that a telephone company's facilities would not qualify as a cable system when used solely for "interactive on-demand services."[66] The Act defines an interactive on-demand service as "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."[67] This definition "has virtually no legislative history explaining its intent or meaning."[68]

As explained above, Project Lightspeed is a switched, point-to-point network that will allow each subscriber to interact directly with the network and select specific programming, which the network then transmits to that particular subscriber. This is in contrast to the much less efficient point-to-multipoint broadcast-like transmissions employed by incumbent cable operators, which simultaneously send all their channels to all subscribers' homes at once, and rely on set top equipment to allow each household to view those channels it has selected.[69]

In the end, SBC's purpose in deploying this point-to-point, two-way network is to provide subscribers with maximum flexibility in customizing what they see and when they see it. This type of IP-enabled network will be unique in its ability, ultimately, to untether subscribers from the confines of a programmer's pre-set schedule. And, while the ultimate breadth and scope of such on-demand capabilities will be a function of a number of factors, including

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[66] *Id.*

[67] *Id.* § 522(12).

[68] *NCTA Memo* at 30.

[69] The cable industry does not appear to disagree that Project Lightspeed satisfies this aspect of the definition of an interactive on-demand service. *See NCTA Memo* at 30-31.

arrangements with content owners and other programming vendors, the key is that SBC's Project Lightspeed entails an infrastructure that will include the capabilities to satisfy the interactive on-demand exclusion found in the Cable Act.[70]

C. A Conclusion that IP-Enabled Video Services Are Not Cable Services Under Title VI Is Entirely Consistent with the Overriding Purposes of the Act.

The Telecommunications Act of 1996 was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[71] The Act's competitive goals apply to all markets, including specifically "[telephone company] entry" into video markets, by providing "multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services."[72] And, as Congress made clear in section 706, the policy of this nation is to *encourage* the deployment of advanced infrastructure and capabilities, including video services.

The Commission has repeatedly found that section 706 supports deregulatory policies that encourage deployment of the new, broadband fiber loops that will be the critical underpinning for most telecommunications carrier provision of both video programming and the

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[70] To be clear, the programming that a distributor offers, and the manner in which it can be viewed, is not just a function of technology; it is also a function of the rights of and business relationships with broadcasters and other programming vendors. Like any other distributor, SBC will be bounded by these rights and relationships, as well as copyright rules. Nonetheless, the architecture that SBC is deploying is designed to offer consumers—as well as the programmers and content owners—maximum flexibility.

[71] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

[72] H.R. CONF. REP. NO. 104-458, at 172, 177 (1996).

next generation of advanced telecommunications capabilities.[73] As the Commission has recognized, the application of burdensome obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure . . . in direct opposition to the express statutory goals authorized in section 706."[74]

The *Vonage Order* and *Cable Modem Order*, again, are concrete examples of the Commission effectuating these broad Congressional mandates. The *Vonage Order* clarified that new entrants into the IP-enabled services market are exempt from legacy "entry and certification requirements."[75] Similarly, the Commission clarified in the *Cable Modem Order* existing law does not impose on cable incumbents' cable modem services the *Computer II* access requirements imposed on ILECs when they provide competing DSL services. It found that imposing such legacy requirements might cause cable operators to "withdraw from the telephony market" and thus "undermine the long-delayed hope of creating facilities based competition in

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[73] *See, e.g.*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*,18 FCC Rcd. 16978, 17145 ¶ 278 (2003)("Triennial Review Order")(finding that new fiber broadband facilities are not covered by section 251(c) of the Act); Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), *Memorandum Opinion and Order*, 19 FCC Rcd 21496, 21512 ¶ 34 (2004) ("*Broadband Forbearance Order*"); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Order on Reconsideration*, 19 FCC Rcd 20293, 20297 ¶ 9 (2004) ("*BellSouth Order*").

[74] *Triennial Review Order* at 17149 ¶ 288; *see also id*. at 17145 ¶ 278 (noting importance of promoting fiber to the home because these enhance carriers' broadband capabilities).

