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OVS: A PLA TFORM WORTH INVESTING IN?

Kimberly Auerbach

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Introduction

On February 8, 1996 President Clinton signed the Telecommunications Act of 1996 ("1996 Act") into law.[1] Among its provisions, the 1996 Act deregulated the local and long-distance telephone markets, as well as the cable and broadcasting industries.[2] This article focuses on Section 653, which created Open Video Systems ("OVS"), a platform developed primarily for telephone companies ("telcos") to enter the video programming market.[3] This article examines whether the regulatory structure established for OVS by the Federal Communications Commission ("Commission") meets the goals set out in the 1996 Act, including flexible market entry, enhancing competition, streamlining regulation, increasing diversity of programming choices, encouraging investment in infrastructure and technology, and increasing consumer choice.[4]

The first section of this article looks at how the 1996 Act defines an OVS and explores comments from cable operators, telcos and municipalities. The second section analyzes the Commission's conclusions and discusses the advantages and disadvantages of an OVS. The third section examines the different ways a telco can enter the video programming market and considers whether an OVS is a viable video programming market.

I. What Will An OVS Look Like?

A. Congress' Vision and the 1996 Act

Congress' intent in creating an OVS was to promote competition in the video programming market. The 1996 Act specifically invites local exchange carriers ("LECs") to become OVS operators."[5] The Commission also may allow other interested parties to become OVS operators if so doing provides for the "public interest, convenience and necessity."[6] To encourage entry, the 1996 Act places fewer regulatory burdens on OVS operators than on cable operators.[7] For example, OVS operators will not have to provide leased access channels, pay franchise fees, or be subject to rate regulations.[8]

Despite these reduced burdens, OVS operators will still be subject to some regulation. Most importantly, if demand exists, OVS operators must relinquish programming control of up to two-thirds of their system to unaffiliated operators.[9] Additionally, although OVS operators do not have to pay local franchise authority fees, they will have to pay local government fees for the use of rights-of-way,[10] Further, an OVS must transmit public, educational and governmental ("PEG") programming and "must-carry" broadcast channels. Applicants must be certified by the Commission, which has 10 days to approve or deny a request to become an OVS operator, and the Commission has the authority to resolve disputes[11] and award damages which it must do within 180 days of receiving the complaint.[12]

B. The Commission Debates and Defines the 1996 Act's Guidelines

While the 1996 Act provides a general description of an OVS, it also directs the Commission to interpret, regulate, and solicit comment to determine the details.[13] On March 11, 1996, the Commission released a *Notice of Proposed Rulemaking ("NPRM")*[14] seeking comment on OVS regulation. After receiving comments from cable operators, telcos and government officials, the Commission adopted its *Second Report And Order* ("*Second Report*")[15] on May 31, 1996. In its report, the Commission sought to strike a balance between encouraging telcos and other parties to enter the OVS market, while protecting unaffiliated programmers and cable operators. On August 6, 1996, the Commission adopted its *Third Report* confirming many of the *Second Report's* conclusions.

This section of the article looks at, in particular: programming and rate discrimination; PEG and must-carry broadcast channels; joint marketing; non-LECs as OVS operators; and the certification process.

1. Discrimination Against Non-Affiliated Video Programming Providers

The 1996 Act prohibits an OVS operator from discriminating among video programming providers.[16] To prevent such discrimination, the 1996 Act provides that, if demand exists, OVS operators must allow unaffiliated programmers to occupy up

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[1] Edmund L. Andrews, *Communications Bill Signed, And Battles Begin Anew*, N.Y. TIMES, Feb. 9, 1996, at A1.
[2] *Id.*
[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
[4] *Id.*
[5] *Id.* at Sec. 653 (a)(1).
[6] *Id.*
[7] *Id.*
[8] *Id.* at Sec. 653 (c)(1)(A), (B), (C).
[9] *Id.* at Sec. 653 (b)(1)(B).
[10] *Id.* at Sec. 653(c)(2)(B).
[11] *Id.* at Sec. 653 (a)(2).
[12] *Id.*
[13] *Id.* at Sec. 653 (b)(1).
[14] *Report and Order* and *Notice of Proposed Rulemaking* in CS Docket No. 96-46, Mar. 11, 1996.
[15] Open Video Systems, 47 C.F.R. Sec. 76.1000, May 31, 1996 ("*Second Report*").
[16] 1996 Act, *supra* note 3, at Sec. 653(b)(1)(A).

to two-thirds of the system's channel capacity.[17] Consequently, the Commission debated whether to give OVS operators broad or narrow editorial control over the system.

