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Column

**Accelerating Beyond The "On-Ramp": Telephone
Company Entry onto the Information
Superhighway Through Video Dialtone**

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1. An integral part of the current debate surrounding the information superhighway focuses upon the convergence of video and telephony. Particular attention is on the provision of video services through video dialtone systems operated by local telephone companies, also known as local telephone exchange carriers (“LECs”). Recent regulatory initiatives and proposed LEC video dialtone deployment plans suggest that voice, video and data services delivered over LECs’ advanced broadband, integrated telecommunications facilities may constitute an important component of information superhighway services offered to consumers. At present, however, participation by LECs remains at the “on-ramp” stage and is subject to federal and state regulatory oversight, judicial review, and proposed legislative initiatives by Congress. These institutional forces will drastically alter the existing telecommunications landscape. In light of these developments, this column attempts to describe briefly: (1) existing video dialtone regulatory policies of the Federal Communications Commission (“FCC”), which govern LEC participation in the video marketplace; (2) the FCC’s Section 214 authorizations which allow LECs to operate and maintain video dialtone systems; (3) the impact of recent judicial decisions on LEC provision of video services; (4) current video dialtone issues before the FCC; and (5) the potential impact of proposed Congressional legislation on video dialtone and future LEC participation on the information superhighway.

I. VIDEO DIALTONE BACKGROUND

2. First, what is video dialtone? In short, video dialtone represents a regulatory framework established by FCC orders adopted between 1991 and 1994.¹ These video dialtone orders permit LECs to deliver video programming to subscribers on a common carrier basis consistent with the telco-cable cross-ownership ban of the Cable Communications Policy Act of 1984 (“1984 Cable Act”).² In addition, LECs may provide various unregulated services using video dialtone. Prior to the FCC’s video dialtone orders, FCC rules had prohibited each LEC from exceeding a “carrier-user” relationship with video programmers.³ These FCC rules had generally limited each LEC, within its own telephone service area, to providing “channel service,” which is a common carrier delivery service linking a cable operator’s headend⁴ to subscriber premises.
3. In the two decades following FCC adoption of the cross-ownership rules, the nation’s cable television industry experienced exponential growth.⁵ Meanwhile, consumer choice among non-cable distribution technologies remained extremely limited.⁶ Recently, however, market trends and new technology have created a

potential for broadened LEC participation in the video market through advanced video capabilities and related services.⁷ In response to these forces, the FCC initiated its video dialtone proceeding by proposing to amend its telco-cable cross-ownership rules to permit LECs to play an expanded role in the video marketplace without running afoul of the 1984 Cable Act.⁸

II. VIDEO DIALTONE REGULATORY FRAMEWORK

4. With respect to LEC provision of video dialtone service, the FCC aspires to three main public interest goals: (1) to increase competition in the provision of video services; (2) to encourage efficient investment in the national telecommunications infrastructure; and (3) to foster the availability of new and diverse sources of video programming to the American public.⁹ Consistent with these goals, the FCC established a video dialtone framework that allows an LEC to offer a basic common carrier video delivery platform as long as the platform is offered on a nondiscriminatory basis and accommodates multiple video programmers.¹⁰ This “first level basic platform” is subject to regulation under Title II of the Communications Act of 1934.¹¹ Under the FCC video dialtone framework, an LEC: (1) may offer enhanced and other unregulated services, provided it complies with existing regulatory safeguards;¹² (2) may not hold an ownership interest of five percent or more in a video programmer that offers service in the LEC’s telephone service area;¹³ and (3) may not acquire an existing cable facility in its telephone service area for the provision of video dialtone service.¹⁴
5. The FCC has also determined that neither an LEC offering video dialtone service nor its programmer-customers are subject to the cable franchise requirements of Section 621(b) of the 1984 Cable Act.¹⁵ In addition, the FCC determined that it has exclusive jurisdiction over interstate video dialtone services only; states retain jurisdiction over intrastate video dialtone services.¹⁶ Finally, the video dialtone framework requires LECs to obtain FCC approval under Section 214 of the Communications Act of 1934 prior to constructing video dialtone facilities.¹⁷

III. LEC VIDEO DIALTONE DEPLOYMENT

6. Following the establishment of the FCC’s video dialtone policies and rules, LECs, and in particular, the Regional Bell Operating Companies (“BOCs”), have sought authority from the FCC to deploy video dialtone technology and offer video services to their subscribers throughout the nation. As of March 1, 1995, the FCC

has granted authority for several LECs to conduct limited technical and market trials of video dialtone services.¹⁸ Consistent with the FCC's "technology neutral" policy, under which the FCC favors no particular video dialtone architecture or service offering, the LEC market trials will test a variety of video delivery technologies.¹⁹ Once fully deployed, these video dialtone trial services will be offered to approximately 230,000 telephone subscribers.

