IPTV: PUBLIC INTEREST PITFALLS

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There is no set recipe for accurately seasoning present-day realities with a dash of the past and a pinch of the future.

—Former FCC Commissioner Kathleen Q. Abernathy

PROLOGUE

Howard County, Maryland, an affluent locale situated between Baltimore and Washington DC, rang in 2006 by unanimously approving a company's request to commence multi-channel video programming distribution (MVPD) within Howard's borders.[1] Though Comcast, whose cable television service is subject to MVPD-specific obligations, already serves the area and likewise received the required approvals from

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1. Larry Carson, *Verizon given nod in Howard*, BALTIMORE SUN, Jan. 4, 2006, *available at* http://www.baltimoresun.com/news/local/howard/bal-md.ho.smoking04jan04,1,1599537.story.

the County Council, the new provider plans to compete directly with the cable giant, hoping to offer wireline (i.e. cable-like) service to 90 percent of Howard's television-watching population within three years.[2] Suggesting confidence in the new entrant's ability to contend with such a strong incumbent, a local regulatory official noted that the company's entry "could reduce. . .television bills for county residents by as much as 15 percent."[3] Indeed, despite the specter of competition from cable, satellite, and broadcast television, the identity of the new entrant largely supports the official's confidence. That new MVPD provider is Verizon Communications, the nation's second largest telecommunications carrier.[4]

INTRODUCTION

Verizon Communications obtained a local franchise in a quest to directly compete with cable in the MVPD market, thereby allowing the local exchange carrier (LEC) to offer its FiOS TV service in Howard County, Virginia. [5] This approval builds upon other local wins in areas of California, Texas, Florida, Massachusetts and Virginia.[6] Verizon's franchising victories signal the renewed interest of telephone companies in MVPD, a market predominantly occupied by cable and direct broadcast satellite (DBS) television operators like Echostar and DirecTV.[7] To be sure, the larger legacy Bell operating companies (RBOCs) already offer MVPD service via joint ventures with DBS providers and over fiber in limited areas.[8] However, the Federal Communications Commission's (Commission) recent acknowledgment

2. *Id.*
3. *Id*.
4. *See* Peter Svensson, *The Call of Video*, ASSOCIATED PRESS, Mar. 28, 2006.
5. Larry Carson, *Comcast Asks Council to Delay Cable Deal*, BALTIMORE SUN, Dec. 23, 2005, *available at* http://www.baltimoresun.com/news/local/howard/bal-ho.cable 23dec23,1,7130966.story; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, 20 FCC Rcd. 2,755, ¶ 125 (2005) [hereinafter *11th Media Competition Report*]; Marguerite Reardon, *Verizon's TV dreams*, CNET NEWS.COM, Oct. 13, 2005, http://news.com.com/2102-1034_3-5894645.html.
6. Reardon, *Verizon's TV Dreams*, *supra* note 5.
7. *See, e.g.*, Michael Totty, *Who's Going to Win The Living-Room Wars?*, WALL ST. J., Apr. 25, 2005, at R1. *See also 11th Media Competition Report*, *supra* note 5, at ¶ 124; Comments of SBC Communications Inc. to the *Notice of Proposed Rulemaking* in IP-Enabled Services, WC Dkt. No. 04-36 (Sept. 14, 2005), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi? native_or_pdf=pdf&id_document=6518157935 [hereinafter AT&T IPTV Comments]; Comments of National Cable & Telecommunications Association to the *Notice of Proposed Rulemaking* in IP-Enabled Services, WC Dkt. No. 04-36 (July 29, 2005), http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi? native_or_pdf=pdf&id_document=6518110131 [hereinafter NCTA IPTV Comments].
8. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, FCC 05-155, MB Dkt. No. 05-255, 2005 WL 1939218, ¶ 54 (Aug. 12, 2005) [hereinafter *12th Media Report Notice*].

of a RBOC push to extensively deploy wireline video services foreshadows a burgeoning legal conflict in telecommunications reminiscent of that recently experienced in the market for cable modem and digital subscriber line (DSL) service.[9] Indeed, the two largest RBOCs, AT&T (formerly SBC and BellSouth) and Verizon, recently announced plans to deploy Internet Protocol Television (IPTV) on a scale comparable to that of existing cable installations.[10]

As in the fight over wireline broadband resolved by *Brand X*, cable operators and LECs stand poised to litigate and lobby over the application of an outdated statutory scheme to a novel technology.[11] Recognizing a brewing storm, the Commission recently requested comments on whether it should regulate "video provided via IP broadband (also known as IPTV)" under the lesser burdens of Title I, like cable modems, or under the more restrictive mandates of Title VI, like cable television.[12] In response, AT&T supports the former, suggesting that the Commission retrofit the deregulatory thrust of the *Wireline Broadband* and *VoIP* proceedings to IPTV, imposing select obligations of Title VI to IPTV via the Commission's ancillary authority.[13] The National Cable and Telecommunications Association (NCTA), a cable industry lobbying group, naturally argues in favor of the latter, pointing to select provisions of the *Cable Modem*[14], *Vonage*[15], *Video Dialtone*[16], and *Over-the-Air Reception Devices (OTARD)*[17]

9. *Id.*; *see generally* Dionne Searcey, *The Price War for Broadband Is Heating Up*, WALL ST. J., June 29, 2005 (noting that AT&T's lowering of DSL rates to $14.95 has spawned similar reductions by cable providers).

10. *11th Media Competition Report*, *supra* note 5, at ¶ 125; AT&T IPTV Comments, *supra* note 7. On January 5, 2006, AT&T deployed service in San Antonio, Texas. Dionne Searcey, *AT&T Rolls Out Net-Based TV*, WALL ST. J., Jan. 5, 2005, at D3.

11. *See, e.g.,* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling & Notice of Proposed Rulemaking*, 17 FCC Rcd. 4,798 (2002), *aff'd*, 125 S.Ct. 2688 (2005) [hereinafter *Cable Modem Order*]; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,986 (Sept. 23, 2005) [hereinafter *DSL Deregulation Order*]. I collectively refer to this progression hereinafter as the *Wireline Broadband Proceedings*. *See also* Dionne Searcey & Peter Grant, *Cable vs. Phone, Giants Escalate Fierce Turf War*, WALL ST. J., Nov. 23, 2005, at B1.

12. *12th Media Report Notice*, *supra* note 8, at ¶¶ 55, 63 (Aug. 12, 2005) ("[S]hould IPTV be considered a separate service, or simply a different means of video programming distribution?").

13. *See* AT&T IPTV Comments, *supra* note 7, at 15-19. Katheleen Q. Abernathy, Comm'r, Fed. Commc'ns Comm'n, The Nascent Services Doctrine, Remarks at the Meeting of the New York Chapter of the Fed. Commc'ns Bar Ass'n (Jul. 11, 2002), http://www.fcc.gov/Speeches/Abernathy/2002/spkqa217.html.

14. *Cable Modem Order*, *supra* note 11.

15. Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion & Order*, 19 FCC Rcd. 22,404, ¶ 20 (2005) [hereinafter *Vonage Order*].

16. Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-

Orders, as well as several *Annual Video Competition* reports for support.[18] Both sides, however, ignore an important piece of the puzzle.

