77.

CITY AT THE CENTER
WEST ALLIS

City of West Allis
Matter Summary

7525 W. Greenfield Ave.
West Allis, WI 53214

File Number	Title	Status
2006-0542	Communication	In Committee

Time Warner Cable communication with enclosures regarding AT&T's claim that their video service is not a cable service.

Introduced: 9/5/2006 **Controlling Body:** License & Health Committee

COMMITTEE RECOMMENDATION POF

ACTION DATE: 9-5-06

	MOVER	SECONDER	AYE	NO	PRESENT	EXCUSED
Barczak						
Czaplewski						✓
Dobrowski			✓			
Kopplin			✓			
Lajsic						
Narlock		✓	✓			
Reinke						
Sengstock	✓		✓			
Vitale						
Weigel						
TOTAL			4	–		1

SIGNATURE OF COMMITTEE MEMBER

Kurt Kopplin

Chair Vice-Chair Member

COMMON COUNCIL ACTION PLACE ON FILE

ACTION DATE: SEP - 5 2006

	MOVER	SECONDER	AYE	NO	PRESENT	EXCUSED
Barczak						
Czaplewski						
Dobrowski						
Kopplin	✓					
Lajsic						
Narlock		✓				
Reinke						
Sengstock						
Vitale						
Weigel						
TOTAL						

UNANIMOUS

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TIME WARNER CABLE
THE POWER OF YOU™

August 11, 2006

Mayor Jeannette Bell
City of West Allis
7525 West Greenfield Avenue
West Allis, WI 53214

Dear Mayor Bell:

On March 8th and April 18th Bev Greenberg sent you letters regarding Time Warner Cable's position on AT&T's claim that their video service is not a "cable service", and how Time Warner Cable supports a competitive marketplace but wants to ensure that like services operate within a "level playing field".

We know that several communities are currently negotiating an Agreement with representatives from AT&T as they plan to offer video services in Wisconsin. As we've stated in the past, Time Warner Cable disagrees with AT&T's ongoing claim that their video service is not a "cable service"; and therefore we expect that they are seeking to obtain a local franchise with Wisconsin communities.

Enclosed, please find a copy of a filing the National Cable Television Association ("NCTA") submitted to the FCC regarding AT&T's claim that its video offering is not a "cable service". I am also providing another copy of the Memorandum prepared by Paul, Weiss, Rifkind, Wharton & Garrison LLP, that outlines why AT&T's argument is baseless as well as other articles that speak to this issue.

As a local franchise authority you might remind AT&T that all of Time Warner Cable's franchise agreements are **non-exclusive**. AT&T has always had the opportunity to offer cable television services to your community. All of the communities we serve have the ability to award additional franchises as we have a **non-exclusive** contract.

Once again, Time Warner Cable supports a competitive marketplace. However, in order to have true competition, all like services must be able to operate within a level playing field. I will continue to keep you updated on all issues. If you would like to discuss this letter or anything relating to Time Warner Cable, please do not hesitate to call me at 414-277-4193.

Sincerely,

Celeste Flynn,
Director of Public Affairs

cable

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July 31, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-36 (*IP-Enabled Services*); MB Docket No. 05-311 (*Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*)

Dear Ms. Dortch:

I am writing on behalf of the National Cable & Telecommunications Association ("NCTA") in response to a series of *ex parte* filings AT&T has submitted to the Commission in which it persists in claiming that its video offering – "U-Verse" – is not a "cable service" provided over a "cable system" and thus is not subject to Title VI of the Communications Act (the "Act").[1] In case there were any doubts that AT&T's video offering is a "cable service" as a matter of law, and that it is virtually identical to the services provided by incumbent operators, as a matter of fact, recent events have put those doubts to rest.