[75] *Vonage Order* at 22416-17 ¶ 20.

the telephony marketplace and thereby seriously undermine the goal of the 1996 Act to open all telecommunications markets to competition."[76]

That same thoughtful approach must be applied to telco development of new broadband networks and entry into the video market. SBC's Project Lightspeed initiative, for one, is exactly the kind of broadband deployment that the Act was written to foster. This $5 billion capital project will enhance the broadband capabilities of SBC's existing communications network. The result, after the initial deployment phase that will include the addition of approximately 40,000 miles of fiber to SBC's networks, will be an advanced, IP-enabled broadband network available to approximately 18 million households in SBC's traditional 13-state service territory.

But entering the video services market to take head-on an entrenched, incumbent provider is a risky and costly enterprise – even under the best of circumstances.

Deploying new region-wide video networks, and acquiring the kind of programming packages and video libraries that are attractive enough to win subscribers away from established cable operators, both require enormous investment. SBC is making its substantial investment without the assurance of a single customer.[77] Just the uncertainty of disparate, costly franchise litigation

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[76] *Cable Modem Order* at 4826 ¶ 47. Cable incumbents also are exempt from any obligation to contribute to universal service when they provide cable modem services, while incumbent LECs do contribute on their DSL service — yet another disparity in the level playing field touted by the incumbent cable operators as the holy grail of fair competition. *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3054 ¶¶ 79-80 (2002).

[77] *See* Press Release, SBC Communications Inc., *SBC Communications To Rapidly Accelerate Fiber Network Deployment In Wake of Positive FCC Broadband Rulings* (Oct. 14, 2004), *at* http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=21427.

or onerous franchise requirements could delay, if not derail, deployment.[78] And the actual dollar costs of delay and onerous incumbent franchise requirements could simply overburden the already slim calculus underlying not only the offering of video services over advanced telecommunications carrier networks, but any deployment at all of such networks.[79]

The losers in that event, as Representative Boucher has noted, would be consumers, who would be deprived of a source of video competition that could help increase programming diversity and choice and create sorely needed cable pricing pressure.[80] More broadly, consumers would be at risk of losing a robust, innovative source of new advanced services, because without the ability to earn video revenues in the near future, telecommunications carriers are unlikely to be able to justify rolling out their new fiber networks at all; analysts generally agree that the ability to offer video is the critical component justifying the high cost of the fiber build-out.[81]

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[78] As the Commission has long recognized, "regulatory uncertainty . . . in itself may discourage investment and innovation." *Cable Modem Order* at 4802 ¶ 5; *see also* Notice of Proposed Rulemaking, *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*, 17 FCC Rcd 3019, 3022-23 ¶ 5 (2002); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1421 ¶ 25 (1994).

[79] To the extent municipalities themselves plan to enter the video market through public financing without the need for franchise agreements, the incentives for competitive entry would be even more diminished. *See, e.g.*, Carol Wilson, *Lafayette voters overwhelmingly OK fiber network*, TELEPHONY ONLINE, July 18, 2005 (recent vote in Lafayette, Louisiana approved construction of a city-owned fiber-to-the-home network to provide voice, data, and video); *Today's News*, COMMUNICATIONS DAILY, July 26, 2005 (Utah's UTOPIA consortium of 14 such municipalities building fiber broadband networks).

[80] Rep. Rick Boucher, *What Can Congress Do to Strengthen Telecommunications Laws?*, ROLL CALL, June 6, 2005.

[81] *See, e.g.*, A. Kilshore, Yankee Group, *Will Video Drive New Revenue Growth for Telcos?*, May 2004, at 11 (telephone companies "must commit to a video strategy today for it to drive revenue in the future"); *SBC, Verizon Challenge Cable at Supercomm*, TELECOM A.M., June 7, 2005 (noting Verizon

III. THE ACT SHOULD NOT BE READ TO IMPOSE REGULATORY REQUIREMENTS WHEN DOING SO WOULD NOT SERVE THE PURPOSE BEHIND THOSE REQUIREMENTS.