In focusing on the orders enumerated above, multiple system operators (MSOs) and LECs rightly emphasize efficiency-related objectives, but wrongly ignore public interest regulation.[19] To be sure, any regulation of IPTV, like wireline broadband and VoIP, will ultimately reflect the pro-competitive, pro-consumer policies recently pursued in broadband-based markets, including transport, applications, and content.[20] But television, whether delivered over the air or via wireline, remains subject to Congressionally-mandated public interest regulations.[21] The *Wireline Broadband* proceedings, however, focused solely on economic regulations in the now (somewhat) commoditized transport market.[22] The *VoIP Proceeding* likewise concerned economic regulations for transport-dependent VoIP applications in a context divorced from the Commission's non-efficiency-related mandates.[23] In other words, one competition policy proceeding concerned the *platform*, the other *applications*.[24]

I argue, in four parts, that the role of public interest regulation in MVPD must supplement any analogies between IPTV and the Commission's economic policies towards wireline broadband and VoIP. Part I therefore reviews the *Wireline Broadband* and *VoIP* proceedings. Part II presents the digital television transition as a paradigmatic example of public interest and efficiency-related regulations combining with mixed effects. Part III frames cable MVPD offerings and the Bells' proposed IPTV services against the backdrop of slowing broadband

63.58, *Second Report & Order & Recommendation to Congress & Second Further Notice of Rulemaking*, 7 FCC Rcd. 5,781 (1992).

17. Implementation of Section 207 of the Telecommunications Act of 1996, *Order on Reconsideration*, 13 FCC Rcd. 18,987 (1998).

18. NCTA IPTV Comments, *supra* note 7, *passim*.

19. Philip J. Weiser, *The Ghost of Telecommunications Past*, 103 MICH. L. REV. 101, 110 (2005).

20. JONATHAN E. NEUCHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS 358 (2005) [hereinafter DIGITAL CROSSROADS]; Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies*, 17 HARV. J.L. & TECH. 85, 86 (2003) (describing vertical relations as "how a firm relates to other firms in adjacent markets and whether it integrates into those markets.").

21. *See* 47 U.S.C. § 301 (2005); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973).

22. JONATHAN E. NEUCHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS xix (2d ed. 2006), *available at* http://spot.colorado.edu/~weiserpj/dc/newpreface.pdf. *See also DSL Deregulation Order*, *supra* note 11, at ¶ 3.

23. DIGITAL CROSSROADS, *supra* note 20, at 359.

24. While "[a]ntitrust commentators discuss the 'primary' (or 'bottleneck') market and the 'secondary' (or 'complementary') market," and "[i]n telecommunications, participants talk of 'conduits' and 'content[,]' here I employ the terminology offered by Farrell and Weiser. Farrell & Weiser, *supra* note 20, at 88.

adoption, showing that IPTV, as both the next great driver of broadband adoption and a television platform, necessarily requires a broader view than solely competition policy. Part IV concludes with an examination of how public interest and competition policy concerns have already combined in the budding controversy over national and statewide franchising. In short, I conclude that competition policy cannot be the sole lens through which the MSOs and LECs frame their filings. Rather, both parties must reflect upon the role of the public interest standard as a driving historical force of change (or lack thereof) in telecommunications policy.[25] Indeed, when viewed in light of a demonstrable slowing in the digital broadband migration, recent leadership changes at the Commission, and distinctions between the networks involved, one must necessarily cast a wider net than solely the competition policy concerns discussed in filings from either side.

I. ECONOMIC POLICY

The *Wireline Broadband* and *VoIP* proceedings encompass a significant aspect of the Commission's efforts to address the "central communications policy objective of the day," facilitating national broadband deployment.[26] Faced with projections touting the economic value of high-speed Internet access,[27] the promise of a novel technological platform enabled by converging technologies,[28] and judicial calls for a more rational regulatory policy,[29] the Commission has encouraged competition in wireline broadband, believing that "expanded

25. *See* LORI A. BRAINARD, TELEVISION: THE LIMITS OF DEREGULATION 5 (2004) ("Economic regulatory agencies usually operate under broad and vague statutory mandates to regulate 'in the public interest.'").

26. Michael K. Powell, *Preserving Internet Freedom: Guiding Principles for the Industry*, 3 J. ON TELECOMM. & HIGH TECH. L. 6 (2003). *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 FCC Rcd. 3,019 (2002); 47 U.S.C. § 157 (a) (2000); FCC, Broadband, Sep. 30 2005, http://www.fcc.gov/broadband/; Remarks of President Bush on Innovation, U.S. Department of Commerce, Washington, D.C., June 24, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/20040624-7.html; *DSL Deregulation Order*, *supra* note 11, at ¶ 3.

27. *See* ROBERT W. CRANDALL & CHARLES L. JACKSON, CRITERION ECONOMICS, THE $500 BILLION OPPORTUNITY 2001 (Allan L. Shampine, ed., 2003), http://www.criterioneconomics.com/docs/Crandall_Jackson_500_Billion_Opportunity_July_2001.pdf (projecting that pervasive broadband use would inject $350 billion dollars into the economy); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 FCC Rcd. 3,019, ¶ 1 (2002) (describing potential technological benefits of increased broadband penetration).

28. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 27 (1983) (explaining convergence).

29. Farrell & Weiser, *supra* note 20, at 89 (noting "judicial demands for a better economic explanation of [the Commission's] regulatory policies.").

choices. . . result in lower prices and higher value."[30] But years of litigation and lobbying long delayed the competition policies embodied in the *Wireline Broadband* proceedings—that is, until the Supreme Court's recent landmark *Brand X* case affirmed the Commission's efforts to promote network deployment through deregulation of broadband facilities.[31] Nevertheless, as I explain below, the Commission's approach to wireline broadband and VoIP, with two limited exceptions, remains focused upon competition policy and not the public interest.

A. The Wireline Broadband Proceedings

Brand X reviewed the *Cable Modem Order*, an economic regulation in which the Commission perpetuated structural separations imposed solely on the RBOCs by the *Computer Inquiries*.[32] The *Computer Inquiries*, undertaken in the 1980s, initially banned Bell entry into the information services market entirely.[33] By the time the Court granted certiorari to *Brand X*, however, the Commission had softened these strictures to allow entry through structurally separated affiliates, and then again to lift the structural separations in favor of requirements forcing Bells into offering the underlying transmission component of "last mile" data transport services on a common carrier basis to Internet Service Providers (ISPs).[34] The latter formulation allowed companies like EarthLink to purchase access to the Bells' wireline broadband networks, but made no similar allowance for access to wireline broadband delivered by cable companies.[35]

The structural separations imposed upon the Bells could be justified by the one monopoly profit principle and Baxter's Law, among other economic theories.[36] The former posits that monopolies encourage competition in complementary markets in order to increase profiteering

30. Powell, *supra* note 26, at 6.

31. *DSL Deregulation Order, supra* note 11, at nt. 14.

32. *Brand X Internet Servs.*, 125 S.Ct. at 2,697-98 (citing *Cable Modem Order*, *supra* note 11, at ¶ 38.). In essence, the *Computer Inquiries* studied BOC provision of data transmission services over common carrier facilities. The Commission mandated certain structural separations upon the BOCs, in essence restricting the means by which they could enter that market, and in what fashion, in large part based upon a suspicion that such entry would generate another case study of Baxter's Law, discussed *infra*. For an excellent discussion of the *Computer Inquiries*, refer to Farrell & Weiser, *supra* note 20, at 129-33.