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[1] *See* Letter from James C. Smith, SBC, to Marlene H. Dortch, WC Docket No. 04-36, September 14, 2005; Letter from James C. Smith, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 04-36, January 12, 2006. Notably, while claiming it is not subject to Title VI, in the same filing, AT&T oftentimes asks for relief from Title VI requirements. *See, e.g.*, Letter from Thomas F. Hughes, AT&T, to Marlene H. Dortch, FCC, CS Docket No. 98-120. June 9, 2006 at 1 ("While AT&T's IPTV service offering is not a cable service as defined in the Act...."); Letter from Jim Lamoureux, AT&T, to Marlene H. Dortch, FCC, EB Docket No. 04-296, June 5, 2006 at Attachment at 1 ("Notwithstanding AT&T's position that we are neither offering a cable service nor deploying a cable system AT&T will provide EAS alerts to its customers."); Letter from James Lamoureux, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 04-36 and MB Docket No. 05-311, May 24, 2006 at 2 ("AT&T believes that its own deployment of video services using new, Internet-based technologies does not trigger local cable franchising requirements because AT&T will not be a 'cable operator' offering 'cable service' over 'cable systems' within the meaning of the Communications Act."); Letter from James Lamoureux, AT&T, to Marlene H. Dortch, FCC, MB Docket No. 05-311, May 26, 2006 at 1 (reporting on FCC meeting in which "AT&T reiterated its position that its IP-video service is not a cable service subject to Title VI of the Act."); Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, WC Docket 04-36 and MB Docket No. 05-311, February 16, 2006 (transmitting letter dated February 10, 2006 from Edward E. Whitacre, Jr., AT&T, to FCC Chairman Kevin Martin noting that AT&T "face[s] arguments by the cable industry that IPTV service is a cable service" requiring franchising and urging the FCC to "take action now to ensure that the franchise rules do not stand in the way of new video entrants....").

In a recent FCC filing, AT&T submitted a copy of a decision of the Connecticut DPUC in which that state agency concluded by a 3-2 vote that AT&T's video offering was not a "cable service" within the meaning of the Act's definitions. The Connecticut decision is the subject of appeals in state and federal courts by the Connecticut Office of Consumer Counsel, "the top agency representing consumers in the state of Connecticut,"[2] and a number of cable parties. In any event, the Connecticut decision was based on the same arguments that AT&T has made to the FCC in *ex parte* filings and is clearly erroneous. Not surprisingly, AT&T urged the FCC to reach a similar result.[3]

AT&T's arguments – which purport to be based on both law and policy grounds – have been rebutted by NCTA on a number of occasions.[4] We will not repeat the entirety of the legal analysis included in earlier filings, but briefly address the crux of the AT&T claims. AT&T argues that: (1) as a matter of law, its video service does not meet the definition of a "cable service" under the Act since it is an IP-based, two-way service;[5] and (2) as a matter of policy, its offering should not be subject to Title VI since it differs fundamentally from the offerings of existing cable operators. AT&T often conflates these two arguments, particularly relying on "*policy*" arguments (*i.e.*, its video offering will offer "new" and "innovative" services to consumers so regulation should be minimal) in attempts to rebut the legal argument that its service is a "cable service" under the definitions in the Act.[6] Regardless of how presented, both arguments have no merit.

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[2] *See AT&T Conn Franchise Fight Heads to Court*, Multichannel Newswire, July 20, 2006, *available at* http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6355023. (The Office of Consumer Counsel joined cable parties asking the "court to declare that the [AT&T offering] meets the federal definition of a cable service....").

[3] Letter from Jim Lamoureau, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 04-36, June 7, 2006.

[4] *See* Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, WC Docket No. 04-36, September 1, 2005, attaching Legal Memorandum on the "Applicability of Title VI to Telco Provision of Video over IP"("NCTA Legal Memorandum"); Letter from Neal M. Goldberg, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 04-36, November 1, 2005 (transmitting "Response of the National Cable & Telecommunications Association" to SBC September 14, 2005 *ex parte* filing). *See also,* Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, at 20-23 (addressing similar claim made by Cincinnati Bell).

