

1985

The Evolution of Telco-Constructed Broadband Services for CATV Operators

Thomas A. Hart Jr.

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Thomas A. Hart Jr., *The Evolution of Telco-Constructed Broadband Services for CATV Operators*, 34 Cath. U. L. Rev. 697 (1985).

Available at: <https://scholarship.law.edu/lawreview/vol34/iss3/8>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE EVOLUTION OF TELCO-CONSTRUCTED BROADBAND SERVICES FOR CATV OPERATORS

*Thomas A. Hart, Jr.**

Recently franchised cable television operators across the country are looking for ways to expedite delivery of transmission service and reduce the expense of constructing broadband systems. At the same time, the telephone industry ("telco") is seeking to diversify its sources of revenue by offering to construct, lease, and maintain broadband cable distribution systems. The interests of both industries seem to be furthered by cable/telco joint ventures to construct broadband cable distribution facilities.

This article discusses the history of telco involvement in the development of cable television service and examines many of the controversial issues raised over the past thirty years at the Federal Communications Commission (Commission or FCC). It also reviews recently passed federal legislation and sections of the American Telephone & Telegraph (AT&T) Modified Final Judgment dealing with telco participation in the cable television industry. Finally, this article analyzes three cable leaseback construction arrangements proposed by cable television operators and the local telephone companies. Of these three proposals, analytical emphasis is placed on the proposal of District Cablevision, Inc. (DCI) and C & P Telephone Company (C & P) to construct and maintain the cable television broadband distribution system for the District of Columbia.

The Commission, under title II of the Communications Act,¹ scrutinizes the construction and leaseback of cable distribution facilities by telephone companies. Typically, the facilities for the cable television operator must be individually designed, constructed, and priced in response to a customer's request where existing lines of ordinary tariffed facilities would be inadequate. Therefore, each joint venture proposal presented by local telcos and

* Partner, Baker & Hostetler; Counsel to District Telecommunications Associates; a Director and Trustee of District Cablevision, Inc.; and Counsel to Palm Beach County Board of Commissioners on cable television regulations. B.A. 1977, Brown University; J.D. 1980, Georgetown University Law Center. The author acknowledges the significant contributions of K. Patrick Meehan, Associate, Leibowitz, Spencer, & Freedman, and Vedia Jones-Richardson in the preparation of this manuscript.

1. 47 U.S.C. § 201 (1982).

cable operators must be evaluated on a case-by-case basis with particular attention to the potential for anticompetitive behavior.

The local telco and cable system have historically been perceived to be strange bedfellows. During the early 1950's and 1960's, telcos first became involved in the construction and maintenance of video cable distribution systems, which were generally leased back to the cable operator. Some independent telcos formed subsidiaries for the management and operation of Community Antenna Television (CATV) systems built by the telco.

The Bell System was barred from providing cable television service by the 1956 Western Electric Consent Decree. Later, in 1970, the FCC prohibited telephone companies from directly or indirectly providing CATV service within their telephone service area. Also in the 1970's, telephone involvement in the construction of cable systems was retarded because the Commission ordered that telephone carriers had to receive approval to construct cable television systems or provide channel service to cable television systems. Concurrently, cable operators found, in some instances, that they could construct their own facilities faster and more efficiently without telco involvement. In the process of this evolution, heated disputes arose between cable operators and the telcos over access to telephone poles and underground conduits. Thus, the relationship between local telephone companies and cable operators has been characterized by periods of cooperation on the one hand and competition on the other.

The cable and telephone industries have now come full circle; cable television operators and telcos are reexamining their relationship from a new and more aggressive perspective. Telcos are eager to improve their competitive edge in the transmission of voice, data, and video information. At the same time, cable operators are more interested in the expedited construction of their cable systems to reduce the potential penetration of competing new technologies such as subscription television (STV), multichannel multipoint distribution systems (MMDS), direct broadcast satellite (DBS) and operational fixed services (OFS). These economic incentives and public policy reasons have brought cable television operators and local telephone companies closer together. In the future, the relationship between the two will continue to evolve in ways that will increase telco involvement in the construction and maintenance of cable television systems.

I. DEVELOPMENT OF TELCO INVOLVEMENT IN CABLE TELEVISION

Most cable television operators in the 1950's found that plant installation expense and local regulation made construction of a utility pole or under-

ground conduit broadband network nearly prohibitive.² In some instances, to reduce expenses, cables were strung on trees throughout the service area.³ As the industry evolved, however, cable operators turned to utility companies with their preexisting pole and conduit networks as an alternate means of distributing cables.⁴

In most rural communities, the utility poles were jointly owned by local power and telephone companies. Many small power companies allowed the larger telephone operating companies to act as sole negotiators for all agreements with cable companies which included attachments to or joint use of poles.⁵ In these early days, the telephone companies, which allowed open access to pole attachments for Western Union and government facilities, allowed many cable television operators to attach their cables for a "pole attachment" fee of one or two dollars per pole per year.⁶

A. AT&T and Bell Operating Companies Move to Influence CATV Development

In the late 1950's, equipment was developed enabling cable systems to

2. Plaintiff's First Statement of Contentions and Proof at 203, *United States v. AT&T*, No. 74-1698 (D.D.C. Nov. 1, 1978) [hereinafter cited as *First Statement*]; 2 C. FERRIS, F. LLOYD & T. CASEY, *CABLE TELEVISION LAW—A VIDEO COMMUNICATIONS PRACTICE GUIDE* ¶ 16.02[1] n.1 [hereinafter cited as *CABLE TV LAW*] (local communities were reluctant to authorize construction of separate cable television pole or conduit systems for aesthetic reasons).

3. *First Statement*, *supra* note 2, at 203. See NATIONAL CABLE TELEVISION ASSOCIATION, *WHITE PAPER: CABLE & TELEPHONE COMPANIES: A HISTORY OF CONFRONTATION* 3 (1983) [hereinafter cited as *WHITE PAPER*].

The first commercial cable system began in Lansford, Pennsylvania in 1950. These early three-channel community antenna systems were developed to provide standard broadcast television signals to areas with poor reception. Antennas were erected on mountaintops or other points of good reception to capture the local television signals and carry them via coaxial cable to subscribers. See 1 *CABLE TV LAW*, *supra* note 2, at ¶ 5.03.

Cable television developed as a result of a lack of adequate broadcast television service in rural and medium sized communities. *Id.* This void in service may have been due, in part, to the Commission's 1948 freeze on the processing of new television station applications pending review of its requirements for mileage spacing between stations. 13 Fed. Reg. 5860 (1948).

4. S. REP. NO. 580, 95th Cong., 1st Sess. 12 (1977) (Regulation of Cable Television Pole Attachments). In most communities, the Bell Operating Companies, as well as local power companies, held franchises that allowed them to construct utility poles and underground conduit networks.

5. *First Statement*, *supra* note 2, at 212.

6. The greater part of the telephone industry viewed CATV service as a rural phenomenon and a temporary service that would disappear in the wake of expanding television broadcast markets. See *id.* at 203. This same attitude has been adopted for Subscription Television (STV) and Multipoint Distribution Systems (MDS). Popular opinion holds that these technologies will only remain profitable in noncabled markets. 2 *CABLE TV LAW*, *supra* note 2, at ¶ 18.05.

increase their channel offering to twelve television channels.⁷ This expanded capacity gave cable systems the ability to offer more than just retransmission of the three network television broadcast services.⁸ The telephone industry, which had considered new broadband services a natural extension of its existing monopoly over wire communications in the local "loop"⁹ area, was faced with potential competition from an aggressive new cable television industry that delivered a second communications conduit into the nation's households. Cable television has the potential of providing communities with a range of entertainment and communications services that would surpass any the telephone company could offer over its existing local telco network.¹⁰

The competitive atmosphere between the telephone company and cable industries was aggravated when the Bell System was prohibited from entering the cable television business under the terms of the 1956 Consent Decree,

7. First Statement, *supra* note 2, at 203-04. The fully transistorized 12-channel cable amplifier gave cable systems the technical ability and channel capacity to offer nonbroadcast broadband services. 2 CABLE TV LAW, *supra* note 2, at ¶ 16.02[2].

8. With the advent of 12-channel capacity, cable systems began to transmit and market other one-way services in addition to off-the-air television programming. In the early 1960's, cable operators began to offer Pay-TV, FM music, closed circuit educational television and some locally originated television programming. First Statement, *supra* note 2, at 204. More importantly, cable operators recognized cable's capacity for transmission of nonentertainment services. These potential new services include one-way hookups, such as teletext, stock market reports, and advertising, and two-way interactive offerings including videotext, alarm systems, meter reading, and electronic banking. These potential new services also include data transmissions, teleconferencing, and even regular telephone service. See, e.g., Noam, *Towards an Integrated Communications Market: Overcoming the Local Monopoly of Cable Television*, 34 FED. COM. L.J. 209, 235-36 (1982).

9. The term "local loop" refers to the pair of copper wires that connects each telephone subscriber to the local phone company's central office or "switch." Anderson & Lazarus, *Data Transmission Under the Cable Communications Policy Act of 1984*, TELEMATICS, November 1984, at 2.

10. A 12-channel cable system offered subscribers tremendous capacity for transmission of voice, data, or other information. A single cable channel has a band width of 6 MHz—the equivalent of 1,500 voice grade lines. *Id.* Overall, the capacity of a coaxial cable is 45,000 times greater than the capacity of a phone wire. See MAJORITY STAFF OF THE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE OF THE HOUSE COMM. ON ENERGY & COMMERCE, 97TH CONG., 1ST SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 215 (Comm. Print 1981) [hereinafter cited as TELECOMMUNICATIONS REPORT]. Telephone companies, however, do have two advantages over cable systems. A telephone company offers universal access and switching equipment that can send a signal from one local loop to another without the message being readily accessible to third persons. A cable system will never achieve 100% penetration of the nation's households. Since messages cannot be individually switched, all subscriber locations between the sending and receiving locations must be blocked off. Anderson & Lazarus, *supra* note 9, at 2.

which settled a 1949 antitrust suit against Western Electric.¹¹ Thereafter, AT&T and its subsidiaries were restricted to offering only common carrier communication services.¹² The retransmission of over-the-air broadcast signals, the basic service provided by cable systems, has been classified by the Commission as a noncommon carrier service.¹³ Thus, the Bell System was

11. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). On January 14, 1949, the government filed an action in the United States District Court for the District of New Jersey against the Western Electric Company, Inc. and the American Telephone and Telegraph Co., Inc. The complaint alleged that the defendants had monopolized and conspired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment, materials, and supplies in violation of the Sherman Act, 15 U.S.C. §§ 1-3 (1982). The relief sought included: the divestiture by AT&T of its stock ownership in Western Electric; termination of exclusive relationships between AT&T and Western Electric; divestiture by Western Electric of its 50% interest in Bell Telephone Laboratories; separation of telephone manufacturing from the provision of telephone service; and the compulsory licensing of patents owned by AT&T on a nondiscriminatory basis. See *United States v. AT&T*, 552 F. Supp. 131, 135-36 (D.D.C. 1982).

On January 24, 1956, the district court accepted a consent decree that precluded AT&T from engaging in any business other than the provision of common carrier communications services and enjoined Western Electric from manufacturing equipment other than that used by the Bell System. The decree also required the defendants to license their patents to all applicants upon the payment of appropriate royalties. *Western Elec. Co.*, 1956 Trade Cas. (CCH) at 71,137-41. See *infra* note 118 and accompanying text.