Cable operators proposed a regulatory scheme which would limit an OVS operator's control of the system. The National Cable Television Association ("NCTA") argued that without nondiscriminatory access to the system by unaffiliated programmers, an OVS is no different from an unfranchised, unregulated cable system.[18] The NCTA further stated that if an OVS operator exercises any editorial control over an unaffiliated programmer, these channels should become part of the OVS operator's one-third capacity.[19] According to the NCTA, editorial control includes assigning channel positions, determining who is allowed on the system, and deciding what prices to charge.[20]

To ensure that OVS remains truly "open," the NCTA proposed that the administration of the OVS be shared by all programmers on the system.[21] Without such oversight, the "openness" of OVS would be destroyed and OVS operators could "exert the same editorial control as traditional cable operators, but without a cable operator's regulatory burdens."[22]

Conversely, telcos petitioned the Commission for broad editorial control, noting that one of the Commission's goals was to impose less regulation in return for requiring operators to relinquish two-thirds control of the system. Additionally, it was argued, OVS operators would have a distinct disadvantage entering a market where, most likely, there is an entrenched, incumbent cable operator.

Consequently, LECs wanted broad editorial control over the OVS platform. US West told the Commission that only programming that is selected by an OVS operator or an affiliate should be included in the one-third capacity.[23] NYNEX Corporation ("NYNEX") in its comments to the Commission echoed this view:

> While Section 653(b)(1)(A) prohibits OVS operators from 'discriminating among video programming providers,' that provision must not be construed to impair the OVS operator's ability to make reasonable business decisions concerning the operation of its open video system, even if some of those decisions may have a disparate impact on some program providers. As the Commission has noted, Section 653(b)(1)(A) is designed to assure that unaffiliated video programmers have "fair access to the open video system," and was not intended to constrain the business judgement of the OVS operator.[24]

Following this reasoning, as long as decisions are based on "bona fide business considerations" and not intended to discriminate, an OVS operator should be given broad flexibility.[25]

Another area where the Commission had to decide whether to allow broad or narrow control concerned pricing. The 1996 Act mandates only that rates, terms and conditions of carriage must be "just and reasonable." Telcos wanted flexibility in defining these terms. Conversely, cable operators wanted guidance from the Commission as to rate regulation and cost allocation. Video program providers expressed concern that without regulation by the Commission, OVS operators will charge excessively high rates to dissuade unaffiliated programmers from seeking capacity.[26] The fewer unaffiliated programmers, the more capacity available for the operator.[27]

Another concern was that LECs will fund their OVS using funds from common carrier services. The NCTA and several public interest groups requested that the Commission ensure that LECs fund OVS through a subsidiary separate from the entity that offers telephone service.[28] Otherwise, they argued, LECs "will have an enormous incentive to channel [telephone] revenues into the provision of video programming, since so doing shifts the costs of entry into the unregulated video programming market onto consumers of telephone service."[29]

LECs, on the other hand, warned against imposing overly regulatory burdens, which they argued would destroy the attractiveness of OVS and revert back to the video dialtone ("VDT") era.[30]

> Congress manifestly did not intend that OVS operators should be passive providers of video distribution capacity. Yet, requiring OVS operators to employ a separate subsidiary, limiting their ability to allocate channels and make decisions concerning the sharing of capacity, obligating them to publish rates and to charge the same rates to all participants, prohibiting them from joint marketing of telecommunications and OVS services, and the other constraints suggested by the Cable Cos would render the OVS operator just such a passive carrier.[31]

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[17] *Id. at* Sec. 653(b)(1)(B).

[18] National Cable Television Association Reply Comments on Open Video Systems in CS Docket No. 96-46, Apr. 11, 1996.

[19] *Id.*at 6-7.

[20] American Cable Entertainment, Bresnan Communications Colk Ltd., Greater Media, Inc., TeleScripps Cable Co. d/b/a North DeKalb Cable; Cable Telecommunications Association of Georgia, Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, New Jersey Cable Telecommunications Association, Ohio Cable Telecommunications Association, South Carolina Cable Television Association, Tennessee Cable Television Association, Texas Cable & Telecommunications Association, Wisconsin Cable Communications Association, Reply Comments on Open Video Systems in CS Docket No. 96-46, April. 11, 1996, at 15.