33. Weiser, *supra* note 19, at 111. *See also* DIGITAL CROSSROADS, *supra* note 20, at 16-21 (describing monopoly leveraging concerns in the voice market).

34. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 475 (1980) [hereinafter *Computer II*].

35. *Cable Modem Order*, *supra* note 11, at ¶ 44.

36. Litton Syss., Inc. v. AT&T Co., 700 F.2d 785 (2d Cir. 1983); MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1105 (7th Cir. 1983); United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983); DIGITAL CROSSROADS, *supra* note 20, at 17-19 (2005).

in the platform market.[37] The latter, an exception to the one monopoly profit principle, holds that price controls in a platform market force the monopolist into complementary markets and encourage anti-competitive behavior.[38] With these principles in mind, in the 1980s the Commission imposed unbundling obligations on the Bell system in a prospective attempt to prevent monopoly leveraging. With the emergence of wireline broadband, competition, and the Bell divestiture, however, the Commission could not justify the continued maintenance of *Computer II* obligations in the 1990s. Moreover, without price controls, Baxter's Law did not operate in wireline broadband.[39]

The Commission also could not ignore new thinking regarding vertical integration.[40] Indeed, the Commission's actions in the *Cable Modem Order* could not only find support in the emergence of vigorous competition and the inherent benefits of internalizing complementary externalities,[41] but also in the notion that "the efficiencies from vertical integration counsel for greater sympathy to it in analyzing how to regulate[.]"[42] (Indeed, Posner suggests that such efficiencies "may well counsel a tolerant regulatory stance, at least in conjunction with a system of oversight or protective measures.")[43] The *Wireline Broadband* proceedings, therefore, also reflect the notion that vertical integration is unobjectionable unless, on a factual basis, investigation proved otherwise.[44]

When presented with the question of whether cable broadband should be regulated under Title II, initially the "Commission concluded that broadband Internet service provided by cable companies [was] an 'information service' but not a 'telecommunications service' under the [96] Act, and therefore not subject to mandatory Title II common-carrier regulation."[45] In other words, to encourage wireline broadband build-out through competition, the Commission perpetuated a temporary double-standard whereby MSOs remained free from unbundling obligations in order to allow achievement of competitive parity with the still-regulated RBOCs through the leveraging of vertical integration. Notwithstanding

37. AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH 103 (Macmillan, Nathaniel T. Bacon trans. 1927) (1838).

38. *See* Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 STAN. L. REV. 1249, 1249-50 (1999); *see also supra* note 36.

39. DIGITAL CROSSROADS, *supra* note 20, at 190.

40. *See Cable Modem Order*, *supra* note 11, at ¶¶ 90-91.

41. For a brief discussion of internalizing complementary externalities, *see* Farrell & Weiser, *supra* note 20 at 89.

42. Weiser, *supra* note 19, at 110.

43. *Id.* at 111 (*citing* RICHARD A. POSNER, ANTITRUST LAW 200-02 (1976); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 374 (7th Cir. 1986) (Posner, J.)).

44. *See* Farrel & Weiser, *supra* note 20, at 87.

45. *Brand X Internet Servs.*, 125 S.Ct. at 2,694.

judicial analogies between the Commission's actions and pizza parlor ownership,[46] the *Order* perpetuated the *Computer Inquiries* because of two key pro-competitive, pro-consumer antitrust concerns: monopoly leveraging and vertical integrative efficiencies. Once MSOs achieved competitive parity, and soon after the Supreme Court's decision on the *Cable Modem order,* the Commission relaxed the RBOC's *Computer Inquiry* obligations and ended the regulatory asymmetry.[47] In so doing, the *DSL Deregulation Order* enhanced investment incentives undermined by common carrier obligations, and superseded regulations set forth under the 1980s-era *Computer Inquiries* with a new set of prerogatives.[48] It did not, however, pursue policies in accordance with a larger public interest mandate.

Rather, the *Computer Inquiries* obligations under consideration in the *Wireline Broadband Proceedings* addressed key economic issues, in particular the Commissions' dominating concern of motivating facilities-based competition in the platform market; at issue in the *Wireline Broadband Proceedings* was a pipe able to "erase distances, dissolve geographic isolation and link citizens to government services."[49] That pipe allows interconnection with an open-access facility regulated largely without price controls, enabling access to a public, standardized network owned and operated by private players—the Internet.[50] In time, that pipe will eclipse old notions of traditional telephone service with "an environment characterized by broadband and wireless services."[51]

While today's *zeitgeist* suggests that "technological determinism and market ordering" bear sole responsibility for the subsequent surge in broadband build-out, in truth the growth of wireline broadband owes much to the Commission's pro-competitive efforts.[52] Such efforts have largely succeeded in stimulating development for those locales in which wireline broadband is now available.[53] Notably, recently released studies

46. *Id.* at 2714 (Scalia, J., dissenting) ("even though we bring the pizza to your house, we are not actually 'offering' you delivery, because the delivery that we provide to our end users is 'part and parcel' of our pizzeria-pizza-at-home service and is 'integral to its other capabilities.'" (internal citations omitted)).

47. *DSL Deregulation Order, supra* note 11, at ¶¶ 1, 4.

48. The Honorable Kathleen Q. Abernathy, Former FCC Commissioner, *A Regulatory Framework for Convergence and Competition* (Sept. 29, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261501A1.pdf [hereinafter Abernathy Convergence Speech]; *DSL Deregulation Order, supra* note 11, at ¶¶ 1, 4.

49. Abernathy Convergence Speech, *supra* note 48.

50. *See, e.g.*, Markus Müller, *Who Owns the Internet?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 709 (2004), *available at* http://ssrn.com/abstract=605104.

51. Philip J. Weiser, *The Behemoth is Dead. Long Live the Behemoth*, WASH. POST., Feb. 27, 2005, at B3, *available at* http://www.antitrustinstitute.org/recent2/388.cfm.

52. *See* Weiser, *supra* note 19, at 102-03 (*citing* PAUL STARR, THE CREATION OF THE MEDIA (2004)).

53. WILLIAM H. LEHR, ET. AL., MEASURING BROADBAND'S ECONOMIC IMPACT 16 (2005) (stating that "between 1998 and 2002. . .communities in which mass-market broadband

demonstrate that communities with mass-market broadband access demonstrate increased employment, business growth, and IT-specific business volume.[54] But the key take-away is that the *Wireline Broadband Proceedings*, at baseline, primarily concerned competition policies governing the *platform*.

B. The VoIP Proceedings

The *VoIP Proceedings* likewise removed geographic constraints, though in the application layer.[55] Voice over internet protocol (VOIP), the technology at issue in the *VoIP Proceedings*, relies upon wireline broadband and the "session initiation protocol" (SIP), a technological standard which corrects latency problems normally associated with the delivery of telephony over the Internet.[56] Whereas the public switched telephone network (PSTN) relies upon a user to connect a telephone to a wall jack and dial a number to reach another party, VoIP piggy-backs on a broadband connection using specialized customer premises equipment (CPE), but some variants allow their users to reach customers of conventional and wireless telephone carriers.[57] Perhaps most importantly, VoIP allows a user to retain a number issued through the North American Numbering Plan (NANP), and to use that number anywhere in the world.[58] A friend of mine in the Foreign Service, for example, retains a number from the 312 area code to allow friends from Chicago to reach him overseas.