12. Independent phone companies, such as General Telephone & Electronics (GTE) and United Telephone, were not prohibited by the consent decree from owning cable systems. WHITE PAPER, *supra* note 3, at 13.

13. *Frontier Broadcasting Co.*, 24 F.C.C. 251, 254 (1958). The case arose from a complaint filed by 13 licensees of standard television broadcast stations who requested that the Commission exercise jurisdiction over cable television systems as communications common carriers under the Communications Act of 1934, as amended. *Id.* at 251. Section 3(h) of the Communications Act states:

'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(h) (1982).

In *Frontier Broadcasting*, the Commission found that the legislative history of the Communications Act makes it clear that Congress intended that the common carrier regulatory provisions of title II should not apply to persons who are not common carriers in the ordinary sense of the term. *Id.* at 254. The Commission found that the traditionally accepted concept of common carrier is one that holds itself out to the public to provide facilities by wire or radio to all members of the public, if they choose to communicate. The content of the communication or transmission is the sole responsibility or prerogative of the subscriber according to the Commission. *Id.* See *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1199-1206 (D.C. Cir. 1984). Although CATV systems possess several attributes of a communications common carrier, specifically, an offer to transmit by wire, intelligence, in the form of television broadcast signals, to any member of the public who desires to subscribe to the service, the Commission found these similarities insufficient to warrant regulation of cable television under title II. The dispositive factor in the *Frontier Broadcasting* decision was that specific television signals re-

foreclosed from direct competition with the cable industry.

In 1964, to assess the potential threat posed by cable television, AT&T established an office in its Planning Department to oversee CATV rates and policies. AT&T management decided that if it did not act quickly, "Ma Bell" would no longer be a full service communications carrier, but would be relegated "to an outmoded, voice-only equivalent of Western Union."¹⁴ AT&T executives concluded that, in order to meet the challenge presented by broadband cable television services, the company had to attempt to become involved in the communications facilities needed to transmit them.¹⁵

To insulate itself from cable's broadband service challenge, AT&T directed its Bell Operating Companies (BOCs) to restrict the types of services that could be provided over any cables which were attached to their poles.¹⁶ The BOCs began to require and to enforce usage restrictions as part of their pole attachment agreement.¹⁷ In particular, many prohibited cable operators from transmitting Pay TV, Education TV, Closed Circuit TV, FM music and any interactive (two-way) services.¹⁸

At the same time, AT&T was adopting policies that served to discourage cable operators from establishing their own facilities.¹⁹ Specifically, AT&T encouraged its operating companies to increase their rates for pole attachments,²⁰ and required that no more than one cable company be allowed to

ceived and distributed by the CATV system are, of necessity, determined by the CATV system and not the subscriber. *Frontier Broadcasting*, 24 F.C.C. at 254-55.

14. First Statement, *supra* note 2, at 205. AT&T executives determined that some data transmissions and even local exchange service could be lost. *Id.*

15. *Id.* at 206. AT&T analysis of cable competition in the 1967 Visual Mode Task Force Report estimated that if AT&T did not get involved, the Bell System could lose the entire broadband market within five years. *Id.*

16. See 2 CABLE TV LAW, *supra* note 2, at ¶ 16.02[3] (CATV systems were restricted to over-the-air broadcast transmission service); see also WHITE PAPER, *supra* note 3, at 12.

17. See 2 CABLE TV LAW, *supra* note 2, at ¶ 16.02[3]. A clause in a model pole attachment agreement used by Pacific Northwest Bell in 1966 represents the restrictions used by the entire Bell System:

[L]icensee agrees that it will use its facilities attached to the Licensor's poles primarily for the transmission of program material received off-the-air from, or furnished by, standard television or FM broadcasting stations. The Licensee may make incidental use of the facilities to transmit to its patrons general program material . . . distributed by closed circuit interexchange networks as such program material originated locally. The Licensor shall have the right to terminate this agreement on thirty days' notice to the Licensee if in the Licensor's judgment the Licensee's transmission of program material from standard broadcasting stations becomes or has become incidental to other uses or the Licensee announces or has announced plans which will have that effect.

First Statement, *supra* note 2, at 208.

18. First Statement, *supra* note 2, at 207.

19. *Id.* at 213. See *supra* note 13.

20. First Statement, *supra* note 2, at 214. Beginning in 1965, AT&T assumed managerial

attach cable to its telephone poles.²¹ These measures were meant to enhance the marketability of cable distribution systems, referred to as channel service.²² These broadband facilities were built by the local BOC and then leased back to the cable operator. The BOCs' share of new cable television construction increased from less than 1% in 1964 to 28.4% in 1967.²³

Under the terms of some BOC Channel Service Tariffs filed with the FCC,²⁴ CATV operators were offered broadband facilities capable of simultaneous one-way, nonreversible transmission of a maximum of twelve television signals.²⁵ The BOCs, however, retained ownership and control over the channel service facilities, which gave them the ability potentially to control the nature of cable television service offered.²⁶ The BOCs limited the use of

control over all aspects of channel service offerings by the BOCs. By the end of 1965, pole attachment rates averaged between three and four dollars, double the original rate. This price increase represented AT&T's policy of setting prices just below the cost at which cable operators could establish their own facilities. *Id.*

21. *Id.* at 216. The BOCs did not restrict the number of CATV operators who could lease channel service. This policy appears to be indefensible because the BOCs had to attach their channel service cables to the same poles upon which the CATV operators had originally requested attachment. *Id.*

22. See 2 CABLE TV LAW, *supra* note 2, at ¶ 16.02[d]. Through this pricing practice, AT&T was able to establish channel service in 44 states by 1966. First Statement, *supra* note 2, at 214.

23. First Statement, *supra* note 2, at 214. As an added incentive to lease channel service, the BOCs offered independent cable operators access to the community without the burden of obtaining a municipal franchise. Because many of the BOCs hold a state franchise for use of the streets and rights of way, many regulators reasoned that a cable operator that leased channel service from the phone company need not obtain a franchise. Such an arrangement gave cable operators a competitive advantage over other operators that were required to obtain a franchise from the city and build their own system. *Id.* at 215. See 1 CABLE TV LAW, *supra* note 2, at ¶ 9.15 n.3.

24. In 1959, New York Telephone (NYT) became the first BOC to initiate channel service to a CATV system. Southern New England Telephone and Southwestern Bell System began to offer channel service in 1963. By 1964, 18 BOCs had filed tariffs with the state public utility commissions (PUC) for channel service. WHITE PAPER, *supra* note 3, at 6. On April 7, 1966, the Commission decided that telephone company tariffs covering the furnishing of local distribution facilities for use by CATV systems must be filed with the Commission rather than with state agencies. Common Carrier Tariffs for CATV Systems, 4 F.C.C.2d 257 (1966). See *infra* note 45 and accompanying text.

25. See New York Telephone Co., Tariff FCC No. 34, *Channel Service for Use in Community Antenna Television Systems* (November 1966) (adopted by AT&T Communications, Tariff FCC No. 36 (January 1, 1984)) [hereinafter cited as NY Tariff].

26. NY Tariff, *supra* note 25, at 7-8. Channel service was furnished on a nonexclusive basis and the plant and facilities used in furnishing such service were part of the phone companies' common carrier plant used generally by them in furnishing communications services to the public. Such facilities provided CATV systems transmission capacity from a specified input point (normally the cable head end-point of reception of over-the-air broadcast signals) to a specified output point (CATV subscribers' premises). *Id.* See North Pittsburgh Telephone Co., Tariff FCC No. 1, *Regulations and Schedules of Changes Applying to Television Transmis-*

channel service to distribution of off-the-air broadcast television and FM radio programming.²⁷ In addition, the cable operator was prohibited from splitting channels or authorizing use of the service by a third party.²⁸ By the terms of the BOC Channel Service Tariffs,²⁹ AT&T attempted to limit severely CATV competition in data transport and two-way transmissions services.³⁰

*B. Independent Telcos Develop Protectionist Policies to Retard
CATV Development*

The pole attachment policies of a few independent telephone companies, namely General Telephone and Electronics (GTE) and United Telephone (United), were probably more detrimental to CATV development in their own service areas than in service areas where the local telephone service was provided by the Bell System. In the period between 1964-1966, GTE and United directed their telephone subsidiaries to refuse all new pole attachment requests from independent CATV operators.³¹ Both independents, free of the ownership restrictions of the 1956 Consent Decree,³² denied pole access to CATV operators because they believed that CATV was a communications service that should be offered by the local telephone company.³³ The independent phone companies felt that they needed to enter the CATV

sion and/or Head End Facilities for Use in Furnishing Community Antenna Service 5 (Sept. 1, 1970).

27. See General Telephone Co., 13 RAD. REG. 2d (P & F) 667, 669 (1968).

28. NY Tariff, *supra* note 25, at 8.

29. *Id.*

30. The growth of cable television systems' two-way services has been slow. Manhattan Cable first tested the market for data transmission between business users in 1974. Manhattan Cable successfully marketed high speed computer interconnections and electronic mail services to several New York City banks and the municipal government. Nonetheless, it was estimated that only 5.26 million homes would be wired for two-way cable television services by the end of 1984. See TELECOMMUNICATIONS REPORT, *supra* note 10, at 214-15; *infra* note 105 and accompanying text.

The independent telephone company tariffs for channel service provided for one-way nonreversible transmission of standard broadcast television and FM radio program material only. Customers were prohibited from reselling the facilities and channel splitting was prohibited. See Carolina Telephone & Telegraph Co., Tariff No. 1, *Channel Service for Use in Community Antenna Television Systems 8-9* (June 1, 1968) [hereinafter cited as Carolina Tariff]. See also *supra* note 12 and accompanying text.

31. CABLE TV LAW, *supra* note 2, at ¶ 16.02[3]; see WHITE PAPER, *supra* note 3, at 14-16.

32. See *supra* note 12.

33. WHITE PAPER, *supra* note 3, at 14. See Manatee Cablevision, Inc., 22 F.C.C.2d 841, 846 (1970) (Commission found that General Telephone of Florida (GTF) and GTE Communications engaged in anticompetitive conduct designed to eliminate a CATV system as a competitor; therefore, these General System Companies were ordered to cease and desist any further CATV operations.).

business primarily to "protect the interests of their local operating companies, in anticipation of future developments in communications which would require a broadband transmission facility."³⁴

Both GTE and United developed cable television service subsidiaries to compete directly with independent cable television operators for local franchises.³⁵ GTE Communications (GTEC), a wholly-owned subsidiary of GTE, was established in 1965 to offer CATV service directly to residential or business customers.³⁶ On several occasions, GTE's local operating companies engaged in conduct that might have given GTEC a competitive advantage over independent cable applicants.³⁷ GTE operating companies would assure the franchising authority that GTEC would experience no delay in the construction of its cable facilities, while at the same time the GTE operating companies refused pole attachment rights to the competing independent cable applicants. Not surprisingly, GTEC was almost always the successful franchisee in communities served by a GTE company.³⁸

United's operating companies were equally aggressive in their attempts to secure cable franchises for their cable subsidiary, United Transmission, Inc. (UTI). United practiced tactics similar to GTE's in an attempt to squeeze independent cable television competitors. Ultimately, the condition became so troubling that the Commission discontinued UTI's cable television service.³⁹ The Commission based its cease and desist order upon United's refusal to allow an independent CATV company pole attachments and access to other facilities for the franchise and construction of a competing cable television system.⁴⁰ The Commission found that UTI took advantage of

34. WHITE PAPER, *supra* note 3, at 14. See *Warrensburg Cable, Inc.*, 48 F.C.C.2d 910, 919 (1973) (Commission found that United Telephone of Missouri (UM) attempted to block entry of an independent CATV operator into the Warrensburg, Missouri market, while at the same time constructing a competing system for a United Telephone subsidiary, United Transmission, Inc. (UTI). *Id.* The Commission also found that UM's sale of the UTI system to a third party without the Commission's approval was void. *Id.* This anticompetitive conduct, the Commission found, warranted an order against the former UTI system to cease and desist any further CATV operations. *Id.*

35. See WHITE PAPER, *supra* note 3, at 16; see also *TeleCable Corp.*, 19 F.C.C.2d 574 (1969) (The Commission found General Telephone Co. of Illinois conferred upon its subsidiary GTEC an unfair advantage over competing applicants for cable franchises in Bloomington and Normal, Illinois.).