[5] In its early filings, AT&T also argued that its facilities did not constitute a "cable system" because they met the "interactive on-demand" exception to the definition of "cable system." SBC September 14, 2005 *ex parte* at 24-25. NCTA has demonstrated why that exception does not apply to the programming AT&T says its will carry – primarily because at least some of the programming will be "prescheduled" by the programming provider and therefore its facilities will not be used "solely to provide interactive on-demand services." *See* NCTA Legal Memorandum at 30-31; NCTA November 1, 2005 *ex parte* at 13-14. AT&T appears to have abandoned that argument both in the Connecticut DPUC proceeding and at the Commission.

[6] For example, when NCTA showed that AT&T's video offering was a "cable service" as a matter of law, AT&T's response was to argue that "the Commission has a well-established history of treating new services and entrants more leniently than their legacy counterparts in order to promote innovation and competition." Letter from James C. Smith, AT&T, to Marlene H. Dortch, WC Docket No. 04-36, January 12, 2006 at 6. AT&T's response totally misses the point. NCTA's primary argument was that the Act simply would not permit AT&T's video offering to be classified as anything other than a "cable service" provided over a "cable system" – regardless of whether some other classification might lead to better "policy" results. To be clear, NCTA does

AT&T's "Legal" Arguments. AT&T's "legal" argument that the current, congressionally-mandated Title VI statutory scheme does not apply to its video offering has received a uniformly negative response from Congress. For instance, at the April 6, 2006, hearing held by the House Telecommunications Subcommittee on video franchising, a number of Committee members from both sides of the aisle criticized AT&T's contention that its offering was not a cable service. Committee Chairman Barton's comment is illustrative: "[O]ur friends at AT&T have sent this silly letter [to Congressman Dingell] saying they're not a cable service, which they shouldn't have done.... *We explicitly say they're a cable service.*"[7]

These congressional reactions are well-founded given the substantive infirmities of AT&T's legal arguments. AT&T contends its video programming service delivered over the public rights-of-way is not a "cable service" under Federal law because it is IP-based and because it utilizes "switched" video transmission that delivers only the channel that the subscriber selects for viewing at any given time. Neither contention leads to the legal conclusion AT&T tries to reach.

AT&T argues that the Act "expressly premises the applicability of its 'cable service' provisions on specific technology-based criteria...."[8] That is simply not the case. As even a glance at the Act's definitions of "cable service"[9] and "cable system"[10] shows, they are technology neutral. The House Commerce Committee has taken exactly the same view. In its

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not seek to impose regulatory burdens on cable's competitors or potential competitors. Where unreasonable burdens are imposed on video providers – new entrants or existing providers – they should be eliminated or minimized. Like services should be treated alike. But that does not mean ignoring statutory requirements – such as Title VI – when they are clearly applicable. Redress for concerns about statutory obstacles to sound public policy results must come from Congress – and be applied to all similarly-situated providers – and not from the Commission which must enforce the Act's requirements until they are changed. NCTA has suggested a number of areas where Congress might make those changes. *See e.g.* Testimony of Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association on The Communications Opportunity, Promotion and Enhancement Act of 2006, Before the Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, March 30, 2006.

[7] *House Telecom Bill Passes 27-4, Following Lively Debate*, Comm. Daily, Apr. 6, 2006 at 4 (emphasis added; also quoting Chairman Barton as saying with respect to AT&T argument: "This is stupido.").

[8] AT&T January 12, 2006 *ex parte* at 8.

[9] "[T]he term 'cable service' means – (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6).

[10] "[T]he term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility systems." 47 U.S.C. § 522(7).

report accompanying HR 5252, the Committee concludes with respect to the cable definition in the Communications Act that:

> *The definitions in current law are already technology neutral*, and the mere fact that programming is delivered using Internet-Protocol technology does not mean that the programming is not "video programming" or "other programming," that it is not provided over a "cable system," that its provision is not the provision of "cable service," or that its provider is not a "cable operator," if the definitions of those terms are otherwise met.[11]

AT&T's argument that use of switched video transmission renders its offering something other than a cable service is likewise fatally flawed. Under the definition of "cable service," as long as the *video programming* is sent in only one direction, the fact that there is two-way interaction between the subscriber and the network to select and use the programming does not matter. To the contrary, subscriber interaction with the network to select and use the programming was explicitly contemplated by the definition of "cable service." Because AT&T transmits video programming one-way, from its network to subscribers,[12] it is a cable operator providing a cable service.