Given the ability of VoIP subscribers to traverse borders with offerings like Vonage, VoIP poses a significant concern to state and local officials responsible for regulating telephony. The Minnesota Department of Commerce filed a complaint in the Minnesota Public Utilities Commission (PUC) in an attempt to force Vonage into complying with state rules requiring telephone companies "to obtain operating authority, file tariffs, and provide and fund 911 emergency

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was available by December 1999 experienced more rapid growth in (1) employment, (2) the number of businesses overall, and (3) businesses in IT-intensive sectors."), http://cfp.mit.edu/groups/broadband/docs/2005/MeasuringBB_EconImpact.pdf.

54. *Id.*

55. *Vonage Order*, *supra* note 15; Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, *Memorandum Opinion & Order*, 19 FCC Rcd. 3,307 (2004) [hereinafter *Pulver Ruling*]; Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, *Order*, 19 FCC Rcd. 7457 (2004) [hereinafter *AT&T VoIP Ruling*] [hereinafter, collectively, *VoIP Proceedings*].

56. SCOTT CLELAND ET. AL., PRECURSOR RESEARCH, SIP HAPPENS: HOW VOIP TECHNOLOGY "RE-UNBUNDLES" TELECOM, (2004); *Vonage Order*, *supra* note 15, at ¶ 5.

57. *Vonage Order*, *supra* note 15, at ¶ 8.

58. *Id.* at ¶ 9.

services."[59] Likewise, the New York Public Services Commission tried to force Vonage to obtain state certification and to file tariffs.[60] The Commission, however, preempted both PUCs on the grounds that "the characteristics of [VoIP] preclude any practical identification of, and separation into, interstate and intrastate communications for purposes of effectuating a dual federal/state regulatory scheme[.]"[61] Indeed, because Vonage has customers like my friend that maintain local telephone numbers for use in foreign countries, and because of the near impossibility of identifying the geographical transmission paths of packets used in VoIP,[62] the Commission deemed Vonage (and, by extension, VoIP carriers of a similar nature) a jurisdictionally mixed service,[63] and therefore subject to exclusive Commission jurisdiction.[64]

The Commission's actions in the *VoIP Proceedings*, as in the *Wireline Broadband Proceedings*, emerged from the larger policy goal of promoting broadband deployment.[65] Indeed, as with the *Wireline Broadband Proceeding,* again the Commission referenced congressional directives requiring it to "encourage the deployment of advanced telecommunications capability to all Americans by using measures that 'promote competition in the local telecommunications market' and removing 'barriers to infrastructure investment.'"[66] To be sure, with the *VoIP E911 Order*,[67] there were additional public interest considerations unique to VoIP's status as an application.[68] But the *VoIP E911 Order*

59. *Id.* at ¶ 10.

60. *Id.* at ¶ 13.

61. *Id.* at ¶ 14.

62. Federal and local officials collaboratively regulate wireline telephony based upon where a call is originated and terminated. Federal power to regulate telephony principally derives from Congressional power to regulate interstate commerce under the Commerce Clause of the United States Constitution, as well as the 1934 Communications Act. For a more detailed discussion of this relationship, see Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 66 N.Y.U. L. REV. 1692 (2001).

63. *See* Louisiana Pub. Servs. Comm'n v. FCC, 476 U.S. 355, 368 (1986) (*citing* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)).

64. *Vonage Order*, *supra* note 15, at ¶ 18.

65. *Id.* at ¶ 1 ("For such services, comparable regulations of other states must likewise yield to important federal objectives").

66. *Id.* at ¶ 2 (citing 47 U.S.C. § 157 nt. (2005)).

67. E911 Requirements for IP-Enabled Service Providers, *First Report & Order & Notice of Proposed Rulemaking*, 20 FCC Rcd. 10,245 (2005) [hereinafter *VoIP E911 Order*].

68. In essence, because of public complaints concerning an inability to reliably dial 911 from VoIP-enabled services, the Commission imposed certain obligations on a subset of VoIP carriers. Specifically, those services which allow consumers to both receive calls from the PSTN, and to make calls to the PSTN, were affirmatively required to comply with the Commission's E911 order. That is, if a person were to subscribe to Vonage, Vonage would need to provide certain data to public safety answering points (PSAPs) in the event of a 911 call, such that first responders would be able to determine the location of that caller, as well as the telephone number of that caller in the event of a dropped or otherwise malfunctioning connection (as in the case of cellular telephones).

simultaneously demonstrated the Commission's intent to avoid burdensome federal and state regulations that might impede VoIP's growth, while remaining mindful of significant public safety issues.[69]

In the *VoIP E911 Order* the Commission mandated that Interconnected Voice over Internet Protocol Providers ("IVPs") provide enhanced 911 ("E911") services.[70] The Commission defined IVPs as those VoIP services capable of both terminating and originating calls on the PSTN.[71] Most importantly, for our purposes, is the following statement:

Although the Commission is committed to allowing these services to evolve without undue regulation in accord with our nation's policies for Internet services, we are, at the same time, aware of our obligation to promote "safety of life and property" and to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.[72]

That is, in this smaller instance, non-efficiency-related goals spurred the Commission to regulate IVP in a way inconsistent with traditional antitrust principals. The Commission continued to perpetuate safety regulations of this type, most recently by extending CALEA obligations to VoIP.[73] Such regulation, however, can be viewed as an outgrowth of a specific contingency; namely, the war on terror and the September 11 attacks.[74] To be sure, the Commission's attention to public safety in the context of broadband deployment suggests a less market-focused approach. But the Commission's actions also suggest that public interest concerns and notions of public choice theory will also bear heavily upon

69. Joelle Tessler, *Net Calls Put Regulators in a Quandary: FCC Considers Whether They Are Telecom or Information Service*, STAR-LEDGER, Sept. 19, 2004, *available at* http://www.vonage-forum.com/printout1167.html.

70. *VoIP E911 Order*, *supra* note 67, at ¶ 23 ("If a VoIP service subscriber is able to receive calls from other VoIP service users *and* from telephones connected to the PSTN, and is able to place calls to other VoIP service users *and* to telephones connected to the PSTN, a customer reasonably could expect to be able to dial 911 using that service to access appropriate emergency services.") (emphasis in original).

71. If the *VoIP E911 Order* and judicial precedent can be taken as signals of future intent, it seems likely that the Commission will label VoIP as an information service, but will exercise its ancillary jurisdiction to impose a select set of regulations traditionally applied to common carriers of telecommunications services upon IVPs, given IVP's use of collocated network equipment. PERKINS COIE LLP, FCC DECISIONS ON VOIP CLASSIFICATION WILL AFFECT THE FUTURE OF THE SERVICE (2005), http://www.perkinscoie.com/content/ren/updates/tc/060605.htm.

72. *Id.* at ¶ 4 (*citing* 47 U.S.C. § 151 (2005); Wireless Communications and Public Safety Act of 1999 § 2, 47 U.S.C.A. § 615 nt. (2006).

73. Communications Assistance for Law Enforcement Act and Broadband Access and Services, *First Report & Order & Further Notice of Proposed Rulemaking*, 20 FCC Rcd. 14,989 (2005).

74. BRAINARD, *supra* note 25, at 8 (discussing the "contingency theory" of regulatory policy, which suggests that "policy outputs are mere possibilities conditional on factors that are themselves fluid and uncertain").