36. *Id.* at 578.

37. *Id.* at 588. See *Manatee Cablevision, Inc.*, 22 F.C.C.2d at 841.

38. *TeleCable Corp.*, 19 F.C.C.2d at 578.

39. *Warrensburg Cable, Inc.*, 48 F.C.C.2d at 919.

40. UTI applied for the Warrensburg franchise, but it was awarded to an independent operator. UM refused to allow the independent franchise to attach to its poles. Ultimately, UTI was awarded a second franchise for the same service area as the independent. With the aid of UM, UTI quickly overbuilt the independent operator. *Id.* at 944-45.

United's monopoly position as a communications common carrier to obtain a CATV franchise and with its aid engaged in anticompetitive conduct to eliminate an independent CATV competitor.⁴¹ Due in part to these types of practices, the Commission began to regulate common carrier involvement in the cable television industry.⁴²

II. FCC ATTEMPTS TO INTRODUCE ORDER TO THE TELCO/CATV RELATIONSHIP

Initially, the FCC was reluctant to become involved in the regulation of cable television. The Communications Act of 1934,⁴³ which granted the Commission primary jurisdiction over "all interstate and foreign communication by wire or radio,"⁴⁴ made no mention of cable television, which had not yet been invented. For some time the FCC asserted that it had no jurisdiction to regulate this new communications medium.

A. Section 214 Certification and Cable/Telco Cross-Ownership Ban

In the late 1960's, however, growing tensions between telephone companies and cable television systems prompted the Commission to take steps to structure this volatile relationship. Therefore, in 1966, the Commission began to examine telco involvement in cable television. Shortly thereafter, the Commission decided that telco construction of cable distribution facilities (channel service) was a common carrier activity that affected interstate communications and, therefore, required the filing of tariffs with the Commission.⁴⁵ Then, in 1968, the Commission ordered telephone companies to file for certificates of public convenience under section 214 of the Communications Act before instituting construction of facilities to provide cable television channel service.⁴⁶ Section 214 applications are reviewed by the

41. *Id.*

42. See 2 CABLE TV LAW, *supra* note 2, at ¶ 9.11. But see *infra* note 51 and accompanying text.

43. 47 U.S.C. §§ 151-609 (1982).

44. 47 U.S.C. § 152(a) (1982).

45. The Commission's first action required AT&T and GTE to file tariffs with the FCC for channel service offerings. Common Carrier Tariffs for CATV Systems, 4 F.C.C.2d 257 (1966).

46. General Telephone Co., 13 F.C.C.2d 448 (1968), *aff'd sub nom.* General Telephone Co. v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). The legal issue presented in this proceeding was whether a certificate of public necessity and convenience pursuant to § 214(a) of the Communications Act must be obtained by a telephone company before undertaking the construction of distribution facilities to provide channel service to a CATV system. *Id.* at 453. Section 214(a) provides:

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in

Commission to determine whether "the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line."⁴⁷

In its decision requiring section 214 certification, the Commission adopted a fairly strict and literal construction of the statute based primarily on an earlier holding that the provision of cable service distribution facilities by a telephone company constituted a common carrier service.⁴⁸ To bring this common carrier service within the ambit of section 214 regulation, the Commission had to substantiate that the service provided was interstate in nature. The Commission stated that the cable facilities furnished by the telephone company are links in "the continuous transmission of signals from point of origin to the set of the viewer." Therefore, the Commission found that the common carrier participating as a link in the relay of interstate television signals is performing an interstate communications service.⁴⁹ This

transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 U.S.C. § 214(a) (1982).

47. 47 U.S.C. § 214(a) (1982).

48. *General Telephone Co.*, 413 F.2d at 399. See *Common Carrier Tariffs for CATV Systems*, 4 F.C.C.2d at 260.

49. The telephone companies argued that even if the service is part of an interstate line, construction of channel service facilities involves "local, branch or terminal lines not exceeding ten miles in length and [is] therefore exempt pursuant to § 214(a)(2) of the Act." The Commission rejected this argument stating that § 214(a)(2) was intended to apply to minor additions or improvements to existing services, not to new construction on a scale envisioned with channel service offerings. *General Telephone Co.*, 13 F.C.C.2d at 461.

regulation led shortly thereafter to the issuance of the Commission's cable/telco cross-ownership rules.⁵⁰

In its cable/telco telephone cross-ownership order, the Commission assessed the impact of telephone company ownership or control of CATV systems within the service area of the telephone company. The Commission found that such concentration of control over the communications media of a community could operate against the interests of both nonaffiliated cable systems and the general public. The public interest would best be served, the Commission decided, by preserving a competitive environment for the development and use of broadband facilities and services.⁵¹

To prevent such anticompetitive concentration, the Commission established that no telephone company's application for section 214 certification, within its areas of service, would be granted absent a showing that the applicant company is wholly unaffiliated with its proposed CATV customer.⁵² Moreover, agreements between telephone companies and their affiliates for the use of pole or conduit space in their local telephone exchange service areas would be prohibited.⁵³ Underscoring this commitment to the preservation of competition, the Commission emphatically stated that it would "broadly interpret the concept of affiliation between the telephone company

50. *In re* Application of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, 21 F.C.C.2d 307, *reconsidered in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom.* General Tel. Co. S.W. v. United States, 449 F.2d 846 (5th Cir. 1971). The Commission stated that the precipitating factor underlying the rulemaking was the filing of 17 applications for authority under § 214 of the Communications Act to construct or operate channel facilities for a CATV system. Every application indicated some degree of ownership affiliation between the telephone company applicant and the CATV customers to be served. The Commission authorized this rulemaking to resolve the question of whether telephone companies, either directly or through a subsidiary, should be permitted to offer CATV service to the public. Telephone Companies for Section 214, 21 F.C.C.2d at 308.

51. Telephone Companies for Section 214, 21 F.C.C.2d at 326. While the Commission did not specifically find that anticompetitive behavior existed, it argued "that the prevention of such possible abuses fully warrant[s] our policy findings herein, and the new rules which will implement them." *Id.* at 329. See Gordon, Levy & Pierce, *FCC Policy on Cable Ownership*, Staff Report, Federal Communications Commission Office of Plans & Policy (November 1981) [hereinafter cited as *Ownership Report*]. The Commission concluded that telephone ownership of CATV systems could exclude others from entry into that service. It recognized that such ownership would extend the telephone companies' monopoly position to broadband cable facilities and to the new and different services such facilities are expected to provide in the future. The Commission envisioned a day when such broadband facilities will be the gateway to a wide variety of different "high-tech" services. The purpose of this rulemaking was to insure against any "arbitrary blockage of this gateway." Telephone Companies for Section 214, 21 F.C.C.2d at 329.

52. Telephone Companies for Section 214, 21 F.C.C.2d at 327.

53. *Id.*

and its proposed CATV customer”⁵⁴

The FCC also addressed the problem of restrictive pole leasing practices. Accordingly, a section 214 applicant would be required to show that the customer CATV system had access to pole attachment or conduit space “(a) at reasonable charges, and (b) without undue restrictions on the uses that may be made of the channel by the customer” and that this option was made known to both the CATV system and the local franchise authority before the local franchise was awarded.⁵⁵

Thus, the FCC has used section 214 certification as a tool to monitor telephone company involvement in many areas of CATV development. It recognized the broad potential of cable technology and the sorts of restrictive practices that phone companies could employ in their efforts to subvert CATV growth.⁵⁶

According to the Commission’s recent decisions, the telephone company can only act as a facilities provider for the delivery of cable service.⁵⁷ The

54. *Id.* at 325-26.

55. *Id.* at 326.

56. *Id.* at 529-30.

At this point it is impossible to foresee, let alone to provide for, the needed policy or regulatory guidance as to [future uses of broadband channels]. However, we expect to give continued consideration to all new wide spectrum service offerings, and will continue to encourage full and free competition in the development of such services under appropriate tariffs by all interested parties.

Id. An example of the Commission’s diligence in this task is reflected in the amendments to tariffs filed by telephone companies that chose to continue to offer channel service after the cross-ownership decision. Under the original NY Tariff, *supra* note 25, channel service was furnished to customers for the primary purpose of distributing broadcast television program material received off-the-air directly, or indirectly from standard broadcast stations to the television sets of all patrons. The cable operator was prohibited from distributing any communication other than the standard broadcast programming. After the Commission implemented the § 214 requirement, NY Telephone amended its tariff to allow distribution of any form of communications including two-way service. *See* NY Tariff, *supra* note 25, at 8.

57. In areas where cable service is possible only if provided by a telephone company, a waiver of the cross-ownership rules would be considered to expedite the provision of service. Telephone Companies for Section 214, 21 F.C.C.2d at 326. *See* 47 C.F.R. § 63.56 (1984). The Commission instituted a waiver presumption policy in jurisdictions with population densities of less than 30 homes passed per cable mile. *See* VHF TV Top 100 Market, 81 F.C.C.2d 233 (1980). The cross-ownership ban may also be waived upon a showing of “good cause.” *See* 47 C.F.R. § 63.56 (1984). As of April 1981, waivers had been granted in 96 cases. *See* Noam, *supra* note 8, at 243 n.152 (citing FCC Master Waiver Log, reported in National Cable Television Association, Comments to the FCC, FCC Docket No. 80-767, April 1981).

To encourage development of cable service in rural areas, in 1981 the Commission again supplemented its waiver policy by granting an exemption from the telephone/cable cross-ownership rules for common carriers serving “rural areas.” CATV Cross-Ownership Rules, 88 F.C.C.2d 566 (1982), *partial reconsideration denied*, 91 F.C.C.2d 622 (1983). This exemption, codified in 47 C.F.R. § 63.58 (1984), applies to a carrier in any area in which no cable system presently exists or is under construction and an area which does not contain:

maximum level of involvement that a telephone company may choose is to lease full channel service to independent cable operators in its service area. Alternatively, the telco may opt simply to provide pole or conduit space for the carriage of independently constructed, owned and operated cable lines.

