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# THE REGULATORY CLASSIFICATION OF INTERNET PROTOCOL TELEVISION: HOW THE FEDERAL COMMUNICATIONS COMMISSION SHOULD ABSTAIN FROM CABLE SERVICE REGULATION AND PROMOTE BROADBAND DEPLOYMENT

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## I. INTRODUCTION

By the grace of its digital DNA, the Internet has turned the communications world on its head in just over a decade of widespread adoption. While we once made do with the now seemingly quaint wired telephone, Internet-enabled messaging and voice software allow us to see and hear relatives on the other side of the globe as if they were in the other room. What was once known simply as “mail” is now derisively referred to as “snail mail,” thanks to the proliferation of e-mail. Where we were once restricted by the contents of our local library, the knowledge of the collective whole of humanity now rests at the tips of our fingers, to be teased out with a few clicks of a button. And in the blink of an eye, the Internet has brought the near collapse of the newspaper industry.<sup>1</sup>

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<sup>1</sup> E.g., Tim Arango, *The Daily News And The Post Talk Business*, N.Y. TIMES, Jul. 16, 2008, at C1 (noting a significant decline in newspaper advertising revenues and subscribers because of the Internet); see Richard Pérez-Peña, *A.P. Seeks To Rein In Sites Using Its Content*, N.Y. TIMES, Apr. 7, 2009, at B1 (discussing the Associated Press’ effort to force Web sites, such as Google and Yahoo!, that use the AP’s content to share revenues and obtain permission for that use). ZenithOptimedia estimates that by 2011, newspaper advertising will shrink 22.7% below its 2007 peak and Internet advertising will account for 15.1% of all advertising expenditures, an increase from its 2007 percentage of 8.7%. Press Release, ZenithOptimedia, *Global Advertising Downturn Slows Despite Disappointing Q1* (July 6, 2009), available at <http://www.zenithoptimedia.com/about/news/pdf/Adspend%20forecasts%20July%202009.pdf>.

This is the power of the technological amalgam known as the Internet. While the technology may be relatively new, its place within the pantheon of communications discoveries from smoke signals to Alexander Graham Bell's telephonic device can hardly be contested. With the innumerable ways in which the Internet has permeated, enriched, and complicated all of life's activities, it only stands to reason that such a transformative force would similarly have disruptive effects within the relatively confined world of telecommunications.<sup>2</sup> The Internet may well be the ultimate telecommunications medium as it can deliver the functional equivalent of any predecessor communications technology while also allowing for amalgamations previously unimagined.<sup>3</sup> This blending and breaking down of technological boundaries has been referred to as convergence.<sup>4</sup> The convergence phenomenon in the telecommunications field has provided consumers with many new options for accessing video and audio media.<sup>5</sup> At the same time, this overlapping of once discrete technologies has led to a regulatory nightmare.<sup>6</sup> Law has long lagged behind technical innovation,<sup>7</sup> and today the Internet revolution is testing regulatory bodies and breaking down traditional distinctions between regulatory regimes.<sup>8</sup> From Voice over Internet Protocol ("VoIP") telephony to online video and radio, the old terminology and approaches to classifying types of technology are increasingly outdated.<sup>9</sup> Now, the Internet is poised to change the face of television, the economic king-of-the-hill in the media landscape.

The Federal Communications Commission ("FCC" or "Commission") has

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<sup>2</sup> See H. Russell Frisby, Jr. & David A. Irwin, *The First Great Telecom Debate of the 21st Century*, 15 COMMLAW CONSPECTUS 373, 377 (2007).

<sup>3</sup> Gerald W. Brock & Gregory L. Rosston, Introduction, in *THE INTERNET AND TELECOMMUNICATIONS POLICY: SELECTED PAPERS FROM THE 1995 TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE 2* (Gerald W. Brock & Gregory L. Rosston, eds., 1996); Steve Lohr, *Seizing the Initiative on Privacy; On-Line Industry Presses Its Case for Self-Regulation*, N.Y. TIMES, Oct. 11, 1999, at C1.

<sup>4</sup> The term "convergence" has been understood in the telecommunications industry to mean "the use of the same technological platform to provide multiple services. . . ." Richard E. Wiley, "A New Telecom Act" – Remarks, 31 S. ILL. U. L.J. 17, 17 (2006); see also John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 63 SMU L. REV. 143, 156 (2000) (labeling convergence as a term to encompass the technological changes that allow for the transmission of voice, video, and data on the same platform).

<sup>5</sup> See, e.g., Kevin J. O'Brien, *A Home Network Where Your TV Talks to Your Fridge*, N.Y. TIMES, Aug. 25, 2008, at C5 (noting that electronics manufacturers are redesigning their "audio and video equipment for a future centered around the Internet, a world in which televisions, stereos and computers . . . can communicate with each other over a wireless home network.").

<sup>6</sup> See discussion *infra* Part V.A.

<sup>7</sup> ROBERT J. KLOTZ, *THE POLITICS OF INTERNET COMMUNICATION* 136 (2004).

<sup>8</sup> See discussion *infra* Part V.C.i.

<sup>9</sup> See *id.*

been under pressure to institute—and has acknowledged the need for—significant reform in the face of a multitude of changes in modern media and telecommunications.<sup>10</sup> The FCC’s struggle with the legal classification of Internet Protocol Television (“IPTV”) is one of the most troublesome examples of a regulatory agency in flux. Most modern cable providers offer “triple-play” packages that provide three distinct services in their voice, data, and video programming capabilities.<sup>11</sup> IPTV, however, integrates technology and service one step further by delivering both data service and video programming in the electronic language known as Internet Protocol.<sup>12</sup> In doing so, IPTV eludes definitive FCC classification.<sup>13</sup>

This regulatory quandary came to a head in 2007 when the United States District Court for the District of Connecticut held that AT&T’s U-verse IPTV service did constitute a cable service under the Cable Communications Policy Act of 1984 (“1984 Cable Act”), reversing the decision of the Connecticut Department of Public Utility Control (“DPUC”).<sup>14</sup> The court accordingly held that AT&T’s U-verse service was bound by Connecticut’s franchising requirement as well as the other regulatory measures associated with provision of cable services.<sup>15</sup> This decision marked the first time that regulatory bodies and courts classified IPTV for legal purposes.<sup>16</sup> The District Court denied AT&T’s petition for reconsideration.<sup>17</sup>

Part II of this Note begins with a technical description of IPTV, which discusses the similarities and differences compared to cable television and identifies the principal players in the IPTV market. Part III outlines the legislative history of the cable service definition and presents some pertinent recent cases. Part IV summarizes the outcome of the Connecticut district court case and presents its underlying rationale. Part V begins with an assessment of the Connecticut decision and argues that a sea change in the telecommunications landscape has rendered the current statutory definitions unworkable. Finally, Part

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<sup>10</sup> Kevin Ryan, *Communications Regulation—Ripe for Reform*, 17 *COMMLAW CONCEPTUS* 771, 806–08 (2009) (describing numerous examples of calls for reforming the FCC from both within the agency itself and from outside parties).

<sup>11</sup> See, e.g., Comcast, Comcast HD Triple Play, <http://www.comcast.com/Corporate/Learn/Bundles/Bundles.html> (last visited Oct. 17, 2009); Time Warner Cable, Super Charged Triple Play, <http://www.timewarnercable.com/SanDiego/learn/bundles/TEMPsupercharged.html> (last visited Oct. 17, 2009).

<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> See discussion *infra* Part IV.

<sup>14</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co. (*Consumer Counsel*), 515 F. Supp. 2d 269, 282 (D. Conn. 2007).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 273.

<sup>17</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co., 514 F. Supp. 2d 345, 351 (D. Conn. 2007).

VI concludes by making recommendations to the FCC on how to address the IPTV question. The Note proposes that the Commission utilize its regulatory forbearance authority to refuse to apply the outdated cable service definition, preempt those states and municipalities that classify IPTV as a cable service, and allow state level franchise reform to smooth the way for telecommunications companies' entry into the video market until a comprehensive reform of the Communications Act can properly address the current definitional morass.

## II. A TECHNICAL OVERVIEW OF INTERNET PROTOCOL TELEVISION

Many commentators and industry experts have criticized the FCC for failing to define the basic terms upon which their regulations are based.<sup>18</sup> The constant evolution of technology, subjective nature of the subject matter, and amorphous legal tests have combined to leave onlookers confused as to how to approach ambiguous cases.<sup>19</sup> One of the latest issues to join that fray is the classification of IPTV. This section presents a basic description of IPTV and how it differs from traditional cable technologies.<sup>20</sup>

Understanding IPTV begins with an understanding of Internet protocol, the "IP" in IPTV. When paired with Transmission Control Protocol ("TCP"), the combined TCP/IP is the "de facto" language of the Internet; in other words, TCP/IP is the "language" spoken between computers when transmitting data over the Internet.<sup>21</sup> Both of these protocols originated as part of a government effort initiated in 1973 by the Defense Advanced Research Projects Agency ("DARPA"), an agency of the United States Department of Defense, to create a series of linked computer networks capable of communicating between facilities at a distance.<sup>22</sup> This effort would eventually give birth to the ARPANET

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<sup>18</sup> See Clay Calvert, *What is News?*, 16 COMMLAW CONSPECTUS 361, 361 (2008) (stating that the FCC "seems to have the tendency to attempt to regulate categories of content that defy clear, coherent, and concise definitions."); see also Amy L. Signaigo, *National Cable & Telecommunications Association v. Brand X Internet Services: Resolving Irregularities in Regulation?*, 5 NW J. TECH. & INTELL. PROP. 385, 385, 398-99 (2007) (noting that the FCC's inconsistencies in defining important regulatory terms have led to continued confusion and classification issues).

<sup>19</sup> See Signaigo, *supra* note 18, at 385, 391-95, 399 (providing that rapid technological advances, such as Internet services on cellular phones, are not something that the FCC can predict, and thus problems in classification and application to more traditional legal frameworks will continue to emerge); Calvert, *supra* note 18, at 361-62 (discussing the amount of subjectivity the FCC uses in classifying news programs).

<sup>20</sup> This Note will not discuss direct broadcast satellite, the third major multi-channel video programming outlet, since it does not pertain to the current regulatory discussion surrounding classification of IPTV.

<sup>21</sup> ANDREW G. BLANK, *TCP/IP FOUNDATIONS* 1 (2004); see also HARRY NEWTON, *NEWTON'S TELECOM DICTIONARY* 1093 (25th ed. 2009).

<sup>22</sup> NEWTON, *supra* note 21, at 1093.

government network.<sup>23</sup> This pioneering system adopted TCP/IP on January 1, 1983, an event that can arguably be titled the “real-world birth of the Internet.”<sup>24</sup> By its use of this particular electronic language, IPTV is distinct from traditional cable programming. The extent of IPTV’s distinction from cable television and its regulatory consequences represent the crux of the current debate.

Cable programming on traditional cable systems is delivered via a coaxial cable that connects directly to the home.<sup>25</sup> IPTV, as it is offered by AT&T, utilizes either a combination of copper wire and fiber-optic wiring, or for some newer homes, an all-fiber approach that takes fiber-optics directly into the home of the individual subscriber.<sup>26</sup> In a hybrid copper/fiber arrangement, fiber is laid out to refrigerator-sized cabinets called “nodes” located throughout a served neighborhood,<sup>27</sup> and traditional copper wiring serves as the “last-mile” connection from the nodes to the homes of subscribers.<sup>28</sup> The nodes essentially serve as information traffic cops, managing the flow of information travelling back and forth between the subscriber’s remote control and the IP Serving Offices that distribute programming to users.<sup>29</sup>

In addition to differences in physical infrastructure, legacy cable television systems and IPTV differ in how programming is communicated along the wired infrastructure.<sup>30</sup> Traditional cable systems automatically send video pro-

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<sup>23</sup> See Mitch Waldrop, *DARPA and the Internet Revolution*, in *DARPA: 50 YEARS OF BRIDGING THE GAP* 78, 85 (2008), available at [http://www.darpa.mil/Docs/Internet\\_Development\\_200807180909255.pdf](http://www.darpa.mil/Docs/Internet_Development_200807180909255.pdf).

<sup>24</sup> *Id.* at 85.

<sup>25</sup> Jennifer H. Meadows, *Multichannel Television Services*, in *COMMUNICATION TECHNOLOGY UPDATE AND FUNDAMENTALS* 97, 97 (August E. Grant & Jennifer H. Meadows, eds., 11th ed. 2008).

<sup>26</sup> AT&T Sticks to Copper and Fiber in Build-Out Plan, *REUTERS*, June 19, 2007, <http://www.reuters.com/article/reutersEdge/idUSN1830972020070620>; see also *NEWTON*, *supra* note 21, at 473 (noting that fiber’s advantage over copper “is that it can carry, far, far more information over much, much longer distances [and] scientists keep discovering more and more ways of putting more and more information down one single strand of fiber.”).

<sup>27</sup> Chris O’Malley, *U-verse Generates Complaints*, *INDIANAPOLIS BUS. J.*, Sept. 29, 2008, at 3. Technically, the nodes are known as VRADs, or Video Ready Access Devices.

<sup>28</sup> See *REUTERS*, *supra* note 26.

<sup>29</sup> See AT&T, *How AT&T U-verse TV is Delivered*, [http://www.att.com/Uverse/files/HowUverselsDelivered\\_2-22.pdf](http://www.att.com/Uverse/files/HowUverselsDelivered_2-22.pdf) (last visited Sept. 10, 2009); see also *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F.Supp.2d 269, 272 (D. Conn. 2007).