IPTV.[75]

II. PUBLIC INTEREST REGULATION

The story of the digital television transition, as it relates to must carry and retransmission consent, best demonstrates the role of non-efficiency-related objectives in television and cable regulation alike. The most contentious issues of the DTV transition are must carry ("a subsidy by a different name")[76] and its cousin, retransmission consent. But delving into must carry and retransmission consent requires a brief overview of the DTV transition's desired endpoint.

A. The Digital Television Transition

The digital television transition began in the sunset of Reagan's second term. However, opinions differ as to its motivation: some state that broadcasters, faced with an allotment of unused UHF spectrum to burgeoning cellular carriers, inspired the DTV transition by arguing that the spectrum in question should be used for "future television services."[77] Others assert that foreign technological advances spurred the FCC's creation of the Advanced Television Services Committee ("ATSC") in 1987 to oversee the development of an American digital broadcasting standard.[78] Whatever the motivation, however, the Commission charged the ATSC with ensuring that digital television ("DTV") would permit high definition signals, use over-the-air spectrum, and be simulcast with old analog signals.[79] And ultimately only the first two goals were ultimately realized by the selected standard.[80] Moreover, somehow each television broadcaster received "a license for a second six megahertz in addition to the license for the six megahertz of spectrum already used for each existing analog signal.[81]

The so-called "great giveaway" saw mixed reviews from policymakers and pundits alike. Some believe that Congress and the Commission gave away "a national resource to an affluent industry in return for abstract gains."[82] Others assert that "the transition is too

75. *See generally* Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96. MICH. L. REV. 1746 (1998).

76. Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 1 COMMLAW CONSPECTUS 97, 117 (2003).

77. *See, e.g.*, *id.*, at 98-99.

78. Symposium, *The Journey to Convergence: Challenges and Opportunities*, 12 COMMLAW CONSPECTUS 183 (2004).

79. DIGITAL CROSSROADS, *supra* note 20, at 396.

80. Graham, *supra* note 76, at 101.

81. Joel Timmer, *Broadcast, Cable, and Digital Must Carry: The Other Digital Divide,* 9 COMM. L. & POL'Y 101 (2004).

82. Benton Foundation, The Transition to Digital Television, http://www.benton.org/

expensive and that a subsidy, in the form of a free license, is necessary to preserve advertiser-supported, over-the-air television from elimination."[83] In essence, however, the "great giveaway" argument concerns whether "broadcast television, digital or not, is in the public interest and deserving of government subsidy."[84]

Upon completion, an idealized DTV transition will allow the transmission of both high-definition television ("HDTV"), standard-definition television ("SDTV"), and ancillary "program-related" content ("ITV") over the six megahertz of electromagnetic spectrum allocated to each television channel.[85] HDTV programs consume most of that spectrum with high-resolution images, a cinematic aspect ratio, and CD-like sound quality.[86] SDTV programs, however, have the same features as existing analog broadcasts and, with digital transmission and compression, consume less bandwidth, allowing television broadcasters to offer multiple channels of programming, expanded advertising, or even to simulcast multiple camera angles of the same sporting events.[87] ITV, alternatively, will allow broadcasters to use their spectrum to supplement sports programs with statistics, business news with detailed financial information, or even television itself with interactivity akin to the Internet.[88]

The key take-away, however, is that initially "[t]he fundamental policy driving the transition to digital television [was] the determination that over-the-air broadcast of DTV [was] in the public interest."[89] In essence, policymakers believed that better picture and sound quality, in and of itself, would benefit the public.[90] Moreover, while cable then served only 66 percent of American households, the Commission believed that broadcasters, who had 99 percent market penetration, could better ease the transition.[91] That is, the Commission felt that in order to maintain free over-the-air television and all its regulatory accoutrements, broadcasters would have to lead the charge of the transition.[92] As the Commission stated, "unlike many other countries, the United States has a strong and independent system of privately-owned and operated broadcast stations," which suggested that the DTV framework must

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publibrary/policy/TV/atv.html (last visited Oct. 1, 2006).

83. Graham, *supra* note 76, at 116.

84. *Id.* at 117.

85. Timmer, *supra* note 81, at 101.

86. *Id.* at 101-02.

87. *Id*. at 102.

88. *See* Carriage of Digital Television Broadcast Signals, *First Report & Order & Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 2,598, ¶ 122 (2001).

89. Graham, *supra* note 76, at 99.

90. *Id.* at 100.

91. *Id.*

92. *Id.*

preserve the benefits of the existing system.[93] DTV, then, is fundamentally a creature of public interest regulation, and not economic considerations, which in some part led to an ongoing battle between broadcasters and MSOs.

B. Must Carry and Retransmission Consent

Much of the tension between broadcasters and cable operators within the DTV transition debate, aside from twenty years of butting heads over the subject with Congress and the Commission, surrounded the question of cable transmission facilities; that is, would cable operators have to carry both the new and improved DTV signals and outmoded analog signals during the transition, or would cable be able to down-convert the digital signals to analog before transmission over cable wires, thereby delaying inevitable upgrades to cable facilities?

Broadcasters understandably saw the technological possibilities of the transition as an avenue for increased revenue, but faced equally understandable opposition from cost-averse cable operators and satellite television providers who feared the intersection of the DTV mandate and the Cable Television Consumer Protection and Competition Act of 1992. ("CTCPCA") The CTCPCA forces cable operators to retransmit broadcasters' programming under either "must carry" or "retransmission consent" arrangements.[94] "Must carry" requires cable providers (and, in limited circumstances, direct broadcast satellite service providers)[95] to rebroadcast the primary signals of television broadcasters within a specific marketplace, while "retransmission consent" arrangements allow cable providers and broadcasters to negotiate the terms of retransmission.[96]

Must carry was designed to serve three interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[97] Congress mandated these arrangements because it feared that cable operators would freeze out local broadcasters, thereby sounding the death knell for local television broadcasting.[98] Likewise, the National Association of Broadcasters ("NAB") argues that "cable operators will not carry broadcasters' digital signals unless required to do so by law."[99] In sum, must-carry concerns both economic and public

93. *Id.* at 114.
94. *See* Timmer, *supra* note 81, at 104-05.
95. 47 U.S.C. § 338 (2006).
96. *See* Timmer, *supra* note 81, at 104-05.
97. Turner Broadcasting Sys. v. FCC, 520 U.S. 180, 189 (1997).
98. DIGITAL CROSSROADS, *supra* note 20, at 366.
99. *See* Timmer, *supra* note 81, at 115.

interest policies.

As in the wireline broadband and VoIP proceedings, however, the courts got involved as well. With regards to digital television, the Supreme Court ruled that cable operators' "must carry" obligations only encompassed broadcasters' analog signals.[100] That is, under then-existing regulations, if ABC wanted Comcast to carry its HDTV or SDTV programming, it could only do so via retransmission consent agreements; in the *Turner* cases, the Supreme Court found the current must carry arrangement a permissible burden on free speech.[101] But in the second *Turner* case, a 5-4 split, "only two of the interests must carry [was] meant to serve were found to justify the burden must carry places on speech by a majority of the court: preserving free, over-the-air broadcasting and promoting the dissemination of information from a multiplicity of sources."[102] In other words, the Court hung its hat on public interest regulations.