7. In addition to granting authorizations for various trial services, the FCC approved several large-scale commercial deployments of video dialtone service. In July 1994, Bell Atlantic received Section 214 authorization for the first commercial video dialtone offering, which will service approximately 38,000 homes.²⁰ In December 1994, the FCC granted Ameritech's proposal to build a video dialtone network which will reach 1.3 million homes in five states.²¹ In February 1995, NYNEX was given authority to construct and operate video dialtone facilities in limited areas of Massachusetts and Rhode Island which will offer service to approximately 392,000 recipients.²²

IV. JUDICIAL ACTION

8. Several federal courts have declared the telco-cable cross-ownership ban unconstitutional as a violation of the First Amendment.²³ The Fourth Circuit, for example, has held that the ban is not "narrowly tailored to serve a significant government interest" and does not make sufficient alternative methods of communication available that are "sufficiently similar to the method foreclosed by regulation."²⁴
9. These court decisions now allow LECs to own and supply the video programming they provide over their video dialtone platforms, in direct competition with unaffiliated video information programmers. As video information providers, LECs would be able to control the content of programming delivered over their facilities. Clearly, this constitutes a far more expansive role for LECs than that envisioned in the FCC's original video dialtone paradigm.
10. In response to these decisions, the FCC has commenced a proceeding to consider the adoption of new rules governing the provision of video programming by LECs directly to their subscribers.²⁵ In this proceeding, the FCC has solicited comment on a tentative conclusion that LECs no longer subject to the telco-cable cross-ownership ban should be allowed to become video programmers on their own

video dialtone platforms, subject to regulatory safeguards. In addition, with regard to any LEC planning to provide video programming directly to subscribers in its own telephone service area, the current proceeding asks parties to comment on whether the FCC has the authority to require use of a video dialtone system instead of a traditional cable television facility. Finally, the FCC also seeks comment on: (1) the extent to which Titles II and VI of the Communications Act of 1934 should apply to LEC provision of video programming over LECs' own video dialtone systems; (2) whether an LEC's provision of video programming over its own video dialtone system is subject in whole or in part to regulation as a Title VI cable system; and (3) if Title VI is not applicable, whether the FCC should incorporate any elements of Title VI into the existing video dialtone framework.

V. PROPOSED CONGRESSIONAL LEGISLATION

11. Video, voice and data technologies are converging, and telecommunications market players are positioning themselves in a volatile and dynamic marketplace. Congress has recently taken up several bills and legislative proposals to overhaul the existing Communications Act of 1934 to reflect this changing environment. These sweeping legislative initiatives include provisions that would impact directly the FCC's existing video dialtone framework.
12. On January 31, 1995, Senate Commerce Committee Chairman Larry Pressler (R-S.D.) circulated a "Discussion Draft" entitled the "Telecommunications Competition and Deregulation Act of 1995." Senator Pressler's proposal is designed to accelerate nationwide private-sector deployment of advanced telecommunications and information technologies and services by opening all telecommunications markets to competition wherever possible. As far as video dialtone is concerned, the proposal aims to: (1) amend Section 613 of the Communications Act of 1934 to eliminate the telco-cable cross-ownership ban; (2) exempt LECs from local franchise requirements when LECs provide video programming through video dialtone facilities on a common carrier basis; (3) impose franchise requirements on LECs that provide cable service through cable systems not open to all on a common carrier basis; (4) freeze FCC action on pending LEC Section 214 video dialtone applications for one year; and (5) eliminate, after one year, the Section 214 authorization process for video dialtone service.²⁶
13. On February 15, 1995, Senator Hollings (D-S.C.) introduced a bill entitled the "Universal Service Telecommunications Act of 1995." The Hollings bill articulates

policy goals similar to those of the Pressler proposal, including promoting the rapid and equitable development and deployment of new technologies and encouraging increased competition to enhance infrastructure development. With regard to LEC provision of video, the Hollings bill and the Pressler proposal are also similar in that both lift the telco-cable cross-ownership ban and both recognize the central distinction between cable service and provision of video programming over a common carrier video platform. However, the Hollings bill does not propose to restrict the FCC's regulatory authority under Section 214. Rather, under the Hollings bill, the FCC's regulatory authority to approve LEC video dialtone service remains intact.

