VIDEO DIALTONE: CONCENTRATION OR COMPETITION

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There was a time when people either tuned into the radio, turned on the television, or picked up the telephone. Now, these distinctions are disappearing. The telecommunications industry is presently engaged in an overall convergence. For example, the corporations that separately provide cable television and local telephone services are merging into single, interactive, full service conglomerates.

In order to encourage investment in the national information infrastructure, while carefully constructing an even playing field on which all telecommunications corporations can compete, Congress enacts legislation and the Federal Communications Commission ("FCC" or "Commission") promulgates regulations. Working within the parameters of the Communications Act of 1934 ("1934 Act"), which sets forth the statutory framework within which the FCC operates, the FCC is primarily responsible for the nation's information infrastructure at-large. Under the 1934 Act, the FCC is obligated "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges." Notwithstanding this obligation, marketplace demands and technological advances require the Commission to continually modify the way it regulates communication services.

Although local telephone companies ("telcos" or "LECs") have the technical ability to build networks that would allow them to provide video programming to customers in their local telephone exchange service areas, Congress has prohibited the cross-ownership of cable television and telephone services. The cable-telco cross-ownership restriction prevents local telephone companies from entering the video distribution market. Although Congress has not enacted legislation that directly repeals the current cable-telco cross-ownership restriction, the Commission ensures competition in the video distribution market by allowing local telephone companies to deliver video programming services, on a common carrier basis through a regime known as video dialtone ("VDT").
This Comment explores the evolution of the cable-telco cross-ownership ban and the Commission's development of VDT. Part I describes cable service and phone service and the traditional regulations that govern each service. Part II takes the reader through the history of the cable-telco cross-ownership ban. Part III discusses the Commission's recent reconsideration of the cross-ownership ban and the judiciary's most recent holdings regarding the cable-telco cross-ownership ban in light of First Amendment constitutional mandates. Part IV analyzes the most recent VDT regulations and considers alternative approaches to the most recent Commission order regarding cable-telco cross-ownership and VDT.

I. THE DIFFERENCE BETWEEN CABLE SERVICE AND TELEPHONE SERVICE

Significant changes have taken place in the field of telecommunications technology since Congress passed the 1934 Act. Industry growth and change of this sort are not unique in business history. As the bottleneck industry of the era, railroads at one time controlled all access points to consumers. As the bottleneck industry of the era, railroads gained control over the coal, iron, and steel markets. Similarly, cable operators created a bottleneck in the video distribution market as did LECs in local telephony. Although distinct regulatory and technical differences in the cable and telco industries preclude immediate competition in the video distribution market, there has been an overall convergence in the telecommunications industry, indicating that the bottlenecks will soon break.  

A. Cable & Telco Regulation

The 1934 Act establishes the regulatory scheme for common carrier (telephone) service. Specifically, Title II of the 1934 Act requires common carriers to provide communications service "upon reasonable request" and at "just and reasonable" rates.  

Born in the 1950s, cable television, also commonly referred to as Community Antenna Television or CATV, was not considered in the 1934 Act's regulatory scheme. In its infancy, cable television went unsupervised by the FCC. According to the Commission, cable systems were "neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act." However, since the late 1960s, the Commission has regulated the cable industry.  

B. Cable & Telco Technology

Advances in technology since the 1950s obscured the line that separated cable and telephone service. Telephone companies once relied solely on copper-wire networks ("twisted pair") to provide voice and limited data communication. If a telephone company wanted to provide video programming that matched the quality provided by cable television op- 

Although different issues arise in the move to "digitalization" in each of these sectors, it is an inevitable move that will further competition.  