In short, the DTV transition encapsulates efficiency and non-efficiency-related objectives. Congress hoped to enable the digital television transition to achieve objectives thought to be in the economic and public interest. However, the digital television transition also ultimately embodied the distortions of cross-subsidies in communications, and an attempt to eliminate them for the sake of improved competition.

III. IPTV TECHNOLOGY

The *Wireline Broadband* and *VoIP Proceedings* demonstrate the Commission's particular attention to modernizing our national communications infrastructure while limiting the impact of outmoded regulations, though some may label the *VoIP E911 Order* an example of industry protectionism.[103] With the *Wireline Broadband Proceedings*, however, the Commission largely eliminated structural separations in the face of emerging competition, though potentially at an earlier than ideal stage, given emerging duopoly concerns.[104] The *VoIP Proceedings* demonstrate the Commission's intent to avoid burdensome Federal and state regulations that might impede VoIP's growth, while simultaneously remaining mindful of significant public safety issues.[105] The Digital

100. *See Turner Broadcasting Systems*, 520 U.S. at 180.

101. *Id.* at 224-25.

102. *Id.* at 225-26 (Breyer, J., concurring in part)).

103. Grant Gross, *FCC Backs off E911 Requirement for VoIP Providers*, NETWORK WORLD, Nov. 8, 2005, http://www.networkworld.com/news/2005/110805-fcc-e911.html ("It's the FCC picking and choosing which technologies they want to support and which technologies they want to succeed.").

104. Weiser, *supra* note 51.

105. Joelle Tessler, *Net Calls Put Regulators in a Quandary: FCC Considers Whether*

Television transition shows the role of public interest regulation in television, and some of the distortions it can cause in marketplace. The question with regards to MVPD and IPTV, however, is whether similar concerns will prevail in governmental attitudes towards IPTV as a hybrid of political volatility and the last great hope of the Digital Broadband Migration. Indeed, as Congress and the Commission look to regulate IPTV, the historical role of public interest regulation in the broadcast and cable context suggests a more active period is ahead.

Analyzing legal aspects of the MVPD market requires a brief description of the technologies and business considerations at hand. LECs face far different shareholder pressures than MSOs. "Unlike cable firms, Bells, valued as producers of free cash flow and dividends, must justify their multibillion dollar investments in that light. . ."[106] Because cable providers are not subject to the same level of regulation as telecommunications carriers, the Act in many ways is seen as favoring one form of communications over another. By providing IPTV services, however, Bells will be able to bundle services at a lower rate than their partnerships with DBS providers have thus far allowed.[107]

To date, both the Bells and the MSOs have continued to upgrade their facilities in a so-called "FTTx" approach, involving the extension of fiber-optic cable either to the node, to the curb, or to the premises.[108] For the MSOs, while the coaxial ports in most living rooms suggest an underlying stagnation in cable platforms, providers have expended a considerable amount of capital upgrading transmission facilities to include fiber-optics, enabling services like video on demand, broadband internet, and VoIP.[109] Regulatory treatment of all the Bell offerings, however, will likely hinge upon whether the television service can be separated from the ancillary functionality highlighted thus far in

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They Are Telecom or Information Service, STAR-LEDGER, Sept. 19, 2004, *available at* http://www.vonage-forum.com/printout1167.html.

106. *Telco, Cable Incumbents Getting Policy Boost, But Investors Aren't Swayed, Analyst Says*, WASH. INTERNET DAILY, Sept. 29, 2005. (stating "Cable has an advantage in the bundling wars, since it's far cheaper for MSOs to add voice than for telcos to provide pay TV, Glenchur said. Cable's weakness is lack of a wireless piece in its bundle, he said.").

107. Rethink Research, *MS's IPTV Strategy in Tatters*, THE REGISTER, June 1, 2005, http://www.theregister.co.uk/2005/06/01/ms_iptv_strategy_in_tatters/.

108. Carl Kandutsch, *The Case for Municipal FTTx*, 2005 BROADBAND PROPERTIES 40 (2005) (Stating that "FTTx" encompasses "a variety of fiber-based architectures including fiber-to-the-home, fiber-to-the-curb, fiber-to-the-premises, fiber-to-the-business, fiber-to-the-node, and so on.").

109. *How Internet Protocol-Enabled Services are Changing the Face of Communications: a Look at Video and Data Services: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 8 (2005) (statement of Lea Ann Champion, Senior Executive Vice President, IP Operations and Services, SBC Communications Inc.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi? dbname=109_house_hearings&docid=f:20748.pdf [hereinafter *AT&T Testimony*].

company road shows.

AT&T has led the "integration" drum beat, highlighting the "new level of interactivity and integration" presumably available in its offering.[110] AT&T is therefore investing $4 billion in its "Project Lightspeed" architecture, an IP-enabled, closed system built by Alcatel and Scientific-Atlanta on Microsoft technologies.[111] AT&T is deploying approximately 40 thousand miles of new fiber optic cable to within an average of 3 thousand feet of each potential customer in what is known as a "Fiber to the Node" (FTTN) approach.[112] The system also involves a set-top box with an integrated digital video recorder that allows both time- and place-shifting of recorded materials.[113] Moreover, AT&T has sought to include a multitude of ancillary features, such as picture-in-picture viewing, web content, and on-demand video programming, presumably in an attempt to avoid the "toaster with pictures"[114] treatment thus far applied to cable systems exhibiting many of the same features.[115] It plans to reach 18 million customers within the United States in five years.[116]

Verizon is investing $6 billion in its FiOS TV project to deploy fiber to as many as sixteen million homes in its service areas.[117] Unlike AT&T, Verizon plans to extend fiber all the way to the premises in what is known as a "FTTP" approach. Verizon's network will deliver programming more like a cable system, broadcasting all channels simultaneously, with additional on-demand offerings.[118] As such, Verizon's offering more resembles a traditional cable television package coupled with a broadband connection than AT&T's offering in that interactive television services remain segmented from the set-top television box.[119] Nevertheless, "Verizon aims for a 30 percent market share within five years of introducing its television service FiOS to a particular region."[120]

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110. *AT&T Testimony*, *supra* note 109, at 7.

111. *Id.*

112. *How Internet Protocol-Enabled Services Are Changing the Face of Communications: a Look at Video and Data Services: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 17 (2005) (statement of David L. Cohen, Executive Vice President, Comcast Corporation) (stating that the cable industry has spent $100 billion upgrading its platform with fiber-optic technology) [hereinafter *Comcast Testimony*].

113. *See, e.g., AT&T Testimony*, *supra* note 109, at 9.

114. C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 3 (2002).

115. *See AT&T Testimony*, *supra* note 109, at 8-9.

116. *Id.* at 8.

117. Michael Totty, *Who's Going to Win the Living-Room Wars*, WALL ST. J., Apr. 25, 2005, at R1.

118. *Id.*

119. Drew Clark, *Verizon Executive Criticizes House Draft Telecom Bill*, NAT'L J., Sept. 22, 2005, http://www.njtelecomupdate.com/lenya/telco/live/tb-USVF1127346400334.html.