<sup>30</sup> See *Consumer Counsel*, 515 F.Supp.2d at 272–74 (explaining the differences between cable television and AT&T’s U-verse service, and noting that the DPUC concluded that U-verse should not be subject to legacy cable franchising agreements because IPTV “will require regular upstream and downstream communication between the video subscriber and the IP-video server, thus requiring a two-way capability not necessarily required by CATV operators for the conventional distribution of cable video programming.”).

gramming subscribers' set-top boxes en masse.<sup>31</sup> With traditional cable systems, all available programming is sent to the subscriber's television set-top box, where the signal is decoded to display only the programming selected by the subscriber.<sup>32</sup> In contrast, IPTV users select which channel they wish to view, and the network transmits that individual station to their set-top box.<sup>33</sup> This difference in infrastructure allows users of IPTV to change the channel faster because the system's reaction time is not dependent on the ability of the particular tuner being used in the set-top box to decode the incoming signal.<sup>34</sup>

Currently, the two largest players in the IPTV market are Verizon's FiOS and AT&T's U-verse service.<sup>35</sup> Verizon began offering FiOS in September 2005 in Texas.<sup>36</sup> As of June 30, 2009, FiOS had secured 2.5 million subscribers out of the 10.3 million premises to which service was available.<sup>37</sup> AT&T rolled out U-verse in Texas in 2006<sup>38</sup> and reported over 1.3 million customers by April 2009, with availability to 17 million living units.<sup>39</sup> Because Verizon FiOS does not currently format and transmit its video content using an IP-based system, with the primary exception of its video-on-demand content,<sup>40</sup> this Note

<sup>31</sup> *Id.* at 272 n.2.

<sup>32</sup> *Id.* at 272. The viewable channels are limited by whether the subscriber is authorized to view the selected channel or programming. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Leslie Ellis, *How IPTV Differs From Cable TV*, MULTICHANNEL NEWS, Feb. 5, 2006, [http://www.multichannel.com/article/122031-How\\_IPTV\\_Differs\\_From\\_Cable\\_TV.php](http://www.multichannel.com/article/122031-How_IPTV_Differs_From_Cable_TV.php).

<sup>35</sup> See Nicholas Bombourg, *Reportlinker Adds 2007 IPTV/Mobile Video Research Report*, PR NEWSWIRE, Oct. 13, 2009, <http://www.prnewswire.com/news-releases/reportlinker-adds-2007-iptv-mobile-video-research-report-64080527.html>; see also Joanne Taaffe, *Walking a Tightrope*, TOTAL TELECOM, Mar. 2, 2009, <http://www.totaltele.com/view.aspx?ID=443655> ("Verizon had 1.9 million FiOS TV customers at year-end 2008. And AT&T had more than one million U-Verse lines in service . . . in the fourth quarter of 2008.").

<sup>36</sup> Press Release, Verizon, Verizon FiOS TV Is Here! (Sept. 22, 2005), available at <http://newscenter.verizon.com/press-releases/verizon/2005/page.jsp?itemID=29707757>.

<sup>37</sup> Verizon, All About FiOS, <http://newscenter.verizon.com/kit/fios-symmetrical-internet-service/all-about-fios.html> (last visited Sept. 11, 2009).

<sup>38</sup> AT&T, AT&T U-verse Availability in Texas, <http://www.att-services.net/att-verse/availability/uverse-texas.html> (last visited Oct. 18, 2009).

<sup>39</sup> Press Release, AT&T, U-verse TV Starts 2009 With Record Quarter (Apr. 23, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26766>; Press Release, AT&T, AT&T to Invest More Than \$17 Billion in 2009 to Drive Economic Growth (March 10, 2009), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26597> (estimating that by 2011, the U-verse footprint will reach thirty million living units).

<sup>40</sup> But see Raymond McConville, *At Age 2, Verizon FiOS Evolves*, LIGHT READING, Sept. 24, 2007, [http://www.lightreading.com/document.asp?doc\\_id=134347&site=telcotv&f\\_src=lightreading\\_gnews](http://www.lightreading.com/document.asp?doc_id=134347&site=telcotv&f_src=lightreading_gnews) (describing the benefits of IPTV and Verizon's plan to move to an all-IPTV platform in 2010). In 2009, Verizon continued to add new IP-based features to their FiOS service, adding the ability to utilize social media services like Twitter and Facebook while

will focus on AT&T's IPTV.

There are however, some noteworthy concerns about the limitations of AT&T's U-verse network architecture. Some observers have questioned the ability of U-verse to stay competitive due to the bandwidth restrictions of IP delivered over "last-mile" copper wire that link homes to the fiber node,<sup>41</sup> and have predicted that the use of data compression techniques to essentially squeeze the video signal into a more compact information packet will only go so far in maximizing the efficiency of the U-verse network.<sup>42</sup> For some U-verse subscribers, these bandwidth limitations initially meant that a single household could receive no more than one high-definition channel at a time.<sup>43</sup> In contrast, traditional cable and all-fiber IPTV networks do not face this capacity constraint because they have higher bandwidth capabilities.<sup>44</sup> Despite this criticism, AT&T appears to be content with the expandability of its current system for the foreseeable future. In September 2008, the company announced that improved compression methods would allow U-verse customers to simultaneously receive up to three streams of live high-definition programming, as well as four high-definition digital video recorder streams, by the end of 2009.<sup>45</sup>

### III. THE CABLE SERVICE LEGISLATIVE HISTORY AND RECENT CASES: FROM STRICT DEFINITIONS TO REGULATORY UNCERTAINTY

Several cases in recent years have shed light on how the courts and the Commission will approach regulation of services that straddle the line between multiple statutory classifications. This section begins with a history of the cable service definition and continues with a summary of those cases.

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watching television. Press Release, Verizon, Verizon Brings the Web to the TV with Facebook, Twitter, and Internet Videos (July 15, 2009), available at <http://newscenter.verizon.com/press-releases/verizon/2009/verizon-brings-the-web-to-the.html>.

<sup>41</sup> See John Timmer, *AT&T Squeezes 18Mbps U-verse DSL Out of Last-Mile Copper*, ARS TECHNICA, Nov. 6, 2008, <http://arstechnica.com/business/news/2008/11/att-squeezes-18mbps-u-verse-dsl-out-of-last-mile-copper.ars>.

<sup>42</sup> See *id.*; O'Malley, *supra* note 27 (noting that research firm Pike & Fischer predicted that "[p]air bonding and compression, AT&T's current response to its network's bandwidth limitations, will not change copper to glass [fiber optic] and will not provide AT&T with a long-term solution, in our opinion.").

<sup>43</sup> See O'Malley, *supra* note 27.

<sup>44</sup> *Id.*; see Timmer, *supra* note 41 (noting that AT&T's fiber/copper hybrid U-verse network has a capacity of about eighteen megabytes ("Mbs") per second, while its competitors, all-fiber and cable networks, have a capacity of about fifty megabytes per second).

<sup>45</sup> Todd Spangler, *AT&T Banks on Compression*, MULTICHANNEL NEWS, Sept. 22, 2008, at 10.

### A. The Cable Service Definition and its Legislative History

The cable service definition first appeared in the 1984 Cable Act.<sup>46</sup> The 1984 Cable Act defined a “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 or use of such video programming or other programming service.”<sup>47</sup> Prior to the 1984 Cable Act, there was no national policy on cable regulation, and the industry was instead regulated at the local level by the imposition of franchising requirements.<sup>48</sup> Though the FCC regulated the cable industry before the 1984 Cable Act in a limited capacity,<sup>49</sup> local franchising authorities played a much larger role, wielding broad power to dictate the scope, nature, and conditions of the service.<sup>50</sup> Recognizing the benefit of industry standardization and the need for cable proliferation, the 1984 Cable Act definition provided cable companies some degree of deregulation while still preserving primary regulation authority within the local franchising bodies.<sup>51</sup> Additionally, Congress sought to identify those services provided over a cable system<sup>52</sup> as exempt from common carrier

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<sup>46</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified as amended at 47 U.S.C. §§ 521-73 (2006)).

<sup>47</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780.

<sup>48</sup> See H.R. REP. NO. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656. The franchising requirement remains to this day. 47 U.S.C. § 541 (2006).

<sup>49</sup> See Shyamkrishna Balganes, *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303, 1351 (2007) (providing examples of the FCC’s limited regulatory rules prior to the enactment of the Cable Act, such as the limits imposed on distant broadcast signals and mandatory carriage requirements).

<sup>50</sup> See H.R. REP. NO. 98-934, at 19, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

A municipal franchise granted to a cable operator has commonly specified the nature of the cable system to be constructed, the service to be provided, and the rate which may be charged for those services. Some states have laws regulating the terms of what may be included in such a franchise, or requiring review or approval of a franchise by the state.

*Id.*

<sup>51</sup> H.R. REP. NO. 98-934, at 19, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656.

<sup>52</sup> The Cable Act defined a cable system as:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems.

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 602(6), 98 Stat. 2781.



regulation under section 621(c) of the Communications Act of 1934.<sup>53</sup>

Additionally, the legislative history of the 1984 Cable Act gives some examples of services envisioned to be included in the cable services definition, including:

video programming, pay-per-view, voter preference polls in the context of a video program video rating services, teletext, one-way transmission of any computer software (including, for example, computer of [sic] video games) and one-way videotex services such a [sic] news services, stock market information, and on-line airline guides and catalog services that do not allow customer purchases.<sup>54</sup>

Examples of non-cable services include “shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission of non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications.”<sup>55</sup> The distinction between the two categories hinges on the issue of whether or not a particular service entails “active” information exchange between a user and the system.<sup>56</sup> Active exchange, in turn, is characterized as providing subscribers with “the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data . . . .”<sup>57</sup>

In enacting the Telecommunications Act of 1996 (“1996 Act”), Congress amended the cable service definition to include the words “or use,”<sup>58</sup> to reflect the evolution of video programming to “include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.”<sup>59</sup> This minor amendment made only a two-word addition to the definition, yet the change was significant because it reflected the burgeoning interactive capabilities of cable services.<sup>60</sup> The question that remains: whether that level of recognition by Congress makes recognizing IPTV as a cable service necessary? This Note asserts the answer is no.

### B. *Brand X* and the Vonage Order: The Collision of Old Regulatory Classification and New Broadband Policies

In two recent cases, courts reviewed FCC decisions that classified technolo-

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<sup>53</sup> H.R. REP. NO. 98-934, at 41 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4678.

<sup>54</sup> H.R. REP. NO. 98-934, at 44, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681.

<sup>55</sup> H.R. REP. NO. 98-934, at 44.

<sup>56</sup> H.R. REP. NO. 98-934, at 42, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4679.

<sup>57</sup> H.R. REP. NO. 98-934, at 42.

<sup>58</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(a)(1), 110 Stat. 56, 114 (codified at 47 U.S.C. § 522(6)).

<sup>59</sup> H.R. REP. NO. 104-458, at 169 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 182.

<sup>60</sup> H.R. REP. NO. 104-458 at 167.

gies in ways that challenged the existing definitional framework. In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court addressed whether cable modem service should be classified under the Communications Act of 1934, as amended (“Communications Act”)<sup>61</sup> as a telecommunications service with Title II common carrier regulations or as an information service with lighter Title I regulations.<sup>62</sup> The Supreme Court upheld a declaratory ruling by the Commission that found broadband cable modem service to be an “information service.”<sup>63</sup> The Court upheld the Commission’s decision that cable modem service provided “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”<sup>64</sup> and was therefore properly classified as an “information service,” rather than a “telecommunications service.”<sup>65</sup> This classification meant that broadband cable modem service was not subject to the common-carrier requirements of Title II of the Communications Act of 1934.<sup>66</sup>

*Brand X* is an example of how pro-competitive policies can trump legacy regulations as the Commission decided that traditional regulatory treatment of facilities-based providers of enhanced services<sup>67</sup> had been overridden by changes in the marketplace—a pragmatic, progressive finding that would appear to support the conclusion that IPTV might not be a cable service, as currently defined.<sup>68</sup> Applying the deferential *Chevron* standard of review,<sup>69</sup> the Supreme Court agreed that such a judgment was within the discretion of the Commission and overturned the Court of Appeals’ finding that cable modem

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<sup>61</sup> Communications Act of 1934, Pub. L. No. 73-416, 43 Stat. 1064 (codified in scattered sections of 47 U.S.C.), amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

<sup>62</sup> Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967, 975-76 (2005).

<sup>63</sup> *Id.* at 999-1000 (quoting 47 U.S.C. § 153(20)).

<sup>64</sup> 47 U.S.C. § 153 (20).

<sup>65</sup> *Brand X*, 545 U.S. at 974.

<sup>66</sup> *Id.* Writing for the majority, Justice Thomas described the hallmarks of Title II regulations, noting that “Telecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, 47 U.S.C. §§ 201-09, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal ‘universal service’ fund, § 254(d).” *Id.* at 975.

<sup>67</sup> The Court defined as facilities-based providers of enhanced services as “enhanced-service providers who own the transmission facilities used to provide those services . . . .” *Id.* at 995.

<sup>68</sup> See *Brand X*, 545 U.S. at 1001.