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12 See id.
15 Southwestern Cable, 392 U.S. at 164.
16 See Malrite T.V. v. FCC, 652 F.2d 1140, 1143-44 (2d Cir. 1981) (holding that the Commission may regulate the cable service industry as long as its regulations are ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting). The 1934 Act, however, forbids the Commission to regulate in certain strictly intrastate matters. Id. The Cable industry is regulated under Title VI of the Communications Act. See 47 U.S.C. § 521(6) (1988).
17 See KELLOGG ET AL., supra note 6, at 49.
18 Id. at 34.
operators, it had to build a separate distribution system of coaxial cable parallel to its telephone system.\textsuperscript{20} Now, with high-capacity fiber optic cables and coaxial cables, telephone companies have the technical capability to provide video and voice over the same common carrier network.\textsuperscript{21}

Cable television systems operated in a different manner. Cable systems received over-the-air signals through an antenna or satellite receiver, and transmitted video programming to subscribers through a coaxial cable.\textsuperscript{22} Cable television operators now plan to use fiber optic technology with switching and two-way devices to provide local telephone service, on a common carrier basis. This technology has traditionally been reserved for local telephone companies.\textsuperscript{23}

C. Convergence

Now that cable television companies and telcos can technically provide the transportation of video programming to subscribers, communications corporations are merging, investing, or forming alliances with one another in order to form full-service conglomerates.\textsuperscript{24} Each arrangement has one thing in common - market share as the "currency of choice."\textsuperscript{25} Local telephone companies are performing VDT trials,\textsuperscript{26} investing in advanced technology, creating alliances with video programmers,\textsuperscript{27} and carving out cable deals\textsuperscript{28} in order to control the means of distribution of communication services in any given market.\textsuperscript{29} These conglomerates will produce sophisticated networks consisting of voice, video, and data communications services.\textsuperscript{30}

U S West is one example of such a conglomerate. Because U S West has entered into deals that cross the most traditional industry lines (to date),\textsuperscript{31} this corporation is more appropriately described as a "communications service provider" than a "Baby

\textsuperscript{20} Id.

\textsuperscript{21} S. Ronald Foster, CATV Systems Are Evolving to Support a Wide Range of Services; Delivering Voice and Other Service Over Cable Television Systems, TELECOMMUNICATIONS, Jan. 1994, at 95. Although fiber optic technology may be the foundation for the information superhighway, the real engineering power lies within switching and digital compression. Additionally, fiber optic technology comes at the cost of $3,000 per subscriber; laying a new cable line cost approximately $500 per subscriber. Id.; cf. George Gilder, Into the Telecom, HARV. BUS. REV., Mar.-Apr. 1991, at 150, 156-57.

\textsuperscript{22} See In re General Telephone Company of California, 13 F.C.C.2d 448, para. 2 (1968) (citing 47 U.S.C. § 74.1101(a)).

\textsuperscript{23} See generally J. Tippler, Switching Systems, TELECOMMUNICATIONS NETWORKS (J.E. Flood ed., 1991). Switching and two-way devices are part of an electronic signal exchange wherein a signal or telephone call is routed from one terminal located in a central building of each community and connected to another terminal. Id.

\textsuperscript{24} See Telephone Industry Interactive Scoreboard, INTERACTIVE AGE, Sept. 26, 1994, at 84. This trend has not gone unnoticed. The Antitrust Division of the United States Department of Justice recently has announced that it is hiring 25 lawyers and 40 paralegals in order to handle its growing caseload. This increase will bring the staff to 779 persons. Cindy Skrzycki, Prospectuses to Be in English. Donkeys to Fly Tomorrow, WASH. POST, Oct. 21, 1994, at B2.

\textsuperscript{25} Gregory Zuckerman, At Long Last, M&A Activity Turns Positively Feverish, INVESTMENT DEALERS' DIG., Oct. 18, 1993, at 21.


\textsuperscript{27} Waller Capital Corp., a brokerage corporation that specializes in the sale of cable corporations, estimates that since June of 1994, $12 billion cable mergers and acquisitions have taken place. Mark Robichaux, Sammons Seeks to Sell Business in Cable TV, WALL ST. J., Oct. 13, 1994, at A3.

\textsuperscript{28} Interactive Scoreboard, supra note 24, at 84. The Bell companies (Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, SBC Corp., and U S West) and the independent telephone companies (GTE, SNET, and Rochester Bell) each have investments, alliances, affiliations and/or joint venture deals in the works. Id.

