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VIDEO DIALTONE: REFLECTIONS ON CHANGING PERSPECTIVES IN TELECOMMUNICATIONS REGULATION

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INTRODUCTION

The Federal Communications Commission's ("FCC" or "the Commission") recent decision on the provision of video dialtone services[1] highlights ongoing changes in the Commission's approach toward telecommunications regulation. Two aspects of the decision, in particular, are noteworthy. First, the decision represents the first attempt by the federal government to provide a comprehensive set of incentives for the deployment to the home of technologically advanced, high-capacity communications facilities, such as fiber optic cables, promoting the development of an array of informational and entertainment video services.[2] The deployment may lead to the "convergence" of all audio and video communications services onto "one wire" into the home. Second, the decision demonstrates the ability of a federal agency to navigate its way through a remarkably technology-restrictive statute in order to promote the principle of allowing market forces, rather than government plan, to be the engine of technological change and innovation. This Article will examine the impact of these perspectives on the

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1. Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 F.C.C.R. 5781 (1992) [hereinafter Second Report]. Petitions for reconsideration of the Second Report are pending. *See, e.g.*, Petition for Reconsideration of the National Cable Television Association, Inc., FCC Common Carrier Docket No. 87-266 (filed Oct. 9, 1992). An appeal to the U.S. Court of Appeals for the District of Columbia Circuit is anticipated.

2. This effort is continuing under the current Democratic administration. *See* WILLIAM J. CLINTON & ALBERT GORE, JR., TECHNOLOGY FOR AMERICA'S ECONOMIC GROWTH 28-30 (1993) (discussing efforts to promote the "information infrastructure" that "has as its lifeline a high-speed fiber optic network"); *see also* Phillip Elmer DeWitt, *Take a Trip into the Future on the Electronic Super Highway*, TIME, Apr. 12, 1993, at 50.

video dialtone decision as well as survey several of the issues that will have a major bearing on the development of video dialtone but that remain to be addressed by the FCC.

The focus of Section I is an overview of the video dialtone decision itself, including the interests of the various parties and an examination of the FCC's analysis of the issues. Section II further examines the technological incentives created by the FCC and also concludes that the FCC's statutory interpretation flowed from a creative, yet well-grounded, analysis of the relevant statutory provisions. This interpretation reflects the importance of adopting a perspective that gives a greater role to technological forces and market-driven solutions in setting telecommunications policy. Finally, Section III analyzes the major issues in implementing video dialtone that the FCC left unresolved in its ruling and the approaches being taken by local telephone companies as video dialtone moves from the drawing board and into the living room.

What is video dialtone? Conceptually, video dialtone, as its name implies, is best compared to the familiar audio dialtone of a telephone. A telephone consumer typically picks up a telephone handset, dials a telephone number, is switched and routed over the facilities of one or more common carriers, and reaches the number dialed—all in a matter of seconds. Similarly, as the FCC envisions video dialtone, a consumer could turn on a television, receive a menu of available services, dial the correct code, and access computer data bases, sporting events, movies, shopping guides, interactive services, and a multiplicity of other video services provided by various programmers (who are customers of the telephone company) ("customer-programmer") or by telephone companies themselves. Ultimately, the FCC envisions that video dialtone "could be offered over a broadband network" so as to enable any subscriber to transmit and receive a video signal to or from any other subscriber.[3]

3. Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 F.C.C.R. 300, 306-07 (1991) [hereinafter First Report].

I. VIDEO DIALTONE PROCEEDINGS AND DECISION

A. Historical Background

Before examining the video dialtone decision, it is necessary to set it in the proper historical perspective. The relationship of telephone companies and cable system operators has been a concern of the Commission for the last twenty-five years. In the *General Telephone* decision,[4] the Commission determined that telephone companies were compelled by § 214 of the Communications Act[5] to seek the FCC's approval before the telephone company could provide channel service[6] to a cable system. In examining the § 214 applications that followed, the Commission became concerned about the potential anti-competitive effects from telephone company ownership of cable systems in the same service area.[7] As a result, the Commission concluded that a ban on such cross-ownership was necessary.[8] Therefore, regulations prohibiting cross-ownership were established.[9] Several years later, recognizing that

4. *See* General Tel. Co. of Cal., 13 F.C.C.2d 488 (1968), *aff'd*, 413 F.2d 390 (D.C. Cir. 1969).