As a result of these regulatory initiatives, independent telephone companies were forced to divest their CATV service subsidiaries.⁵⁸ In addition, any telephone company seeking section 214 authority to offer channel service within its service area is now required to show that it is not related or affiliated in any way with the proposed customer CATV system, that it will exercise no control over the broadband facilities, and that the independent cable operator was allowed the option of constructing its own facilities.⁵⁹

In conjunction with the Commission's adoption of the section 214 procedure came the decline of channel service offerings.⁶⁰ Channel service could

-
- (1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;
 - (2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or
 - (3) Any other territory, incorporated or unincorporated, included in an urbanized area.

47 C.F.R. § 63.58 (1984). The Commission's telephone/cable cross-ownership rules do not bar common carriers from owning cable systems outside of their service area. The carrier, however, had been required to obtain construction authority under § 214 of the Communications Act. Recently, the Commission eliminated the § 214 requirement, stating that the cost of CATV facilities outside of a carrier's service area would not be subjected to cross-subsidies from the carrier's rate base. The Commission decided that separate accounting mechanisms would provide adequate protection and that Commission oversight was no longer necessary. See Report and Order, *In re* Blanket 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and Other Noncommon Carrier Services Outside its Telephone Service Area, 98 F.C.C.2d 354 (1984).

58. Telephone Companies for Section 214, 21 F.C.C.2d at 326. Most recently, the Commission issued a cease and desist order against Northwestern Indiana Telephone Company, Inc. (NITCO) and Northwest Indiana CATV, Inc., d/b/a Northwestern Indiana CableVision (Northwest Cable) for violation of the Communications Act and the Commission's cable/telco cross-ownership rules. The Commission found that NITCO and Northwest Cable were "affiliated" companies within the meaning of the cross-ownership rules and that NITCO also violated these rules and § 214(a) of the Act by constructing cable TV distribution facilities within its telephone service area without prior Commission authorization. NITCO was ordered to terminate any affiliation with Northwest Cable and divest itself of any facilities prohibited by the cross-ownership rules. Furthermore, NITCO was notified of an Apparent Liability for Forfeiture in the amount of \$20,000 for willful and repeated violations of Commission rules. See Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, *In re* Comark Cable Fund III d/b/a CCI Cablevision v. Northwestern Indiana Tel. Co. and Northwest Indiana CATV, Inc. d/b/a Northwestern Indiana Cablevision, File No. E-84-1, F.C.C. No. 85-116 (released Mar. 18, 1985).

59. In communities where the telephone company did not seek § 214 authorization to provide channel service, pole attachment policies would not be subjected to FCC attention. Therefore, cable operators with their own distribution facilities would remain at the mercy of the local telephone and utility companies for pole and conduit space.

60. See 1 CABLE TV LAW, *supra* note 2, at ¶ 9.15 n.1. In practice, the leaseback of telephone company-provided facilities has been uncommon. One reason for this scarcity, how-

no longer be used by independent telephone companies to benefit their divested CATV subsidiaries. More importantly, any telephone company that applied for section 214 authority to construct and market channel service facilities surrendered its ability to control CATV systems through manipulation of attachment prices.⁶¹ Not surprisingly, telephone companies lost interest in channel service and used their power over pole attachments as the prevailing means of influencing competition from cable operators.

B. Pole Attachment Act Provides Cable Operators with Greater Access

In 1975, responding to strong encouragement from the Commission, AT&T and the National Cable Television Association (NCTA) negotiated an agreement regarding pole attachment rates. This agreement was binding only on AT&T and its affiliates, however, and most other pole providers refused to respect it. Despite concerns voiced by the cable industry, the FCC maintained that it had no jurisdiction over what it considered to be private agreements entered into between telephone or other utility companies and cable operators regarding the lease of pole space.⁶² As a result, a full 70% of the available poles remained unregulated for some time.⁶³ Ultimately it was left to Congress to grant regulatory authority in this area, which it did with passage of the Communications Act Amendments of 1978.⁶⁴

One section of the 1978 amendments, known as the Pole Attachment Act,⁶⁵ granted the FCC regulatory authority to provide for just and reasonable rates, terms and conditions in cable television pole attachments.⁶⁶ A "just and reasonable" rate was defined as one which allows the pole provider

ever, may be the Commission's effort to discourage telephone company ownership of cable facilities. *Ownership Report, supra* note 51, at 113 n.7.

61. See 47 C.F.R. § 63.57 (1984). Prior to the 1978 Pole Attachment Act, 47 U.S.C. § 224 (1982), the FCC had jurisdiction over pole attachment matters only if a telephone company sought § 214 authority to construct facilities for lease to cable operators. By simply declining to offer channel service facilities, telephone companies could immunize their pole attachment policies from federal jurisdiction. See *California Water & Telephone Co.*, 64 F.C.C.2d 753, 758 (1977). Therefore, in order to continue to control the development of the cable industry, by manipulation of the process for essential pole attachments, most telephone companies discontinued channel service. See *WHITE PAPER, supra* note 3, at 210.

62. *California Water & Telephone Co.*, 64 F.C.C.2d 753 (1977).

63. Seven million of the ten million available poles were controlled by independent telephone and utility companies who were not party to the agreement. See Siegel, *The History of Cable Television Pole Attachment Regulation*, COM. & L., Dec. 1984, at 9-22.

64. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (1978).

65. 47 U.S.C. § 224(b)(1) (1982), states in pertinent part that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable"

66. 47 U.S.C. § 224(c)(1) (1982) states that "[n]othing in this section shall be construed to

to cover his costs without exceeding a mathematical determination of that portion of his costs which should be directly attributable to the attachment sought to be created.⁶⁷

The Commission established the following mathematical formula in its rules⁶⁸ pursuant to the Act's definition of just and reasonable rates:

$$\text{Maximum Rate} = \frac{\text{Space Occupied By CATV}}{\text{Total Usable Space}} (\text{Op. Expenses} + \text{Capital Costs of Poles})^{69}$$

Refusing to become primary arbiter of all pole attachment agreements, the Commission further provided detailed complaint procedures⁷⁰ requiring that all possible attempts be made toward private resolution of the problem before a complaint is brought.⁷¹ In addition, the FCC placed on the complainant the burden of showing unreasonableness.⁷² Failure to meet these requirements, as well as the existence of preempting state regulation, were made grounds for dismissal of pole attachment complaints.⁷³

C. A First Amendment Right of Access

Perhaps the most dramatic and far reaching development regarding pole attachments is the recent decision by the United States Court of Appeals for the Ninth Circuit in *Preferred Communications, Inc. v. Los Angeles*.⁷⁴ Preferred Communications, Inc., an unsuccessful applicant for the Los Angeles cable television franchise,⁷⁵ asked the court of appeals to decide whether a city may, consistent with the first amendment, use the franchising process to limit cable operators' access to public facilities (e.g., pole attachments or underground conduit). The court decided that if these public facilities are physically capable of accommodating more than one additional wire, then the municipality may not stop an unfranchised operator from using such facilities to effect his free speech rights. An apparent result of the court's decision is that utilities and telcos with available capacity cannot deny access

apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State." See *infra* note 100.

67. 47 U.S.C. § 224(d)(1) (1982).

68. Subpart J. Rules For the Regulation of Cable Television Pole Attachments, 47 C.F.R. § 1.1409(c) (1983).

69. *Id.*

70. *Id.* § 1.1404.

71. *Id.* § 1.1404(i).

72. *Id.* § 1.1409(b).

73. *Id.* § 1.1406.

74. 754 F.2d 1396 (9th Cir. 1985), *reh'g denied* (June 13, 1985).

75. The City of Los Angeles refused Preferred Communications, Inc.'s (PCI) request for a franchise because PCI had failed to participate in the city's auction process whereby the city allocates the cable television franchise. *Id.* at 1401.

to their poles or conduits by requiring an operator to show that he has a franchise from the city.⁷⁶

The court refused to decide the validity of any specific requirements called for by the city's franchising process. In particular, the court avoided the issue of whether a city may require cable operators to turn over channels for use by the government, by educational institutions, and by the public. But in a footnote, the court stated that the mandatory access and leased access requirements contained in the city's franchising scheme and called for by sections 611 and 612 of the Cable Communications Policy Act of 1984 "pose particularly troubling constitutional questions."⁷⁷ The case was remanded to the district court to resolve the factual issue of whether the City of Los Angeles violated Preferred's first amendment rights by refusing access to public facilities.

This decision could provide the impetus for a new competitive environment within the cable industry. In those cities with additional capacity in their public facilities, the door has been opened to unfranchised competitors. Just as cable operators are being freed of the franchise requirement, the Commission is considering whether to grant telcos blanket authority to construct cable distribution facilities.

III. FCC PROPOSES THAT SPECIAL CONSTRUCTION OF LINES AND SPECIAL ARRANGEMENTS PROVIDED BY COMMON CARRIERS RECEIVE BLANKET AUTHORIZATION

On April 30, 1984, the Commission issued a Notice of Proposed Rulemak-

76. *See id.* at 1409.

77. *Id.* at 1401 n.4. The court found that imposing access requirements on the press would no doubt be invalid. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). [However,] [c]ourts have divided as to the effect of the *Tornillo* holding on the validity of access requirements imposed on cable television operators. *Compare Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir. 1978) (suggesting that to the extent the government's interest in imposing such requirements stems from the economic scarcity of the cable medium, the Supreme Court's decision in *Tornillo* casts considerable doubt on the government's ability to do so), *aff'd on other grounds*, 440 U.S. 689 (1979) with *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 n.82 (D.C. Cir.) (suggesting that, unlike the right of reply statute involved in *Tornillo*, which was triggered by the publication of certain items, rules requiring cable operators to dedicate channels to common carrier use would not diminish the overall diversity of cable programming or deter the presentation of controversial material regarding public figures), *cert. denied*, 434 U.S. 829 (1977) and *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976, 983-88 (D.R.I. 1983) (upholding franchising procedure that required applicants to provide access channels for governmental, educational, and public use). We decline to reach this question.

Id. (parallel citations omitted).

ing that offered to dispense with the traditional common carrier treatment of special construction of lines and special service arrangements.⁷⁸ Specifically, the Notice proposes to: (1) grant carriers blanket section 214 authorization for special activities; (2) disallow the filing of tariffs for special activities; (3) require the costs of special activities for regulated activities to be kept on separate books of account; and (4) require carriers to file semiannual reports listing each of their special activity projects with a brief description of the facilities and services to be provided.⁷⁹

The Commission's proposal to deregulate the special activities of common carriers most notably proposes to eliminate the section 214 requirements.⁸⁰ This follows an attempt to remove title II oversight of common carrier activities for which regulation may be unnecessary to protect or to promote consumer interests. This deregulatory initiative has been in place at the FCC for a number of years and has recently received an increased momentum from the current procompetitive philosophy at the Commission.⁸¹

A number of parties responded to the Commission's proposed rule change. Comments varied from strongly in favor of to strongly against the proposed change. Most of the BOCs and AT&T supported the deregulation of special activities.⁸² The telephone companies, however, differed as to the scope of and rationale for such a deregulatory initiative. Southwestern Bell Telephone Co. argued that special construction should be deregulated only where the underlying associated service has been deregulated.⁸³ In contrast, Pacific Bell and Nevada Bell argued that only stand-alone activities are non-common carrier and thus are the only service that should operate free of

78. Notice of Proposed Rulemaking, *Special Construction of Lines and Special Service Arrangements Provided by Common Carriers*, 97 F.C.C.2d 978 (1984).