<sup>69</sup> *Id.* at 981 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (explaining that “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”)).

service was a telecommunications service.<sup>70</sup> The Court left it to the FCC to determine such classifications, as “[t]he Commission is in a far better position to address these questions . . . .”<sup>71</sup>

*Minnesota Public Utilities Commission v. FCC* arose after the Commission preempted state regulation of Internet-based voice service.<sup>72</sup> At issue was the classification of VoIP, defined in this case as “an internet application utilizing ‘packet-switching’ to transmit a voice communication over a broadband internet connection.”<sup>73</sup> The Court of Appeals for the Eighth Circuit affirmed the Commission’s finding that this service—by virtue of its dispersed, cross-jurisdictional nature—had characteristics that would allow the Commission to invoke the “impossibility exception” of 47 U.S.C. § 152(b).<sup>74</sup> This exception “allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.”<sup>75</sup> This case exemplifies how the preemption authority of the FCC can be applied in scenarios where classification of an advanced service proves difficult. The Vonage case also illustrates courts’ acceptance of the use of federal preemption power as a means of avoiding the classification question.<sup>76</sup>

#### IV. THE DISTRICT COURT OF CONNECTICUT DETERMINES INTERNET PROTOCOL TELEVISION IS A CABLE SERVICE

In 2007, for the first time, a federal court addressed whether IPTV reached should be considered a “cable service” under the Communications Act.<sup>77</sup> Spe-

<sup>70</sup> *Brand X*, 545 U.S. at 1003.

<sup>71</sup> *Id.*

<sup>72</sup> *Minn. Pub. Utils. Comm’n. v. FCC (Vonage)*, 483 F.3d 570, 574 (8th Cir. 2007).

<sup>73</sup> *Id.* at 574. The Court described the difference between VoIP and circuit-switched communications, by noting that:

In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call. Packet-switched communications travel in small digital packets along with many other packets, allowing for more efficient utilization of circuits. While sophisticated, the application is also more cost effective than traditional circuit switches.

*Id.*

<sup>74</sup> *Id.* at 578–79 (noting that the technical functioning of VoIP service made the intrastate and interstate components of VoIP communications practically indistinguishable).

<sup>75</sup> *Id.* at 578 (citing *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir. 2004)).

<sup>76</sup> *See id.* at 580 (stating that rather than rule on classification, the court limited its review to “whether the FCC’s determination was reasonable based on the record existing before it at the time.”).

<sup>77</sup> *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, 270–71 (D. Conn. 2007). The matter came before the court in the wake of two separate lawsuits, subsequently. The first part of the consolidated action involved was a suit by the Office of

cifically, the matter before the court was whether AT&T's prospective IPTV service was a "cable service" and thus subject to cable-specific regulations within the state—namely, the franchising requirement.<sup>78</sup>

Congress established the definition of "cable service" in the 1984 Cable Act.<sup>79</sup> As the legislative history of the definition and its amendment heavily influenced the District Court's analysis of IPTV's proper regulatory definition,<sup>80</sup> an examination of that analysis with a brief history of the definition's development is needed.

In 2006, the Department of Public Utility Control of the State of Connecticut ("DPUC") determined that AT&T's U-verse service should be considered a cable system under the Cable Act.<sup>81</sup> The DPUC concluded that IPTV did not fit the definition of a cable service because of the distinctly robust "two-way video capabilities" of IPTV, an element not present in traditional cable television.<sup>82</sup> The District Court came to the opposite conclusion of the DPUC concluding that IPTV operators and the IPTV service did meet the statutory definition of a "cable operator" providing a "cable service" over a "cable system," as those terms are defined in the Cable Act,<sup>83</sup> and therefore granted summary judgment.<sup>84</sup> AT&T would later acquire a franchise through a new streamlined state video franchising process that was approved in late 2007.<sup>85</sup> However, in August 2008, AT&T filed an appeal with the U.S. Court of Appeals for the Second Circuit, seeking to reverse the District Court's ruling, arguing that because AT&T had acquired a video franchise, the issue of franchising require-

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Consumer Council and New England Cable and Telecommunications Association, Inc. against Southern New England Telephone Company, doing business as AT&T Connecticut, Inc. ("AT&T") and the Department of Public Utility Control of the State of Connecticut ("DPUC"). The second part of the consolidated action involved Cablevision of Connecticut, L.P., Cablevision of Southern Connecticut, L.P., and Cablevision of Litchfield, Inc. ("Cablevision") against the Connecticut DPUC. *Id.*

<sup>78</sup> *Id.* at 271.

<sup>79</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified as amended at 47 U.S.C. § 522(6)).

<sup>80</sup> *Consumer Counsel*, 515 F. Supp. 2d at 275–76.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 273 (noting that IP-based networks require constant interaction between the user and the network).

<sup>83</sup> *Id.* at 282.

<sup>84</sup> *Id.* at 271 (granting summary judgment on the issue of "whether defendant DPUC's determination concerning AT&T's service is preempted by federal law and whether, accordingly, AT&T's provision of that service in Connecticut should be regulated as is the 'cable service'").

<sup>85</sup> Steve Donohue, *AT&T Wins Conn. Franchise: Utility Board's Decision Reverses State Court Ruling*, MULTICHANNEL NEWS, Nov. 4, 2007, [http://www.multichannel.com/article/131012-AT\\_T\\_Wins\\_Conn\\_Franchise.php](http://www.multichannel.com/article/131012-AT_T_Wins_Conn_Franchise.php); Linda Haugsted, *AT&T Appeals Connecticut Court's U-verse Definition*, MULTICHANNEL NEWS, Aug. 11, 2008, [http://www.multichannel.com/article/82900-AT\\_T\\_Appeals\\_Connecticut\\_Court\\_s\\_U\\_verse\\_Definition.php](http://www.multichannel.com/article/82900-AT_T_Appeals_Connecticut_Court_s_U_verse_Definition.php)

ments for the service had been rendered moot.<sup>86</sup> AT&T sought to avoid a final judgment of the legal classification of IPTV as a cable service, which would have created precedent for such a classification in future adjudications.<sup>87</sup>

While previous cases have broached the issue of such classifications,<sup>88</sup> the DPUC proceeding was the first direct treatment of this point of contention between courts and regulatory bodies.<sup>89</sup> Both the DPUC and the District Court acknowledged that the end product—programming content displayed on a television screen—and users’ interaction with the product were all but indistinguishable, in appearance, from that of cable television.<sup>90</sup> But the DPUC found that the level of interaction between the IPTV customer, via their set-top box, and the network was much more extensive than the limited level of interaction seen with cable television users and the network, where the “two-way” interaction only exists when using video-on-demand options.<sup>91</sup>

In assessing the nature of the IPTV offering, the District Court looked to the statutory definition of cable service, and found that the DPUC’s previous finding that U-verse constituted a “two-way transmission” was over-stated.<sup>92</sup> The decision that U-verse constituted “video programming”<sup>93</sup> was not disputed; the court’s inquiry hinged on the “one-way transmission” of the service and “subscriber interaction” elements.<sup>94</sup> AT&T argued that the very nature of the service required two-way transmission and a heightened degree of interactivity.<sup>95</sup> As discussed earlier,<sup>96</sup> U-verse users see only the channel they have requested from the network through manipulation of the remote control.<sup>97</sup> Thus, AT&T argued, the service was sufficiently more interactive than cable.<sup>98</sup>

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<sup>86</sup> Haugsted, *supra* note 85.

<sup>87</sup> *See id.*

<sup>88</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co., 515 F. Supp. 2d 269, 273 (citing and quoting Ill. Bell Tel. Co. v. Vill. of Itasca, 503 F.Supp.2d 928, 942 (N.D.Ill. 2007) (noting that the *Itasca* court left the decision on whether “‘plaintiff’s IP-based services’ [were] ‘outside the definition of “cable services” in the Cable Act’ . . . ‘to another day.’”) (citation omitted); Pacific Bell Tel. Co. v. City of Walnut Creek, 428 F.Supp.2d 1037, 1045 (N.D.Cal. 2006) (stating that “[w]hether AT&T’s video programming in fact is a two-way interactive service is an evidentiary matter to be addressed in future proceedings.”).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 272–73.

<sup>91</sup> *See id.* at 273–74.

<sup>92</sup> *See id.* at 277–79.

<sup>93</sup> *See* 47 U.S.C. § 522(20) (2006) (providing the definition of “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”).

<sup>94</sup> *See Consumer Counsel*, 515 F.Supp.2d at 275–78.

<sup>95</sup> *See id.* at 278–80.

<sup>96</sup> *See* text accompanying *supra* note 34.

<sup>97</sup> *Consumer Counsel*, 515 F.Supp.2d at 272.

<sup>98</sup> *See id.* at 278 (citing *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*; Internet Over Cable Declaratory Ruling; Appropriate Reg-

The District Court disagreed with AT&T's argument, finding that user interaction did not reach the "high degree" that might take U-verse out of the scope of cable services regulation.<sup>99</sup> Rather, the court found that regardless of the level of interactivity involved, U-verse fit squarely within the cable service definition.<sup>100</sup> Furthermore, the court found the idea that all programming must be pushed to cable subscribers at all times was not, in fact, a necessary element of a cable service under the Cable Act.<sup>101</sup> The 1984 Cable Act definition for cable service requires that programming must be made "generally available to all subscribers" and "must be limited to a 'specific number of options or categories delineated [and] created by the cable operator or programming service provider'"—a requirement U-verse met, the court held.<sup>102</sup> AT&T's argument that U-verse provided "tailored" programming to each subscriber by way of its channel selection process was deemed unjustified since the court found that U-verse limited its subscribers to programming within their programming package tier—in contrast to service one receives from their Internet service provider where the user has full control over what content is transmitted to them.<sup>103</sup> Finally, the court rejected AT&T's argument that U-verse constituted an unregulated "information service," as defined in section 153(20).<sup>104</sup> The District Court decisively disposed of this argument, noting the one-way, "downstream" nature of the IPTV service, and that the holding of the FCC decision that AT&T cited for its argument was limited to very narrow circumstances not applicable to U-verse.<sup>105</sup>

Looking to the legislative history of the 1984 Cable Act, the District Court noted that the House Report stated that "the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities" of a service – should guide the inquiry into whether a particular offering is consid-

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ulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 F.C.C.R. 4798, ¶¶ 60, 64 (Mar. 14, 2002) [hereinafter *Cable Modem Ruling*]).

<sup>99</sup> See *id.* at 279.

<sup>100</sup> *Id.* at 279–80.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 279–80 (alteration in original) (quoting H.R. REP. NO. 98-934 at 43 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4680).

<sup>103</sup> *Id.* at 280.

<sup>104</sup> *Id.* at 280–81. Section 153(20) defines "information service" as:

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

47 U.S.C. § 153(20) (2006).

<sup>105</sup> See *Consumer Counsel*, 515 F. Supp. 2d at 272, 280–81.

ered a cable service.<sup>106</sup> Thus, a service that allows purchase of products by sending a signal through the system, regardless of the technology used to send that signal, is not a cable system,<sup>107</sup> whereas selection of pay-per-view programming does not necessarily bring a service outside the cable service definition,<sup>108</sup> as provided under section 522(6)(B).<sup>109</sup> With these guideposts and the language of the statute itself, the District Court found that while U-verse involved two-way transmission of data/signals, that setup did not bring it outside the definition of “cable service” contemplated by Congress.<sup>110</sup> Put another way, U-verse entailed two-way transmission with regard to its transmitting technology, but *not* with regard to the nature of the programming being transmitted.<sup>111</sup> As stated earlier, the District Court found that the latter inquiry was controlling. The subscriber received “video or other programming,” but this subscriber merely sent signals whose sole purpose was to obtain programming. The court compared this setup with that of broadband Internet access, which does not constitute a “cable service,” and noted that broadband Internet involves “two-way communication and *information exchange* unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.”<sup>112</sup>

Regarding the subscriber interaction component, the District Court asserted that Congress plainly contemplated and allowed for subscriber interaction within the scope of the cable service definition.<sup>113</sup> The House Report also specified that interaction resulting in information retrieval “from among a specific number of options or categories delineated by the cable operator or the programming service provider” is still within the definition of a cable service.<sup>114</sup> However, the House Report continued by saying that “interaction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information would not fall under the definition of cable

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<sup>106</sup> *Id.* at 275 (quoting H.R.REP. NO. 98-934, at 43) (emphasis omitted from first quotation).

<sup>107</sup> *Id.* at 275–76.

<sup>108</sup> *Id.* at 277.

<sup>109</sup> See 47 U.S.C. § 522(6)(B)(2006).

<sup>110</sup> See *Consumer Counsel*, 515 F. Supp. 2d at 278.

<sup>111</sup> See *id.* at 277.

<sup>112</sup> *Id.* at 277 (quoting *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876–77 (9th Cir. 2000)).

<sup>113</sup> *Id.* at 278 (“[S]ubscriber interaction required for selection of ‘which programs they want to receive,’ including when such selection ‘involves sending a signal from the subscriber premises to the cable operator over the cable system,’ ‘is permitted in a cable service.’”) (quoting H.R. REP. NO. 98-934, at 43 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4680).

<sup>114</sup> *Consumer Counsel*, 515 F. Supp. 2d at 276 (quoting H.R. REP. NO. 98-934, at 43 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4680).

service.”<sup>115</sup> The District Court stated that “the subscriber interaction involved in AT&T’s video programming service is the same as that involved in traditional CATV programming, and does not exceed the scope of that degree of interaction ‘required for the selection or use’ of the programming, as contemplated by the 1984 Cable Act’s definition of ‘cable service.’”<sup>116</sup> The court supported its finding by noting the lack of user-end distinction between the U-verse and cable subscriber—turning the set-top box on and off, changing channels, and selecting video-on-demand programming.<sup>117</sup> Furthermore, the service neither entailed “off-premises creation and retrieval of a category of information” nor “off-premises data processing”; both non-cable features specified by the House Report.<sup>118</sup> In short, the District Court used a form of the “smell” test, concluding that if the service behaves like a cable service, it is a cable service.