The Act's provisions should also be construed so as to avoid the imposition of regulatory requirements that have no relation to the purpose for which they were established. As noted above, among the most burdensome consequences of being characterized as a "cable operator" are the requirements of negotiating and obtaining thousands of franchises before a new telco entrant can enter the market competitively. Franchise regulation, however, has always been rooted in municipal governments' need to regulate and manage the use of public rights of way. Title VI itself thus expressly limits the obligation to obtain franchises to those facilities that use a "public right-of-way."[82] And the Act's legislative history confirms that "[t]he premise for the exercise of . . . local jurisdiction over cable systems continues to be [the] use of local streets and

comment that the "ability to offer video is a central premise of Verizon's broadband rollout"); Cynthia Webb, *SBC Bets $6 Billion Against Cable*, WASH. POST, June 23, 2004, *available at* 2004 WLNR 5856851 ("The launch of new services like video is vital for SBC and the other regional Bell companies, analysts said."); Buckingham Research Group, *Network Wars: Exploring Fiber's Rewards, Risks, Myths & Competitive Implications*, Nov. 30, 2004, at 23 ("In SBC's case, gaining a strong foothold in the video market will be absolutely critical to making the project [Net Present Value]-positive[.]").

[82] 47 U.S.C. § 522(7)(B). The Cable Act does preserve a very limited form of state or local authority to "license or otherwise regulate" facilities which serve only multiple unit dwellings under common ownership, control, or management, even without use of public rights of way. *Id.* § 541(e). However, even this limited preservation of authority for this discrete set of facilities did not extend to the preservation of *franchising* authority. Quite the contrary. It was intended not to disturb "the F.C.C.'s [prior] franchising preemption" for such facilities. *Guidry Cablevision v. City of Ballwin*, 117 F.3d 383, 385 (8th Cir 1997) (citing House report endorsing FCC's prior ruling). That FCC decision had preempted "state or local government *entry* regulation of SMATV," while preserving local "zoning or public safety and health" or other similar authority. Earth Satellite Communications, Inc., *Memorandum Opinion, Declaratory Ruling, and Order*, 95 F.C.C. 2d 1223 ¶¶ 19, 21 (1983)(emphasis added).

rights of way."[83] Indeed, in federalizing the franchising requirement, Congress incorporated the Commission's own pre-Cable Act premise for municipal regulation: "that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve."[84]

Both the Commission[85] and the courts[86] also have repeatedly reaffirmed that franchising authorities' jurisdiction is implicated only insofar as a service uses the public rights of way. In deciding that "video dialtone" services offered by telephone companies should not be subject to cable franchise regulations, for example, the Commission stated:

> In enacting Section 621 of the Cable Act, Congress was primarily concerned with the use of public streets and rights-of-way by cable television operations and the ability of state and local entities to regulate such use. In contrast to cable operators, local telephone companies already receive authorization to use the public rights-of-way pursuant to

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[83] S. Rep. No. 97-518, at 5 (1982).

[84] Report and Order, *Definition of a Cable Television System*, 5 FCC Rcd 7638, 7639 ¶ 10 (1990).

[85] *See, e.g.*, Motion for Declaratory Ruling, Entertainment Connections, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 14277, 14301, 14307-08 ¶¶ 52, 62 (1998) (cable franchise requirement "inextricably linked to the use of public rights-of-way"); *Cable Modem Order* at 4750 ¶ 104 (citing *TCI* Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 21396, 21429 ¶ 78 (1997) ("We are concerned that State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs.").

[86] *See National Cable Television Ass'n v. FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994)(upholding FCC determination that the Cable Act did not subject video dialtone to duplicative franchise regulation); *City of Chicago* 199 F.3d at 433 (affirming FCC ruling that SMATV operator qualified for franchise exemption because it did not use a right of way); *Century Federal Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1477-78 (N.D. Cal. 1986) (*quoting Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985)) (invalidating municipalities' exclusive franchise for failure to demonstrate nexus with need for "minimizing disruption" and "maintaining public thoroughfares"); *City of New York v. Comtel, Inc.*, 57 Misc.2d 585 (N.Y. Sup. Ct. 1968) (satellite content provider distributing its signal through telephone lines does not use public rights of way and thus not subject to city's franchise requirement); *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 656-57 (N.D. Ohio 1968) (city had no authority to impose franchise where operator "is not stringing wires or digging ditches or erecting poles so that the general problems which these activities present to the local residents are not present").