VI. CONCLUSION

14. This brief overview of the current regulatory landscape reveals that, where video dialtone service is concerned, change is constant. As described above, actions by the FCC, industry, courts, and Congress have resulted in major modifications to the FCC's original video dialtone objectives. Previously, the FCC's objective was to allow limited LEC participation in the video marketplace within the boundaries delineated by the telco-cable cross-ownership ban. Now, however, it appears that the telco-cable cross-ownership ban will not hinder LEC entry into the video marketplace. These rapidly unfolding events and the continuing evolution of video dialtone service render highly speculative any specific predictions about video dialtone service.
15. Nevertheless, even amidst this continuing evolution, video dialtone will continue to advance the public interest goals originally set forth by the FCC some five years ago. Regardless of its final form, the video dialtone framework will most likely be recognized for imparting a critical guiding regulatory principle for the next generation of converging technologies: technologically advanced services will be offered over a non-discriminatory common carrier platform open to all comers. This concept of the common carrier platform has escaped the confines of the FCC's video dialtone framework. Now the common carrier platform appears, in one form or another, as an important element of all current Congressional proposals on telecommunications reform.
16. Moreover, LECs have already begun to put their shovels in the ground for constructing video dialtone facilities. These efforts provide tangible evidence that video dialtone will contribute to increased competition in the video marketplace,

encourage investment in the national telecommunications infrastructure and provide consumers with new and diverse sources of video programming. Indeed, LEC video dialtone plans have already motivated competitors in the home video delivery market: in response to video dialtone developments, cable operators and digital broadcast satellite providers, such as DirecTV, are working to develop cutting edge technology so that consumers will have new and increased video programming choices. At this stage, it appears that consumers and video programmers can only benefit as LECs advance beyond the information superhighway's "on-ramp" to provide video services in a new and dynamic competitive marketplace.

ENDNOTES

¹ See Telephone Company-Cable Television Cross-Ownership Rules, 47 C.F.R. §§ 63.54 - 63.58 (1994); Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 F.C.C.R. 300 (1991) [hereinafter First Report and Order], *recon.*, 7 F.C.C.R. 5069 (1992), *aff'd* Memorandum Opinion and Order on Reconsideration, 7 F.C.C.R. 5069 (1992), *aff'd*, National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994); Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992) [hereinafter Second Report and Order], *aff'd*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 F.C.C.R. 244 (1994) [hereinafter Video Dialtone Reconsideration Order], *appeal pending sub nom.* Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

² Cable Communications Policy Act of 1984 § 613(b), 47 U.S.C. § 533(b) (1988). The telco-cable cross-ownership ban prohibits each LEC from providing video programming to subscribers in its telephone service area. *Id.* The genesis of the telco-cable cross-ownership ban dates back to an FCC rule adopted in 1970. See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307, 324-25, *recon. in part*, 22 F.C.C.2d (1970), *aff'd*, General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). At that time, cable television was a nascent industry; the FCC promulgated cross-ownership rules in order to protect this industry from the establishment of LECs as monopoly cable television providers. Applications of Telephone Companies for Section 214 Certificates for Channel Facilities to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d at 324-25. Then, in 1984, Congress enacted a similar statutory ban prohibiting each LEC from providing video programming directly to subscribers in its telephone service area. See 47 U.S.C. § 533(b)(1) (1988). The 1984 Cable Act defined "video programming" as "programming provided by, or generally comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19) (Supp. V 1993).

³ The "carrier-user" relationship encompassed communications services and functions provided by telephone companies on a common carrier basis. See Comark Cable Fund III, 100 F.C.C.2d 1244, *recon. denied*, 103 F.C.C.2d 600 (1985), *remanded for clarification sub nom.* Northwestern Indiana Tel. Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1985), *clarified*, 3 F.C.C.R. 3096, 3097 (1988), *pet. for review denied*,

Northwestern Indiana Tel. Co. v. FCC, No. 88-1521, slip op. (Apr. 11, 1989), *pets. for reh'g and reh'g en banc denied*, (D.C. Cir. June 27, 1989).

⁴ A cable operator's headend is the central cable office where programming originates.

⁵ In 1970, the fledgling cable television industry provided service to approximately 9% of all homes; by 1991, the cable industry offered channel service to over 90% of American homes and was worth twenty billion dollars. See Second Report and Order, 7 F.C.C.R. at 5848, para. 137.

⁶ In 1990, the FCC issued a report stating that, as a result of the limited presence of alternative multichannel distribution technologies, the multichannel video marketplace was not as fully competitive as it could be. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 F.C.C.R. 4962, 5002-07 (1990).