AT&T's use of switched video, no different from the coming switched digital video services operators are planning on offering,[13] is therefore irrelevant to the classification of its linear offerings as cable services.[14] The fact that it may also offer some on-demand video, just like other cable operators, likewise does not warrant different treatment. AT&T can point to no policy reason why Congress would have adopted a completely different regulatory regime premised solely on the fact that a consumer selects programming from a suite of signals at a set-

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[11] H.R. Rep. No. 109-470, pt. 1, at 25-26 (2006) (emphasis added) (also noting that "the bill adds additional clarifying language in an effort to minimize litigation and to address arguments that the mere use of Internet-Protocol technology for the transmission of programming somehow removes the programming, the service, the facilities, or the provider from the ambit of the definitions.").

[12] For instance, according to testimony submitted by AT&T in the same Connecticut DPUC proceeding it cites now in support of its claim to classification as an information service, AT&T said it will broadcast video programming one-way from a national headend to regional/local video serving offices, and subscribers will join existing streams of programming. The only difference between AT&T's transmission of programming and that of existing cable operators is that, due to capacity constraints, AT&T's programming is "stored" slightly further up the network (at the node) while other cable operators store much of their programming in the set-top box.

[13] *See Switched Digital Surges at SCTE Expo*, Multichannel News, June 26, 2006 at 40 ("It's not a matter of if or when – switched digital is the way cable has to go.")

[14] If anything, Congress's modification of the definition of cable service in 1996, adding "or use," expands the range of interactivity included within the definition of "cable service." *See* Telecommunications Act of 1996, Conference Report, H.R. Rep. 104-458, at 167, 169 ("Section 307(a) of the House amendment amends the definition of "cable service" in Section 602(6) of the Communications Act by adding 'or use' to the definition, *reflecting the evolution of video programming towards interactive services*. . . . The conference agreement . . . adopts the House provision amending the definition of cable service. *The conferees intend the amendment to reflect the evolution of cable to include interactive services* such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services" (emphasis added).

top box as opposed to a suite of signals at a headend. Both use rights-of-way, both offer comparable programming, and both have two-way capability.

Therefore, a plain reading of the Act – as well as its legislative history – belies AT&T's reliance on its technical method of program delivery as a basis for claiming different regulatory treatment. The relevant definitions provide no exclusions for any particular delivery technology. AT&T's decision to rely on its copper network for the last step in programming delivery, such that channel selection requires a signal to be sent "up" the network, does not merit any different regulatory treatment under the Act. Nor do AT&T's plans to bundle its video offering with Internet access or voice services render the video offering any less a cable service under the law. In sum, AT&T cannot define itself out of the existing Title VI regulatory framework. Any decision by the Commission that enables it to do so would be inconsistent with law and would seriously undermine the structure and purpose of Title VI of the Act.

AT&T's "Policy" Arguments. In the absence of a legal justification to eliminate Title VI requirements on its video offering, AT&T falls back on "policy" justifications – that it will be offering "new" and "innovative" services to consumers as alternatives to the video offerings of existing multichannel video providers.[15] AT&T has advanced similar "policy" justifications in arguing for changes in the video franchising process in the Commission proceeding examining those issues.[16] But, as shown below, even if "policy" justifications could trump statutory requirements – which they can't – the AT&T description of its services as "new and innovative" does not hold up to scrutiny.

