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## Federal Regulation of FIOS and Lightspeed: A Tale of Two Jurisdictional Dilemmas

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## Federal Regulation of FIOS and Lightspeed: A Tale of Two Jurisdictional Dilemmas

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## I. INTRODUCTION

Once upon a time in the 1950s, a new electronic medium graced the United States—cable television. It raised a recurring question in U.S. media and telecommunications policy: when a new medium impacts public service, other telecommunications industries, public safety, and the like, how, if at all, should the federal government regulate it? Although some issues are inherently local, most electronic communications raise national concerns as to economic or technological matters.<sup>1</sup> Unfortunately, neither Congress nor the Federal Communications Commission (“FCC”),<sup>2</sup> the government’s chosen regulatory agent, has a particularly outstanding track record in dealing with new media.

Both are faced with yet another impending issue, which has created more heat than light in the last few years: the slow but ongoing development of FIOS and Lightspeed (for convenience referred to as FIOS/Lightspeed in this piece) by Verizon and AT&T, respectively, the two largest telecommunications companies in the United States.<sup>3</sup> FIOS/Lightspeed seems locked into a regulatory regime very similar to that of cable in its first three decades. The history of cable regulation provides lessons for the regulation of successor technologies such as FIOS/Lightspeed.

Although the technological and economic infrastructure of FIOS/Lightspeed is quite different from cable, this technology raises a number of the same regulatory issues that were hashed out by the FCC, Congress, and the courts fifty years ago. It thus may be useful to look at cable’s federal regulatory history in order to shed some light on prospective regulatory schemes for FIOS/Lightspeed. But first, it is important to understand the technologies of cable and FIOS/Lightspeed, which are quite different.

## II. TECHNOLOGY AND ECONOMICS OF CABLE AND FIOS/LIGHTSPEED

Although both cable and FIOS/Lightspeed have high bandwidth compared to terrestrial broadcast television—i.e., more than 100 full-motion video color channels, as well as interactive voice and data applications—their economic underpinnings are somewhat different. Cable generally charges by the tier of channels (e.g., “basic,” and “expanded basic”), while FIOS/Lightspeed uses per-program or per-use fees.

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1. For a delineation of issues with apparently inherent national characteristics, see discussion *infra* pp. 1044–45.
  2. The FCC, established by the Communications Act of 1934, is an independent federal agency that regulates radio, television, wire, satellite, and cable communications. See 47 U.S.C. § 151 (2006). See generally About the Federal Communication Commission, <http://www.fcc.gov/aboutus.html> (last visited Jan. 29, 2008).
  3. FIOS and Lightspeed are fiber optic services that represent the next generation of technology used to provide television, Internet, and telephone services to customers at increasingly high speeds with greater capacity. Each of these uses a slightly different version of fiber to the home (“FTTH”) to deliver two-way, high-speed broadband services to homes and businesses. AT&T executives claim that Lightspeed can be made fully compatible with FIOS. However, when pressed for an engineering explanation, their responses are somewhat vague. The consumer service from AT&T often is termed “U-verse.” AT&T describes Lightspeed as the infrastructure and U-verse as the content. Confidential Interview with AT&T executive, in N.Y., N.Y. (Oct. 16, 2008). The distinction, however, is sometimes less than clear.

Further, their technological capabilities differ significantly, with varying abilities to provide high-speed Internet and voice telephony. Nevertheless, both are multi-channel video, voice, and data providers. Thus, to an as yet unknown extent, they may compete directly with each other. They may also compete with direct broadcast satellites (“DBS”)—such as DirectTV and Echostar—that can deliver hundreds of high-quality digital signals to terrestrial users from platforms 22,300 miles in space; but which lack any interactive capability, thus making the provision of Internet or voice telephony services impossible.<sup>4</sup>

Both cable and fiber optics can deliver a hundred or more channels of programming with varying degrees of interactive or two-way capacity, but they operate in radically different ways. Cable uses essentially the same radio frequency transmission technology as broadcast television, except that it distributes signals through coaxial cable as well as through light-based fiber optic material, rather than over the air. The basic plant is the same, whether the system distributes analog or digital signals, or both. The main limitation on a cable system’s bandwidth is not so much the cable as the associated electronics, such as amplifiers and switchers. Precisely for this reason cable operators are incorporating increasing amounts of fiber optics into their systems.