Having found U-verse to be a cable service, the District Court went on to find that the service was offered on a “cable system” by a “cable operator.”<sup>119</sup> Accordingly, the District Court held that the 1984 Cable Act preempted DPUC’s finding that IPTV was not a cable service because the 1984 Cable Act grants a local municipality the authority to mandate franchising and other regulatory requirements when an entity is found to be a cable service under section 522(6).<sup>120</sup>

#### V. THE PASSAGE OF TIME AND SHIFTS IN TELECOMMUNICATIONS POLICY REQUIRE A FORGIVING APPLICATION OF THE CABLE SERVICE DEFINITION

With the enactment of the Telecommunications Act of 1996 (“1996 Act”),<sup>121</sup> Congress directed the Commission to facilitate a deregulatory approach to next-generation communications services.<sup>122</sup> Recognizing the need for rapid

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 278.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 276 (citing H.R. REP. NO. 98-934, at 43).

<sup>119</sup> *Id.* at 282. The term “cable operator” is defined as:

any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5) (2006).

<sup>120</sup> *Consumer Counsel*, 515 F. Supp. at 282 (citing 47 U.S.C. § 541).

<sup>121</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (codified at 47 U.S.C. § 151).

<sup>122</sup> See H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.) (noting that the legislation is to “provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to



expansion of such technology to all Americans, and advocating a pro-competition approach, Congress acknowledged the momentous steps in technology over the past decade and expressly discouraged the imposition of legacy regulatory burdens that might constrain such growth.<sup>123</sup> In light of this shift, any moves by the Commission to step in and regulate IPTV as it would a legacy technology, would be out of step with this recognized policy directive.<sup>124</sup> Additionally, even if the language of the cable service definition applies to IPTV, the traditional rationale underlying the treatment of cable services as distinct from other services has been weakened by the convergence of technologies, which has complicated the application of the old definitions that effectively cordoned off individual services from one another.<sup>125</sup>

Meanwhile, state-level reform of old cable franchising arrangements has helped telephone companies enter the video market with greater ease.<sup>126</sup> Debate surrounding the rise of state video franchise reform likewise has shed light on the impropriety of subjecting new entrants to regulations that were largely passed in recognition of traditional cables' status as a natural monopoly in its serviced neighborhoods.<sup>127</sup> Rather than declare that IPTV is a cable service and effectively nullify state franchise reform laws, the FCC should embrace this policy.<sup>128</sup> However, in those states that seek to declare IPTV to be a cable service, the Commission should utilize its preemption authority to keep franchising requirements from being imposed on IPTV in a manner that divorces the franchising requirement from its purpose of mitigating the monopoly power of

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competition . . .”).

<sup>123</sup> *See id.*

<sup>124</sup> *See In re* Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services, *Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services (SBC Petition)*, WC Docket No. 04-36, at 5 (Feb. 5, 2004).

The roots of [the Commission not regulating the Internet] . . . lie in the Commission's treatment of enhanced services in the *Computer Inquiries* over 20 years ago. Recognizing the enormous potential of enhanced services generally, the Commission resisted calls to regulate such services under Title II, concluding that subjecting them 'to a common carrier scheme of regulation . . . would negate the dynamics of . . . this area. *Id.* (quoting Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 431-32 ¶ 123 (1980)).

<sup>125</sup> *See* discussion *infra* Part V.A.i. The 1996 amendments to the Act did foresee some overlap between services, but not to the extent we have now seen come to fruition. *See infra* notes 241-47 and accompanying text.

<sup>126</sup> THEODORE BOLEMA, MACKINAC CENTER FOR PUBLIC POLICY, AN EVALUATION OF LEGISLATIVE PROPOSALS FOR HIGHER CABLE FEES TO FINANCE PUBLIC, EDUCATION AND GOVERNMENT ACCESS CHANNELS 5 (2008), <http://www.mackinac.org/archives/2008/2008-11REGfeesWEB.pdf>.

<sup>127</sup> *See* Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 2, 10 (2007).

<sup>128</sup> *See* discussion *infra* Part V.C. It is a policy that is echoed in certain portions of the 1996 Act and recent court decisions. *See id.*

cable providers.<sup>129</sup>

## A. Convergence Makes the Old Definitions Obsolete

### *i. Blending of Technologies Renders “Smokestack” Regulation Obsolete*

The advent of consumer broadband and coinciding rise of convergence renders the pre-1996 statutory definitions unworkable. As Barbara Esbin wrote in *Internet Over Cable: Defining the Future in Terms of the Past*:

[t]he communications and communications services made possible by the Internet are fundamentally unlike those provided in the past over the technologically separate public switched telephone network, data networks, broadcast networks, and cable television systems in that a single medium is capable of delivering nearly any type of communications service on an integrated basis.<sup>130</sup>

Esbin wrote these words in 1999, when the Internet was just becoming part of mainstream life.<sup>131</sup> But even then, many commentators recognized the importance, and inevitability, of the convergence phenomenon.<sup>132</sup> The progression of that idea from conceptual seedling into full-blown techno-cultural revolution has been rapid and its effects have been wide-ranging.<sup>133</sup> It has fundamentally changed business strategies and outlooks for communications and media companies, from the smallest Internet start-ups to the oldest of “old media” stand-bys.<sup>134</sup> This is the communications landscape as it now stands, and it is within this reality that regulatory decisions should be made.

Without precedential guidance to guide the court, *Consumer Counsel’s* analysis was limited to statutory and legislative history interpretation. Based on this analysis, the court concluded that there was enough evidence in the Congressional record to suggest that Congress would view the level of subscriber

<sup>129</sup> See Hazlett, *supra* note 127, at 81.

<sup>130</sup> Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 41 (1999).

<sup>131</sup> See *id.* at 42.

<sup>132</sup> See *id.* at 118.

<sup>133</sup> See, e.g., Nate Anderson, *Cell Phones Quickly Becoming Portable Entertainment Devices*, ARS TECHNICA, <http://arstechnica.com/gadgets/news/2007/12/cell-phones-quickly-becoming-portable-entertainment-devices.ars> (finding “47 percent of 25-41 year olds use their cell phone for entertainment, a massive surge from the 29 percent who said they did so only eight short months ago.”); LEE RAINIE, PEW INTERNET & AMERICAN LIFE, PEW INTERNET PROJECT DATA MEMO 1 (Jan. 9, 2008), available at [http://www.pewinternet.org/~media/Files/Reports/2008/Pew\\_Videosharing\\_memo\\_Jan08.pdf](http://www.pewinternet.org/~media/Files/Reports/2008/Pew_Videosharing_memo_Jan08.pdf) (noting that as of December 2007, forty-eight percent of Internet users have been to video-sharing sites such as YouTube); see John Markoff, *Vision of Personal Computers as Heart of Home Entertainment*, N.Y. TIMES, Nov. 17, 2003, at C1 (noting how computer makers are envisioning further inroads into the home entertainment market).

<sup>134</sup> See, e.g., Pérez-Peña, *supra* note 1; Richard Pérez-Peña, *Times Co. Said to Consider Closing The Boston Globe*, N.Y. TIMES, Apr. 4, 2009, at B5.

interaction involved with the U-verse service as insufficient to take the technology out of the realm of cable services.<sup>135</sup> While this analysis may have some merit in a language-parsing sense, the court's decision ignores the fact that the cable service definition was written at a time when the Internet, let alone Internet-based technologies using cable and phone wires, had not become the ubiquitous technology it is today. The old definition of cable service and the coinciding rationales have grown out-of-sync with modern technological and market realities. Application of those definitional standards would distort the underlying policy goals and only add to already rampant regulatory confusion.<sup>136</sup>

*Consumer Counsel* overstates the clarity of the legislative history of the cable service definition.<sup>137</sup> That is not to say the position taken by the court is outrageous and wholly without basis in the statutory language. However, there is a "natural turmoil of entry" regarding regulation of new services that does not tend to lend itself to rote application of old regulation to new technology.<sup>138</sup> Just because the language of a now twenty-five year-old statute *can* encompass a definition of IPTV as a cable service does not mean legislators foresaw the drastic changes that have taken place since that language was written, let alone that they intended the Act to regulate such changes. A classification under a statute does not stand on its own. Rather, the true importance of legal standing under a given statutory definition lies in the real-life consequences stemming from application of such definitional frameworks.<sup>139</sup>

Indeed, the vagueness of the statutory definitions and the isolated "smoke-stack" regulation they provoke<sup>140</sup> have been roundly, and deservedly, panned

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<sup>135</sup> See *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, 277–78 (D. Conn. 2007).

<sup>136</sup> See Barbara Esbin & Gary Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMMLAW CONSPICUOUS 23, 24, 27–28 (2001).

<sup>137</sup> The court stated:

[T]he level of interactivity required [with the U-verse service] exactly fits into the FCC's own characterization of what Congress intended by its "cable service" definition . . . . [A]s the legislative history indicates, programming simply must be made "generally available to all subscribers," and must be limited to a "specific number of options or categories delineated [and] created by the cable operator or programming service provider."

*Consumer Counsel*, 515 F. Supp. 2d at 279–80.

<sup>138</sup> See Randal C. Picker, *Who Should Regulate Entry into IPTV and Municipal Wireless?* 23 (Univ. of Chicago Law School, Working Paper No. 308, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931495](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931495).

<sup>139</sup> See Esbin, *supra* note 130, at 99.

<sup>140</sup> See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 104 (2006) ("[T]he stovepipes, or vertical 'silos' or 'smokestacks' as some prefer, refer to the distinct sets of regulations that attach to a service offering once it is classified under one definition or the other.").

by some commentators.<sup>141</sup> While applauding the ingenuity of regulators in conceiving, updating, and attempting to keep the definitions of the Communications Act relevant,<sup>142</sup> Randolph J. May wrote that the unwieldy “techno-functional constructs” of the statutory definitions of “telecommunications,” “information service,” “cable service,” and many others are well past their prime.<sup>143</sup> These analog-era definitions, half-jokingly referred to by May as regulatory “metaphysics” and “the stuff of digital age philosophers,”<sup>144</sup> are rife with definitional concepts hinging on interpretation of similarly amorphous terms.<sup>145</sup>

These statutory definitions were perhaps suitable for the era in which they were conceived, when the constraints of narrowband communications limited the variety of services that could be pushed through a single technological conduit.<sup>146</sup> However, today the broadband thruways by which communications make their way into users’ homes means that services can no longer be confined to a particular technological underpinning.<sup>147</sup> Telecommunications no longer means just voice. Cable does not equate solely to video. Where technology is now ever more pervasive and complicated, the definitions we have no longer suffice. Where the courts and the Commission have considered the overlap of certain technologies and regulatory models, the definitions have led only to abundant confusion.<sup>148</sup>

## ii. IPTV Continues to Add More Interactive Features

The decision in *Consumer Counsel* hinged on the legislative history’s con-

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<sup>141</sup> See, e.g., Christopher S. Yoo, *New Models of Regulation & Interagency Governance*, 2003 MICH. ST. DCL L. REV. 701, 714 (asserting that definitions based solely on means of transmission are unduly restrictive and not in accordance with the changing times).

<sup>142</sup> May, *supra* note 140, at 107.

<sup>143</sup> *Id.* at 106.

<sup>144</sup> *Id.*

<sup>145</sup> See *id.* at 105 (contending that defining “telecommunications” and “information service” for instance, rests on how one defines such concepts as transmission of information among points “‘specified by the user,’ ‘without a change in form or content,’ ‘generating,’ ‘storing,’ ‘processing,’ ‘retrieving,’ ‘transforming’ information, and so on.”) (citing 47 U.S.C. §§ 153(43), 153(20) (2000)).

<sup>146</sup> See May, *supra* note 140, at 106–08; see also *Cable Modem Ruling*, *supra* note 98, at 4833, ¶ 61 (stating that “[t]he phrase ‘one way transmission to subscribers’ in the definition reflects the traditional view of cable as primarily a medium of mass communication . . .”).

<sup>147</sup> May, *supra* note 140, at 108.

<sup>148</sup> See discussion *infra* at Part V.C.i. The *Brand X* case and the *Vonage Order* illustrate the pro-innovation policy in effect at the Commission. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 972 (2005); *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Public Util. Comm’n.*, *Memorandum Opinion and Order*, 19 F.C.C.R. 22404, 22405 ¶2 (Nov. 9, 2004) [hereinafter *Vonage Order*].

templation of *some* interaction between the subscriber and the network.<sup>149</sup> The court admitted that the legislative history supported the notion that a service's evolution, by adding features of a decidedly more "two-way" nature, may take the service out of the realm of cable services.<sup>150</sup> In this light, this argument may appropriately be characterized as an assessment of the *degree* of interactivity, as opposed to a comparison of unique "siloeed" cable and non-cable technologies.<sup>151</sup> Such a scenario makes defining IPTV as a cable service even more difficult, as the addition of just one especially "interactive" feature may reverse such a finding.

In fact, just a few months before *Consumer Counsel* was decided, U-verse added features that may take the service across the "interaction threshold." U-verse Mobile Remote Access allows "AT&T U-verse TV and Internet customers . . . [to] use any compatible AT&T wireless phone or handset to search U-verse TV program listings, schedule program or series recordings, and manage or delete stored DVR content."<sup>152</sup> The legislative history of the 1984 Cable Act notes that "unlimited keyword searches of information stored in data bases is not permitted in a cable service" and that searches of a database for "all occurrences of a particular piece of information such as a name, a location or date" cannot be considered cable services.<sup>153</sup> Yet, this is exactly what the Mobile Remote Access service allows users to do by allowing them to type in keywords on their phone, as opposed to "pre-selected" content.<sup>154</sup> Nor does Mobile Remote Access entail the sort of "simple menu-selection" contemplated by the legislative history that would keep a service under the cable service designation.<sup>155</sup>

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<sup>149</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co., 515 F. Supp. 2d 269, 275–77 (D. Conn. 2007).

<sup>150</sup> *Id.* at 277–79. On the issue of whether IPTV "exceed[ed] the scope of that degree of interaction 'required for the selection or use' of the programming, as contemplated by the Cable Act's definition of 'cable service,'" the court conceded that a higher "degree" of interaction brings a service further from the cable service classification. *See id.* at 278.