Almost one year ago, AT&T (then SBC) described its proposed video service as follows: "SBC's IP-enabled video service is designed to place the subscriber at the command center of a sophisticated array of services and content that can be manipulated and individualized to meet the tastes and needs of each individual member of the subscriber's household."[17] Indeed, in congressional testimony, an SBC executive observed that its proposed service "is not plain-old-cable. It is a game-changing alternative to traditional cable service...."[18] And a recent AT&T *ex parte* claimed "IP-based video differs significantly from traditional cable in terms of both network architecture and end-user experience.... IP video services include features that permit the user to create an individualized, customized viewing experience."[19]

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[15] *See* note 6, *supra*.

[16] *See* Letter from Jim Lamoureux, AT&T, to Marlene H. Dortch, FCC, MB Docket No. 05-311, June 16, 2006 (transmitting a proposed "Federal Framework For Wireline Competitive Franchises" and noting (at pp. 2, 9) that its technology "will drive fundamental changes in the consumer video experience far beyond traditional 'cable service,'" including a "myriad [of] new and innovative video services").

[17] SBC September 14, 2005 *ex parte* at 17.

[18] Statement of James D. Ellis, Senior Executive Vice President and General Counsel, SBC Communications, Inc., Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, November 9, 2005, at 3.

[19] AT&T January 12, 2006 *ex parte* at 8-9.

AT&T objected to NCTA's description of these services as "hypothetical," saying "AT&T already has begun to deploy its video services and will continue to do so."[20] But a close look at what AT&T has deployed demonstrates that NCTA's characterization of AT&T's services was then – and still is today -- on point. Indeed, the only major difference between an AT&T subscriber's "end user experience" and that of a customer of any other multichannel video provider is that AT&T's customers cannot view any programming in high definition!

Let's review what AT&T is now offering.[21] After all this time – and having claimed for months that it was ready to deliver great benefits to consumers – AT&T now makes available, in a single market, three familiar packages of conventional cable programming, at three different prices (offered both with and without high-speed Internet), delivered via wires that traverse city rights-of-way. The services are:

- **U200**: "More than 100 channels" plus a 1.5 MB data connection for $69 per month ($59 without Internet).
- **U300**: "More than 150 channels" – including a movie package – and 1.5 MB for data for $89 per month ($79 without Internet).
- **U400**: "More than 175 channels" – including a movie package – and a 3 MB data service for $114 per month ($94 without Internet).

These quoted prices include three bundled set-top boxes per home, one with digital video recorder ("DVR") capability, as well as an electronic program guide ("EPG"), 18 digital music channels and access to a video-on-demand ("VOD") library. Prices reflect a 12-month promotion for its Internet service, after which standard rates apply. Prices exclude taxes, city video cost-recovery fees, and "additional fees." As noted, none of the services includes high-definition channels. AT&T claims, however, that "[c]hannel changes . . . are so fast they seem instant."[22]

In a note to investors, Jeffrey Halpern, Vice President and Senior Analyst for U.S. telecommunications services at Sanford C. Bernstein & Co., said that "the most noteworthy aspect of the launch is U-Verse TV's relatively high prices."[23] He also observed that "AT&T's U-Verse pricing is virtually identical to [that of] San Antonio's incumbent MSO, Time Warner Cable,"[24] and that "[i]t remains a question whether or not AT&T will be able to lure subscribers away from cable with a product that has *few elements of differentiation, and is priced no better*

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[20] *Id.* at 1.

[21] *See* http://www.sbc.com/gen/u-verse?pid=7885&cdvn=custom.

[22] *See AT&T U-verse: Frequently Asked Questions, available at* http://www.sbc.com/Uverse/files/u-verse_FAQs.html#IPTV; *see also AT&T U-verse TV, available at* http://www.sbc.com/gen/u-verse?pid=7885&cdnv=custom#.

[23] *See Street Eyes AT&T U-Verse TV Launch*, Telco Media News, available at http://www.telecomedianews.com/view.cfm?ReleaseID=223.