> common carrier regulation. Consequently, there is no basis to infer that Congress intended that local telephone companies secure a cable television franchise to use the same rights of way they are already authorized to use.[87]

Similarly, in upholding the Commission's decision against a challenge by NCTA, the D.C. Circuit held that it is the "use of public rights of way" that "provide[s] a key justification for the cable franchise requirement."[88]

In the case of SBC's proposed IP-enabled video service, the rights of way premise for municipal franchise regulation is wholly inapplicable. As the New York Public Service Commission has recently acknowledged,[89] municipalities (and state governments) *already* closely oversee telecommunications carriers' use of local rights of way when they use those rights of way to offer telecommunications services and information services. Telecommunications carriers are subject to a host of permitting requirements and rules that dictate how, when, and where they can deploy facilities in the public rights of way and that are

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[87] Telephone Company-Cable Television, Cross-Ownership Rules, Sections 63.54-63.58, *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069, 5072 ¶ 11 (1992); *see also id.* ¶ 15 (concluding that franchise requirements would improperly involve franchising authorities in the review of proposals to build common carrier facilities); *id*. ¶ 22 (franchise regulation redundant because common carrier regulations "incorporate the same concerns about public safety and convenience and use of public rights-of-way that provide a key justification for the cable franchise requirement"); *see also* Implementation of Section 302 of the Telecommunications Act of 1996, *Order on Remand*, 14 FCC Rcd 19700, 19705 ¶ 9 n.29 (1999) (questioning whether municipalities should be permitted to impose franchising obligations on an OVS provider that "already has a franchise as a telephone company").

[88] *National Cable Television Ass'n*, 33 F.3d at 73 (*quoting* Memorandum Opinion and Order on Reconsideration, *Telephone Company-Cable Television, Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5069, 5072, ¶ 22 (1992)); *see also City of Chicago v. FCC*, 199 F.3d at 433.

[89] Joint Petition of the Town of Babylon, the Cable Telecommunications Ass'n of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc., *Declaratory Ruling on Verizon Communications, Inc.'s Build-out of Its Fiber to the Premises Network*, Cases 05-M-0250, 05-M-0247, at 20-21, 26-27 (N.Y. Pub. Serv. Comm'n June 15, 2005).

designed to protect public safety and welfare.[90] Telecommunications carriers already are subject to the equivalent of a "franchise" or other agreement to use the public rights of way.

SBC will continue to comply with these rights of way protections and rules in deploying new video facilities, and the fact that its facilities will carry some video services will in no way increase or even change the burden on the rights of way. As the Commission determined in the *Cable Modem Order*, "a local franchising authority [should not be free] to impose an additional franchise" on a provider that is already — and would continue to be — subject to one set of franchising obligations as a result of its use of those rights of way.[91] As the Commission explained, imposing a duplicative tier of franchising regulation would "extend[] far beyond local government interests in managing the public rights-of-way," and would likely "impede competition and impose unnecessary delays and costs on the development of new broadband services."[92]

Moreover, non-imposition of incumbent cable franchising requirements will not in any way usurp the current authority of municipalities to require permits each time telecommunications carriers seek to cut pavement or lay fiber or do any other construction; to

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[90] *See, e.g.*, ARK. CODE ANN. § 14-200-101(a)(1)(A) (2004); CITY OF UPPER ARLINGTON, OHIO STREETS AND SERVICES CODE, § 933.03(B) (2004); KAN. STAT. ANN. § 17-1902(d) (2004); OHIO REV. CODE ANN. § 4939.03(C)(1) (2004).

[91] *Cable Modem Order* at 4850 ¶ 102.