\textsuperscript{29} Id. Roughly divided, these deals come in the form of technology trials, investments, joint ventures, acquisitions and alliances. The Commission has not taken a direct stance on cable-telco mergers. See Leopold & Boyd-Merritt, supra note 11, at 44.
Bell.” In addition to its plans to provide traditional local telephone service, U S West is performing a trial of two-way interactive services with Time Warner in Florida and has invested ten to fifteen billion dollars in broadband networks.\textsuperscript{33} U S West also has set up alliances with video programmers and equipment manufactures.\textsuperscript{33} In addition, U S West has invested $2.5 billion in the Time Warner Entertainment (“TWE”)\textsuperscript{34} project wherein TWE will utilize the phone companies know-how and capital to build full service networks in communities where TWE offers cable service.\textsuperscript{35}

II. THE HISTORY OF TELEPHONE COMPANIES PROVIDING CABLE SERVICE

In 1968, the Commission ruled that if a local telephone company wanted to provide the transportation of video programming to cable operators, it must first acquire certification pursuant to section 214 of the 1934 Act.\textsuperscript{36} Section 214 requires interstate common carriers to convince the FCC that the proposed service will serve the public’s convenience and necessity.\textsuperscript{37} As a result of the section 214 application process, varying degrees of ownership affiliation between telephone companies and cable operators materialized.\textsuperscript{38} The Commission found cross-ownership between cable and telephone companies unsettling and initiated a rulemaking proceeding in order to determine whether telephone companies should be able to provide video programming to the public.\textsuperscript{39}

A. The FCC’s 1970 Order

In 1970, the Commission banned telephone common carriers from providing CATV service to the public in their operating territory except when the telco can demonstrate a good cause why the Commission should grant a waiver.\textsuperscript{40} Initially, the Commission’s cross-ownership prohibition was an effort to prevent telephone companies from discriminating against CATV providers, in favor of their affiliates, in granting access to telephone poles for attachment of CATV cables.\textsuperscript{41} The Commission also concluded that the ban gave cable television operators an opportunity to establish themselves as viable competitors in the video distribution market.\textsuperscript{42} Accordingly, the cross-ownership ban was established in order to “prevent the development of local media monopolies and to encourage a diversity of ownership of communications outlets.”\textsuperscript{43}

\textsuperscript{33} See Interactive Scoreboard, supra note 24, at 84.
\textsuperscript{34} See id.
\textsuperscript{35} Time Warner Entertainment owns Time Warner Cable which is the second largest cable operator in the nation. See Time Warner’s Telephone Service Plan, N.Y. Times, Oct. 25, 1994, at D4. Time Warner is petitioning the Ohio Public Utilities Commission of Ohio for permission to proceed with a plan to provide local phone service to nearly half of Ohio. Id.
\textsuperscript{36} U S West paid $1.2 billion for Wometco and GCTV, two cable companies that serve the Atlanta, Georgia region. Interactive Scoreboard, supra note 24, at 84.
\textsuperscript{38} Id.
\textsuperscript{40} See In re Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 F.C.C.2d 307 (1970) [hereinafter 1970 Order]; see also Northwestern Ind. Tel. Co. v. FCC, 824 F.2d 1205, 1208 (D.C. Cir. 1987) (stating that an “affiliation” between cable and telephone companies sweeps within its term “any financial or business relationship whatsoever”) (citing 47 C.F.R. § 63.54 Note 1(a) (1993)).
\textsuperscript{41} See 1970 Order, supra note 38, para. 1.
\textsuperscript{42} Id. para. 49 (holding that, unless the Commission’s waiver of its own rule is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, the Commission may waive its own rules).
\textsuperscript{43} See id. para. 46. The monopoly position of the telco results in “effective control of the pole lines (or conduit space) required for the construction and operation of CATV systems.” Id. The telephone company is, therefore, in an “effective position to preempt the market for this service.” Id.
\textsuperscript{44} Id. para. 45.
B. The 1984 Cable Communications Policy Act