[21] NCTA, *supra* note 18, at 29.

[22] American Cable, *supra* note 20, at 8.

[23] US West Comments on Open Video Systems in CS Docket No. 96-46, Apr. 1, 1996, at 16.

[24] NYNEX Comments on Open Video Systems in CS Docket No. 96-46, Apr. 1, 1996, at 9-10.

[25] *Id.* at 10.

[26] American Cable, *supra* note 20 at 19.

[27] *Id.*

[28] NCTA, *supra* note 18 at 24. The interest groups include Alliance for Community Media, Alliance for Communications Democracy, Consumer Federation of America, Consumer Project on Democracy, Center for Media Education, and People for the American Way, Public Interest Comments, Apr. 1, 1996.

[29] *Id.* at 3-4.

[30] NYNEX, *supra* note 24, at 5.

[31] *Id.* at 6.

Many LECs also wanted control over the allocation of channels, proposing a three to five year enrollment period to prevent constant alteration of programming. NYNEX wrote, "Once an open video system's initial configuration is established, the operator should not be required to alter that configuration or expand capacity to additional programmers until the beginning of the next enrollment period."[32] Under such a regulation, if, at the beginning of an enrollment period there were not enough programmers to operate two-thirds of the system's capacity, the OVS operator could exceed its one-third capacity limit. Cable operators strongly opposed this, seeking to limit operator control to one-third of the system.

After reviewing the comments, the Commission concluded that OVS operators may take an active role in structuring and managing the OVS platform.[33] Consequently, the Commission granted a three-year enrollment period so that services would not be interrupted in case demand surged,[34] ruling that OVS operators may occupy more than one-third of the system if demand does not exceed capacity.[35]

Operators may also assign channel positions, grant long-term contracts, and decide whether to create shared channels for duplicative programming.[36] The Commission rejected the idea of creating an administrative body made up of the system's video program providers to make decisions collectively and allowed an OVS operator to limit the selection of programming by an in-region cable operator.[37] The Commission reasoned that competing cable operators should be encouraged to develop and upgrade their own systems rather than occupy capacity on another's system.[38]

The Commission also chose not to impose a method to determine reasonable rates prior to entry on an OVS.[39] Whether a rate is reasonable will be determined after a complaint is filed.[40] Generally, the Commission will look to see if the OVS operator is charging unaffiliated programmers more than its affiliated programmers.[41] If this is not the case, most likely discrimination will not be found. The following factors will be considered when assessing rate discrimination: 1) costs related to the creative development and production of programming; 2) costs associated with packaging programs; 3) costs identified with building and maintaining the OVS; and 4) loss of subscribers to OVS operator's programming packages as a result of carrying competing programming.[42] OVS operators may also charge different carriage rates depending on the type of programming and the number of subscribers in an area.[43]

[32] *Id.* at 8.
[33] *Second Report*, *supra* note 15, at 29.
[34] *Id.* at 53-54.
[35] *Id.* at 50.
[36] *Id.* at 56.
[37] *Id.* at 36.
[38] *Id.*
[39] *Id.* at 66.
[40] *Id.*
[41] *Id.* at 63.
[42] *Id.* at 69.
[43] *Id.* at 70.

2. Imposing Must Carry and PEG Requirements Absent a Cable Franchise Authority

The 1996 Act mandates that OVS operators are subject to must carry and PEG requirements but that these obligations may not be greater or lesser than those imposed on cable operators.[44] Often PEG access and must carry are conditional to a cable operator receiving a franchise agreement or renewal.[45] But OVS operators are not subject to a cable franchise authority, so the question arises who will impose and enforce these requirements?[46]

The National Association of Broadcasters ("NAB") requested that broadcasters receive the same carriage rights on an OVS as broadcasters have on cable systems.[47] NAB argued that broadcasters should have the right to grant consent to one programmer on an open video system and deny consent to others.[48] Ultimately, NAB stated that all subscribers should be able to receive must-carry signals regardless of the package subscribers choose to purchase akin to a basic tier cable package.[49]

Similarly, NYNEX argued that must carry, retransmission and PEG requirements should apply to OVS operators and should mirror a cable operator's compliance.[50] When there is a competing cable operator in an OVS's area both should devote the same capacity to PEG and must carry channels.[51] The OVS operator, however, not the unaffiliated programmer should be responsible for assuring that OVS subscribers have access to these channels.[52] Finally, NYNEX contended that must carry and PEG channels should not count against an operator's one-third channel capacity since the operator did not choose the programming.[53]