<sup>151</sup> *See id.* at 278 (noting that the court focused on the "degree of interaction" in assessing whether a service falls under the Cable Act's definition of "cable service").

<sup>152</sup> Press Release, AT&T, AT&T Launches Mobile Remote Access for AT&T U-verse TV (Apr. 19, 2007), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23702>. The absence of any discussion of this feature by the *Consumer Counsel* court is notable. The court's focus on the one-way nature of the video programming content coming into the subscriber's home suggests it may not have been swayed even had it considered the new feature.

<sup>153</sup> H.R. REP. NO. 98-934, at 43 (1984).

<sup>154</sup> *See* AT&T, Manage Your DVR From a Web-Enabled Mobile Phone, <http://attfig-tv.hagginmarketing.com> (scroll over "Total Home DVR", then follow "Manage DVR from Web-enable mobile phone" hyperlink) (guiding Mobile Remote users on how to perform keyword searches on their mobile phones) (last visited Sept. 17, 2009).

<sup>155</sup> *See* H.R. REP. NO. 98-934, at 43 (1984) ("The Committee intends that the interaction permitted in a cable service shall be that required for the retrieval of information from

Another new feature on U-verse that suggests it may be something other than a cable service is the availability of an application on U-verse to access Flickr, a photo-sharing Web site.<sup>156</sup> Flickr exemplifies just how integrated the Internet is in U-verse's architecture. While the video programming component of U-verse is delivered in an IP-based format, Flickr accesses the Internet itself to provide U-verse users with access to photos they have stored online.<sup>157</sup> The legislative history of the 1984 Cable Act declares that "services providing subscribers with the capacity to . . . store, transform, forward, manipulate, or otherwise process information or data would not be cable services."<sup>158</sup> It also notes that "non-video data and information not offered to all subscribers" is not a cable service.<sup>159</sup> Additionally, off-premises data processing is excluded from the definition of cable service.<sup>160</sup> The AT&T Online Photos application allows users to access their Flickr accounts to view photos that they have uploaded onto the Web site.<sup>161</sup> Thus, the service entails the *storage of data* that is *not offered to all subscribers*, a setup that arguably takes the service across the threshold of interactivity.

Today, telephone companies are not just moving into the video market to provide "bonus" services for their customers. Rather, the consolidation of services into so-called triple-play offerings of voice, video, and broadband Internet reflects an outright urgency on their part.<sup>162</sup> Market pressures and the ever-increasing technological expectations of consumers have rendered standalone wireline phone service a dwindling market and thus, phone companies must diversify their service offerings in order to survive.<sup>163</sup>

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among a specific number of options or categories delineated by the cable operator or the programming service provider.").

<sup>156</sup> Press Release, AT&T, AT&T U-verse TV Tunes into Personalized Channel of Online Photos from Flickr (Apr. 2, 2008), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25420>.

<sup>157</sup> *Id.*

<sup>158</sup> H.R. Rep. No. 98-934, at 42 (1984) (emphasis added).

<sup>159</sup> H.R. Rep. No. 98-934, at 44.

<sup>160</sup> H.R. Rep. No. 98-934, at 43.

<sup>161</sup> Press Release, AT&T, *supra* note 156. In order to access Flickr on U-verse, AT&T directs customers to "tun[e] to Channel 91 or [use] the U-verse TV menu. Customers will then select from their Flickr photo sets, which are automatically available from their master AT&T High Speed Internet account, and they can browse photos or start a slide show." *Id.*

<sup>162</sup> See GEORGE S. FORD, THOMAS KOUTSKY, & LAWRENCE J. SPIWAK, PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES, THE CONSUMER WELFARE COST OF CABLE "BUILD-OUT" RULES 20 (2005) (noting that the "dream" of "policymakers" for "the nation's two wireline communications goliaths - the cable and local telephone industries - to compete aggressively for residential consumers over a bundle of voice, video, and data services . . . is on the brink of becoming a reality.").

<sup>163</sup> See, e.g., Leslie Cauley, *Cable, Phone Companies Duke it Out for Customers*, USA TODAY, May 23, 2005, at 1B. Ford Cavallari of Adventis, a consulting company, noted, "There is not a telco on the planet today that doesn't have a video strategy or offer on the

Consumer viewing tendencies also point clearly to a future of inevitably increasing interactivity and customization. The very concept of appointment television—the idea that viewers will tune in to programming at a given time, week after week—is now threatened by the advent of on-demand services, digital video recorders, and online episodes of broadcast shows.<sup>164</sup> The “TiVo generation” has proven to be quite enamored with the added control it has over its viewing habits: “whenever a household gets a TiVo or other DVR, about 75% immediately dump appointment TV.”<sup>165</sup>

The current cable service definition does not contemplate a scenario in which the backbone of “information service”—Internet Protocol—could come to underpin essentially *all* communications and media services entering the consumer’s home.<sup>166</sup> Nor does it address the fact that the 1996 Act defines information services 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.<sup>167</sup>

Certainly, the U-verse network, with its IP-infrastructure, may be deemed *capable* of such activities, as the use of the Internet Protocol as the base technology of the U-verse system was grounded in such a purpose.<sup>168</sup> It is also important to note that in utilizing the Internet Protocol for delivery of video programming, U-verse is capable of interactivity with Internet applications, as evidenced by the Flickr application.<sup>169</sup> U-verse’s IP-based infrastructure is a point that, while technical and easily overlooked, is crucial to understanding how the U-verse network is setup and capable of expanding. Rolling out new next-generation technologies and services is eased by utilizing an established protocol.<sup>170</sup> So the question remains: is IPTV more of a cable service than an information service, purely by its functional equivalence to cable? The Vonage order indicates that the Commission will not proceed with that line of reason-

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books.” *Id.*

<sup>164</sup> *Id.* (noting that a 2004 survey of several thousand television viewers by Adventis found that “85% of consumers said they were at least ‘somewhat’ dissatisfied with the ‘appointment TV’ model that cable operators have long embraced.”).

<sup>165</sup> *Id.*

<sup>166</sup> See 47 U.S.C. § 522(6).

<sup>167</sup> 47 U.S.C. § 153(20) (emphasis added).

<sup>168</sup> See Spangler, *supra* note 45 (quoting John Donovan, Chief Technology Officer, AT&T, as stating that “[t]he explosive growth in mobility and video really drives us toward more IP techniques, not only for efficiencies but for integration.”).

<sup>169</sup> See *supra* text accompanying notes 153–54.

<sup>170</sup> See Nate Anderson, *An Introduction to IPTV*, ARS TECHNICA, Mar. 12, 2006, <http://arstechnica.com/business/news/2006/03/iptv.ars>.

ing carelessly.<sup>171</sup>

The Commission would make a significant mistake by moving forward with any consideration of this issue by focusing solely on the statutory definition, as the district court did in *Consumer Counsel*.<sup>172</sup> Rather than blindly applying old definitions to new services, the Commission must attempt to reconcile such definitions with policy directives favoring burgeoning technologies.<sup>173</sup> The Commission seeks to avoid the uncertainty and chilling effect on new ideas that accompanies regulations and laws that lack specificity.<sup>174</sup> At a time when subscription television customers may finally choose a third major multichannel video programming distributor (“MVPD”) competitor,<sup>175</sup> enforcement of traditional regulatory definitions applied to IPTV would be a setback for consumers and contrary to the inevitable shift toward an integrated communications industry.<sup>176</sup> At this juncture, confusion is endless, and any attempt to

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<sup>171</sup> See discussion *infra* Part V.C.i.

<sup>172</sup> See *Office of Consumer Counsel v. S. New Eng. Tel. Co.*, 515 F. Supp. 2d 269, 271 (D. Conn. 2007).

<sup>173</sup> See 47 U.S.C. § 230(b)(1) (stating “it is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services . . .”).

<sup>174</sup> See, e.g., *Cable Modem Ruling*, *supra* note 98, at ¶ 5; see *In re Implementation of Section 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, *Second Report and Order*, 9 F.C.C.R. 1411, ¶ 25 (Feb. 3, 1994) (“Our definition of [Commercial Mobile Radio Service] . . . establishes clear rules for the classification of mobile services, minimizing regulatory uncertainty and any consequent chilling of investment activity.”); *cf. In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, 322 ¶ 5 (Feb. 14, 2002) [hereinafter *Wireline Broadband Rulemaking*] (“We recognize that substantial investment is required to build out the networks that will support future broadband capabilities and applications. Therefore, our policy and regulatory framework will work to foster investment and innovation in these networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs.”).

<sup>175</sup> Multichannel video programming distributors are defined as:

entit[ies] engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

47 C.F.R. § 76.1000(e) (2008).

<sup>176</sup> Christopher Yoo takes the view that the days of treating an individual communications technology as being isolated within its own regulatory “silo” are numbered, predicting that:

[t]he impending shift of all networks to packet-switched technologies promises to complete the collapse of any remaining attempt to base regulation on differences in the means of transmission. Once all communications are reduced to bits and bytes, all media will constitute substitutes for one another, and attempts to segment markets based on the means of conveyance will become increasingly problematic.



make a cut-and-dry definition of IPTV as a cable service will only serve to deter additional advances and create more regulatory headaches. The Commission, however, may not need to look far for guidance. As it stands, developments at the state level may be addressing the issue as we speak—without having to address the definitional conundrum head-on.

## B. State-Level Action is On the Rise

### *i. State Video Franchises Reap Rewards for Consumers*

In the past few years, many states have enacted video franchise reform statutes to foster greater competition in the MVPD arena.<sup>177</sup> These reform laws smooth entry into a given market by removing the requirement that a video provider establish franchising agreements with each and every municipality in which it seeks to gain a foothold.<sup>178</sup> By authorizing state entry at a much lower cost, state-wide franchises represent one option to avoid what is well-recognized as one of the foremost barriers to MVPD marketplace entry: lengthy delays in the franchise negotiation process.<sup>179</sup> In twenty-four states already, and more with pending legislation,<sup>180</sup> the state grants state-wide video licenses,

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Yoo, *supra* note 141, at 714.

<sup>177</sup> STEVEN TITCH, REASON FOUND., BETTER PRICES AND BETTER SERVICES FOR MORE PEOPLE: ASSESSING THE OUTCOMES OF VIDEO FRANCHISE REFORM 3 (2007), available at <http://reason.org/files/2791c693f550bc6dd8447b17923bfc2a.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> *In re* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C.R. 5101, ¶ 3 (Dec. 20, 2006) [hereinafter *Section 621(a)(1) Order*]; *In re* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Ex Parte Submission of the Department of Justice*, MB Docket No. 05-311, at 3 (May 10, 2006) [hereinafter *DoJ Ex Parte*] (“Regulatory restrictions and conditions on entry tend to shield incumbents from competition, and are associated with a range of economic inefficiencies including higher production costs, reduced innovation, and distorted service choices.”); see also 47 U.S.C. § 541(a)(1) (establishing authority of local franchising bodies). Negotiating with each local franchising authority can take from a few months to more than a year. David Koenig, *Big Telcos Frustrated in Bid to Challenge Cable TV Head-On*, ASSOCIATED PRESS, May 31, 2005.

<sup>180</sup> See Map of States with Statewide Franchise Laws, available at <http://www.millervaneaton.com/State%20map%202008.pdf> (last visited Sept. 17, 2009). As of January 2009, Idaho, Massachusetts, New York, Pennsylvania, and Washington all had statewide franchising legislation pending. Norman M. Sinel et al., Recent Developments in Cable Law, 958 PLI/Pat 15, 29-30; see S. 100, 60th Leg. (Idaho 2009); A. 1875, 232d Sess. (N.Y. 2009); S. 2649, 185th Sess. (Mass. 2007) (establishing a commission to study the costs and benefits of a statewide franchise system); S. 1247, 190th Sess. (P.A. 2006); S. 6003 (60th Leg. (Wash. 2007). *But see* H. 2050 193d Sess. (Pa. 2009) (amending Pennsylvania’s existing municipal franchise law).

negating the need for local cable franchising agreements.<sup>181</sup>

The FCC has expressed concern over rising cable rates, as Cablevision, Comcast, Time Warner Cable, and Cox all saw rate increases.<sup>182</sup> Cablevision saw a 3.5 percent average increase, while Comcast increased rates by 3.7 percent for customers who purchase a discounted bundle of services.<sup>183</sup> Time Warner Cable customers see varying increases from region to region.<sup>184</sup> Meanwhile, even as local advocates balk at the idea of diminished local control and fears of decreased revenues from franchise fees,<sup>185</sup> the streamlined passage to entry afforded by state video reform statutes has borne concrete evidence of improved competition.<sup>186</sup> Texas initiated the wave of reform in the summer of 2005,<sup>187</sup> and later that year became the first state to have a commercial rollout of Verizon's FiOS service.<sup>188</sup> By the end of 2005, this move had spurred cable competitors to decrease rates, upgrade broadband speeds, and discount bundled packages.<sup>189</sup> Statewide franchise reform in Indiana prompted Comcast to increase the speed of its broadband service.<sup>190</sup> And in Virginia, after new franchise legislation in 2006 eased entry for Verizon FiOS in some areas, Cox Communications cable prices dropped in those areas.<sup>191</sup> In contrast, areas of Virginia where FiOS had not been rolled out yet, Cox's triple-play cable service cost \$37 more.<sup>192</sup> These results correlate with the positive findings of a 2004 study in which the Government Accountability Office ("GAO") found that where cable markets are competitive, prices are on average about 15 percent lower.<sup>193</sup>

In addition to the effect on prices and upgrades to existing features, the added pressure from competitors spurred further technological innovation on the part of cable companies as well. For instance, Time Warner introduced a service to its Texas customers in October 2006 called "Start Over" that allows

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<sup>181</sup> Congress has considered a national video franchising system, but to date, has not enacted such legislation. *See* Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006), *reprinted in* 152 CONG. REC. H3563-69 (daily ed. June 8, 2006).