The FCC’s cross-ownership prohibition was codified in the Cable Communications Policy Act of 1984 (“1984 Cable Act”).44 The 1984 Cable Act prevents telcos and their affiliates from transporting video programming directly to subscribers in their telephone service areas, except in small rural communities.45 In addition, the 1984 Cable Act prohibits a local telephone company from either providing “video programming” to its subscribers or being “affiliated” with a video program provider.46 Codifying the 1970 Order, the 1984 Cable Act also exempted cable operators from common carrier regulation insofar as they provide “cable service,”47 and preserved the Commission’s local and state regulatory franchising system.48

Congress made an educated choice when it elected to statutorily prohibit cable-telco cross-ownership. In addition to the 1970 Order, Congress had the benefit of a 1981 report issued by the Commission’s Office of Plans and Policy (“OPP Report”)49 that weighed alternative telecommunication ownership policies.50

The OPP Report concluded that the cross-ownership restriction must be retained for the time being.51 Although the Commission, in the OPP Report, argued in favor of the cable-telco cross-ownership prohibition, it acknowledged that concern of discriminatory pole access will no longer “by itself” justify the restriction.52 Instead, the Commission’s primary concern turned to cross subsidization.53 Cable-telco cross-subsidization, without a well-designed separations policy, results in the telephone company avoiding rate of return regulation on its telephone service by shifting costs and revenues from the unregulated cable entity to its regulated telephone division.54 The Commission feared that, if cross-subsidization emerged, competition in the video programming marketplace never would occur, because the profits that telephone companies received from their local exchange monopoly would be used to undercut the prices of the cable industry.55 In other words, the Commission feared that a local telephone company would leverage its local exchange monopoly in order to create a monopoly of video transmission services.56

C. Video Dialtone

The cross-ownership prohibition has been the focus of much debate.57 In 1987, the Commission began a rulemaking process by issuing a Notice of Inquiry (“NOI”),58 requesting comments on the cross-programming; the LECs do not select, price, or package video programming; cable operators, on the other hand, make editorial decisions; and 2) VDT customers are not cable operators because they do not control the telephone companies’ facilities. The Circuit Court upheld the FCC’s reasoning, which held the LECs exempt from the regulatory constraints that restrict cable. Id. at 67.
47 47 U.S.C. § 541(a)(1988). In the end, a dual regulatory system emerged, whereby the FCC exercised “exclusive authority over all operational aspects of cable communication, including technical standards and signal carriage,” and the state or local government issued franchises. Id.
49 Id.
50 Id. at 163-64.
51 Id. at 162.
52 Id. at 159.
53 Id. at 158.
54 Id.
55 Id.
56 Id.
57 Competing sectors of the communications industry (the $90 billion local telephone industry, the $60 billion long-distance industry, and various consumer advocate groups) against the backdrop of political maneuvering, are players in this debate. In 1994, these groups precluded efforts to overhaul the telecommunications regulatory framework. Edmund L. Andrews, The Phone-Law Static, N.Y. Times, Sept. 26, 1994, at D1.
58 Supra note 4.
ownership prohibition in order to reassess the rules regarding video distribution by telcos.\(^6^8\) In 1988, the Commission issued a Further Notice of Inquiry and Notice of Proposed Rulemaking ("FNOI")\(^6^9\) in which it tentatively concluded that the ban should either be repealed or modified.\(^6^1\)

1. 1991 and 1992 VDT Regulatory Realizations

The 1987 NOI led to the formulation of FCC rules that enable telcos to provide video transportation without legislative action. In the 1991 First Report and Order\(^7^0\) and then in the 1992 Second Report and Order ("VDT Order")\(^7^1\) the Commission "remove[d] unnecessary regulatory barriers in order to permit telephone companies to provide video dialtone in response to marketplace forces"\(^6^4\) and recommended that Congress repeal the statutory telephone company-cable television cross-ownership restriction.\(^6^5\) In contrast to the 1970 Order, the Commission in 1991 recognized the "increasing convergence of previously separate markets embracing voice, data, graphics and video,"\(^6^6\) and proposed a VDT regulatory framework.\(^6^7\)