The NCTA, on the other hand, disagreed that OVS operators' one-third capacity should not be affected by must carry and PEG channels. Instead, the NCTA proposed that the number of must carry and PEG channels be subtracted from the total number of channels and the OVS operator's one-third derived from the remaining channels.[54] They stated that since the basis for the limited regulation of OVS is that unaffiliated programmers are given the opportunity to occupy twice the number of channels as the operator[55], such an outcome would not be reached if must carry and PEG channels only count against the unaffiliated programmers' channels.[56]

The Commission concluded that PEG and must carry

[44] 1996 Act, *supra* note 3, at Sec. 653 (c)(1)(B).
[45] *Id.*
[46] NPRM, *supra* note 14, at 46.
[47] National Association of Broadcasters, Comments of the National Association of Broadcasters on Open Video Systems in CS Docket No. 96-46, Apr. 1, 1996, at 12.
[48] *Id.* at 16.
[49] *Id.* The Cable Act of 1992 requires cable operators to retransmit broadcast signals with the consent of the broadcaster.
[50] NYNEX, *supra* note 24, at 16.
[51] *Id.* at 17.
[52] *Id.*
[53] *Id.* at 18.
[54] NCTA, *supra* note 18, at 4.
[55] *Id.* at 5.
[56] *Id.*

channels will be excluded from the OVS operator's one-third capacity since they are are not selected by the system operator.[57] On the other hand, the Commission did find that since the local franchising authority is in the best position to determine what is in the public's best interest, OVS operators should negotiate with the franchising authority to determine PEG obligations.[58] If the parties cannot negotiate, the OVS operator must satisfy the same PEG obligations as the local cable operator.[59] If there is no cable operator in the area then that number should be determined from past franchise agreements or from the nearest operating cable system.[60]

3. Should OVS Operators Be Permitted to Offer Bundled Packages?

The 1996 Act is silent on the matter of joint marketing and bundling. However, the Commission raised the possibility that OVS operators and cable operators may want to offer local and long distance telephone service, video programming and data transmissions in one package to subscribers.[61] Bundling, also known as "one stop shopping," occurs when an entity offers a discounted package of services to the consumer. Proponents of bundling or joint marketing argue that such packaging makes services cheaper and more convenient.[62] On the other hand, bundling may discourage customers from seeking service providers that do not bundle services, yet may be competitively priced.[63]

LECs wanted the market to determine the success of bundled services.[64] They argued that the Commission should distinguish bundling from the goal of encouraging telco's to become OVS operators.[65] The LECs proposed that as they and cable operators enter each other's markets, "they should have the flexibility to offer their services in the manner they conclude will best secure customers,"[66] maintaining the 1996 Act's goal to deregulate markets and enhance competition.[67]

Some cable operators requested restrictions placed on joint marketing and bundling while others wanted LECs to be prohibited from jointly marketing and bundling services. The NCTA did not oppose joint marketing of telecommunications services as long as telephone operators: 1) are prohibited from directly referring a customer to an OVS representative and 2) are required to inform the customer of all competing video programming services.[68] The NCTA reasoned that an incumbent LEC, which was also an OVS operator, would have an unfair advantage, particularly with customers new to an area.[69]

Other cable operators, however, wanted the Commission to prohibit LECs from joint packaging altogether. A joint filing by 12 cable operators argued that packaging of services will require the OVS operator to determine channel allocation, which the group strongly opposed.[70] These cable operators were concerned that LECs, in their capacity as OVS operators would use joint marketing to exercise editorial control over the entire OVS.

The Commission, contrary to the requests of cable operators, declined to restrict joint marketing for the most part. The Commission refuted the contention that bundling will lead to cross-subsidization but imposed two restrictions: 1) where an OVS operator is the incumbent LEC, it may not require that a subscriber purchase its video service in order to receive local exchange service and 2) while the OVS operator may offer subscribers a discount for purchasing the bundled package, the LEC must impute the unbundled tariff rate for the regulated service.[71]

4. Should Non-Local Exchange Carriers Become OVS Operators?

While the 1996 Act expressly invites LECs to become OVS operators, it granted the Commission discretion to determine whether other entities should be allowed to operate an OVS.[72] The criteria applied to non-LECs is whether such certification is in the public interest, convenience and necessity.[73]