A cable plant uses a “tree and branch” architecture in which signals move “downstream” from a central “headend” to subscribers through a series of cables. It thus resembles many traditional public utilities, such as water, gas, or electricity.<sup>5</sup> Although some cable systems are adding small switches, unlike traditional telephone companies they cannot connect subscribers directly with third parties for two-way or interactive services.<sup>6</sup> To the extent that cable operators provide telephony or Internet services, they generally do so through direct cable modem connections to Internet service providers (“ISPs”), rather than through their own systems. Therefore, cable systems are not interactive in the same sense as local or long distance telephone carriers.

FIOS/Lightspeed uses fiber optics for virtually all wiring, other than the “last mile” to a home or business.<sup>7</sup> Though both Verizon and AT&T are extraordinarily secretive about their technology, some information about their architecture is known.

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4. *But c.f.* Press Release, Hicks Holdings, LLC, Hicks Holdings Forms New Venture, DIRECTPATH, to Provide DirectTV, Broadband, Other Services to Multiple Dwelling Unit Market (May 2, 2006), <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=851360&highlight> (announcing that its new company “will help drive the efficient deployment of the full suite of DirectTV content *plus* such advanced service offerings as HDTV, digital video recording (DVR), [and] interactive services”). Despite asserting that it has a solution to provide two-way capacity, so far DirectTV has not adopted any detailed plan.

5. MICHAEL BOTEIN, REGULATION OF THE ELECTRONIC MASS MEDIA: LAW AND POLICY FOR RADIO, TELEVISION, CABLE AND THE NEW VIDEO TECHNOLOGIES 6 (3d ed. 1998).

6. *Id.*

7. See Robert Crandall, J. Gregory Sidak & Hal Singer, *Does Video Delivered over a Telephone Network Require a Cable Franchise*, 59 FED. COMM. L.J. 251, 253–55 (2007).

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FIOS runs fiber optics directly to the user while Lightspeed uses copper wire.<sup>8</sup> Thus, FIOS somewhat resembles cable's tree and branch architecture; downstream signals are ubiquitous to all subscribers within the same service tier. The similarity is relatively minor, however, because FIOS is a fully interactive system, unlike most cable systems. Lightspeed, on the other hand, seems to provide one signal at a time through a "video on demand" basis, presumably making it, unlike FIOS, an Internet Protocol-driven system.<sup>9</sup> This distinction, however, does not prevent FIOS subscribers from using the system to access the Internet to send and receive video, voice, or data.

FIOS and Lightspeed thus are significantly different not only from cable, but also from each other, if only because of Lightspeed's use of Internet Protocol to provide switching and addressing functions.<sup>10</sup> Neither service is technologically compatible with cable, and it is doubtful whether they could be compatible with each other. Lightspeed officials claim that on a very basic transmission level the two systems theoretically could interconnect because both are digital.<sup>11</sup> As is so common in this area, however, there is no publicly available engineering data to support this proposition because of the intense secrecy surrounding these technologies. Thus, the legal regime may be dealing with three technologically distinct and incompatible multi-channel approaches: cable, FIOS, and Lightspeed—and potentially a fourth approach, DBS.

DBS poses fewer jurisdictional issues than FIOS/Lightspeed since its use of over-the-air frequencies clearly brings it within the definition of broadcasting.<sup>12</sup> If DBS develops the capacity to interconnect users, it obviously would be more akin to other multi-channel providers in regulatory terms.

### III. FEDERAL CABLE REGULATION

#### *A. Rationales for Federal, State, and Local Regulation*

All media are not created equal, and some require no federal presence. For example, there naturally is an interest in ensuring that newspapers do not litter or employ drunk drivers when delivering their wares. But this certainly falls within the traditional public safety functions of local governments. The idea of federally licensing delivery trucks and drivers presumably would be objectionable to most observers.