The Commission concluded in the VDT Order that any anticompetitive risks resulting from local telephone companies entrances into the video distribution market "have been attenuated by the enormous growth of the cable industry."\(^6^8\) Because of the robust growth of the cable industry,\(^6^9\) the Commission concluded in 1991 that the repeal of the cross-ownership ban would promote competition in the video distribution marketplace, spur the investment necessary to deploy an advanced infrastructure, and increase the diversity of services made available to the public.\(^7^0\) The Commission additionally concluded that "any remaining risk of anticompetitive conduct by local telephone companies is outweighed by the potential benefits their entry would bring,"\(^7^1\) including the increase in video programming and competition in the video marketplace.\(^7^2\)

The Commission provided a means by which telcos may enter the video distribution market by recognizing that the 1984 Cable Act's "statutory ban does not preclude telephone companies from undertaking an expanded role in the video marketplace provided that they do not do so as traditional cable operators."\(^7^3\) Relying on the distinction between "cable service" and "telephone service,"\(^7^4\) the Commission modified its rules, allowing telcos to offer a new service that it vaguely described as video dialtone or VDT, which is regulated under a common carrier regulatory framework.\(^7^5\)

The Commission envisioned VDT as a "platform service" consisting of two levels.\(^7^6\) The Commission designated the first level of the platform non-discriminatory access to video programmers.\(^7^7\) Because it is a common carrier service, the first platform is regu-

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\(^{6^0}\) Id. para. 16.


\(^{6^2}\) Id. para. 59.

\(^{6^3}\) Supra note 43.


\(^{6^5}\) Id. para. 1.

\(^{6^6}\) Id. para. 3.

\(^{6^7}\) First Report and Order, supra note 43, para. 7.

\(^{6^8}\) Id.

\(^{6^9}\) VDT Order, supra note 63, para. 137.

\(^{7^0}\) Id. The issue remains whether the cable industry can withstand competition. For example, FCC Commissioner Rachelle Chong, in reaction to a recent Commission report on the cable industry, explained that many of the statistics which indicate that the cable industry remains a growing industry may be misleading because it may be "too soon" to determine the 1992 Cable Act's impact on the cable industry. Ted Hearn, Hundt, Chong Clash on Cable's Economic Progress, MULTICHANNEL NEWS, Sept. 26, 1994, at 38.

\(^{7^1}\) See First Report and Order, supra note 43, para. 13; see also VDT Order, supra note 63, para. 139.

\(^{7^2}\) VDT Order, supra note 63, para. 138.

\(^{7^3}\) Id.

\(^{7^4}\) Id. para. 67.

\(^{7^5}\) The 1984 Cable Act describes "cable service" as: (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service. 47 U.S.C. § 522(5) (1988). The FCC determined that a telephone company offering video dialtone service would not be providing "cable service" as defined by the 1984 Cable Act because it would not be engaged in the transmission . . . of video programming" contemplated by Section 522(6)(A)(i). VDT Order, supra note 63, para 75 n.194.

\(^{7^6}\) The Commission described VDT as an:

"electronic platform" or "window" that opens to a broader network, giving the user access to video and non-video communication services provided by a multiplicity of competitive service providers. Through this platform, consumers could gain access to video programs (provided by entities other than the local exchange carrier), information services, competing video and videotext gateways, videophone, and other communication services.


\(^{7^7}\) First Report and Order, supra note 43, para. 25.

\(^{7^8}\) VDT Order, supra note 63, para. 10.
lated under Title II of the 1934 Act. On the second platform video programmers do not have nondiscriminatory access. The second level of the platform will not be regulated under Title II of the 1934 Act and, in that fashion, will be similar to video programming provided by cable operators. For example, the VDT Order authorized local telephone companies to provide enhanced and non-regulated services which are related to video programming such as video gateways, video processing services, billing and collection services, order processing, or any other non common carrier service.