⁷ These technological developments included the "...rapid deployment of fiber optic networks, advances in multimedia applications, broadband digital switching technology, and video compression capabilities" that would eventually make economically and technically feasible the deployment by LECs of advanced video network capabilities. Second Report and Order, 7 F.C.C.R. at 5793. This order also cited the potential demand for technologically advanced LEC participation in the video market. *Id.* at 5794.

⁸ See First Report and Order.

⁹ *Id.*

¹⁰ The FCC defines the "basic platform" as a common carriage transmission service, coupled with the means by which consumers can access any or all video program providers making use of the platform. Second Report and Order, 7 F.C.C.R. at 5783, para. 2 n.3.

¹¹ Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1988 & Supp. V 1993). One of the key distinctions between video dialtone and cable television service is that video dialtone is regulated under Title II of the Communications Act, whereas cable service is subject to regulation under Title VI of the Communications Act. Title II, unlike Title VI, is guided by the fundamental principles of common carriage which require telecommunications carriers to provide their customers with non-discriminatory access to their networks.

¹² Second Report and Order, 7 F.C.C.R. at 5797 para. 2; Video Dialtone Reconsideration Order at para. 87-102.

¹³ Second Report and Order, 7 F.C.C.R. at 5817 para. 69; Video Dialtone Reconsideration Order at para. 64.

¹⁴ Second Report and Order, 7 F.C.C.R. at 5837 para. 109-11; Video Dialtone Reconsideration Order, at para. 48-55.

¹⁵ See First Report and Order, 7 F.C.C.R. at 324, para. 50-52. These rulings were upheld by the D.C. Circuit. See *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

¹⁶ Video Dialtone Reconsideration Order, at para. 121-24. Interstate video dialtone services involve the

"...delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves." *Id.* at para. 123.

¹⁷ Second Report and Order, 7 F.C.C.R. at 5820, para. 72; Video Dialtone Reconsideration Order, at para. 137-40; see 47 U.S.C. § 214(a) (1988).

¹⁸ The FCC has granted ten Section 214 applications to the following LECs to conduct video dialtone market and technical service trials, subject to some conditions formulated to protect interstate rate payers: Bell Atlantic (Fairfax, Va.), NYNEX (New York City), US WEST (Omaha, Neb.), Bell South (Ga.), Rochester Telephone, Southern New England Telephone Company (Hartford & Stamford, Conn.), the Carolina Telephone Company (Wake Forest, N.C.), and the Puerto Rico Telephone Company.

¹⁹ The video delivery technologies that LECs propose to test include fiber-to-the-curb ("FTTC"), asymmetrical digital subscriber line ("ADS"), and hybrid-fiber coaxial cable ("HTC") systems.

²⁰ *In re New Jersey Bell Tel. Co.*, 9 F.C.C.R. 3677 (1994).

²¹ Ameritech's proposed system would provide video services over a hybrid fiber-coaxial cable infrastructure constructed solely for the provision of video dialtone services. The proposed video dialtone network would offer 310 multicast (240 digital and 70 analog) channels and 80 switched digital channels. *In re Ameritech Operating Cos.*, FCC Common Carrier No. 94-340, 1995 FCC LEXIS 70 (Dec. 23, 1994).

²² NYNEX proposes to build two broadband, hybrid fiber-coaxial cable networks offering advanced voice, data, and video services. See COMM. DAILY, Feb. 9, 1995, at 7.

²³ See, e.g., *Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181 (4th Cir. 1994); *US West, Inc. v. United States*, No. 94-35775, D.C. No. CV-93-01523-BJR, 1994 U.S. App. LEXIS 39121 (9th Cir. Dec. 30, 1994); *Bell South Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994).

²⁴ *Chesapeake*, 42 F.3d at 203. The Ninth Circuit also found that the provision was not "narrowly tailored," but declined to reach the issue of the availability of "ample alternative channels of communications." *US West*, 1994 U.S. App. LEXIS 39121, at *43-44.

²⁵ Telephone Company-Cable Television Cross Ownership Rules, 47 C.F.R. §§ 63.54-63.58 (1994); Fourth Further Notice of Proposed Rulemaking, FCC Common Carrier No. 87-266, 1995 FCC LEXIS 396 (Jan. 29, 1995).

²⁶ Under the Pressler proposal, BOCs that choose to provide video dialtone service would have to provide such service through a separate subsidiary. The proposal's separate subsidiary requirement differs from existing FCC rules that permit LECs to provide video dialtone service subject to non-structural separation of regulated and non-regulated activities, such as accounting and cost-allocation safeguards. See Telecommunications Competition and Deregulation Act of 1995, Discussion Draft (1995), Section 202, available on Internet at www.bell.com (World Wide Web site for Alliance for Competitive Communications).