[92] *Id.* at 4850 ¶ 104. Indeed, avoidance of such duplicative and unnecessary regulation would avoid serious questions about whether constitutionally protected speech rights would be infringed by state regulation of public rights of way that has no real purpose in the circumstances. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 180 (2003); *see also, e.g.*, *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005) ("If one [statutory construction] would raise a multitude of constitutional problems, the other should prevail[.]"); *Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) ("The canons of construction, however, require us to construe statutes in such a way as to avoid raising such constitutional concerns.").

require payment of applicable excavation and right of way management fees; and to ensure compliance with public safety and traffic requirements for rights of way projects. In short, the absence of a *cable franchise* will in no way detract from municipalities' ongoing rights to manage telecommunications carriers' use of the local rights of way. Imposing a cable franchise is clearly not necessary to protect those rights of way; to the contrary, it would be entirely duplicative.

In short, as the Commission has concluded, "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new facilities to provide a broad array of new communications services."[93] IP-enabled video service will not impose any incremental burden on public rights of way. Thus, interpreting the language of Title VI to require additional barriers to entry would not serve the underlying purpose of the franchise requirements of Title VI.

Such a statutory disconnection would also raise important First Amendment considerations.[94] The Supreme Court has established that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the

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[93] *Cable Modem Order* at 4850 ¶ 104 (quoting Memorandum Opinion and Order, *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21429 ¶ 78 (1997)); *cf. id.* at 4849-50 ¶ 102 ("Once a cable operator has obtained a franchise . . . our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service.").

[94] It is axiomatic that, when interpreting a statute, "a court must consider the necessary consequences of its choice. If one [construction] would raise a multitude of constitutional problems, the other should prevail . . . ." *Clark*, 125 S. Ct. at 724.

First Amendment."[95] The same is equally true of other would-be providers of video content to subscribers, as the federal courts uniformly concluded in a series of decisions striking down a (now-repealed) Cable Act ban on the provision of video programming by local telephone companies. Applying the Supreme Court's *Turner I* decision, these courts all concluded that such a ban implicated the First Amendment by "prohibiting [common carriers] from directly engaging in this form of speech within a certain area,"[96] and warranted intermediate scrutiny under *United States v. O'Brien*.[97]

The *O'Brien* standard permits the government to impose a restriction on speech only "if [the restriction] furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[98] In order to identify the governmental interest in burdening protected First Amendment activity, courts look closely at the underlying law and its purpose as identified in the

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[95] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

[96] *U S WEST, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated as moot*, 516 U.S. 1155 (1996) (statute violated First Amendment under intermediate scrutiny standard); *see also Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (same); *see also Southern New England Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *Southwestern Bell Corp. v. United States*, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414, at *3 (N.D. Tex. Mar. 27, 1995); *NYNEX Corp. v. United States*, No. 93-323-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill.1994).

[97] 391 U.S. 367 (1968).

[98] *O'Brien*, 391 U.S at 376-77; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

legislative history.[99] Here, as discussed above, those sources make clear that franchise regulation has always been rooted in municipal governments' need to regulate and manage the use of public rights of way. Indeed, the Supreme Court has specifically held that the First Amendment analysis of the legality of local cable franchising requirements should turn on information about the relevance of the requirement to the would-be-provider's "use of the public utility poles and rights-of-way and how [it] proposes to install and maintain its facilities on them."[100]

No additional government regulatory interest — much less a substantial one — is triggered by the mere fact that some of the packets SBC will transmit over its networks (and the rights of way) will contain video. These networks *already* have the right to use local rights of way, and the transmission of these video packets will involve no additional burden on those rights of way. Interpreting the Act to impose such "duplicative"[101] rights of way authority would thus create significant First Amendment concerns under *O'Brien*.

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[99] *See, e.g.*, *Turner II*, 520 U.S. at 195-204 (looking to congressional findings concerning the statute in question to determine government interest); *Turner I*, 512 U.S. at 662-63 (examining the congressional history of the regulations in question); *U S WEST*, 48 F.3d at 1101 (turning to congressional findings).

[100] *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986) (remanding challenge to exclusive franchising requirement); *City of Los Angeles v. Preferred Communications*, 13 F.3d 1327, 1330-31 (9th Cir. 1994) (on remand from the Supreme Court, rejecting city's claim of need for such requirement).

[101] *National Cable Television Ass'n*, 33 F.3d at 73; *see also City of Chicago v. FCC*, 199 F.3d at 433.

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