The Commission also held in the VDT Order, that local telephone companies may enter into non-ownership affiliations with video programmers which are customers of, interconnected with, or share the construction and/or operation of the basic platform, so long as the local telephone company does not attempt to provide “cable service” directly to subscribers within their telephone service area.

2. The Common Carrier Procedure to Provide VDT Service

Consistent with the judgment of the 1970 Order, the Commission, in the VDT Order, held that telcos desiring to provide a video service must comply with common carrier regulations. This means that the telco must submit a section 214 application to receive authorization, and then if granted, submit a tariff to the Commission’s Common Carrier Bureau. The Commission concluded that, during the section 214 process, it would determine whether additional safeguards were needed in regard to specific video dialtone proposals. In like manner, the Commission transferred current safeguards that protect against anticompetitive behavior by telephone companies to VDT service offerings.

III. THE CURRENT VDT REGULATORY SCHEME

The current regulatory scheme of VDT is in a state of flux. Recently, several federal courts have freed local telephone companies from the cross-ownership constraints based on First Amendment principles. In addition, the Commission reaffirmed, and to some extent modified, its VDT position in a recent Order.

A. The LECs’ Constitutional Right to Speak

In addition to attempting to provide VDT service pursuant to the section 214 application process, local telephone companies have been challenging the cross-ownership prohibition on First Amendment principles, and have been winning. Bell Atlantic (C & P Telephone), US West, BellSouth, and Ameritech have obtained favorable decisions from U.S. District Courts holding that the cable-telco cross-ownership restriction of the 1984 Cable Act is unconstitutional. These decisions recently have been affirmed by the Court of Appeals for the Fourth and Ninth Circuits.

Bell Atlantic was the first LEC to obtain a favorable ruling. On December 17, 1992, C & P Telephone and Bell Atlantic Video Services (“BVS”), both wholly owned subsidiaries of Bell Atlantic, filed suit in the U.S. District Court in Alexandria, Virginia to challenge the 1984 Cable Act’s cross-ownership prohibition. In C & P Telephone v. United States, Bell Atlantic attacked the cross-ownership prohibition on constitutional grounds by asserting that the cross-ownership ban violated its

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78 Id. para. 16.
79 Id. para. 48.
80 Id paras. 2, 3.
81 See, e.g., id. paras. 8, 16. By providing this basic platform, local telephone companies are not permitted to exceed the “carrier-user relationship” with video programmers who are affiliated with the basic common carrier platform; although § 214 applications have been granted to the contrary, in general, local telephone companies which provide the basic platform are not permitted to enter any relationship with video programmer other than “carrier-user.” See 47 C.F.R. § 63.54 (1993); VDT Order, supra note 63, para. 8 n.18.
82 See VDT Order, supra note 63, para. 12.
83 See 1970 Order, supra note 38.
84 VDT Order, supra note 63, para. 72.
85 Id.
87 In re Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rule Making, CC Docket No. 87-266 (Nov. 7, 1994) [hereinafter VDT Recon Order].
88 See supra note 86.
89 Id.
90 Chesapeake and Potomac, 830 F. Supp. at 909.
91 Id. at 911.
First Amendment rights. The Court agreed with Bell Atlantic and held that the 1984 Cable Act’s prohibition “directly abridges the plaintiff’s right to express ideas by means of a particular, and significant, mode of communication—video programming.”

The United States persuaded the court that the cross-ownership prohibition did not merit “strict scrutiny,” the standard applicable only to content-based regulations. Accordingly, the court determined that the cross-ownership ban was not a content-based regulation and therefore may be accorded a lower, “intermediate” level of judicial scrutiny. The court applied the test enunciated in United States v. O’Brien. Under O’Brien, the United States would have had to prove that its justifications for the cross-ownership ban are narrowly tailored to serve its purpose. Ruling in Bell Atlantic’s favor, the court held that the statute is not narrowly tailored to serve the government’s interest of promoting competition in the cable television market and, therefore, is an unconstitutional restriction of C & P’s freedom of speech. Specifically, the court concluded that diversity of ownership of communications outlets and competition in the video programming market were insufficient justifications to limit the time, place and manner of video programming.