5. *See* 47 U.S.C. § 214 (1988). Generally, common carriers must show that it will serve "public convenience and necessity" before the Commission will grant permission under § 214 for the carrier to construct and operate new lines. *Id.* This is known as "214 authority."

6. "Channel service," referred to in 47 C.F.R. § 63.55 (1992), occurs when telephone companies construct and maintain cable television distribution networks that are leased to cable operators within the same area in which the telephone companies provide telephone service. *See* Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63-.58, Notice of Inquiry, 2 F.C.C.R. 5092, 5097 n.15 (1987) [hereinafter Notice of Inquiry].

7. *See* Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d [illegible] (1970)[hereinafter Applications for Certificates], *aff'd sub nom.* General Tel. Co. of S.W. v. United States, 449 F.2d 846 (5th Cir. 1971).

8. Applications for Certificates, *supra* note 7, at 325.

9. 47 C.F.R. § 63.54 (a)-(b) (1992). In an effort to maintain competition within each of these submarkets, the same policy makers have erected a complex network of ownership restrictions that have frequently caused competitors to choose among video delivery systems. For example, ownership barriers were erected between cable systems and local television stations and the national television networks, such as ABC, CBS, and NBC, 47 C.F.R. § 76.501(a) (1992). The Cable Act itself prohibited some of cable's most potent potential competitors, local telephone companies, from owning cable systems within their service areas. Cable Communications Policy Act of 1984, 47 U.S.C. § 533(b) (1988); *see also* 47 C.F.R. § 63.54(b) (1992) (implementing the Cable Act restriction). Outside the region where they provide telephone service, the telephone companies are permitted to own cable systems. For example, Southwestern Bell recently purchased two cable systems in metropolitan Washington, D.C. *See* Paul Farhi & Cindy Skrzycki, *Southwestern Bell To Buy*

the cross-ownership ban was preventing any cable service in some situations, the Commission established an exception for "rural" areas.[10]

This general ban was codified in the Cable Act of 1984.[11] Specifically, the statute prohibited "any common carrier provid[ing] video programming directly to subscribers in its telephone service area"[12] and maintained the rural exemption.[13]

B. Prior Proceedings on Video Dialtone

As federal regulatory time goes, video dialtone is a very new concept and grew out of proceedings that were not aimed at working within the ownership restrictions of the Cable Act, but aimed at doing away with them. In fact, it was not until 1991 that the structure of video dialtone began to take specific form.[14] That year the Commission proposed for

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Arlington, Montgomery Cable, WASH. POST, Feb. 10, 1993 at C1. Adding an additional layer of complexity, as part of the consent decree that resulted in the AT&T break-up, the local telephone companies that were once part of AT&T are prohibited from providing "interexchange" services, which involve transmitting information across certain geographical boundaries known as LATAs. *See* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

10. *See* Elimination of the Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.56, 88 F.C.C.2d 564, 576 (1981) ("In rural areas, we have determined that the costs of imposing the cross-ownership rules outweigh their benefits. Those costs include foreclosure or delay of cable television service to rural residents and wasted administrative resources at the Commission [processing waivers]."); 47 C.F.R. § 63.58 (1992) (defining the rural exemption).