Terrestrial broadcast stations also are subject to local governmental jurisdiction in a number of respects: for example, requiring permission to use public property or adhering to zoning requirements. They also require some type of federal coordination

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8. *Id.*

9. See AT&T U-Verse, Internet Protocol (IP) Video Distribution Advantages, [http://www.att.com/Uverse/files/IPVideoDistribution\\_2-22.pdf](http://www.att.com/Uverse/files/IPVideoDistribution_2-22.pdf) (last visited Feb. 12, 2008).

10. See *id.*

11. Confidential Interview with AT&T executive, in N.Y., N.Y. (Apr. 5, 2008).

12. See *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C. Cir. 1984).

since their frequencies cross local and often state boundaries, thus potentially causing interference that only a national entity can prevent.<sup>13</sup> Even Professor Coase's classic marketplace regulation theorem recognizes that some national body must allocate frequencies in order to prevent electrical interference.<sup>14</sup>

With cable—and potentially FIOS/Lightspeed—the jurisdictional situation is not so clear. Many aspects of their operations are solely within the local jurisdiction of cities, particularly those involving the use of public property for road or curb cuts to lay cable. At the same time, some of their operations raise substantial federal issues even beyond the electrical interference potentially caused by terrestrial broadcasters. These involve both technological and economic considerations, very often combined with a healthy dose of competition policy. A few examples include: (i) public safety considerations, such as emergency communications;<sup>15</sup> (ii) interesting and informative programming for a national audience; (iii) intermodal competition and its effect upon consumers, such as potential cable-FIOS/Lightspeed on a national basis;<sup>16</sup> (iv) policies to ensure that FIOS/Lightspeed carries local terrestrial broadcast signals in order to allow, or at least prolong, its economic viability; (v) requirements that media do not prevent other operators from buying attractive programming;<sup>17</sup> and (vi) equal treatment of content providers by the Internet, in terms of bandwidth, delivery, etc.—so-called “network neutrality.”<sup>18</sup>

At least some characteristics of cable seem to require national and hence federal regulation. This is not to suggest that, historically, the only appropriate authority to deal with federal interests in cable has been the FCC. Congress obviously could have created a completely new agency or given cable jurisdiction to an existing body, such as the Federal Trade Commission. Indeed, Congress initially gave power over

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13. *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387–88 (1969) (“When two people converse face to face, both should not speak at once if either is to be clearly understood. . . . But the . . . problem of interference is a massive reality.”).

14. Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 25 (1959).

15. The FCC recently went through a complicated and complex process in setting aside frequencies for public safety providers (e.g., police, fire, and medical) in newly free portions of the 700 Mhz band. In the Matter of Service Rules for 698–746, 747–762, and 777–792 MHz Bands, Third Further Notice of Rulemaking, 23 F.C.C.R. 14301 (explaining the process toward “achieving the goal of a nationwide interoperable broadband wireless network for public safety entities”); *see also* Fed. Comm’n Comm’n, Revised 700 MHz Plan for Commercial Services, <http://wireless.fcc.gov/auctions/data/bandplans/700MHzBandPlan.pdf>.

16. FIOS/Lightspeed also competes with a host of other print and electronic media. For example, it presumably takes away some number of magazine or newspaper readers—in a time of declining print media revenues—as well as audiences for terrestrial television, DBS, and cable. *See generally* Crandall, Sidak & Singer, *supra* note 7, at 261–62 (discussing multi-channel competitors).

17. This prohibition, preventing other operators from purchasing attractive programming, already applies to cable. 47 U.S.C. § 548(b) (2006).

18. *See* Robert Hahn & Scott Wallsten, *The Economics of Network Neutrality*, THE ECONOMISTS’ VOICE, Apr. 2006, at 1, <http://www.bepress.com/ev/vol3/iss6/art8/>; Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003) (explaining the conflict surrounding network neutrality as it applies to the “open access” debate).

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interstate telephone companies to the now-terminated Interstate Commerce Commission, even though its only experience was with railroad carriers. This had the obvious drawback of creating different agencies with power over similar media, which would have been increasingly aggravated with the later emergence of new related or competitive technologies.