The NCTA urged the Commission to permit non-LECs to become OVS operators, even if they already operate cable systems.[74] The National League of Cities and other municipal representatives ("municipalities"), on the other hand, argued that the 1996 Act limits cable operators to providing programming on an LEC's OVS platform.[75] The municipalities noted that the 1996 Act uses different language when referring to LECs and cable operators. LECs "may provide *cable service*...through an open video system," while "an operator of a cable system may provide *video programming* through an open video system ."[76] Therefore, the municipalities argued, cable operators may only be programmers on a LEC's OVS platform. The New York City Department of Information Technology and Telecommunications stated:

Contrary to the strained arguments advanced by some

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[57] Second Report, *supra* note 15, at 41.
[58] *Id.* at 73.
[59] *Id.* at 76.
[60] *Id.* at 81.
[61] NPRM, *supra* note 14, at 58.
[62] *Id.*
[63] *Id.*
[64] NYNEX, *supra* note 24, at 28.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] NCTA, *supra* note 18, at 23.
[69] *Id.*
[70] American Cable, *supra* note 20, at 12.
[71] *Second Report*, *supra* note 15, at 125.
[72] 1996 Act, *supra* note 3, at Section 653 (a)(1).
[73] *Id.*
[74] NCTA, *supra* note 18, at 25.
[75] Comments of the National League of Cities; The United States Conference of Mayors; The National Association of Counties; The National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; The City of Los Angeles, California; The City of Chillicothe, Ohio; The City of Dearborn, Michigan; The City of Dubuque, Iowa; The City of St. Louis, Missouri; The City of Santa Clara, California; and the City of Tallahassee, Florida, in CS Docket No. 96-46, Apr. 1, 1996, at 46-48.
[76] 1996 Act, *supra* note 3, at Sec. 653(a)(1).

commentators, the terms "cable service" and "video programming" cannot be construed as interchangeable. Allowing incumbent cable operators to become OVS operators within their franchised service areas will clearly neither enhance competition, maximize consumer choice, nor create an outlet for unaffiliated video programming providers. Under such a scenario, consumers would not have more choice, competition would be reduced, and fewer outlets would be available for unaffiliated videoprogramming providers.[77]

Conversely, the NCTA argued that the phrases are interchangeable. The NCTA further stated that the only reason the 1996 Act uses different wording is to avoid the confusion that could arise when using "cable service" to refer to cable operators offering video programming in an OVS context.[78] In addition, NCTA stated, the 1996 Act uses the wording "providing video programming" when referring to a LEC becoming an OVS operator, emphasizing that the difference in language was "merely a meaningless anomaly."[79]

The Commission concluded that it is in the public interest, convenience and necessity for non-LECs to operate open video systems outside their telephone service area[80] as well as for non-LECs to operate open video systems within its cable franchise area as long as there is "effective competition."[81] However, cable operators that are also LECs may not operate an OVS. The Commission reached its decision by determining that nothing in the 1996 Act or legislative history prohibits non-LECs from operating OVS and noted that its ruling is consistent with the 1996 Act's goal to promote competition.[82]

5. Should the Certification Process Be Demanding?

The Commission must certify within 10 days of receiving applications all requests by an entity to become an OVS operator.[83] Other than this broad mandate, the 1996 Act did not give the Commission additional guidelines to conduct the certification process. The Commission had to determine whether to require specific or broad criteria from applicants.

The telcos stated that the 10-day period in which the Commission has to act on an application implies that the process should not be complicated. They further proposed that OVS applicants should not have to obtain consents from broadcasters or satisfy other lengthy obligations before being certified.[84] NYNEX requested that the application only ask for basic information such as name, address, areas to be served, how programmers can gain access, a list of eligible broadcasters for carriage and a statement noting the operator will comply with the Commission's rules.[85] Unless an opposing party can make a prima facie case against the OVS applicant within the 10-day certification period, the application should be approved.[86]

Cable operators disagreed. Since the 10-day certification period is brief, commentators suggested that certain information indicating that an applicant complied with the Commission's rules be filed as a prerequisite to filing an application for certification. This information should include: 1) proof that cross-subsidization will not occur; 2) the operator's plans for distributing channels, including shared channels, non-discriminatorily; 3) the length of enrollment periods; 4) how must carry and PEG channels will be managed;[87] and 5) how rates, terms and conditions will be determined.[88]