B. The 1994 VDT Reconsideration Order

On November 7, 1994, the Commission adopted a Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking (“VDT Recon Order”) in response to petitions for reconsideration of the VDT Order, in which it affirmed its common carrier approach to VDT. Specifically, the Commission affirmed its ruling that the platform service must provide access in a nondiscriminatory manner and have the capacity to meet this burden. In addition, the Commission maintained its definition of VDT service, which includes video-on-demand, and declined to change its recommendation that Congress lift the 1984 Cable Act provision that prohibits cross-ownership. The Commission departed significantly from the cable television model and held that LECs “may not allocate all or substantially all analog capacity to a single ‘anchor programmer.’”

Furthermore, the Commission affirmed common carrier procedures, including section 214 authorization and tariff filing requirements as the procedural method for licensing VDT services. Finally, the Commission renewed its holding that limits a LEC from having an interest greater than five percent in any video programmer in its service area and insisted that telcos who enter into distribution of enhanced services do so within the existing safeguards applicable to local exchange carriers.

In addition to affirming its basic regulatory framework for VDT, the Commission granted a joint petition for rule making to establish a “price cap basket” for video dialtone services. The Commission also solicited additional information and comment on various issues. For example, because the Commission wishes to prevent telcos from increasing basic telephone rates as a result of becoming VDT service providers, it will address the need for particular safeguards “in the context of individual Section 214 applications or in any other rulemaking proceeding [it] may initiate to address the LEC provision of video programming directly to subscribers.” Finally, the

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93 Id. at 911.
94 Id. at 918.
95 Id. at 917.
96 Id.
97 391 U.S. 367 (1968). The Supreme Court in O’Brien, ruled that either type of content-neutral regulation will survive scrutiny under the First Amendment if the provisions, without reference to the content of the regulated speech, are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information. Id. at 377.
98 Chesapeake and Potomac, 830 F. Supp. at 917.
99 Id. at 920.
100 Id.
101 Supra note 87.
102 Id. para. 25. The tariff process in the VDT Recon Order sets out specific guidance in order to identify the costs of VDT. In particular, incremental costs, shared cost and allocated costs must be identified. The Commission warns that extremely low allocations of shared plant costs to VDT will require strong jus-
Commission refused to adopt special incentives for local phone companies to provide VDT at discounted access rates to particular classes of programmers.\textsuperscript{112}

1. The Reconsideration Order's Clarification and Modification of the VDT Order

The VDT Recon Order elaborates on the requirement that VDT providers expand the VDT platform as demand increases.\textsuperscript{113} Although the Commission reestablished an ownership policy regarding local video programmers, as of the order, a telco may lease the lines that connect subscribers homes to the network ("drop wires") from cable operators within its service areas. This is so, provided that the lease is limited in scope and duration, and does not permit the LEC to impede the access of any other video programmer to lease the cable drops.\textsuperscript{114}

The Commission modified its non-ownership affiliation rules in four ways: (1) video providers are no longer required to establish a nexus to the VDT platform before LECs can provide enhanced and nonregulated services related to video programming, so long as the video programmer's service area is substantially served by VDT; (2) LECs may not exceed the carrier-user relationship with cable operators except to provide non-regulated services or lease drop wires; (3) LECs may establish certain non-ownership relationships other than with franchised cable operators within the LEC's service area, without regard to the existence of a VDT platform; and (4) LECs are generally prohibited from participating in the operation of the common carrier level of the VDT platform in a non-ownership affiliation with a video programmer.\textsuperscript{115}

Finally, the Commission modified the jurisdiction allocation of the VDT Order.\textsuperscript{116} The VDT Recon Order provides that the FCC only has jurisdiction over LEC transmission of video communications that are broadcast over radio airwaves or transmitted across state boundaries.\textsuperscript{117} However, the jurisdictional separation process is unsettled. The Commission has indicated that it will initiate a Notice of Inquiry, formally requesting comments on the jurisdictional separation process when VDT and other technological advances are introduced into the local exchange facilities.\textsuperscript{118}