### *B. Overview of Cable Regulation: “Reasonably Ancillary” Jurisdiction*

The FCC initially was slow to intervene in cable regulation. By the late 1950s, broadcasters were sufficiently concerned about the potential development of cable—even though it had less than one million subscribers, which FIOS and Lightspeed each now claim to have—and requested that the FCC regulate it. The FCC reaction was negative; in a 1959 case and rulemaking, the FCC concluded that cable did not represent a significant threat to “free” terrestrial broadcasting. In a decision that would come back to haunt it, the FCC held that it might not have jurisdiction over cable, since cable was neither a common carrier nor a broadcaster.<sup>19</sup> At that time, the Communications Act only covered carriers and broadcasters, thus leaving no independent jurisdictional basis for cable.<sup>20</sup>

The FCC’s reaction to the new technology was not unusual. When confronted with a new and unknown medium, its first strategy has often been just to ignore it—as it subsequently has done with the Internet and FIOS/Lightspeed. In some respects, its behavior resembles the Kubler-Ross model of dealing with grief, which begins with denial and ends in acceptance.<sup>21</sup>

By the beginning of the 1960s, the FCC was left with a medium which called for federal, state, and local regulation of its components—what became generally known as concurrent jurisdiction. This was not a new situation for the agency; it had been dealing with state public service commissions for years in separately regulating interstate and intrastate aspects of telephone companies. In situations involving both, the FCC and state authorities have convened “joint boards” under the Communications Act.

During the next few years, the FCC slowly began to regulate cable. The FCC limited a cable operator in carrying “distant” television signals from other areas by prohibiting a microwave common carrier from delivering the signals; it based its jurisdiction not on the cable system’s status, but on its licensing authority over the

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19. *Frontier Broad. Co.*, 24 F.C.C. 2d 251 (1958), *reconsideration denied*, 26 F.C.C. 2d 403 (1959). In holding that CATV systems are not under the jurisdiction of the Communications Act, the FCC implicitly held that CATV broadcasters were not responsible for the “economic plight” of local television stations. *Id.* at 253–56.

20. *See* Cable Act of 1984, 98 Stat. 2779 (1992) (current version at 47 U.S.C. § 609 (2006)) (beginning the creation of a comprehensive statutory framework for cable).

21. ELISABETH KUBLER-ROSS & DAVID KESSLER, *ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS* 7 (Simon & Schuster 2005). The stages are: denial, anger, bargaining, depression, and acceptance. *Id.* Some aspects of all five stages may be present in regulatory agencies’ treatment of new challenges.

common carrier.<sup>22</sup> Technically, the FCC was regulating the microwave carrier, rather than the cable operator. However, its rationale was potentially economically harmful for cable operators. As the FCC recognized, this was an indirect form of regulation. It later imposed a comprehensive set of signal regulations on all cable systems receiving signals via microwave.<sup>23</sup>

This left the FCC's glass only half full, however, since at that time only large cable systems used microwave carriers. As a result, it had jurisdiction over only part of the industry. In 1966 it nevertheless adopted a comprehensive set of rules applicable to all systems, setting the stage for ten years worth of litigation and three trips to the Supreme Court regarding its jurisdiction over cable.<sup>24</sup>

In 1968 the Court held that cable might be neither common carriage nor broadcasting, but that the FCC had jurisdiction over it for actions "reasonably ancillary to its authority over broadcasting."<sup>25</sup> *United States v. Southwestern Cable Co.* involved a California cable system's attempt to "import" an out-of-market broadcast television signal. The FCC had adopted a highly difficult set of full-blown evidentiary hearings at which a cable operator had to prove that a signal's importation would not harm local television stations. The petitioner, Southwestern, sought to avoid the hearing requirement. The Court accepted that cable was not subject to any express provision of the Communications Act but recognized that the FCC's authority under section 152(a) of the Act did not preclude it from issuing "such rules and regulations . . . not inconsistent with law."<sup>26</sup> This seems like purely housekeeping language to implement the substantive provisions as to carriers, broadcasters, and other electronic media. In highly ambiguous terms, the Court held:

It is enough to emphasize that the authority which we recognize today under Section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.<sup>27</sup>

The circumstances suggest that the Court did not intend to create plenary FCC jurisdiction over cable. Instead, it may only have been looking for a simple way out

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22. *See Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 951 (1963).