79. *Id.* at 981-82.

80. See *supra* notes 45-61 and accompanying text. The proposed rulemaking does not specifically equate construction of broadband facilities for CATV systems with special construction or special activities. According to FCC officials, however, construction of CATV facilities fits within the definition of these special activities.

Special construction of line and special service arrangements (collectively referred to as special activities) are those services that are individually tailored and priced in response to a customer's request where ordinary tariffed (generally offered) services would not satisfy that request. Notice of Proposed Rulemaking, 97 F.C.C.2d at 981-82.

81. See, e.g., Second Computer Inquiry, 77 F.C.C.2d 384 (1980), *aff'd sub nom.* Computer and Communications Industry Assoc. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983); see also Competitive Carrier Rulemaking, Fourth Report and Order (CC Docket 79,252), F.C.C. 83-481 (Nov. 2, 1983).

82. See, e.g., Comments of American Telephone & Telegraph, C.C. Doc. 84-369 (July 3, 1984).

83. Comments of Southwestern Bell Tel. Co., C.C. Doc. No. 84-369 (July 3, 1984), at 5-11.

regulation.⁸⁴ Bell Atlantic questioned the Commission's conclusion that special activities do not fit within the definition of "common carriage" and therefore should not be regulated. Instead, Bell Atlantic suggested that the Commission should treat these special activities as candidates for regulatory forbearance rather than as being entirely outside the Commission's jurisdiction.⁸⁵

Opposition to the proposal came primarily from the cable industry. The National Cable Television Association (NCTA) filed comments urging the proposed rulemaking be limited. NCTA stressed that the Commission's efforts to detariff should be "de minimis"—with special activities being implemented in a precise and certain manner. NCTA urged the adoption of dollar and duration limitations to justify further the Commission's treatment of minor "special activities" without an undue risk to monopoly ratepayers that would accompany the deregulation of activities in a full market or in too broad a context.⁸⁶ Further, NCTA argued that the current regulatory scheme for cable distribution facilities remains outside the scope of the proposed rulemaking.⁸⁷

Obviously, the proposed rulemaking has broad implications on the way in which telephone companies will be involved in cable television construction and operation over the next few years. This rulemaking has the potential to eliminate the regulatory barriers imposed by the FCC to telco involvement in the construction of lines and special arrangements for cable systems. While the cable/telco cross-ownership rules would not be dramatically affected, clearly the final rulemaking could encourage further telco involvement in the construction and maintenance of cable systems.

IV. THE CABLE COMMUNICATIONS POLICY ACT OF 1984

The Cable Communications Policy Act of 1984⁸⁸ (Cable Act) incorporated into the Communications Act of 1934 a coherent national policy concerning cable communications. The Cable Act established franchise procedures to encourage the growth and development of the cable industry and to assure that cable systems are responsible to the needs of the local community. Guidelines for the exercise of federal, state, and local authority

84. Comments of Pacific Bell and Nevada Bell, C.C. Doc. No. 84-369 (July 3, 1984).

85. Comments of Bell Atlantic Telephone Companies, C.C. Doc. No. 84-369 (July 3, 1984), at 2.

86. See Comments of the National Cable Television Assoc., C.C. Doc. No. 84-369 (July 3, 1984), at 2, 12.

87. *Id.* at 3.

88. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C.A. §§ 521-611 (West Supp. 1985)) [hereinafter cited as Cable Act].

were instituted to minimize unnecessary regulations, and specific cable system ownership restrictions were incorporated to promote competition in cable communications.⁸⁹

The Cable Act represents a compromise between the cable industry and the cities. The Act assures that the cable industry will receive reasonable franchise fees⁹⁰ as well as standardized renewal procedures.⁹¹ Alternatively, the Act codifies municipal authority to negotiate with CATV operators for service and facility requirements for the community⁹² and provides protec-

89. Cable Act, 98 Stat. at 2780-86.

90. Section 622 of the Cable Act states, in part:

(a) Subject to the limitations of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

Cable Act, 98 Stat. at 2787, 47 U.S.C.A. § 542 (West Supp. 1985).

91. Cable Act, 98 Stat. at 2791-93, 47 U.S.C.A. § 546 (West Supp. 1985).

92. Section 624 of the Cable Act states:

(a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.

(b) In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 626), may establish requirements for facilities and equipment, but may not establish requirements for video programming or other information services; and

(2) subject to section 625, may enforce any requirements contained within the franchise—

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

(c) In the case of any franchise in effect on the effective date of this title, the franchising authority may, subject to section 625, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) (1) Nothing in this title shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) (A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale

tion against modification of franchise provisions.⁹³

or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(B) Subparagraph (A) shall take effect 180 days after the effective date of this title.

(e) The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.

(f) (1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

(2) Paragraph (1) shall not apply to—

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

(B) any rule, regulation, or order under title 17, United States Code.

Cable Act, 98 Stat. at 2789-90, 47 U.S.C.A. § 544 (West Supp. 1985).

93. Section 625 of the Cable Act states:

(a) (1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise—

(A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

(B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

(2) Any final decision by a franchising authority under this subsection shall be made in a public proceeding. Such decision shall be made within 120 days after receipt of such request by the franchising authority, unless such 120 day period is extended by mutual agreement of the cable operator and the franchising authority.

(b) (1) Any cable operator whose request for modification under subsection (a) has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 635.

(2) In the case of any proposed modification of a requirement for facilities or equipment, the court shall grant such modification only if the cable operator demonstrates to the court that—

(A) it is commercially impracticable for the operator to comply with such requirement; and

(B) the terms of the modification requested are appropriate because of commercial impracticability.

(3) In the case of any proposed modification of a requirement for services, the court shall grant such modification only if the cable operator demonstrates to the court that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

(c) Notwithstanding subsections (a) and (b), a cable operator may, upon 30 days' advance notice to the franchising authority, rearrange, replace, or remove a particular cable service required by the franchise if—

This new legislation will allow the franchising authority to establish specific requirements for the construction of facilities and to provide equipment for newly franchised systems. The municipality may not, however, establish requirements for video programming or other information services.⁹⁴ Under the Act, a municipality may enforce any requirements contained within the franchise.⁹⁵ In addition, the cable operator may not alter the agreement unless it can be shown that execution of its provisions is commercially impracticable⁹⁶ or that the integrity of the cable services will be maintained after such modification.⁹⁷

A. Cable/Telco Cross-Ownership Restrictions in the Cable Act

Section 613 of the Cable Act incorporates the general language of the Commission's cross-ownership rules.⁹⁸ Paragraph 1 prohibits common carriers from providing "video programming" within its telephone service area.⁹⁹ Common carriers are also prohibited, under paragraph 2, from pro-

- (1) such service is no longer available to the operator; or
- (2) such service is available to the operator only upon the payment of a royalty required under section 801(b)(2) of title 17, United States Code, which the cable operator can document—

(A) is substantially in excess of the amount of such payment required on the date of the operator's offer to provide such service, and

(B) has not been specifically compensated for through a rate increase or other adjustment.

(d) Notwithstanding subsections (a) and (b), a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 623.

(e) A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access.

(f) For purposes of this section, the term 'commercially impracticable' means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

Cable Act, 98 Stat. at 2790-91, 47 U.S.C.A. § 545 (West Supp. 1985).

94. See *supra* note 92, at § 624(b)(1).

95. See *id.* § 624(b)(2).

96. See *supra* note 93, at § 625(a)(1)(A).

97. See *id.* § 625(a)(1)(B).

98. States and franchising authorities may hold ownership interest in any cable system provided the authority does not exercise any editorial control regarding the content of any cable service on a cable system in which such authority has an ownership interest. 47 C.F.R. §§ 63.54-58 (1983).

99. See 47 C.F.R. § 63.54(a) (1983). Section 613, subsection (b), paragraph 1 of the Cable Act states:

It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide *video programming* directly to subscribers in its telephone

viding channel facilities or pole attachments to any related entity that would use such facilities to deliver video programming within the service area of the carrier.¹⁰⁰ Paragraph 3 incorporates the rural area exemption,¹⁰¹ while paragraph 4 establishes the criteria for waiver of the ownership restrictions.¹⁰²

Substitution of the term "video programming" for the term "cable televi-

service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

Cable Act, 98 Stat. at 2785, 47 U.S.C.A. § 533(b)(1) (West Supp. 1985) (emphasis added).

100. See 47 C.F.R. § 63.54(b) (1983). Section 613, subsection (b), paragraph 2 of the Cable Act states:

It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of *video programming* directly to subscribers in the telephone service area of the common carrier.

See Cable Act, 98 Stat. at 2785, 47 U.S.C.A. § 533(b)(2) (West Supp. 1985) (emphasis added).

The Act also amended § 224(c) of the Communications Act concerning pole attachment:

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

98 Stat. at 2801-02, 47 U.S.C.A. § 224(c)(3) (West Supp. 1985). See *supra* note 66 and accompanying text.

101. See 47 C.F.R. § 63.58 (1983). Section 613, subsection (b), paragraph 3 of the Cable Act states: "This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission)." See Cable Act, 98 Stat. at 2785, 47 U.S.C.A. § 533(b)(3) (West Supp. 1985).

102. See 47 C.F.R. § 63.56 (1983). Section 613, subsection (b), paragraph 4 of the Cable Act states:

In those areas where the provision of *video programming* directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitions, taking into account the policy of this subsection.

See Cable Act, 98 Stat. at 2785, 47 U.S.C.A. § 533(b)(4) (West Supp. 1985) (emphasis added).

The legislative history of the Cable Act indicates that the policy underlying § 613(b) is that telephone companies should not provide video programming directly to subscribers in their

sion programming" is the sole distinction between subsection (b) of the Cable Act and the Commission's preexisting cable/telco cross-ownership rules. The legislative history of the Cable Act specifies that the term "video programming"¹⁰³ is not intended to include the transmission of information that is primarily textual in nature, even though broadcast stations have been granted authority to provide such information generally known as teletext.¹⁰⁴ The term "video programming" appears to narrow the scope of the Cable Act's ownership restrictions.

B. Noncable Services

While the cross-ownership rules prevent competition between the cable operators and telephone companies for provision of video programming, there are new areas of service developing in which the two industries will compete head on. Taking advantage of the two-way capacity of cable systems, some cable operators have begun to provide communications services traditionally offered by the telephone company. Some cable systems with institutional networks already compete with the local telephone company in the rapidly growing data transmission market.¹⁰⁵ Although such private line data services are still in the developing stages and do not yet represent a significant percentage of telephone company revenue, they are growing at the rate of 28% a year.¹⁰⁶

Another area of competition between cable operators and telephone companies is the use of cable systems for the origination and termination of long distance voice and data traffic. Several cable systems have proposed to offer their institutional customers the capacity to connect directly with MCI or AT&T, bypassing the local telephone company entirely.¹⁰⁷

telephone service areas. 130 CONG. REC. S14,286 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood).

103. Video programming is defined by § 602(16) of the Cable Act as programming provided by, or generally considered comparable to programming provided by a television broadcast station. See Cable Act, *supra* note 88.