11. 47 U.S.C. § 533(b) (1984). In addition, AT&T and its affiliates were barred from providing cable television service as part of a 1956 antitrust settlement. United States v. Western Elec. Co., 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). *See* Notice of Inquiry, *supra* note 6, at 5096 n.22 (recognizing this interpretation of the decree). The later decree governing the break-up of AT&T maintained this ban on the former Bell System operating companies. United States v. AT&T, 552 F. Supp. 131, 180-86, 189-90 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983) (establishing a prohibition on providing "electronic publishing" and "information services," which encompasses cable television service). However, more recent court action has freed these companies from the prohibition. United States v. Western Elec. Co., 767 F. Supp. 308 (D.D.C.), *stay lifted*, 1991-92 Trade Cas. (CCH) ¶ 69,610 (D.C. Cir.), *aff'd sub nom.* American Newspaper Publishers Ass'n v. United States, 112 S. Ct. 366 (1991).

12. 47 U.S.C. § 533(b)(1). Congress intended to adopt the then existing FCC rules on this point. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 56 (1984) ("It is the intent of section 613(b) to codify current FCC rules concerning the provision of video programming over cable systems by common carriers, except to the extent of making the exemption for rural telephone companies automatic.").

13. 47 U.S.C. § 533(b)(3). In light of changed market place conditions from those which many years ago prompted the Commission to impose the ban, the Commission has now advocated that Congress repeal the cross-ownership ban. Second Report, *supra* note 1, at 5847-51.

14. In 1987, the Commission issued a Notice of Inquiry to explore the continued need for

the first time, to allow telephone common carriers to provide what the FCC denominated "video dialtone service."[15] As initially envisioned by the agency, video dialtone would not be limited to the transport function that had been traditionally associated with common carriage and allowed by the cross-ownership restriction but that had limited appeal to telephone companies. Rather, the FCC proposed that telephone companies could provide "additional non-programming services and enhanced video gateways including detailed menus, information search capabilities, and subscriber-driven data processing."[16] Thus, the Commission said, video dialtone will "provide a 'platform' through which subscribers can access video and other information services."[17]

C. Establishing the Regulatory Structure for Video Dialtone

Based on this vision, last summer, the Commission decided on an initial regulatory structure and established broad definitions for video

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a cable-telephone company cross-ownership ban. Notice of Inquiry, *supra* note 6. The Notice sought comment on the continuing validity of the rationale for the cross-ownership rules in light of changing marketplace conditions and technology. *Id.* at 5093. The possibility of video dialtone grew in part from the National Telecommunications and Information Administration's ("NTIA") belief at the time that telephone companies should themselves be allowed to provide programming in light of cross-subsidization concerns. NATIONAL TELECOMMUNICATIONS & INFORMATION ADMIN., NTIA REP. NO. 88-233, VIDEO PROGRAM DISTRIBUTION AND CABLE TELEVISION: CURRENT POLICY ISSUES AND RECOMMENDATIONS (1988). Following that report, the Commission suggested that there might be a policy somewhere between the mere provision of transport, which was generally conceded to be allowable under the Cable Act, and the ownership and provision of full-blown cable service, which seemed clearly prohibited by the Cable Act. In a Further Notice, Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54-63.58, 2 F.C.C.R. 5849 (1988), the Commission referenced NTIA's discussion of "'video dial tone'" and solicited comments "generally on whether the existing definitions under the Cable Act of cable operator and associated franchise and other obligations can reasonably accommodate such switched video networks and whether legislative recommendations would be warranted." *Id.* at 5874 n.57. The Commission also sought comment on whether, under a video dialtone-type regime, telephone common carriers or their customer-programmers were required to secure a local cable franchise. *Id.* at 5863. Still, even at this stage, the Commission's focus continued to be on the necessity of *any* cable-telephone company cross-ownership restriction. The FCC proposed that it would recommend to Congress the repeal or modification of the cross-ownership restrictions put in place by the Cable Act. *See id.* at 5865-66 (discussing the restriction in 47 U.S.C. § 533(b).

15. First Report, *supra* note 3, at 306-21. The FCC decided that local telephone companies would not need to obtain a cable television franchise in order to provide video dialtone service. The agency also asked further questions regarding the need for a cable-telephone company restriction. *Id.*

16. *Id.* at 307.

17. *Id.*

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