23. Rules *re* Microwave-Served CATV, 38 F.C.C. 683 (Apr. 22, 1965) (First Report and Order).

24. CATV, 2 F.C.C.2d 725 (Mar. 4, 1966) (Second Report and Order).

25. *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968). The point at issue was whether under the 1966 Second Report and Order cable systems were required to obtain prior FCC approval—after an evidentiary hearing—to bring in a "distant" broadcast signal from another television service market. *Id.* at 159 n.1.

26. *Id.* at 178 (citing 47 U.S.C. § 303(r)); *see also* 47 U.S.C. § 154(i) (2006) (defining the FCC's duties and power to include "mak[ing] such rules and regulations . . . not inconsistent with [the Communications Act], as may be necessary in the execution of its functions").

27. *Sw. Cable Co.*, 392 U.S. at 178.



of the Communications Act's inadequacies and Congress's failure to act for over a decade. Indeed, the Court very well may have seen *Southwestern* as a one-off case, and thought that it would not need to deal with the issue again—which soon proved to be an incorrect assumption. In any event, the operative language, as well as the issue involved, seems to suggest that the Court viewed this case as a turf battle between broadcasters and cable operators, with few other ramifications.

Within four years, the ancillary jurisdiction issue was back before the Court, forcing it to deal with *Southwestern's* ambiguous “other circumstances” and “other purposes” language. In *United States v. Midwest Video Corp.* (“*Midwest I*”), a cable operator challenged the FCC’s “program-origination” rule that required cable systems to operate, “to a significant extent,” as a local outlet through programming a channel with local news and public affairs.<sup>28</sup> The FCC had adopted rules requiring large cable systems to provide a channel of “public service” type programming to their local communities.<sup>29</sup> Unlike later rules, this rule gave cable operators complete content control. In a plurality decision, the Court ultimately upheld the rule under *Southwestern's* reasonably ancillary analysis;<sup>30</sup> Chief Justice Burger concurred in the result and noted that the rule “strain[ed] the outer limits” of the agency’s authority.<sup>31</sup>

The Court heard what might have been the last reasonably ancillary case in 1979 in *FCC v. Midwest Video Corporation* (“*Midwest II*”), a rematch between the *Midwest I* parties.<sup>32</sup> In this case, the operator challenged the FCC’s replacement of the program-origination rule with “access” requirements for public, education, and governmental (“PEG”) and leased channels.<sup>33</sup>

Whether *Midwest II* actually involved the reasonably ancillary doctrine is less than clear. Although a majority invalidated the access requirements, the Court seemed to acknowledge the existence of jurisdiction but held that such jurisdiction could not apply to the access channel rules. The majority claimed that the requirements essentially turned cable operators into common carriers by requiring them to carry third parties’ material without any content control.<sup>34</sup>

This may have been somewhat questionable for several reasons. First, section 153(10) of the Communications Act provides that “a person engaged in . . . broadcasting shall not . . . be deemed a common carrier.”<sup>35</sup> Twenty years before, *Carter Mountain Transmission Corp. v. FCC* established that cable operators were not broadcasters, and

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28. 406 U.S. 649, 657 (1972).

29. *Id.* at 653–55.

30. *Id.* at 669–70.

31. *Id.* at 676 (Burger, C.J., concurring).

32. 440 U.S. 689 (1979).

33. In the interest of full disclosure, it should be noted that the author represented the intervener, the American Civil Liberties Union, in these proceedings.

34. *Midwest II*, 440 U.S. at 701.

35. 47 U.S.C. § 153(10) (2006) (emphasis added).

thus they could not be subject to the same protections as broadcasters.<sup>36</sup> Second, the access channel rules required operators to make only a limited amount of bandwidth available, and only to entities with public service agendas—schools, local governments, clubs, churches, and the like. This regulatory regime was significantly different from traditional common carrier regulation, which required an operator to make all of its capacity available to anyone able to pay the established rate. Finally, since the Court emphasized that cable systems were neither broadcasters nor common carriers, the decision may have been based more on an *ultra vires* theory than on either traditional common carrier regulation or reasonably ancillary jurisdiction.