104. See 130 CONG. REC. S14,285 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood).

105. One example is Manhattan Cable (MC), which provides point to point data services to its institutional network customers throughout Manhattan. Businesses are attracted to cable distribution systems because broadband facilities can carry data at higher speed and offer higher quality, as compared to the dedicated line service of the local phone company. MC's earnings as of December 1984 from such services were approximately \$1 million as opposed to New York Telephone's dedicated line revenues of \$4 billion. 584 Telecom Highlights, No. 49, Dec. 12, 1984, at 13-14. See *supra* note 30.

106. H.R. REP. NO. 934, 98th Cong., 2d Sess. 28 (1984) [hereinafter cited as Cable Report] (quoting the California Public Utilities Commission).

107. Manhattan Cable and Commline, the institutional cable network of Cox Cable Communications, Inc. in Omaha, Nebraska, are examples of cable systems that have proposed to offer such services.

The question of regulation of these new communications services has been the subject of discussion at both the state and federal level. The New York Public Service Commission (PSC) ruled in October 1983 that Manhattan Cable was offering "telephone service for hire" and, therefore, was required to obtain a Certificate of Public Convenience and Necessity from the PSC.¹⁰⁸ Also in 1983, the Nebraska Public Service Commission (NPSC) invoked jurisdiction over Comcline, the institutional cable network of Cox Cable Communications, Inc. The NPSC ordered Comcline to cease and desist operations until a certificate of public convenience and necessity was obtained. Subsequently, Cox Cable petitioned the FCC to preempt any state regulation of such services.¹⁰⁹ Most recently, on June 13, 1984, the California Public Utilities Commission released an order that adopted regulations regarding alternative supplies of local private line services, including cable systems.¹¹⁰

The authors of the Cable Act did not attempt to resolve the regulatory issues presented by these potentially lucrative services. In fact, the Act preserves the status quo of regulation of these new communications systems.¹¹¹

108. 584 TELECOM HIGHLIGHTS, *supra* note 105, at 13. Manhattan Cable has filed an application which is being held in abeyance while NYPSC is investigating the general "bypass" problem. *Id.*

109. *In re Cox Cable Communications, Inc., Comcline, Inc., and Cox DTS, Inc.* (CCB-DFD 83-1).

Pursuant to § 1.2 of the Commission's Rules, Cox Cable Communications, Inc. (Cox) and others petitioned the Commission for a declaratory ruling that: (1) this Commission has jurisdiction over (and has preempted state and local regulation of) facilities located wholly within one state and used to originate, distribute, or terminate interstate communications including such facilities which also distribute intrastate communications; and (2) "institutional" broadband coaxial cable providing interactive (two-way) local distribution of inter- and intrastate communications, whether on a "stand-alone" basis or via interconnection with Digital Terrestrial Systems (DTS) operating in the same area, constitute but another manifestation of such intrastate facilities.

110. *See* Cable Report, *supra* note 106, at 29.

111. *Id.* at 60. The key to future regulatory battles involving new cable offerings will be the Act's definition of "cable service." If a cable system offering fits within the definition of a cable service, then the state PUC is preempted from regulating that service as a common carrier. Section 602(5) of the Act defines cable services:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service

See Cable Act, 98 Stat. at 2780, 47 U.S.C.A. § 522(5) (West Supp. 1985).

The legislative history of the Act specifies that this definition does not include such services as private line data transmission or video communications that compete with services provided by telephone companies. "Thus, the definition of other programming service requires that the information provided in a cable service must be made available to all subscribers generally and may not include information that is subscriber-specific." Cable Report, *supra* note 106, at 41.

Subsection (c) of section 621 of the Act prohibits the regulation of a cable system as a common carrier or utility by reason of providing cable service. However, the drafters of the Act have stated that subsection (c) has no effect upon the proceedings before the New York PSC or Cox Cable's petition before the FCC because they concern noncable services.¹¹² The framers of the Cable Act left the decision concerning the exercise of regulatory authority over noncable services to the appropriate regulatory bodies. This approach was chosen because "it protects cable companies from unnecessary regulation, while reserving for state and federal officials the authority they need to address the issue of competition between telephone and cable companies."¹¹³

To aid state and federal officials in this task, the Cable Act empowers the states or the FCC, if they so choose, to require cable operators to provide informational tariffs.¹¹⁴ Under section 621(d), tariffs would be required for any noncable service that would be subject to regulation by the FCC or any state if offered by a title II common carrier. Subsection (d) was designed to assure the effective monitoring of these new services and was not intended to create new or additional regulatory authority over noncable services.¹¹⁵

These noncable services, such as intrastate and interstate voice and data transmission, provide cable operators with the opportunity to expand their commercial potential while more fully utilizing their broadband facilities. The cable industry, however, faces protracted regulatory battles over its entry into these previously exclusive telephone service markets. The telephone industry in the post-divestiture world must now compete with cable operators for institutional customers that were once taken for granted. As noted, the Cable Act does not directly address this new area of cable-telco competition. The participation of the BOCs in these new competitive markets is, however, subject to the provisions of the Modified Final Judgment.¹¹⁶

V. BROADBAND SERVICES UNDER THE MODIFIED FINAL JUDGMENT: WAIVER OR NOT?

The Bell System was divested on January 1, 1984 under the 1982 Justice

112. Cable Report, *supra* note 106, at 61.

113. *Id.*

114. Cable Act, 98 Stat. at 2786.

115. See Cable Report, *supra* note 106, at 60.

116. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). The legislative history of the Cable Act provided that § 613(b) does not override restrictions on electronic publishing imposed by court decree, agency order, or otherwise including but not limited to the Modified Final Judgment. 130 CONG. REC. H12,235 (daily ed. Oct. 11, 1984) (statement of Rep. Wirth).

Department/AT&T Consent Decree approved by United States District Court Judge Harold Green in the Modified Final Judgment (MFJ).¹¹⁷ Under the terms of the MFJ, AT&T was separated from the twenty-two BOCs, which were organized under seven regional holding companies. The MFJ altered the 1956 Consent Decree that had prohibited the Bell System from providing CATV service. With the exception of a seven-year ban on "electronic publishing," the MFJ has removed all of the line of business restrictions imposed upon AT&T under the previous decree.¹¹⁸ Electronic publishing is defined by the MFJ "as the provision of any information which AT&T or its affiliates has or has caused to be originated, authored, compiled, collected or edited or in which it holds either a direct or indirect financial or proprietary interest and which is disseminated to an unaffiliated person through some electronic means."¹¹⁹ From this definition it could be argued that AT&T would be restricted from owning or operating a cable system until 1991, because the operation of a cable system includes collecting and disseminating information to an unaffiliated customer.

The twenty-two BOCs that were divested from AT&T are prohibited under the consent decree from providing directly or through an affiliate, any interexchange telecommunications or information services.¹²⁰ In fact, BOCs

117. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

118. *Id.* at 223. The court reasoned that with the loss of control over the local network, AT&T would no longer be able to disadvantage its competitors; therefore, the restrictions imposed on AT&T under the 1956 Consent Decree, see *supra* note 11, will no longer be necessary. 552 F. Supp. at 223.

119. 552 F. Supp. at 225. Judge Green placed the seven-year moratorium on electronic publishing to insure the basic first amendment value of continued diversity of sources of information. Electronic publishing, still in the experimental stage, has the potential to become an important provider of news, entertainment, and advertising in competition with the more traditional media formats. Judge Green reasoned that if AT&T were permitted to engage in both the transmission and generation of information, there would be a substantial risk that AT&T would discourage the efforts of other electronic publishers and acquire a monopoly over this new medium of communication. *Id.* at 223-24.

120. *Id.* at 224. After divestiture, the BOCs were left with a monopoly over local telephone service. The Justice Department decided that the BOCs must be barred from entering all competitive markets to ensure that they will not misuse monopoly power. In addition to a general prohibition against the provision of any product or service that is not a natural monopoly service actually regulated by tariff, the BOCs were banned from the following activities by § 11(D) of the Decree: "(1) The provision of interexchange services; (2) The provision of information services; (3) The manufacture of telecommunications products and customer premises equipment; and (4) The marketing of such equipment." *Id.* at 227-28. BOCs may now provide enhanced services and customer premises equipment through structurally separated entities. See Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, CC Docket No. 83-115, F.C.C. No. 83-552 (released Dec. 30, 1983), *reconsideration*, FCC Report No. 18,012 (released June 5, 1984), *aff'd*, *Illinois Bell Telephone v. FCC* (7th Cir. No. 84-1145, decided June 29, 1984). If such a service offered a BOC is not

cannot provide any other product or service except exchange telecommunications and exchange access service. Under the MFJ, these restrictions may be waived by the court upon petition showing there is no substantial possibility that the BOC could use its monopoly power to impede competition in the proposed market.¹²¹

Following divestiture, some of the regional holding companies began to file requests for waiver of the line of business restrictions. Reacting to this demand, the United States District Court for the District of Columbia established general guidelines for the evaluation and processing of waiver requests.¹²² Initially, the Department of Justice (DOJ) reviews the request to determine if the petitioner met its burden under the MFJ. If the DOJ approves the waiver, a proposed consent order is submitted to the court.¹²³ The July 1984 waiver opinion did not address the possibility of a telco venture into the cable industry through provision of broadband transport facilities.

In a letter dated February 5, 1985, the Department of Justice announced that the Chesapeake & Potomac Telephone Company (C & P), a local subsidiary of Bell Atlantic, may provide broadband transport facilities to District Cablevision, Inc. without requesting a waiver of the MFJ.¹²⁴ The Justice Department found that the proposed distribution of cable television signals by means of broadband transport facilities provided by C & P appeared to constitute exchange telecommunications within the definition of "telecommunication services" contained in the MFJ.¹²⁵

considered a regulated service under title II, then it may only be offered by the BOC through a separate subsidiary. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *reconsidered*, 84 F.C.C.2d 50 (1980), *further reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C.Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

121. The court found that line of business restrictions upon the BOCs must be based on an assessment of the realistic circumstances of the relevant markets, including the operating companies' ability to engage in anti-competitive behavior, their potential contribution to the market as an added competitor for AT&T, as well as upon the effects of the restrictions on rates for local telephone service. 552 F. Supp. at 221.

122. *See* United States v. AT&T, No. 82-0192 (D.D.C. July 26, 1984).

123. *Id.* slip op. at 53-58.

124. Letter from Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, to Richard C. Shramm, Vice President and Associate General Counsel, Bell Atlantic (Feb. 5, 1985) [hereinafter cited as Letter from Charles F. Rule].

125. *Id.* at 1. The MFJ defines "telecommunications" as the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of an electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage,

The Justice Department's inquiry was initiated, in part, as a result of complaints filed by Capital City Cable (CCC)¹²⁶ on September 26, 1984 and Inner City Broadcasting Corp. (ICBC), one of CCC's partners, on October 12, 1984. These parties argued that this joint venture is a new line of business requiring waiver under the MFJ, even though C & P is reimbursed as the system is constructed and even though the venture conveys equitable title as well as control over its design, costs and alternative uses.¹²⁷

In support of this argument, ICBC stated that the C & P/DCI plan did not fall within the definition of telecommunications services. Specifically, ICBC alleged that C & P was not offering the capacity of communication facilities, or the transmission of information via such facilities. The Justice Department discredited ICBC's argument by stating simply that C & P has previously provided dedicated facilities that were paid for as they were built.¹²⁸

The Justice Department limited its decision by emphasizing that its opinion letter was specifically limited to an analysis under the MFJ restrictions of C & P's proposal for provision of broadband facilities to DCI. Also, DOJ stated that its decision did not resolve the question of whether C & P's proposal violated the antitrust laws or presented other competitive problems.¹²⁹

VI. COMMISSION GRANTS C & P AUTHORITY TO CONSTRUCT DCI SYSTEM

In granting C & P's application for section 214 authority to provide the broadband facilities, the FCC noted "that except for the payment schedule[,]

forwarding, switching, and delivery of such information) essential to such transmission.