Contrary to the cable operators' request, the Commission found that the certification process should not be lengthy and rejected the idea of a pre-certification period.[89] Therefore, OVS operators will not be required to present cost allocation break-downs or obtain the consent of local authorities for use of public rights-of-way.[90]

II. Did The Commission Create A Viable Video Programming Platform?

A. Why The Adopted Rules Favor The Telcos

The Commission granted OVS operators considerable regulatory flexibility to encourage entry. Many attribute OVS' regulatory flexibility to the outcome of VDT, an attempt by the Commission to get around the 1984 Cable Act's prohibition of telco entry into cable.[91] However the system's proposed regulatory structure precluded successful market entry. Consequently, the Commission and Congress crafted the framework of OVS to ensure that the platform was more attractive than VDT.

Although the Commission's *Third and Final Report* almost mirrors telco reply comments, the decision to remain broad and flexible was practical. OVS operators should be able to structure and manage their platform. PEG and must carry channels should not be included in the OVS operator's one-third capacity. These are not channels the OVS operator or its affiliates chose to carry but are established by law and through negotiations with local franchising authorities.

OVS operators should be allowed to occupy excess capacity if demand does not exceed capacity. Further, the three year

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[77] Open Video Systems, Apr. 1, 1996, at 5-6.
[78] NCTA, *supra* note 18, at 26-27.
[79] American Cable, *supra* note 20, at 23. See 1996 Act, *supra* note 3, at Sec. 651(a)(3), (4) and Sec. 653(b).
[80] *Second Report*, *supra* note 15, at 11, 12.
[81] *Id.* at 11.
[82] *Id.* at 14.
[83] 1996 Act, *supra* note 3, at Sec. 653(a)(1).
[84] NYNEX, *supra* note 24, at 26.
[85] *Id.* at 27.
[86] *Id.*
[87] NCTA, *supra* note 18, at 38.
[88] *Id.*
[89] Second Report, *supra* note 15, at 23-24.
[90] *Id.* at 22.
[91] Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181 (4th Cir. 1994), *rehearing denied* (Jan. 18, 1995), *cert. granted*, 115 S.Ct. 2608 (June 26, 1995, *remanded* (Feb. 27, 1996). The Commission sought to repeal Sec. 533(b) in 1987, 1988 and 1992. Although the Department of Justice concurred with the Commission, Congress would not repeal the statute until the 1996 Act.

enrollment period established by the Commission to monitor carriage demand was fair. Continuity is important and OVS operators should not have to alter their platform whenever demand increases.

Similarly, OVS operators should be allowed to charge different carriage rates for different types of programming. Arguably, this will make carriage more affordable for not-for-profit programmers as more commercially-oriented channels, such as pay-per-view and home shopping networks will subsidize costs.

In addition, the Commission's decision to allow OVS operators to bundle and joint market services will spur growth and promote competition for communications services accross the board. To allow entities to provide various services but force them to separately market and sell them would fail to realize the two of the 1996 Act's goals: to encourage competition and benefit consumers.

The Commission, however, thwarted its goal to promote competition when it approved such a limited certification process. Cable operators' request for a pre-certification process to supplement Congress's unrealistic 10-day certification was reasonable. While OVS may be different from the more highly regulated broadcast and cable industries, there remain compelling reasons for regulating OVS. With so little information required in the certification process, there is a greater possibility that entities will act irresponsibly when they become OVS operators.

The Commission should not be able to regulate rates, but it should insist on knowing how an OVS operator plans to charge affiliates and non-affiliates, not-for-profit and movie programmers. Similarly, upon its request for certification, OVS operators should present a plan to the Commission explaining how programmers can gain carriage. Denying unaffiliated programmers such basic information could lead to disputes. To make entrance on an OVS practical for unaffiliated programmers and to prevent excessive need of the dispute resolution process, more information should have been required of the prospective OVS operator at the certification stage.

B. The LECs Got What They Wanted, But Is It Enough?

Despite the promised deregulatory environment by the Commission, OVS may still not be a viable alternative video programming platform. Prior to the 1996 Act, LECs did not have the options to enter the video programming market that they have now. The recent deregulation of the markets, however, may make an OVS less appealing, especially because an operator may have to relinquish two-thirds of the platform.

The arguments for a telco to merge with a cable operator are persuasive. First, the wire is already laid. Second, telcos will be able to enter the video programming market much quicker and be assured a substantial customer base. Finally, by 1999, premium tier cable rates will be deregulated -- this may occur even sooner if the Commission finds that there is "effective competition" in an area. Consequently, telcos have more appealing options to explore before investing in an OVS.