Even in the short run, the actual rationale may have been less than important. In the 1984 Cable Act, Congress mooted the whole debate by giving power over access channel requirements to state and local governments, thus making section 153(10) of the Communications Act, relating to the federal requirements, totally irrelevant.<sup>37</sup> Because FIOS/Lightspeed includes a broad-based constituency, a legislative resolution very well may be far more preferable than a joint agency-court result that would occur under cases like *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>38</sup>

Though Congress has resolved the issues involved in these cable regulation cases, a question remains as to whether the reasonably ancillary doctrine still has any juridical existence, and, if so, whether it might apply to other media. Surprisingly enough, there still may be some life in the old rationale. In a relatively recent decision, the Supreme Court was faced with deciding whether cable modems provided “telecommunications services,” thus making them subject to common carrier types of obligations.<sup>39</sup> In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, the Court upheld the FCC’s declaratory ruling that cable modems—through ISPs—offered “information” rather than “telecommunications” services.<sup>40</sup> This effectively immunized them from regulation as common carriers.

The opinion is somewhat opaque, with a running debate between Justice Thomas in the majority and Justice Scalia in dissent framing arguments based on examples of how to characterize the functions of pizza deliveries and dog leashes. One of the majority’s arguments is that the FCC may impose some carrier-type obligations on non-telecommunications services<sup>41</sup>—almost precisely the position rejected by the

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36. See *Carter Mountain*, 321 F.2d 359.

37. 47 U.S.C. § 556 (2006) (relating to coordination of federal, state, and local authority).

38. See 467 U.S. 837, 842–45 (1984). Perhaps the most influential case in modern U.S. administrative law, *Chevron* holds, in relevant part, that judicial review of administrative action is a two-step process: (1) whether Congress’s intent is clear in the relevant enabling statute, and (2) if not, whether the agency’s interpretation of the statute is reasonable. *Id.* at 842–44.

39. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

40. *Id.* at 977–78. The Court held that Ninth Circuit Court of Appeals erred in refusing to apply *Chevron*, *id.* at 984, and went further to note that the FCC’s construction passed both steps in the *Chevron* two-step analysis, *id.* at 997.

41. *Id.* at 996–97.

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Court in *Midwest II* in 1979.<sup>42</sup> Indeed, at one point Justice Thomas, in dicta, notes that “the Commission remains free to impose special regulatory duties on facilities-based ISPs under its *Title I ancillary jurisdiction*.”<sup>43</sup>

Whether Title I ancillary jurisdiction is still viable has yet to be seen. But fifty years of experience with it through cable regulation may provide some useful lessons for FIOS/Lightspeed regulation.

### IV. LESSONS FOR FIOS/LIGHTSPEED

At present, it is less than clear how many customers subscribe to either FIOS or Lightspeed. Each predicted subscription rates exceeding a million as of the end of 2008.<sup>44</sup> But some observers saw a much larger difference and predicted more than a million FIOS subscribers in 2008 and a few hundred thousand for Lightspeed.<sup>45</sup> Moreover, the capital expenditures appear to be extremely high—somewhere in the range of \$4000 per subscriber—making it less than clear whether these systems will ever be profitable.<sup>46</sup>

Regardless of accuracy, this range is very close to the number of cable subscribers in 1959, when broadcasters first asked the FCC to regulate cable television.<sup>47</sup> This raises the question as to whether, at this point, there is any need for federal regulation of FIOS/Lightspeed. Since the FCC took ten years to establish its jurisdiction over cable in *Southwestern*,<sup>48</sup> and Congress another fifteen to pass the first cable legislation,<sup>49</sup> a need to rush to federal intervention may be less than clear. In any event, at this point, there is no clear basis for federal jurisdiction.

As with the history of cable regulation, the first question under *Chevron* is whether there is any clear congressional mandate in the area.<sup>50</sup> When FIOS/Lightspeed first debuted in the middle of the decade, a number of observers—

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42. *Midwest II*, 440 U.S. at 709.

43. *Brand X*, 545 U.S. at 996 (emphasis added).