[24] *Id.*

than the prevailing cable rates."[25] The *Wall Street Journal* says that "AT&T's pricing for San Antonio is similar to that of its main cable competitor for the most part but *cable offers more general channels and more features such as high-definition television.*"[26]

AT&T has every right to choose the mix of services that it delivers to its potential customers. But in the public policy arena it cannot rely on unproven (and apparently inaccurate) claims that it will be delivering a "sophisticated array of services and content that can be manipulated and individualized" in order to seek exemption from the rules that apply to similarly situated video providers – even assuming the delivery of such services somehow would exempt AT&T from the statutory requirements that apply to all providers of cable services (which it would not).

* * * *

The Commission should reject AT&T's arguments that its video offering is not a "cable service" delivered over a "cable system." As we have demonstrated, AT&T's use of IP is irrelevant to the legal issue since the Act's definitions are technology neutral. The subscriber interactivity on which AT&T pins its argument was contemplated by Congress, both when it originally enacted the "cable service" definition and certainly when it modified that definition in 1996. Indeed, "subscriber interaction" was part and parcel of the definition from its first enactment in 1984, and has long been part of existing on-demand cable service. As a matter of policy, AT&T has not shown that it is offering any video services that are any different from the video offerings provided by other multichannel video programming distributors. But, even if it had, to the extent laws need to be changed to facilitate delivery of such services, Congress must change them, and any changes must be applicable to all providers of like services.

Respectfully submitted

/s/ Neal M. Goldberg

Neal M. Goldberg

cc: Daniel Gonzalez, Chief of Staff, Office of Chairman Martin
Heather Dixon, Legal Advisor, Office of Chairman Martin
Michelle Carey, Legal Advisor, Office of Chairman Martin
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Scott Deutchman, Legal Advisor, Office of Commissioner Copps
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[25] *See AT&T Begins Commercial Expansion of IPTV in San Antonio*, Screen Plays, *available at* http://www.screenplaysmag.com/news_exclusives/ATT-VoIP-SanAntonio-062706.html (emphasis added).

[26] *See AT&T Launches Its Cable Foray With TV Service*, Wall St. J., June 27, 2006, at D4, *available at* http://online.wsj.com/article/SB115136024461991212.html (emphasis added).

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April 14, 2006

MEMORANDUM

Project Lightspeed and Local Franchises

Under federal law, "a cable operator may not provide cable service without a franchise."[1] AT&T has argued, however, that, when it launches its Project Lightspeed, it will be neither a "cable operator" nor providing a "cable service." AT&T's arguments are baseless and in any event would not have the desired result.

1. AT&T's Arguments Are Baseless.

"Cable Service" — The Communications Act defines "cable service" as "(A) the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[2] According to AT&T, its service is not one-way but two-way. That is so, AT&T says, because its network sends subscribers only the programming that they request — unlike traditional cable systems, which send subscribers all available programming and rely on set-top boxes to select the programming the subscriber can watch.

But, even if Project Lightspeed works the way AT&T describes it, the "transmission to subscribers of . . . video programming" is still only "one-way": from AT&T's network to the subscriber. It may well be that there will be two-way communication — in that the subscriber returns impulses to call up particular programming. But those impulses are "subscriber interaction . . . required for the selection or use of . . . video programming." To fall outside the definition, there would have to be two-way transmissions of video (as in video telephony). Otherwise, the "interactive on-demand" exception, discussed below, would be superfluous.

"Cable System." — The Communications Act defines "cable operator" as a person operating a "cable system."[3] That term in turn is defined as "a facility . . . that is designed to provide cable service,"[4] but there is an exception for "a facility of a common carrier which is . . . used . . . solely to provide interactive on-demand services."[5] "[T]he term 'interactive on-demand services' means a service providing video programming to subscribers over switched networks on an on-demand, point-to-

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[1] 47 U.S.C. § 541(b)(1).

[2] *Id.* § 522(6) (emphasis added).

[3] *Id.* § 522(5).

[4] *Id.* § 522(7).

[5] *Id.* § 522(7)(C).

point basis, but does not include services providing video programming prescheduled by the programming provider."[6] According to AT&T, its programming will be "interactive on-demand" because it will be visible only to subscribers who specifically request it.