<sup>182</sup> Deborah Yao, *FCC Concerned at Trend of Pay-TV Rate Hikes*, ABC NEWS.COM, Oct. 29, 2008, <http://abcnews.go.com/Technology/wireStory?id=6142096>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See* Leo John, *New Law Allows Phone Companies to Offer Cable TV*, CHARLOTTE BUS. J. (N.C.), Jan. 26, 2007, at 12.

<sup>186</sup> *See* Titch, *supra* note 177, at 1.

<sup>187</sup> *Id.* at 6.

<sup>188</sup> Press Release, Verizon, *supra* note 36.

<sup>189</sup> *See* Titch, *supra* note 177, at 6.

<sup>190</sup> *Id.* at 7.

<sup>191</sup> *Id.* at 8.

<sup>192</sup> *Id.*

<sup>193</sup> U.S. GEN. ACCOUNTING OFFICE, TELECOMMUNICATIONS SUBSCRIBER RATES AND COMPETITION IN THE CABLE TELEVISION INDUSTRY 6 (2004).

viewers to rewind shows they have started watching from the middle back to the beginning—without any additional fees.<sup>194</sup>

AT&T has indicated that it is the speed of entry—and concomitant decrease in cost—that is the critical issue.<sup>195</sup> The clarity afforded by statewide video franchises is much more preferable to the regulatory patchwork resulting from negotiation with each and every municipality to which a video provider seeks entry.<sup>196</sup> Moreover, state video franchises avoid the scenario where local franchising authorities (“LFAs”) wield their power as a tool to extract unreasonable—and unrelated—concessions from franchise hopefuls.<sup>197</sup> These concessions, which are imposed apart from any franchise fee based on gross income, can range from the somewhat odd to the downright outrageous, having little to do with provision of a video service.<sup>198</sup> Citing Thomas Hazlett, a former Chief Economist for the FCC, Clark Bowers writes:

[T]he ‘bells and whistles’ stuck into cable franchises raised rates 20 to 30 percent. Moreover, municipalities received 3 to 5 percent of a cable company’s local revenues as franchise fees, providing a strong disincentive for local regulators to lower prices as *much* as possible. A nationwide FBI investigation also found franchise negotiations were endemic with corruption. Cable companies spent millions to wine and dine city governments in exchange for a lucrative monopoly.<sup>199</sup>

## ii. State Franchises Do Not Entail the End of Public Interests

Public interest policy issues weigh heavily at the local level of the franchise debate. The cable service requirements of must-carry,<sup>200</sup> build-out,<sup>201</sup> and Pub-

<sup>194</sup> See Titch, *supra* note 177, at 7.

<sup>195</sup> *In re* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Comments of AT&T, Inc.*, MB Docket No. 05-311, at 52–53 (Feb. 13, 2006) (accessible via FCC Electronic Comment Filing System).

<sup>196</sup> See Felecia R. Lee, *Proposed Legislation May Affect Future of Public-Access Television*, N.Y. TIMES, Nov. 8, 2005, at E1 (noting that there are some 33,000 local franchising authorities nationwide); *DOJ Ex Parte*, *supra* note 179, at 16–17.

<sup>197</sup> See Titch, *supra* note 177, at 14 (noting some local franchising authorities have demanded municipal parking lots and televisions for local religious worship facilities).

<sup>198</sup> See *Section 621(a)(1) Order*, *supra* note 179, at ¶ 43 (noting examples of concessions requested by communities to include street lights, parking, public pools and recreations centers, and scholarship contributions).

<sup>199</sup> Clark Bowers, *From Regulation to Competition*, FREEDOMWORKS, July 21, 2005, <http://www.freedomworks.org/publications/from-regulation-to-competition> (citing Thomas Hazlett, *Wiring the Constitution for Cable*, REGULATION, available at <http://www.cato.org/pubs/regulation/regv12n1/reg12n1-hazlett.html>).

<sup>200</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 614, 106 Stat. 1460, 1471 (1992) (codified as amended at 47 U.S.C. § 534 (2006)). The U.S. Supreme Court said, “the must-carry provisions serve three interrelated, important governmental 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 television programming

lic, Educational and Governmental programming (“PEG”)<sup>202</sup> are often cited by advocates of local franchising as a means of ensuring dedication to local interests.<sup>203</sup> The geographic targeting of the U-verse roll-out has been a concern, and some municipalities have expressed concerns about redlining.<sup>204</sup> Verizon has been accused of targeting the wealthier strata of customers for the rollout of its television service.<sup>205</sup> Despite this, most of those states that enacted franchise reform did incorporate concessions to local interests, such as mandatory PEG channel capacity, a five percent franchise fee, and for some states, some form of build-out/no-redlining provisions as part of such agreements.<sup>206</sup>

Build-out requirements are among the elements of video regulation that often deter entry into a market by new video providers.<sup>207</sup> By requiring strict, and sometimes universal, coverage to all residents of a municipality within a certain timeline, build-out provisions impose a constrictive, inflexible level of start-up cost that scares off new entrants.<sup>208</sup> Build-out was first instituted as part of a bargain between communities and cable operators—a monopoly on video service within a community in exchange for a guarantee of service to all of its citizens.<sup>209</sup> The larger, fixed financial burden was justified on the premise that

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market.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662–63 (1994). The justification for must-carry was to protect the interests of, as of 1994, those forty percent of American households that relied on over-the-air signals for television programming. *Id.* at 663. Currently, only between thirteen and fifteen percent of American households rely exclusively on over-the-air signals for television programming. Nate Anderson, *20% of Antenna Users to Let TV Sets Go Dark in 2009*, ARS TECHNICA, Oct. 22, 2008, <http://arstechnica.com/old/content/2008/10/20-of-antenna-users-to-let-tv-sets-go-dark-in-2009.ars>.

<sup>201</sup> Thomas Hildebrandt describes build-out requirements as “common franchise exactions [that] force a cable provider to serve an entire community in exchange for a franchise.” Thomas Hildebrandt, Note, *Unplugging the Cable Franchise: A Regulatory Framework to Promote the IPTV Cable Alternative*, 42 GA. L. REV. 227, 262 (2007). Local franchises implemented build-out requirements after the 1984 Cable Act to prevent “redlining,” which is “the practice of not building out in lower income neighborhoods.” *Id.* at 236.

<sup>202</sup> 47 U.S.C. § 531 (2006).

<sup>203</sup> See, e.g., *The Cable Choice and Competition Act: Hearing on S.B. 1247 Before the S. Communications and Technology Comm.*, 2006 Leg., 187th Sess. 2-3 (Pa. 2006) (statement of Beth McConnell, Director, The Pennsylvania Public Interest Research Group), available at <http://static.pennpirg.org/testimony/PennPIRG.SB1247.pdf>.

<sup>204</sup> See, e.g., Rick Barrett & Ben Poston, *AT&T U-verse Access Debated*, MILWAUKEE J. SENTINEL, Dec. 11, 2007, at 1A.

<sup>205</sup> Cauley, *supra* note 163.

<sup>206</sup> Miller & Van Eaton P.L.L.C., *State Cable Franchise Laws at a Glance*, <http://www.millervaneaton.com/00130020.pdf> (last visited Sept. 18, 2009).

<sup>207</sup> See Section 621(a)(1) Order, *supra* note 179, at ¶ 35.

<sup>208</sup> See *DoJ Ex Parte*, *supra* note 179, at 15 n.37 (quoting AT&T’s comments that telecommunication providers have been forced to back-out of entering some markets after “incurring huge losses while attempting to satisfy municipal build-out conditions.”).

<sup>209</sup> See Section 621(a)(1) Order, *supra* note 179, at ¶ 87. The practice has been referred to as a “citizen-based version of carry one/carry all. . . .” Picker, *supra* note 138, at 21.

the cable provider operated without any competition.<sup>210</sup> That rationale, however, simply does not apply to IPTV. As a new entrant into the market, the IPTV provider would not be bartering for such a special competitive advantage.<sup>211</sup> In addition, the loss of the monopoly incentive weakens the justification for imposing franchise fees on new entrants.<sup>212</sup>

The Department of Justice (“DoJ”) has worked with the FCC to provide clarity to telecommunications competition by issuing its own analysis in the form of official comments and *ex parte* submissions. In 2006, the DoJ announced its public position that build-out provisions should not be permitted absent clear evidence of income-based discrimination.<sup>213</sup> The DoJ rejected the notion that discrimination was occurring if entrant plans did not cover an entire franchise area, especially for telephone companies building upon their existing infrastructure.<sup>214</sup> In light of the evolving marketplace and current competitive concerns, the FCC began to express skepticism on unreasonable build-out provisions, finding in its 2006 First Report and Order that “[i]n many cases, build-out requirements may . . . deter competition and deny consumers a choice.”<sup>215</sup>

<sup>210</sup> *Section 621(a)(1) Order*, *supra* note 179, at ¶ 87.

<sup>211</sup> *See DoJ Ex Parte*, *supra* note 179, at 16 n.38. “[A] new entrant will enter a mature market where it must compete to attract new customers away from an incumbent, as virtually all potential customers will already have subscribed to either an incumbent cable or DBS provider.” *Id.*

<sup>212</sup> BOLEMA, *supra* note 126, at 3-4; Robert W. Crandall, et al., *Does Video Delivered Over a Telephone Network Require a Cable Franchise?*, 59 FED. COMM. L.J. 251, 293 (2007). The authors note that:

[e]ven if maximizing public revenues were the (perverse) objective of social policy, it is not obvious whether the decrease in franchise fees would exceed the increase in tax revenues from greater employment (by telephone companies) and greater expenditures on video services, and the economic benefits to the community from more sophisticated communications infrastructure. Social policy should be designed to maximize social welfare, not tax proceeds. And with that proper objective, it is clear that consumers would be better off with greater competition in the delivery of MVPD services.

*Id.*

<sup>213</sup> *See DoJ Ex Parte*, *supra* note 179, at 12.

<sup>214</sup> *Id.* at 13-14.

<sup>215</sup> *Section 621(a)(1) Order*, *supra* note 179, at ¶ 37. The Commission addressed six issues impeding entry of video competitors:

(1) unreasonable delays by LFAs in acting on franchise applications; (2) unreasonable build-out requirements imposed by LFAs; (3) LFA demands unrelated to the franchising process; (4) confusion concerning the meaning and scope of franchise fee obligations; (5) unreasonable LFA demands for PEG channel capacity and construction of I-Nets; and (6) level-playing-field requirements set by LFAs.

*Id.* at ¶ 21. The Commission went on to state that:

[T]he record indicates that because potential competitive entrants to the cable market may not be able to economically justify buildout of an entire local franchising area immediately, these requirements can have the effect of granting *de facto* exclusive franchises, in direct contravention of Section 621(a)(1)’s prohibition of exclusive cable franchises.

*Id.* at ¶ 40 (citations omitted).

The Commission found that section 621(a)(4)(A) was not a grant of authority to impose build-out requirements, but rather was a limitation on local franchising authorities.<sup>216</sup> Thus, the Commission could properly limit the extent to which LFAs might impose build-out requirements. Finding such authority to act, the Commission decided that “unreasonable” build-out requirements—as assessed by a fact-specific inquiry—would not be legal justification for denying a franchise.<sup>217</sup> For example, “it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone . . . .”, but it would be “reasonable for [a] [local franchising authority] to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.”<sup>218</sup>

Recently, some states appear to think that even traditional cable providers do not need to be encumbered by local franchise agreements once competition has increased in a given market.<sup>219</sup> After passage of reform laws in North Carolina in 2006,<sup>220</sup> AT&T announced in July 2007 that they would bring U-verse to the state,<sup>221</sup> and service began in November of 2008.<sup>222</sup> Once U-verse began service in North Carolina, a provision in the 2006 reform statute entitled the incumbent cable provider, Time Warner Cable, to cancel its existing municipal franchise agreement.<sup>223</sup> In enacting this escape clause, North Carolina sought to allow competition between providers to maintain the requisite level of consumer attentiveness.<sup>224</sup> However, the provisions of the escape clause do not absolve Time Warner cable of all duties to the local market. For instance, the City of

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<sup>216</sup> *Id.* at ¶ 84.

<sup>217</sup> *Id.* at ¶¶ 40, 89–90.

<sup>218</sup> *Id.* at ¶ 89.

<sup>219</sup> *See, e.g.*, Press Release, City of Raleigh, Time Warner Cable Terminates Cable Franchise with City Of Raleigh (Feb. 4, 2009), *available at* [http://www.raleigh-nc.org/portal/server.pt/gateway/PTARGS\\_0\\_2\\_411\\_208\\_0\\_43/http%3B/pt03/DIG\\_Web\\_Content/news/public/News-PubAffTime\\_Warner\\_Cable\\_Termin-20090204-16444584.html](http://www.raleigh-nc.org/portal/server.pt/gateway/PTARGS_0_2_411_208_0_43/http%3B/pt03/DIG_Web_Content/news/public/News-PubAffTime_Warner_Cable_Termin-20090204-16444584.html).

<sup>220</sup> *See* N.C. GEN STAT. §§ 66-350–356 (2007).

<sup>221</sup> Rick Smith, IPTV Is Coming to N.C.: AT&T Plans \$350M in Network Upgrades, *Local Tech Wire*, July 31, 2007, [http://localtechwire.com/business/local\\_tech\\_wire/news/story/1654218/](http://localtechwire.com/business/local_tech_wire/news/story/1654218/).