120. Eric Auchard, *Telco, Cable TV Fight to Spark Ad War*, REUTERS, Aug. 11, 2005,

However, Bell entry in the IPTV market should not be viewed as a novel expansion of the service. Rather, members of the European Union have benefited from IPTV for years.[121] But whereas the European entrants in Italy, the United Kingdom, and Scandinavia have seen relatively smooth deployments, "Swisscom, the one company that Microsoft managed to convince to go with its proprietary vision, is delayed."[122] Critics point to the fact that Microsoft's architecture is fundamentally at odds with Telco billing systems, relying upon a closed, proprietary standard that, curiously, requires the purchase of substantial complementary Microsoft products, such as Windows 2003 Video-on-Demand servers, problematic .NET extensions, and other client-server technologies deemed so anti-competitive that European Commission anti-trust authorities have already fined Microsoft for their use.[123] It should also be noted that the set top boxes required for IPTV by Verizon and AT&T will require licenses for Microsoft's TV Foundation Edition.[124] This flies in the face of traditional cable systems, which thus far have relied upon open standards developed by the cable industry's Bell Labs equivalent, Cable Labs.[125] To be sure, the Cable industry recently began the migration to a Microsoft-dominated architecture, but the transition thus far has been slow.[126]

Regardless of the architectural distinctions, however, the Bells and MSOs look to both the *Wireline Broadband* and *VoIP Proceedings* as precedent. The Bells urge the Commission to look upon IPTV as simply another internet-enabled service worthy of the same regulatory treatment afforded to both wireline broadband and VoIP.[127] The MSOs, for their part, discount those proceedings, noting that "*nothing* the Bell companies have proposed—video offerings, IP transmission, switching technology, interactive applications—is any different from what cable companies now provide[.]"[128] Indeed, the MSOs, per the NCTA, state that "[a]ll of these 'IPTV' features that the Bells tout. . .cable companies provide today or will provide in the future."[129]

Comcast assumes a slightly different posture, arguing that IPTV should either be regulated under Title VI, or that the Commission should

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available at http://today.reuters.com/summit/BreakingNews.aspx?name=TelecomSummit05.

121. Rethink Research, *supra* note 107.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See*, *e.g.*, Cable Labs, www.cablelabs.com (last visited Oct. 1, 2006).

126. Rethink Research, *supra* note 107.

127. AT&T IPTV Comments, *supra* note 7, at 2 ("Just as voice-VoIP is transforming the paradigm of person-to-person communications, video-VoIP promises to do the same for video-based communications.").

128. NCTA IPTV Comments, *supra* note 7, at 1 (emphasis in original).

129. *Id.* at 2.

forbear from applying Title VI mandates to all providers.[130] Comcast also argues that "the issues raised by IP video have no parallel in IP voice. . . ."[131] Citing to the *Cable Modem Order*, the MSOs point to the fact that, "for years the phone companies have protested the disparity between the way the law treats their DSL service and the way it treats cable's high speed Internet service."[132]

Any variant of the argument hinges on the distinct treatment of cable services and information services under the 96 Act. Under the 96 Act, information services are classified as

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[133]

Under Title VI, cable services are classified as "the one-way transmission to subscribers of. . .video programming" over a "cable system," which is in turn defined as a "set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service[.]"[134] This definition contains several exceptions, most notable an exception for facilities regulated under Title II (i.e. wireline telephony) or Open Video Systems.[135]

The final regulatory treatment will likely depend upon the specific architectural and technical choices made by the Bells. The decision will also turn on whether or not the service is predominantly two-way or not, given the definition of a cable service.[136] As such, Verizon has highlighted the two-way nature of their architecture.[137] Regardless of the

130. *Comcast Testimony, supra* note 112, at 18.

131. *Id.* at 19.

132. *Id.* At 20.

133. 47 U.S.C.A. § 153 (20) (2005).

134. *Id.* at § 522 (6) *et. seq.* (2005).

135. *Id.* at § 522 (7)(D) (2005); *See also* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, 20 FCC Rcd. 2,755, ¶¶ 70-75 (2005) (noting that open video systems are subject to reduced regulation under Title VI, including a presumption that rates are just and reasonable where one or more unaffiliated video programming providers occupy channel capacity on the system at least equal to that of the open video system operator and its affiliates).

136. 47 U.S.C.A. § 522 (6) *et. seq.* (2005).

137. *How Internet Protocol-Enabled Services Are Changing the Face of Communications: a Look at Video and Data Services: Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 109th Cong. 20 (2005) (statement of Robert Ingalls, Jr., President, Retail Markets Group, Verizon Communications), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid= f:20748.pdf [hereinafter *Verizon Testimony*] ("What we think customers are really going to like about FiOS is the upstream capacity of the system that will connect them to a world of multimedia and interactive

ultimate regulatory classification, however, the NCTA and the Bells cannot afford to ignore or discount the role of "non-efficiency-related objectives in the television world[.]"[138] Such an oversight would obscure the largest variable in the coming regulatory framework for IPTV. Indeed, while one can arguably characterize the *Wireline Broadband* and *VoIP* proceedings as efficiency-focused, one cannot extend that label alone to MVPD regulation. Historically, as shown through the DTV transition, far more so than wireline broadband policy, MVPD regulation reflects the idea that "there are certain core social policy goals that are not market-driven and probably cannot be achieved without governmental urging, and perhaps mandates."[139] Further, the *E911 Order*[140] suggests that "even as the FCC emphasizes the need to keep the Internet free of traditional common carrier regulation, it will impose non-economic regulation of Internet-based services in the name of particular social welfare objectives."[141] It is for these reasons that Lawrence Lessig concisely stated that "[t]he Internet is not cable television."[142]

IV. FRANCHISES: ECONOMICS, PUBLIC INTEREST, & TECHNOLOGY

Again, the LECs will rely upon technological distinctions between MSO platforms and the new IPTV facilities in order to gain preferential treatment from the Commission. Moreover, the Bells will likewise focus on those regulations deemed more or less helpful to their cause. These include franchising, must-carry and retransmission consent, horizontal and vertical ownership limits, as well as Title-specific privacy strictures. To demonstrate how efficiency and non-efficiency related objectives already prevail in IPTV, however, one need only examine the question of franchises.

The IPTV debate, as of this writing, mostly concerns the role of local franchising authorities in slowing the roll-out of IPTV. Historically, governments used franchises to deter excessive rent-seeking, limit anti-competitive behavior, impose common-carrier-like obligations on regulated firms, and limit market power.[143] In the United States, before the Cable Acts of 1984 and 1992, local franchising authorities (LFAs)

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possibilities.").

138. DIGITAL CROSSROADS, *supra* note 20, at 359.

139. The Honorable Kathleen Q. Abernathy Commissioner, Disruptive Technologies and Opportunities for Service Providers Panel 2005 Telecoms Transition World Summit (June 27, 2005), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260480A1.pdf.

140. *VoIP E911 Order*, *supra* note 67, at ¶¶ 3-5, 36-53.