2. Three Areas in which the Commission Seeks Comment

In the VDT Recon Order, the Commission asked for information and comment in three areas. First, the Commission requested comment on how to efficiently use analog channels. Specifically, the Commission invited comment on mechanisms to address the technical and economic constraints on the provision and expansion of analog channel capacity and mechanisms that would provide effective channel sharing.\textsuperscript{119}

Second, the Commission requested comments on its affiliation and acquisition rules, specifically on areas where the Commission may be able to loosen cable-telco affiliation rules within the same service area.\textsuperscript{120} Finally, the Commission will consider whether LECs should provide preferential treatment for certain classes of commercial and non-commercial video programming and whether voluntary preferential treatment would be lawful.\textsuperscript{121}

IV. AT THE CROSSROADS OF REGULATORY APPROACHES, HOW WILL VDT EMERGE?

The Commission is attempting to pave the road to the information highway instead of being a roadblock. Although VDT seems to be good news in the telecommunications industry, the Commission needs to be careful of the potential dangers.\textsuperscript{122} There will be billions of dollars of investment in telco network upgrades.\textsuperscript{123} A misallocation of costs could cause

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\textsuperscript{112} VDT Recon Order, supra note 87, para. 256.
\textsuperscript{113} Id. para. 268.
\textsuperscript{114} Id. para. 17.
\textsuperscript{115} Id. para. 19.
\textsuperscript{116} Id. para. 2. The cable industry is particularly concerned with this issue. Although the issue remains undecided, a telco that controls the content of video programming may be subject to municiple franchise fees. Steve Effros, President, Cable Telecommunications Association, argues that when telcos "become programmers, they become subject to the whole panoply of cable regulation." Harry A. Jessell, Cable, Telco Clash Over VDT, Broadcasting & Cable, Dec. 12, 1994, at 83.
\textsuperscript{117} VDT Recon Order, supra note 87, paras. 20, 137.
\textsuperscript{118} Id. para. 190.
\textsuperscript{119} Id. para. 14.
\textsuperscript{120} Id. para. 276.
\textsuperscript{121} Id.
\textsuperscript{122} See VDT Recon Order, supra note 87, Separate Statement of Commissioner Ness, paras. 1, 3.
\textsuperscript{123} See generally Foster, supra note 21.
substantial injury to telephone ratepayers. The
Commission must emphasize competition that is fair
and thereby will maximize the likelihood that two-
wire competition will be sustainable.

The Commission believes that the VDT Recon
Order reflects a balance of interests. However,
several important issues merit further review. At is-
sue is consumer privacy and, in particular, what in-
formation will be available to video dialtone platform
providers and what safeguards are needed. In addi-
tion, channel sharing plans such as the “will carry”
proposal and the proposal that public broadcasters
receive preferential rates for access to the video di-
altone platform remain undecided. Finally, although
the Common Carrier Bureau of the Commission is
supposed to review cost allocation issues, they re-
main unsettled.

V. CONCLUSION

One way or another telcos will be providing cable

service. How VDT will effect technology and the
marketplace is yet to be decided. By introducing the
VDT concept the Commission has taken a bold step
in assuring competition in the video distribution
market and provoking infrastructure investment. Ex-
actly how competition in the video distribution mar-
ket place will emerge is uncertain. Because of the ju-
diciary’s recent acknowledgement of a telco’s First
Amendment right to provide cable programming,
competition may be in the form of little or no re-
straint. Alternatively, VDT may be a service ancil-
ary to cable that will be a video programming op-
tion to consumers. Either way, there will soon be
competition in the video distribution market. Ulti-
mately, this confusion should receive a legislative
cure that addresses video transportation in general
by corporations that are neither simply cable opera-
tors, nor local telephone providers. VDT and cable
regulations that operate independently of each other
during the convergence period seem to make the best
of a bad situation.

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124 Id.
125 Id.
126 VDT Recon Order, supra note 87, para. 3.