<sup>222</sup> Press Release, AT&T, AT&T U-verse TV Service Arrives in Charlotte (Nov. 24, 2008), *available at* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26335>.

<sup>223</sup> *See* N.C. GEN STAT. § 66-355; *see also* Press Release, City of Raleigh, *supra* note 219. As such, Raleigh can no longer resolve customers’ complaints or require cable service providers to “[p]rovide service to low-income or low-density areas.” *Id.*

<sup>224</sup> *See* N.C. Gen. Assem. Bill Summ., H.B. 2047, at 1 (N.C. 2006) (stating that the Video Service Competition Act, H.B. 2047, “seeks to promote consumer choice,” and “ensure competitive neutrality by allowing cable providers to opt out of existing local agreements. . .”).

Raleigh retained its rights to “[m]anage its rights-of-way for the benefit of Raleigh residents; . . . [provide] public, education, and government access channels; and . . . require provision of basic service to City buildings.”<sup>225</sup>

*iii. The Policy Behind Franchise Requirements is Misapplied to Phone Companies Offering Video Service*

Finally, it is important to take account of the justifications for franchise requirements over cable operators in the first place. The statutory provision that grants franchise power to local authorities, section 621 of the Cable Act,<sup>226</sup> was enacted primarily to recognize the fact that cable companies had to dig up public streets and use rights-of-way.<sup>227</sup> Acknowledging the right of local authorities to maintain control of their streets, Congress enacted the provision subjecting cable providers to local franchising authorities in consideration for the right to introduce cable company equipment and wiring into subscriber neighborhoods.<sup>228</sup> Telephone companies, on the other hand, are already authorized to utilize the rights-of-way under common carrier regulation.<sup>229</sup> To require cable franchise fees on top of existing rights of way amounts to two regulatory bites of the same apple.<sup>230</sup> Indeed, some believe that the progress made in bringing widely available new video entrants into the market may justify the end of the franchising approach in general.<sup>231</sup> Adam Thierer of the Progress & Freedom Foundation has argued that “high-minded” public interest ideals of franchise regulation no longer hold up in today’s media environment.<sup>232</sup> According to Thierer, the rationale for the rules—improved cable television reception and as

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<sup>225</sup> See Press Release, City of Raleigh, *supra* note 219.

<sup>226</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2786 (codified as amended at 47 U.S.C. § 541 (2006)).

<sup>227</sup> *In re Telephone Company-Cable Television Cross-Ownership Rules*, Sections 63.54-63.58, *Memorandum Opinion and Order on Reconsideration*, 7 F.C.C.R. 5069, ¶ 11 (July 16, 1992).

<sup>228</sup> See 47 U.S.C. § 541.

<sup>229</sup> *In re Telephone Company Cable Television Cross-Ownership Rules*, *supra* note 227, at 5070, ¶ 11.

<sup>230</sup> See Crandall et al., *supra* note 212, at 288. The authors argue that:

[t]he local telephone company already compensates public owners for the use and occupation of public rights-of-way for the delivery of telephone service, albeit at the state level (and in certain cases, at the local level); consequently, the imposition of local franchise fees for video services delivered over the same network would amount to double recovery by local and state governments.

*Id.*

<sup>231</sup> See Cauley, *supra* note 163 (noting that Adam Thierer of the Progress & Freedom Foundation called franchising rules “an historical anachronism” and that Jim Harper of the Cato Institute views such rules as actually anti-consumer).

<sup>232</sup> *Id.*

a quid pro quo for market exclusivity—no longer exist.<sup>233</sup> The rise of wireless, Internet, and satellite television technology has changed the need for LFAs, as he argues, the rules “are an historical anachronism . . . [t]hey make no sense in our new telecom-media landscape.”<sup>234</sup>

With the traditional regulatory structure for cable television services under attack, it makes even less sense to apply those same regulations to new technologies that would potentially loosen cable’s market share stranglehold. As in the case of the IPTV entrants, regulation has been shown to deter entry of video service providers and the critical infrastructure that makes those services possible.<sup>235</sup> As James Gattuso said, “Not only is the disincentive effect particularly strong for such investment, but—because of the wide availability of cable modem service—the [local exchange carriers] also have no monopoly power, making regulation unnecessary.”<sup>236</sup>

The Commission should forbear from further action as it appears the states are moving quickly to enact the appropriate statutory amendments for franchise reform. The proliferation of state-level reform means the federal government need not step in at this time to address issues of entry and competition. However, reforming the regulatory framework to ensure IPTV is treated consistently with cable television may require comprehensive reform of the FCC.

### C. Regulating IPTV as a Cable Service is Against Current Policy Trends

The court in *Consumer Counsel* based its holding in large part on the “interactivity” component of the cable service definition.<sup>237</sup> It is curious then, that the finding of *Consumer Counsel* amounts to an imprimatur for regulation of a burgeoning technology in direct conflict with the stated policy goal of the FCC. The Commission’s policy goal is to help bring increasingly advanced technology to the market—technology that in turn only improves the chances of more interactive telecommunications services.<sup>238</sup> From the broad deregula-

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See Section 621(a)(1) Order, *supra* note 179, at ¶ 40.

<sup>236</sup> James L. Gattuso, *Local Telephone Competition: Unbundling the FCC’s Rules*, THE HERITAGE FOUNDATION, Feb. 10, 2003, <http://www.heritage.org/Research/Regulation/bg1621.cfm> (alteration added).

<sup>237</sup> Office of Consumer Counsel v. S. New Eng. Tel. Co., 515 F. Supp. 2d 269, 278–80 (D. Conn. 2007).

<sup>238</sup> 47 U.S.C. § 230; see also Section 621(a)(1) Order, *supra* note 179 (statement of Commissioner Jonathan S. Adelstein)

The award of competitive cable franchises will encourage broadband deployment by new entrants, such as telephone companies, by granting them a new revenue source that helps justify investment in new high capacity fiber networks. So the award of new franchises will improve access not only to innovative new cable services but also to more robust broadband networks.



tory efforts of the 1996 Act<sup>239</sup> to the outcome of recent FCC decisions dealing with technologies of ambiguous regulatory standing,<sup>240</sup> a consensus has developed that improving and expanding our telecommunications infrastructure is a worthy goal justifying regulatory upheaval.

When the definition of “cable service” was promulgated by Congress in the 1984 Cable Act,<sup>241</sup> the Internet as we know it today did not even exist.<sup>242</sup> Furthermore, it would be another decade before services like America Online (now known as AOL) brought Internet access to the public at large.<sup>243</sup> As a result, the 1996 Act was not terribly sophisticated in its approach to Internet policy.<sup>244</sup> However, it did recognize the burgeoning competition between traditionally distinct industries and lay some groundwork for future treatment of converged technologies.<sup>245</sup> The 1996 Act was intended “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .”<sup>246</sup> Similarly, as the DoJ has noted, a heavy regulatory hand can restrict entry and “shield incumbents from competition,” leading to a “range of economic inefficiencies including higher production costs, reduced innovation, and distorted service choices.”<sup>247</sup> While the 1984 Cable Act prohibited telephone companies from entering into the cable market,<sup>248</sup> the 1996 Act lifted that restriction.<sup>249</sup> Moreover, the 1996 Act made no indication that such a service provided by a telephone company would be

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*Id.*

<sup>239</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in various sections of 47 U.S.C.). See Ryan, *supra* note 10, at 789 (citation omitted).

<sup>240</sup> See, e.g., *Vonage Order*, *supra* note 148 and accompanying text.

<sup>241</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. § 522).

<sup>242</sup> See DAVID REED, *A BALANCED INTRODUCTION TO COMPUTER SCIENCE* 50 (2nd ed. 2008).

<sup>243</sup> Rose Aguilar, *AOL Boasts 4.5 Million Subscribers*, CNET NEWS, Dec. 28, 1995 (noting that AOL only had one and a half million subscribers at the end of 1994, but a mere year later AOL had four and a half million subscribers, and CompuServe had four million subscribers at the end of 1995).

<sup>244</sup> See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 69 (2005).

<sup>245</sup> See S. REP. NO. 104-23, at 3 (1995) (“Telephone companies are seeking the right to provide cable service in competition with the cable companies. Similarly, cable companies are seeking the right to provide telephone service.”); see also Hildebrandt, *supra* note 201, at 237–38 (“[T]he Telecommunications Act of 1996 sought to promote competition through deregulation. It permitted telephone companies to enter the cable business and cable companies to enter the telephone business.”).

<sup>246</sup> See S. REP. NO. 104-23, at 1–2.

<sup>247</sup> *DoJ Ex Parte*, *supra* note 179, at 3.

<sup>248</sup> See H.R. REP. NO. 98-934, at 41–43 (1984).

<sup>249</sup> See S. REP. NO. 104-23, at 6.

deemed a cable service simply because that service would compete with cable companies.<sup>250</sup>

*i. Commission Emphasis on Broadband Deployment is Served by Relaxed Regulation of Entities Building Enhanced Communication Networks*

The Commission's recent emphasis on broadband deployment<sup>251</sup> has a direct connection with such cable competition concerns. The Commission, even as far back as 2002, has gone so far as to declare that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day."<sup>252</sup> As discussed earlier, to compete in the marketplace, telephone companies must offer the triple-play package of Internet, voice, and video.<sup>253</sup> The pressure to move away from wireline phone services means that building out broadband networks requires inclusion of video services in order to justify investment.<sup>254</sup> Regulating telephones that offer video as a traditional cable service would then have the unintended consequence of slowing down the continued deployment of broadband infrastructure<sup>255</sup> that the

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<sup>250</sup> To the extent that section 571 appears to give telephone companies seeking carriage of video programming services only three options that would negate Title VI cable regulation applicability—carriage as a common carrier, as a radio-based system, or as an open video system—this Note emphasizes that IPTV should be regulated as a service completely apart from cable service, thus relieving an IPTV provider from being restricted to these three options. See 47 U.S.C. § 571 (2006). Instead, until Congress enacts a new regulatory classification for IPTV services, the FCC should forbear from applying outmoded regulatory structures.

<sup>251</sup> See *In re National Broadband Plan for Our Future, Notice of Inquiry*, FCC 09-31, GN Docket No. 09-51 (Apr. 8, 2009).

<sup>252</sup> *Wireline Broadband Rulemaking*, *supra* note 174, at ¶ 1.

[T]he Commission's regulatory framework will conceptualize broadband broadly to include any and all platforms capable of fusing communications power, computing power, high-bandwidth intensive content, and access to the Internet. As we have noted in the past, broadband is evolving across multiple electronic platforms as traditional wireless, cable, satellite and wireline providers have expended substantial investments in broadband capable infrastructures. We believe that by promoting the development and deployment of multiple platforms, competition in the provision of broadband capabilities can thrive, and thereby ensure that the needs and demands of the consuming public are met.

*Id.* at ¶ 4.

<sup>253</sup> See *supra* notes 162–63 and accompanying text.

<sup>254</sup> Ex parte letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Marlene H. Dortch, Secretary, FCC, *In re IP-Enabled Services*, WC Docket No. 04-36, at 28 (Sept. 14, 2005) (accessible via FCC Electronic Comment Filing System)

<sup>255</sup> See Robert W. Crandall, Brookings Institute, *Debating U.S. Broadband Policy: An Economic Perspective* 4 (March 2003), available at [http://www.brookings.edu/~/media/Files/rc/papers/2003/03telecommunications\\_crandall/pb117.pdf](http://www.brookings.edu/~/media/Files/rc/papers/2003/03telecommunications_crandall/pb117.pdf).

Commission seeks.<sup>256</sup>

The “looks like cable, acts like cable, so it must be cable” line of reasoning employed by the district court in *Consumer Counsel*<sup>257</sup> must be examined in light of other FCC action to see if such reasoning should be followed in other contexts. Examination of the FCC’s recent treatment of VoIP sheds light on how the Commission has treated services that toe the line between “information” and more traditional wired services, such as telecommunications and cable services. In the Vonage Order,<sup>258</sup> the FCC declined to decide whether VoIP is an information or telecommunications service, but it did note the impropriety of judging a service based “solely on functional similarities.”<sup>259</sup> On review of the Vonage Order, the U.S. Court of Appeals for the Eighth Circuit found that “[c]ompetition and deregulation are valid federal interests that the FCC may protect through preemption of state regulation.”<sup>260</sup> The case arose after the Minnesota Public Utilities Commission tried to subject VoIP to traditional telephone regulation.<sup>261</sup> Where the interest in “promot[ing] the continued development of the Internet” and “encourag[ing] the deployment” of advanced telecommunications capabilities” is involved, the FCC saw fit to properly exert its preemption power in order to protect advanced telecommunications services from state regulation.<sup>262</sup>

The findings in the Vonage Order are readily applied to the IPTV scenario. The Vonage Order gave two independent grounds for preempting state regulation of VoIP services. First, the FCC found that it is impossible to determine where nomadic Vonage customers are calling from because customers can send non-geographically-identifiable IP packets to Vonage’s servers from any working Internet connection.<sup>263</sup> Thus, it is impossible to separate the intrastate components of VoIP service from its interstate components, the interstate components being under the exclusive jurisdiction of the FCC.<sup>264</sup> Second, the FCC ruled that regardless of the definitional classification, the Minnesota Public Utilities Commission’s ruling would “directly [conflict] with our pro-competitive deregulatory rules and policies . . . .”<sup>265</sup> If Vonage’s service is a “telecommunications service,” than a patchwork of fifty different state entry

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<sup>256</sup> *Cable Modem Ruling*, *supra* note 98, at ¶ 4.

<sup>257</sup> *See* Office of Consumer Counsel v. S. New Eng. Tel. Co., 515 F. Supp. 2d 269, 276–79 (D. Conn. 2007).