United States v. AT&T, 552 F. Supp. at 229.

126. Capital City Cable was an unsuccessful applicant for the Washington, D.C. cable television franchise.

127. Letter from Charles F. Rule, *supra* note 124, at 2.

128. *Id.* at 3. An example of previous C & P dedicated line service was the construction of a fiber optic facility for MCI in 1983. *Id.* at 3 n.4.

129. Letter from Charles F. Rule, *supra* note 124, at 4. Capital City Cable (CCC), a losing bidder for the Washington, D.C. cable television franchise, filed suit against members of the City Council, DCI, and C & P in the United States District Court for the District of Columbia. Capital City Cable v. District Cablevision, Inc., No. 84-3524 (D.D.C. filed —, 1984). In its suit, CCC alleged that there was a conspiracy in restraint of trade to award the franchise to DCI and C & P. CCC contended that the award of the franchise would provide C & P a monopoly over broadband transport facilities and the provision of cable services in the District.

DCI and CCC reached an out-of-court settlement of the antitrust case on February 20, 1985. The case was formally dismissed by United States District Court Judge Gesell on February 21, 1985. *Id.* (order dismissing action).

C & P's proposed tariff is essentially like those on file by other carriers."¹³⁰ The FCC concluded that C & P's proposal appeared to include the primary features included in traditional channel service offerings made by other companies. The fact that C & P proposed to recover its costs in a period shorter than normally associated with channel service did not, according to the Commission, fundamentally merit voiding the proposal.¹³¹ Opponents to C & P's section 214 application alleged that the structure of the venture between DCI and C & P provided C & P with the opportunity to cross-subsidize this venture with revenue from its common carrier business. To mitigate this anticompetitive potential, the Commission required C & P to maintain separate books of account for its broadband transport service. The Commission concluded that C & P's maintenance of the broadband facilities did not present a substantial likelihood that C & P would restrict competition. The C & P/DCI proposal is just one of the recent proposals presented by local telcos and cable television operators that has forged a new relationship between the two industries.

Telephone companies, particularly the BOCs, have traditionally denied cable systems open access to underground conduit space and pole attachments, retarding the development of some cable television systems. Recently, however, a few telephone companies have aggressively pursued joint venture agreements with local cable companies in an effort to hasten the delivery of cable television service to the communities under consideration for service. Telephone companies seeking to construct cable television systems have had to maneuver carefully within the web of federal and local regulations affecting telco involvement in the cable industry. As a result, aggressive and creative proposals have been offered by local telcos in an effort to develop joint ventures that are within permissible regulatory guidelines, that are technologically feasible, and that are financially secure for all parties.

VII. WISCONSIN BELL'S PROPOSAL TO THE CITY OF BROOKFIELD, WISCONSIN

The first of the post-moratorium section 214 applications to receive ap-

130. *In re* Application of the Chesapeake and Potomac Telephone Co. for § 214 Authority, Memorandum Opinion, Order and Certificate, F.C.C. No. 85-48, at 7 (Jan. 30, 1985).

131. *Id.* The Commission found that the C & P proposal "appears to include the primary feature included in channel service offerings made by other companies." *Id.* The Commission did not find C & P's proposal to recover its costs, in a period shorter than normally associated with channel service, to be a determinative factor. *Id.* Instead, the Commission noted that in a recent proposed rulemaking, it recognized that some carriers' tariffs provide for rapid recovery of costs in "similar situations." *Id.* at 7 n.11.

proval was filed by Wisconsin Bell on January 30, 1984, on the heels of the AT&T divestiture.¹³² This former BOC, which provides telephone service to much of the State of Wisconsin, proposed to construct a broadband distribution system to serve Brookfield, Wisconsin, a suburb of Milwaukee. TeleNational Communications, Inc., the successful cable franchisee, had contracted with Wisconsin Bell to use the system once construction was completed.

Wisconsin Bell asserted that its construction of the proposed broadband cable television distribution system would serve the public interest through swift and efficient provision of cable service according to the city's express desire. The system designed for Brookfield would be composed of a single coaxial cable network of 407 "star nodes" fed by one centrally located head end facility.¹³³ This one network would provide fifty-four forward and four reverse channels to serve both the residential and institutional cable needs of the community.¹³⁴ All of the proposed channel capacity would be dedicated to the needs of the cable system with none reserved inactive for later use. If additional capacity was required to meet future needs, another application would have to be submitted to request authority for further construction.¹³⁵

Wisconsin Bell would bear sole financial responsibility for the construction of the system. In its revenue projections, Wisconsin Bell described its plan to recoup this investment, primarily through charges to TeleNational for services in fulfillment of its cable franchise commitment and subordinatedly through charges to other customers who may provide other services, such as "pay-per-view," polling/data collection, and new entertainment channels.¹³⁶ In anticipation of possible post-divestiture action by the FCC or Congress, Wisconsin Bell and TeleNational also entered into a Conditional Purchase Agreement¹³⁷ which provided an opportunity for the cable franchisee to purchase the facilities should the telco be barred from operating the system and from maintaining a carrier-user relationship with TeleNational for this service.¹³⁸

132. *In re* Application of Wisconsin Bell, Inc. for § 214 Authority, File No. W-P-C-5348 (filed Jan. 30, 1984).

133. *Id.* at 3.

134. *Id.* at 4.

135. *Id.* at 5. It is common for broadband distribution systems to be designed with surplus unactivated channels to allow for future system expansion without additional construction. Plans may call for this excess capacity to be reserved by the telephone company or dedicated to the cable system. See *infra* notes 141, 152 and accompanying text.

136. Application of Wisconsin Bell, File No. W-P-C-5348, at 6. These projections anticipate an average annual revenue of \$2,108,000, which is potentially \$303,000 greater than the 12.75% rate of return required by the telco's tariff.

137. *Id.* at app. F.

138. *Id.* at 8-9.

The Commission approved the proposal, and on August 30, 1984, granted Wisconsin Bell section 214 authority to construct and operate a broadband distribution system in Brookfield, Wisconsin.¹³⁹ Furthermore, on December 13, 1984, in the face of a subsequent challenge by the unsuccessful cable franchisee asserting violative pole attachment practices, the Commission reaffirmed its decision.¹⁴⁰

VIII. THE PACIFIC BELL PROPOSAL TO THE CITY OF PALO ALTO, CALIFORNIA

Pacific Bell submitted an application on March 9, 1984 for section 214 authority to construct and operate a cable television distribution system in Palo Alto, California.¹⁴¹ The arrangement proposed by Pacific Bell represents what would probably be the highest level of involvement in cable television service by a telephone company since the institution of cross-ownership restrictions. Not only does Pacific Bell intend to reserve channel capacity on the system that it would lease, it also plans simultaneous construction of an entirely separate network which it would not lease, but would operate for its sole benefit. Moreover, Pacific Bell has sought to serve cable customers individually by obtaining section 214 authority.¹⁴²

The system proposed by Pacific Bell would be a highly sophisticated state-of-the-art hybrid fiber optic and dual trunk coaxial system.¹⁴³ Authority was specifically sought for a "subscriber network" which would consist of 112 channels on two coaxial feeder trunks, each affording two-way capacity in varying degrees between Palo Alto and Stanford University.¹⁴⁴ In addition, Pacific Bell would simultaneously construct a separate fiber optic Institutional Network to provide ancillary business-related services to over eighty pre-designated customers in the area.¹⁴⁵

In addition to its unique, innovative technology, the structure of the venture confirms that the arrangement proposed by Pacific Bell would not be a traditional cable television leaseback. A significant portion of the Palo Alto

139. Memorandum Opinion and Order, File No. W-P-C-5348, Mimeo No. 6335 (Aug. 30, 1984).

140. Memorandum Opinion and Order, *In re* Wisconsin Bell, Inc., F.C.C. No. 84-618 (Dec. 13, 1984).

141. *In re* Application of Pacific Bell for § 214 Authority, File No. W-P-C-5384 (filed July 2, 1984).

142. The City of Palo Alto had expressed the desire to assume the role of cable service operator, the necessary result of Pacific's assertion that the city would be its customer. *Id.*

143. *Id.* at 3.

144. *Id.* at 4.

145. Response to the City of Palo Alto Request for Proposals to Provide Cable Television Service to the Designated Service Area 1 [hereinafter cited as Pacific Proposal].

system would not be leased at all. Pacific planned to lease 80 of the 112 channels on the subscriber network for independent operation. Moreover, Pacific intended to retain complete ownership of the separate Institutional Network. That portion of the system's facilities would be operated by and for the exclusive benefit of the telephone company.¹⁴⁶

Pacific Bell's innovative foray into the cable TV arena also extended to its involvement in the franchise process. Rather than waiting to be asked by a franchise applicant to supply its broadband distribution expertise, the telephone company submitted its own application.¹⁴⁷ The Palo Alto City Council's Request for Proposals (RFP) was interpreted by Pacific Bell as an open invitation to anyone able to provide cable service. With a rationale reminiscent of the pre-1970 channel service arrangements, this telco asserted that its telephone service franchise provided it with authority to wire the city, thereby obviating any need for a specific cable system franchise.¹⁴⁸ In its section 214 application, Pacific Bell proposed to construct a cable system with the City of Palo Alto as operator.

Despite Pacific Bell's intention to have Palo Alto lease its subscriber network, the city has nevertheless declined the telephone company's invitation to operate the cable television service. Instead, the city council decided to entertain the proposals of two franchise applicants, each of whom has submitted proposals technologically different from that of Pacific Bell for distribution of their cable television service.¹⁴⁹ In response to an apparent lack of interest on the city's part, Pacific Bell insists that its advanced cable distribution is an optimum arrangement for Palo Alto, particularly because of the flexibility and control that such an advanced system would afford in response to the specific needs of the residents.

As of yet, Pacific Bell has not been successful in convincing others of the merit of its proposal. Based perhaps on its judicious decision not to accept Pacific Bell's lease offer, as well as on its desire not to influence adversely the ongoing franchise process, the City of Palo Alto refrained from providing the pole conduit rights certification required by the Commission as part of a

146. *Id.*

147. The common practice is to apply for authority to construct channel facilities in response to the need of a successful cable franchisee. In this instance, however, the telephone company submitted its own proposal directly to the franchising body without the participation of an independent cable operator.

148. See discussion of telephone franchise-based authority for provision of channel service prior to cross-ownership prohibition, *supra* notes 5-18 and accompanying text.