141. NUECHTERLEIN & WEISER, *supra* note 22, at xix.

142. Lawrence Lessig, *Re-Marking the Progress in Frischman*, 89 MINN. L. REV. 1031, 1042 (2005).

143. *See* Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MNGT. SCI. 22, 37-38 (1971); *Lassman Testimony*, *infra* note 156.

regulated cable by exercising or withholding franchising rights, and the Commission deferred to those actions.[144] With *Southwestern Cable* and the Cable Acts, however, the Federal government entered the franchising fracas with full force.[145] The Cable Act of 1992, for instance, established standards for local rate regulation of basic cable, thereby limiting the extent to which local regulators had interfered with cable pricing schemes and other economic forces.[146] Moreover, "[c]able companies now have approximately 12,000 such franchise pacts, which earn municipalities a total of about $3 billion a year."[147]

Today, Section 621(a)(1) of the Communications Act states that cities "may not unreasonably refuse to award an additional competitive franchise." Localities use such franchises to impose affirmative and negative burdens upon facilities-based providers seeking to provide service in a particular jurisdiction.[148] That is, local regulators rely upon franchises to ensure universal service (known as "redlining" in the MVPD context) and impose pricing restrictions on basic service tiers.[149] "Quite simply, franchise regulation is an opportunity to achieve social goals through regulation."[150] Indeed, "[e]very cable operator in business today. . .has built out its systems to avoid redlining."[151] AT&T, however, plans to focus "most of its initial investment on affluent neighborhoods, where households would be willing to pay from $110 to $200 a month for a package of video, telecom, and data services."[152] Cable operators have seized upon this "cream-skimming" in their efforts to obtain statewide or national franchises.[153]

Competition, however, undermines the cross-subsidies involved in universal service.[154] Given the difficulty of justifying franchises on an anti-monopolistic premise in the face of growing cross-platform

144. *See* Jerry Brito & Jerry Ellig, *Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives*, 5 J. ON TELECOMM. & HIGH TECH. L. 199, 202 (2006); Frontier Broadcasting v. Collier, 24 FCC Rcd. 251 (1958).

145. *See* United States v. Sw. Cable Co., 392 U.S. 157 (1968); 47 U.S.C. § 543 (2000); *see, e.g.,* Brito & Ellig, *supra* note 144, at 212.

146. 47 C.F.R. § 76.905 (2003); Brito & Ellig, *supra* note 144, at 214; *see* Posner, *supra* note 143*,* at 33.

147. Bara Vaida, *The Clash of the High Tech Titans*, NAT'L J., Sept. 28, 2005, http://www.njtelecomupdate.com/lenya/telco/live/tb-ZLCM1127945542869.html.

148. One should also note that "franchise authority and fees are legally and intellectually distinct from right-of-way authority and fees." *Lassman Testimony*, *infra* note 156.

149. Ray Gifford, *Franchising Détente: Is It Possible?*, 2005 PROGRESS SNAPSHOT 1.25 (2005), http://www.pff.org/issues-pubs/ps/1.25franchising.htm (stating that "these franchising obligations are analogous the [sic] provider of last resort and universal service obligations that the Bells assumed under state public utility laws").

150. *Lassman Testimony*, *infra* note 156.

151. *Comcast Testimony*, *supra* note 112, at 2.

152. Vaida, *supra* note 147.

153. *Id.*

154. *See* Posner, *supra* note 143, at 34.

competition, regulators and commentators instead premise their continued use under the guise of public interest regulation. Indeed, in an antemortem editorial, civil rights activist C. Delores Tucker likened telephone and television service to a civil right that would be disserved by the relaxation of franchising obligations.[155]

In practice, franchises comprise a significant portion of local tax revenue.[156] Under the 96 Act, municipalities may collect franchise fees of up to 5% of gross revenues from cable providers for use of public rights of way.[157] Likewise, the Commission itself collects certain regulatory fees, as approved by Congress on an annual basis to fund the Commission's enforcement activities.[158] As a result, rough estimates indicate that local franchises allow localities to collect almost $3 billion in additional tax revenue they would not otherwise receive.[159] Indeed, almost fifteen percent of the municipal general funds for some communities in Nevada come out of franchise fees.[160] And while the 96 Act does include certain exceptions to rate regulation for competitive entrants, the same title would reduce rate regulation on cable providers.[161]

With the RBOCs' successes in obtaining local franchises and government threats to create a national franchise, local regulators worry that the Commission will usurp both authority and revenue.[162] As of 2004, at least 25 percent of the average phone bill consisted of taxes, when including implicit carrier access and other charges.[163] Indeed, some have even argued that, by creating a nationwide franchise, the Commission would violate the Takings Clause of the United States Constitution.[164] Carriers and Cable operators, alternatively, assert that

155. C. Delores Tucker, *Civil Rights Unplugged*, WASH. POST, Oct. 15, 2005, at A19 (arguing that the potential benefits of IPTV "should not transform our elected officials into marionettes for two monopolies that want to trample our civil rights traditions.").

156. *See* Brito & Ellig, *supra* note 144, at 219; *Statewide Video Franchise Authority: Before the H. Comm. on Regulated Industries*, (Tx. 2005) (statement of Kent Lassman, Research Fellow, The Progress & Freedom Foundation) [hereinafter *Lassman Testimony*].

157. 47 U.S.C.A. § 542(b) (2005).

158. 47 U.S.C.A. § 159 (2005); s*ee, e.g.*, Assessment and Collection of Regulatory Fees for Fiscal Year 2004, *Notice of Proposed Rulemaking*, 19 FCC Rcd. 5,795, ¶ 1 (2004).

159. Vaida, *supra* note 147.

160. *Lassman Testimony*, *supra* note 156.

161. *See Comcast Testimony*, *supra* note 112, at 2.

162. Leslie Cauley, *FCC Chief Considers Forcing Cable TV Competition*, USA TODAY, Aug. 22, 2005, http://www.usatoday.com/money/industries/telecom/2005-08-22-telecom-usat_x.htm.

163. Robert E. Entman, *Reforming Telecommunications Regulation*, 2005 ASPEN INST. 11.

164. *See, e.g.*, Comments of the National Association of Telecommunications Officers and Advisors and the Alliance for Community Media to the *Notice of Inquiry* in Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment

"[s]ome municipalities have subjected them to long processing delays and overly burdensome application processes, and some have charged excessive fees."[165] Still others assert that statewide franchises "would be a welcome change from the status quo and an opportunity to reduce regulatory costs on all providers of IP based services."[166] The Telcos, meanwhile, have raised the flag of regulatory parity. "Public policy should reduce any roadblocks and unnecessary rules to encourage new entry into the video services market. In particular, new entrants should not be saddled with the legacy regulation applicable to incumbent providers."[167]

The Bells, for their part, point regulators and Congress to the fact that they already retain franchises for delivering telephone service, and that their IPTV services will use the same rights of way.[168] Whatever the resolution of the controversy, however, both efficiency and non-efficiency purposes pervade the ongoing franchise debate.

CONCLUSION

IPTV will remain a contentious issue for years to come. As a creature of broadband, IPTV will evince some of the pro-consumer, pro-competition regulations typical of the wireline broadband and VoIP proceedings. As purveyors of a new form of television, however, the LECs likely also run afoul of public interest regulations that, historically, have slowed and distorted market adoption and uptake. The franchising case suggests that the Commission will take a more active role in determining the ultimate conclusion to the IPTV story. Regardless of the epilogue, however, MSOs and LECs would do well to consider the role of public interest regulations in their future interactions with telecommunications regulators.

Pursuant To Section 706 of the Telecommunications Act of 1996, GN Dkt. No. 04-54, ex. 4 (May 10, 2004), http://www.natoa.org/public/articles/NATOA-ACM_706_Comments_04.pdf.

165. Jennifer Manner, *Emerging Communications Technologies: Wireless Developments and Beyond*, 3 J. ON TELECOMM. & HIGH TECH. L. 417, 423 (2004).

166. *Lassman Testimony*, *supra* note 156.

167. *AT&T Testimony, supra* note 109.

168. *Verizon Testimony*, *supra* note 137, at 4.