Recent mergers bear this out. The NYNEX-Bell Atlantic;[92] Pacific Telesis-SBC;[93] and US West Media Group and Continental Cablevision[94] mergers indicate that the Baby Bells are more interested in joining forces with well-established entities rather than experimenting with the unknown.

In its decision to merge with a cable operator, US West announced that it was most profitable to team up with an incumbent cable operator and improve existing wires rather than lay its own wires or create a separate platform, such as an OVS.[95] According to Charles Lillis of US West and a principal architect of the merger, cable companies have two things critical to a Baby Bell: existing hybrid fiber-coaxial systems and knowledge of the cable and entertainment industries.[96]

Many smaller deals have also occurred, none of which indicate any movement for a Baby Bell or LEC to become an OVS operator. In 1994, US West, which has 16 million cable customers in the U.S., spent $1.2 billion to acquire Wometco and Georgia Cable TV, today known as Media One. The group, located in Atlanta, has 500,000 subscribers.[97] Ameritech is working to construct its own cable network using fiber-optic lines, securing ten cable TV franchise agreements in Michigan and 13 additional cable franchise agreements throughout the Midwest.[98]

Other telco executives believe that the future is wireless. Air Touch Communications, which is part of a four-company alliance that includes Bell Atlantic, NYNEX, and US West, paid $1.1 billion for personal communications service ("PCS") licenses.[99] Bell Atlantic Video Services has begun to test a digital wireless cable network in Virginia[100] and BellSouth has bought a wireless cable channel package in Georgia[101] and New Orleans for $12 million.[102]

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[92] Steve McClellan, *Merged to Bell Atlantic to Target Long Distance,* BROADCASTING & CABLE, Apr. 29, 1996, at p. 92.

[93] *SBC Communications Inc. Will Merge With Pacific Telesis,* THE ECONOMIST, Apr. 6, 1996, at p. 5.

[94] Rich Brown, *US West Buys Continental,* BROADCATING & CABLE, Mar. 4, 1996, at p. 12.

[95] Michael Burgi, *The Telco Express: US West Pulls In,* ADWEEK, Apr. 29, 1996, at S16.

[96] *Id.*

[97] *Id.*

[98] Joe Estrella, *Ameritech Gets 17th Franchise,* MULTICHANNEL NEWS, May 27, 1996.

[99] Mark Landler, *An Aerial Assault on the Wired Nation,* N.Y. TIMES, Feb. 26, 1996, at D1.

[100] Joe Estrella, *Bell Atlantic Starts Testing Digital Wireless Cable in VA.,* MULTICHANNEL NEWS, May 27, 1996, at p. 33.

[101] Kent Gibbons, *BellSouth Starts Knocking on Doors,* MULTICHANNEL NEWS, June 3, 1996.

[102] Kent Gibbons, *BellSouth Eyes 'Bid Easy' For Digital MMDS Entry,* MULTICHANNEL NEWS, June 3, 1996, at p. 1.

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EDITOR'S NOTE

The Telecommunications Act of 1996 (the "1996 Act") promised to create competition in telecommunications to a degree heretofore unrealized. Immediately after the 1996 Act was signed, trade publications and the popular press were filled with predictions of a new telecommunications landscape where innovative competitors challenged entrenched monopolies -- with consumers to benefit. One year later, however, these predictions have yet to be fully realized.

A superficial analysis might conclude that the 1996 Act failed to create competition in telecommunications. However, a more careful analysis would reveal that such a massive overhaul of an industry as significant in size and scope as telecommunications would not develop without thoughtful implementation of the 1996 Act's provisions as well as additional legislation.

The three articles in this issue explore the legislative and administrative efforts required to implement not only the 1996 Act's provisions, but the 1996 Act's intent -- to open up the telecommunications market to meaningful competition. Debate is certain to continue over how such competition can best be promoted -- we at *Media Law & Policy* hope this issue will help fuel the debate.

ARTICLE SUBMISSIONS

Media Law & Policy accepts articles from professionals and academics in the field. Articles from law school students are also welcome. Submissions should be approximately 5-20 double spaced pages in length and should be submitted in printed form and on an IBM compatible Microsoft Word or WordPerfect disk. Submissions will not be returned and are subject to editing.

Submissions should be sent to:

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