<sup>258</sup> *See* Vonage Order, *supra* note 148.

<sup>259</sup> *Id.* at ¶ 22.

<sup>260</sup> *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 580–81 (8th Cir. 2007) (citation omitted).

<sup>261</sup> *Id.* at 576.

<sup>262</sup> *Vonage Order*, *supra* note 148, at ¶ 2.

<sup>263</sup> *Id.* at ¶¶ 23–32.

<sup>264</sup> *See id.* at ¶ 18.

<sup>265</sup> *Id.* at ¶ 20.

requirements would potentially stifle new services,<sup>266</sup> and if it is an “information service,” than state regulation of any sort would be inconsistent with the FCC’s policy of not regulating such services.<sup>267</sup>

Since IPTV also travels across state lines with highly interrelated in-state and out-of-state components, the rationale of the Vonage proceedings appears to be directly applicable. The Commission’s treatment of VoIP suggests that the Commission would likely not be adverse to resolving close definitional questions in favor of improved deployment of technology. For those states that attempt to regulate IPTV as a cable service, preemption is an option for the FCC.<sup>268</sup> Perhaps most importantly, the Eighth Circuit found that applying the preemption authority *before* answering the classification question was not arbitrary and capricious.<sup>269</sup> The court instead found that such an approach was not only permissible, but was in fact a reasonable means of avoiding a potentially complex issue.<sup>270</sup>

In paving the way for broader and faster issuance of video franchises in many states, the trend appears to be fostering entry of new players like IPTV.<sup>271</sup> The Commission is well aware of IPTV’s possibilities, as noted in its dealings with the plight of telephone companies looking to enter the video programming market and their concerns over the regulatory burden of negotiating individual local franchise agreements.<sup>272</sup> In recent proceedings regarding interpretation of section 621(a)(1) franchise authority, the Commission considered the extent to which the patchwork local and state regulatory framework impeded entry.<sup>273</sup> It found that operation of the entrenched local franchising process constituted a potential roadblock to entry to new video and broadband providers where such local authorities were unreasonable in the speed with which they approved franchises and the terms by which they were approved.<sup>274</sup> The proceeding re-

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<sup>266</sup> *Id.* at ¶ 41.

<sup>267</sup> *Id.* at ¶ 21.

<sup>268</sup> *See* *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 576 (noting that the where state regulation of a service would interfere with “valid federal rules or policies” preemption may be deemed an appropriate measure).

<sup>269</sup> *Id.* at 577–78.

<sup>270</sup> *Id.* (noting that “[D]ecisionmakers sometimes dodge hard questions where easier ones are dispositive.”) (quoting *Nat’l Cable & Telecomms. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002)).

<sup>271</sup> *See supra* Part V.B.i.

<sup>272</sup> *See* Section 621(a)(1) Order, *supra* note 179, at ¶ 6.

<sup>273</sup> *See id.* at ¶ 21.

<sup>274</sup> *Id.* at ¶ 20.

The dearth of competition is due, at least in part, to the franchising process. The record demonstrates that the current operation of the franchising process unreasonably prevents or, at a minimum, unduly delays potential cable competitors from entering the MVPD market. Numerous commentators have adduced evidence that the current operation of the franchising process constitutes an unreasonable barrier to entry. Regulatory restrictions and conditions on entry shield incumbents from competition and are

sulted in a new remedy for potential entrants, imposing a ninety day to six month time limit, within which the local franchising authority had to make its decision.<sup>275</sup>

*Brand X* represents another example of how the Commission has adjusted its approach to next-generation technology as the marketplace has evolved and national telecommunications policy shifted toward deregulation.<sup>276</sup> The case arose in response to the FCC's determination that cable modem service was an unregulated information service.<sup>277</sup> In reviewing the FCC's decision, the Supreme Court noted the Commission's conclusion that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."<sup>278</sup> Therefore, the Commission reasoned that cable modem service should be treated differently than those facilities-based enhanced-service providers that, under the *Computer II* rules, were subjected to common carrier requirements.<sup>279</sup> The Court acknowledged the earlier application of common-carrier regulations to "enhanced-service providers who own the transmission facilities used to provide those services" but found this historical approach did not justify classifying *any* such service arrangement as a telecommunications service as a *per se* rule.<sup>280</sup> After all, the Court noted, "the definition of 'telecommunications service' says nothing about imposing more stringent regulatory duties on facilities-based information-service providers."<sup>281</sup> The Court went on to say that the telecommunications service definition instead "hinges solely on whether an entity 'offer[s] telecommunications for a fee directly to the public.'"<sup>282</sup> Thus, the Court found that the FCC's deviation from the *Computer II* findings was justified.<sup>283</sup> The treatment of facilities-based enhanced services under the *Computer II* rules was based upon "the concern that local telephone companies would abuse the monopoly power they possessed by virtue of the 'bottleneck' local telephone facilities they owned," not upon "the nature of the 'offering' made by those carriers . . ."<sup>284</sup>

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associated with various economic inefficiencies, such as reduced innovation and distorted consumer choices.

*Id.*

<sup>275</sup> *Id.* at ¶ 67.

<sup>276</sup> Natl. Cable Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

<sup>277</sup> *Brand X*, 545 U.S. 967 at 977–78 (citing *Cable Modem Ruling*, *supra* note 98).

<sup>278</sup> *Id.* at 1001 (citing *Cable Modem Ruling*, *supra* note 98, at ¶ 5).

<sup>279</sup> *Id.* at 995–96.

<sup>280</sup> *See id.* at 996.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* (alteration in original) (quoting 47 U.S.C. § 153(46)).

<sup>283</sup> *Id.* at 996–97.

<sup>284</sup> *Id.* at 996. The Court summarized its findings by concluding that:

If the Act fails unambiguously to classify non-facilities-based information-service providers that use telecommunications inputs to provide an information service as "offer[ors]" of "telecommunications," then it also fails unambiguously to classify facili-

As *Brand X* illustrates, where the policy justification for a heightened regulation has failed, the Commission has seen it unfit to apply old regulation to new technology.<sup>285</sup> This was true even where the legacy regulation, if applied in a rote manner, seemed to somewhat parallel the modern service. Though a cable modem service did arguably provide an enhanced service over lines owned by the service provider, the changes in the competitive landscape warranted deviation from those regulations. Cable modem service was not subject to common carrier requirements because the providers were not found to hold a monopoly over information service to the customers within their reach.<sup>286</sup> The Commission soon thereafter deregulated DSL service deeming it to be an unregulated information service and bringing it more in-line with treatment of cable modem service.<sup>287</sup> This decision effectively neutralized the outdated treatment of facilities-based enhanced service providers with regard to information services.<sup>288</sup>

Similarly, trying to apply cable service regulation to IPTV simply because definitional terms and language appear to apply is misguided. The natural monopoly concerns and rights-of-way issues of cable service are not present when it comes to IPTV providers.<sup>289</sup> Where the assumptions and intended goals of a regulation become divorced from the marketplace reality it is well within the rights of the Commission, as an expert agency, to adjust such policies.

*ii. The Commission's Forbearance and Preemption Authority May be Employed to Further the Cause of Promoting Next-Generation Technologies*

Some commentators have advocated withholding the application of old de-

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ties-based information-service providers as telecommunications-service offerors; the relevant definitions do not distinguish facilities-based and non-facilities-based carriers. That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.

*Id.* at 996–97 (alteration in original).

<sup>285</sup> See *id.* at 1001–02.

<sup>286</sup> See Cable Modem Ruling, *supra* note 98, at ¶ 95.

<sup>287</sup> See *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, *Report and Order and Notice of Proposed Rulemaking*, 20 F.C.C.R. 14,853, 14,862, ¶ 12 (Aug. 5, 2005).

<sup>288</sup> See *id.*

<sup>289</sup> See *supra* notes 127, 207–10, 226–33, and accompanying text.

definitions through the use of the forbearance authority of sections 706 and 10 of the 1996 Act while more reasonable definitions are created.<sup>290</sup> Operation of sections 706 and 10 require a finding that IPTV is an advanced telecommunications service.<sup>291</sup> IPTV can and should be recognized as such. Section 706 provides that advanced telecommunications capability “is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>292</sup>

IPTV would appear to fall within such a definition. The fiber IPTV architecture being deployed for U-verse also “enables” future high speed services that would allow increasingly synergistic television/Internet applications,<sup>293</sup> making it more difficult to separate the video and data services of the system. In this context, building up Internet television *is* the building up of broadband. Furthermore, section 10(b) expressly directs that in determining whether forbearance is consistent with public interest under section 10(a)(3), the Commission will consider whether forbearance will promote competitive market conditions,<sup>294</sup> including the extent to which such forbearance will enhance competition among providers of telecommunications services.<sup>295</sup> Taken in combination

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<sup>290</sup> See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Comments of The Progress & Freedom Foundation*, C.C. Docket No. 98-146, at iv (Sept. 24, 2001) (accessible via FCC Electronic Comment Filing System); see also Esbin, *supra* note 130, at 116–17.

The relationship between section 10 and 706 forbearance authority is discussed in the Section 706 MO&O. There, the Commission found that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, it directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a), to encourage deployment of advanced services.

*Id.*

<sup>291</sup> 47 U.S.C. §§ 157(b), 160(a). Barbara Esbin notes that, Section 10, added by the 1996 Act, expressly grants the Commission the authority to ‘forbear from applying any regulation or provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services’ if the Commission determines that enforcement of such regulation or provision is not necessary to ensure (1) just and reasonable and non-discriminatory rates and practices with respect to telecommunications carriers and services, (2) that enforcement is not necessary to protect consumers, and (3) that forbearance is consistent with the public interest.”

Esbin, *supra* note 130, at 116 (citing 47 U.S.C. § 160(a)).

<sup>292</sup> 47 U.S.C. § 706(c).

<sup>293</sup> See Press Release, AT&T, *supra* note 156 and accompanying text.

<sup>294</sup> 47 U.S.C. § 160(b) (2006).

<sup>295</sup> 47 U.S.C. § 160(b).

with section 230's pro-Internet stance,<sup>296</sup> the Commission has both a statutory and policy justification for refusing to apply the old cable service definition to IPTV.

To the extent that the section 706 authority for Commission action is predicated upon a finding that there has been a failure to deploy advanced services to "all Americans" on a "reasonable and timely basis," it is acknowledged that the Commission has yet to find that such a condition has occurred.<sup>297</sup> However, in light of continued calls from Congress to speed up the deployment of advanced services,<sup>298</sup> and given that the metrics of broadband deployment tracking are far from perfect, a shortcoming already conceded by the Commission,<sup>299</sup> what constitutes "reasonably and timely" should be revisited. As other nations continue to see broadband-enabled technology progress at a superior pace than the United States,<sup>300</sup> a significant reevaluation of the true level of deployment is warranted.

During the 2008 presidential campaign, Barack Obama presented plans that emphasize a focus on technology<sup>301</sup> and encourages the role of technology in strengthening the nation's economy during this current economic crisis. This focus only strengthens the case for a deregulatory approach to the handling of IPTV. The FCC should utilize a two-prong approach: forbear from application of Communications Act requirements to IPTV providers and preempt individual localities and states that attempt to treat IPTV purveyors as entities providing cable service. Such an approach may allow federal authorities to implement their current pro-competition, pro-broadband policy.

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<sup>296</sup> See 47 U.S.C. § 230(b)(1)–(2) (2006).

<sup>297</sup> See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, *Fifth Report*, 23 F.C.C.R. 9615, at ¶ 1 (Mar. 19, 2008).

<sup>298</sup> See *In re A National Broadband Plan for Our Future, Notice of Inquiry*, GN Docket No. 09-51 (Apr. 8, 2009), at ¶ 6.

<sup>299</sup> See *In re Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip, Report and Order and Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 9,691, ¶¶ 1–4 (Mar. 19, 2008).

<sup>300</sup> See Jacqui Cheng, *Study: Japan Set for Broadband Future; Everyone Else Screwed*, ARS TECHNICA, Sept. 12, 2008, <http://arstechnica.com/old/content/2008/09/study-japan-set-for-broadband-future-everyone-else-screwed.ars> (describing how the United States ranked sixteenth in a study of "future-readiness" with regards to broadband speeds).

<sup>301</sup> Barack Obama, Barack Obama Technology Plan, [http://www.barackobama.com/issues/technology/index\\_campaign.php](http://www.barackobama.com/issues/technology/index_campaign.php) (last visited Oct. 21, 2009).



## VI. CONCLUSION

With IPTV's broadband Internet skeleton and its cable television-like countenance, it should be no surprise that the arrival of IPTV has caused a stir. Reconciling the uncertain nature of this service with the existing regulatory framework has proven challenging. But while the definition of IPTV as a cable service is tenuous at best, even if well-grounded in current statutory definitions, it has been well-recognized that those definitions are hopelessly dated.<sup>302</sup> The IPTV offering is fully capable of meeting the degree of interactivity pointed to within the legislative history as being "non-cable." Such is the nature of an IP-based underpinning—increased interactivity is the specific purpose for which T&T selected this protocol.

Stifling development now with legacy cable mandates because of topical similarities is inadvisable. The regulatory tools of forbearance and preemption are admittedly sweeping in their reach and breadth and should be approached with a due amount of care. The technology of IPTV is distinct at a granular level, the policy justifications for regulation as a cable service are lacking, and consumers are clamoring for better options. What is keeping IPTV within the realm of cable television regulation is merely an inflexible obedience to a legal standard drawn up in a bygone technological era. To apply the current outdated laws amounts to nothing more than adherence to protocol without an underlying policy rationale. Such a course of action can be justified neither on the grounds of precedent nor prudence.

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<sup>302</sup> See *supra* discussion Part V.A.i.