But, as AT&T has described it, it plans to provide a video service that, to the consumer, is indistinguishable from traditional cable service. The only difference is that the subscriber's remote requests programming from the head-end instead of from the set-top box. That is not enough: "interactive on-demand services . . . does not include services providing video programming prescheduled by the programming provider." A service that a subscriber is able to watch only at the time selected by the video-programming service is "prescheduled by the programming provider."

2. AT&T's Arguments Would Not Yield the Desired Result.

AT&T's arguments in any event cannot free it from the requirement that it obtain a franchise. *First*, in 1996, Congress replaced a prohibition on video service by telephone companies with a requirement that telephone companies providing video programming abide by all requirements imposed on cable operators: "t[o] the extent that a common carrier is providing video programming to its subscribers in any manner . . . , such carrier shall be subject to the requirements of [Title VI of the Communications Act]."[7] AT&T is a "common carrier," and Title VI includes the requirement to obtain a cable franchise.

Second, even if AT&T's arguments were successful, that would mean only that there is no franchise requirement under federal law. If state law makes it unlawful to provide video service without a franchise, a provider must still abide by the state law requirement.[8] Because applicable law provides that firms wishing to provide video service in this State must obtain a cable franchise,[9] it does not matter whether there is a federal requirement.

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[6] *Id.* § 522(12).

[7] *Id.* § 571(a)(3)(A).

[8] *See City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999); *Pacific Bell Tel. Co. v. City of Walnut Creek*, No. C-05-4723 MMC, at 10 (N.D. Cal. Apr. 13, 2006).

[9] *See* Wis. Stat. § 66.0419(3)(b) ("A municipality may . . . [g]rant or revoke one or more franchises authorizing the construction and operation of a cable television system and govern the operation of any franchise granted.").

Warning:

You may have been exposed to misleading ads about CABLE TV competition.

If you have seen, heard or read the ads sponsored by the "TV4US Coalition" then in fact you have been exposed to a slick ad campaign funded by big telephone companies.

Former Bell companies are spending millions to convince people there is no competition to cable TV and that state and local governments must take action so that there can be competition for video services.

Here's what you should know about this issue:

- "TV 4 Us" has been exposed as a front group for telephone giant AT&T.[1]
- Consumers have a real choice TODAY of video service providers. In addition to cable providers, the vast majority of Wisconsin homes can choose between at least two satellite providers. In fact, according to the FCC, satellite providers serve more than 27 percent of people who pay for TV service.[2]
- The market for multichannel video service is *more* competitive than the voice telephone market of which the Bells control 85 percent.[3]
- No laws need to change for AT&T and others to get into the cable business. ***Cable television franchises with municipalities are not exclusive.*** Any company can negotiate a similar franchise with Wisconsin municipalities.
- AT&T is funding a massive ad campaign touting the benefits of choice on cable prices while CEO Ed Whitacre is telling Wall Street AT&T has no intention of engaging in a price war with cable.[4]
- What AT&T and friends really want is for the state government to create a new law which gives them a sweetheart deal – one state issued franchise to serve where and how they please – while preventing cable operators from competing on a level playing field, just like they did in Texas and tried to do in several other states this year.

So when their lobbyists come to you asking for help in creating a sweetheart deal, tell them to go out and compete in the video market just like the cable companies do.

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[1] *Ads urge cable competition*, Milwaukee Journal Sentinel, May 29, 2006

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, FCC 06-11* ¶ 5, *Mar. 3, 2006.*

[3] Source: FCC, "Selected RBOC Telephone Data, as of 12/31/04.

[4] Stanford C. Bernstein & Co. Conference, 5/31/06 included the following question to Mr. Whitacre and his answer. Question: "[I]sn't a price war inevitable? And won't declining prices just continue to pressure your business case for Lightspeed over time? And then with the cable companies offering discounts, same question, how do you avoid a price war?" Whitacre Response: "...[N]o, I don't think there's going to be a price war. I think it's going to be a war of value and of services, and I don't think, we're not going to chase that down, or certainly don't have any plans to do that."