149. Of the five franchise applicants, the city chose to negotiate with two cable companies, with the understanding that either of them could opt to have Pacific construct its facilities.

successful section 214 application.¹⁵⁰ Therefore, the Commission refused Pacific Bell's request for section 214 authority in a Memorandum Opinion and Order holding that the absence of this certification, which indicated lack of a cable operator customer, was fatal to Pacific's application.¹⁵¹ Accordingly, the application was dismissed without prejudice as being prematurely filed. The decision failed to address whether the telco's retention and operation of such a large portion of the system would have been allowed. It also did not indicate whether Pacific Bell's use of its telephone service capabilities to qualify for the city's cable television franchise process would be considered an appropriate use of its common carrier position.

IX. THE C & P/DCI JOINT VENTURE PROPOSAL TO THE DISTRICT OF COLUMBIA

As discussed earlier, the DCI and C & P joint venture in the District of Columbia is one of the most recent examples of the telephone industry's renewed interest in the provision of cable-related services.¹⁵² As part of its successful franchise application, DCI proposed that C & P construct broadband transport facilities to be used to distribute DCI's cable service to subscribers. DCI argued that C & P's involvement would assure the construction of a quality cable delivery system and the expeditious delivery of cable service to the District.

A. Description of Services

On September 10, 1984, C & P Telephone Company submitted an application to the FCC for approval under section 214 to construct and maintain broadband transport facilities in the District for exclusive use by DCI. The system that C & P designed would use a combination of microwave and coaxial cable to provide two distinct service networks. In accord with DCI's franchise, the broadband facilities would consist of seventy-nine forward and four reverse channels on the residential network, and fifty-one forward and twenty-seven reverse channels on the institutional network, for a total of 161 channels. In addition, an inactive "shadow cable" would also run along the

150. Memorandum dated March 14, 1984 to Cable Files, Palo Alto City Clerk's Office regarding telephone call from Jeanne Moulton to Jerry Yanowitz.

151. Memorandum Opinion and Order, *In re* Application of Pacific Bell for Section 214 Authority, File No. W-P-C-5384.

152. Bell Atlantic, C & P's parent company, has expressed an interest in making a bid to build a similar system in Baltimore, Maryland and may approach other cities that do not have cable television service. Wash. Post, Dec. 30, 1984, at F4, col. 6. Another Bell Atlantic subsidiary, Bell of Pennsylvania, has discussed the possibility of constructing a cable system for the city of Philadelphia. See MULTICHANNEL NEWS, Feb. 20, 1984, at 15.

residential route to provide additional channel capacity in the future. Plans call for the residential network to offer a three-tiered assortment of program and nonprogram services ranging from basic broadcast signals to interactive shopping and home banking services.

B. Indices of Ownership

One area of interest in the C & P/DCI joint venture is the ownership structure for the project and facilities. Unlike the standard cable television leaseback, ownership of the C & P/DCI system would not be held completely by either party. The agreement between C & P and DCI provides that C & P should hold legal title as "record owner," while DCI, as "beneficial owner," should enjoy "all other incidents of ownership."¹⁵³ In accord with this creative proprietary arrangement, C & P promised not to claim an investment tax credit or a depreciation allowance for the cost of building the systems as long as such tax benefits are claimed by DCI.¹⁵⁴

Additionally, DCI would receive the exclusive right to use the system in the provision of cable service.¹⁵⁵ On the other hand, no provision is made for transfer of legal title by C & P to DCI at termination of the agreement.¹⁵⁶ Moreover, DCI's right to transfer its interest in the system is limited to transfers to subsequent franchisees, city-appointed trustees, or the city itself.¹⁵⁷ As a result, absent failure to obtain the necessary approval, C & P may hold title to the facilities of the cable television system as long as it is used to provide cable service to the District of Columbia, regardless of who operates the system.

C. Construction Arrangements

The construction guidelines established in the C & P/DCI Agreement may provide additional guidance on the issue of ownership and control. The construction routes, mechanisms, and timetables are very strictly dictated. They evidence, however, no clear governing influence other than compliance with the franchise. The work description calls for minimal integration of the cable system lines with C & P's own telephone conduits,¹⁵⁸ but the scheme

153. *Agreement for the Provision of Broadband Transport Facilities, The Chesapeake and Potomac Telephone Company and District Cablevision, Inc.*, Nov. 5, 1984, at § 11.4 [hereinafter cited as *C & P/DCI Agreement*].

154. *Id.* § 11.4.

155. *Id.* § 11.1.

156. In fact, C & P would have no obligation to relinquish its legal title to the cable system unless it was unable to secure approval from the Commission under § 214 or from the court under the Modified Final Judgment. *C & P/DCI Agreement, supra* note 153, at § 12.3(4).

157. *Id.* § 17.1.

158. *Id.* § 3.3.

for selecting rights of way in the District shows a preference for existing poles and conduits, particularly those of C & P.¹⁵⁹

The agreement places full financial responsibility on DCI. A letter of credit from DCI to C & P triggers the start of preconstruction activities¹⁶⁰ by the telephone company, and every subsequent expenditure requires DCI's authorization¹⁶¹ to be followed by actual payment within thirty days. In this manner, the arrangement ensures that C & P has accepted very little financial risk in this joint venture.

A separate agreement will cover pole attachments and conduit space necessary to the construction of the DCI system.¹⁶² This arrangement is to follow the now standard FCC provisions for fair and reasonable rates, terms, and conditions. Attachments to poles not controlled by C & P, however, would be subject to preexisting joint-use agreements between C & P and the other utility providers, with payments made directly to C & P for subsequent transmittal to the other utilities in the District.

D. Operating Arrangements

After construction is completed, C & P proposes to remain involved in the District of Columbia cable system through maintenance service agreements. DCI has contracted with C & P to perform the franchise requirement of round-the-clock maintenance service for only that portion of the cable facilities which C & P has constructed.¹⁶³ C & P will bill DCI in advance on a monthly basis for this service.

Excluding its maintenance responsibilities, C & P will otherwise have no involvement with the operation of DCI's cable television system.¹⁶⁴ All control over initial services, inactive or reserved services, and future channel capacity will be held by DCI. In its agreement, C & P acknowledges that DCI may offer competition in the provision of two-way services, but that for such activities DCI should be regulated as a common carrier.¹⁶⁵

E. Final Steps to Construction

The existence of the C & P/DCI joint venture was contingent upon authorization from various governmental entities. Initially, the District of Co-

159. *Id.* §§ 5.9, 5.10.

160. *Id.* § 4.1.

161. *Id.* § 8.1.

162. *Id.* § 5.3.

163. *Id.* § 7.2.

164. *Id.* § 11.2.

165. Lloyd & Leahy, *The New Border Wars: Confrontation Between Cable and Telco Interests*, *TELEMATICS*, August 1984, at 6.

lumbia Council reviewed the merits of the venture during its franchising process. More recently, on January 30, 1985, the FCC granted C & P authority to construct the facilities for DCI.¹⁶⁶ On February 5, 1985, the Justice Department approved the activity under the MFJ.¹⁶⁷ The final step toward construction of the system was DCI's consummation of the contract with the District government on February 25, 1985.¹⁶⁸

In signing the cable pact, DCI promised that construction on the \$130-million, 1,115-mile system will begin within eighteen months and will be completed within four years. Under the contract, DCI must provide service to at least 14% of the homes in each of the city's eight wards by April 1, 1986. In addition, the city will require the company to establish a two million dollar security fund while the system is under construction. Further, DCI must secure thirty million dollars in initial financing before April 1, 1986 or suffer termination of the franchise agreement.

X. PROS AND CONS OF CABLE TV PROPOSALS

An examination of the pros and cons of telco involvement in the construction and maintenance of cable television broadband distribution facilities in the same city where it provides local exchange service is timely and warranted. There are a number of arguments that must be evaluated prior to reaching a conclusion regarding the legality and propriety of cable/telco construction proposals.

The vast revenue base generated by the telephone companies' monopoly service justifies concern over the construction of possible cross-subsidized ventures into the openly competitive area of cable television systems. Also, cable operators should be limited in their ability to enter into joint ventures with local telcos in ways that may have an anticompetitive effect on the delivery of enhanced services to consumers. There are equities favoring cable/telco construction projects. The cost of constructing and operating cable systems has forced cable operators to reevaluate previously awarded franchising agreements while seeking alternative means of financing construction and operation of cable systems. Cable operators have recently begun to open new points of negotiation with local governments to develop ways to reduce the often crippling expense necessary to construct and to operate a cable television system. Franchises previously awarded to cable operators proposing to construct fifty-five channel systems have now been revised downward with proposals for fewer channels. In some instances,

166. *See supra* note 130 and accompanying text.

167. *See supra* note 124 and accompanying text.

168. Wash. Post, Feb. 26, 1985, at A1, col. 1.

telco construction of the cable television system would reduce the cost of underground construction and better and more efficiently utilize conduit space in existing telecommunications facilities. Moves in this area have also been supported by the willingness of the telephone company to assist the cable operator in providing marketing and maintenance services.

Additionally, cooperative efforts between cable operators and telcos could lead to more active inter-connected data networks for midtown corporate institutional networks. Moreover, cable/telco joint ventures would reduce the inconveniences to the public imposed by constructing an underground system through a more expeditious use of the short-term workforce required to build the system.

Cable operators have mounted an attack against these proposed relationships between telcos and cable operators. The California Cable Television Association (CCTA) has claimed that proposals of this type would reduce local control and transfer to federal regulators much of the control traditionally exercised by municipalities over cable franchises. Many argue that the telephone companies, through use of their monopoly power, will create an anticompetitive climate for cable-related businesses. Cable companies have also argued to federal and state regulators that BOC involvement in cable construction and leaseback ventures will cause an upward pressure on local telephone rates resulting from the increased cost of telephone customer tariffs to fund the vast capital expenditures required to finance the construction of broadband cable facilities.

First amendment issues are also raised due to the potential for placing control over the facilities utilized in transmitting video programming either in the hands of local government officials through their regulation of the telephone utility or in the telcos themselves. The ultimate fear asserted in opposition to joint cable/telco proposals is that the cable television industry will become anticompetitive due to the telephone company's exertion of the power to control the means of receiving the only other form of broadband wire transmission to the home that can perceivably provide a long-term competitive alternative to telephone systems through various bypass technologies.

There are valid arguments on both sides of this debate. On balance, the public interest favors the movement by the telephone company back into the cable television industry. The potential for the delivery of new and nearly inconceivable technology outweighs the potential for anticompetitive behavior.

The potential for anticompetitive behavior is sufficiently great to warrant the FCC's imposition of structural safeguards to separate the accounting and

operational departments of the telco's cable television construction department from its other departments which perform common carrier functions. These minimal regulations will not inhibit the development of aggressive and successful joint ventures between telcos and cable operators.

XI. CONCLUSION

Over the past thirty years telcos have come full circle in their efforts to facilitate the development of cable television service. At one time, local telephone companies made their facilities open to cable television operators. Thereafter, a period of hostility emerged which was characterized by telco schemes to thwart cable television access to poles and underground conduits. Presently, we are experiencing a reaffirmation of the cooperative spirit between the telco and cable industries.

This cooperative spirit should be permitted to continue and mature. The new generation of telco involvement in the construction of cable television broadband facilities is in its infancy. There are a number of cable television systems in many small and large markets throughout the country that have not been built; thus the future holds numerous opportunities to forge new relationships between cable television companies and local telcos to expedite the construction of broadband facilities.