44. See Todd Spangler, *Charge of the Light Brigade*, MULTICHANNEL NEWS, July 21, 2008, at 12 [hereinafter Spangler, *Charge of the Light Brigade*]; Todd Spangler, *U-Verse TV: Half Million Served*, MULTICHANNEL NEWS, July 28, 2008, at 10.

45. See Joe Savage, Managing Director, Telecom ThinkTank Inc., Presentation at the GLGi Seminar: Lightspeed vs. FiOS 15 (Sept. 13, 2007), available at <http://www.glggroup.com/Council-Events/GLGi-Lightspeed-vs.-FiOS-2552118.html> (follow “Supporting Materials Download PowerPoint” hyperlink). Actual 2008 data is not yet available.

46. Saul Hansell, *A Smart Bet or a Big Mistake?*, N.Y. TIMES, Aug. 19, 2008, at C1; Spangler, *Charge of the Light Brigade*, *supra* note 44; see also Michael Botein, *The Demise of the Information Superhighway*, 2 MEDIA L. & POL’Y 85, 88 (2003) (providing data on DSL costs, which are comparable to FIOS).

47. Thomas R. Eisenmann, *Cable TV: From Community Antennas to Wired Cities*, HARV. BUS. SCH. WORKING KNOWLEDGE, July 10, 2000, <http://hbswk.hbs.edu/item/1591.html> (putting the number of cable subscribers at 150,000 in 1955).

48. *Sw. Cable Co.*, 392 U.S. 157; see also *supra* note 26 and accompanying text.

49. Cable Communications Act of 1984, § 601, 98 Stat. 730 (1984) (current version at 47 U.S.C. § 532 (2006)); see also *supra* note 20 and accompanying text.

50. See *supra* note 38.

particularly potential competitors—rushed to conclude that FIOS/Lightspeed was another form of cable. The argument was that the new services were just an alternative delivery mechanism for multi-channel programming, and thus could and should be regulated under the cable provisions in Title VI of the Communications Act.<sup>51</sup>

But this interpretation goes against the clear language of section 522(7) of the Communications Act, which defines “cable system” as a facility providing “cable service” and includes “video programming to multiple subscribers within a community.”<sup>52</sup> On its face, this encompasses at least some FIOS/Lightspeed functions since they do provide video programming to local subscribers. It does not give any weight, however, to the statute’s use of the phrase “cable service,” which is a defined term. Under section 522(6), 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.”<sup>53</sup> FIOS/Lightspeed service clearly includes one-way video programming and two-way interactive programming.<sup>54</sup> But it also offers a host of other two-way services, such as voice or video telephony, high-speed Internet access, and enhanced control of video reception. It thus seems to go far beyond the contemplation of the 1996 amendments to the Communications Act.<sup>55</sup> But this is less than surprising since, in 1996, the most advanced cable systems offered a large number of downstream channels and limited interaction for video-on-demand. Thus, there was no reason for the drafters to anticipate the advent of technologies like FIOS/Lightspeed.

After this brief initial enthusiasm for treating FIOS/Lightspeed as cable, it became clear that some other jurisdictional basis for its regulation would be necessary. Indeed, a number of bills quickly surfaced in Congress to give the FCC jurisdiction over FIOS/Lightspeed including a national franchising bill for both cable and FIOS/Lightspeed, which the House passed in 2006.<sup>56</sup>

There is, however, another obvious possible approach based on fifty years of cable regulatory history: reasonably ancillary jurisdiction. For reasons which still are somewhat unclear, there was no attempt to invoke this, even after *Brand X* seemed to

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51. 47 U.S.C. § 609 (2006); *see also supra* note 20 and accompanying text.

52. 47 U.S.C. § 522(7) (2006).

53. 47 U.S.C. § 522(6) (2006) (emphasis added).

54. *See* Crandall, Sidak & Singer, *supra* note 7, at 279–81 (explaining how Lightspeed utilizes both one-way cable transmission and two-way interactive cable capabilities).

55. *Id.* at 280; *see also* 47 U.S.C. § 571 (2006).

56. *See* Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 630 (2006) (as referred to Senate). This bill did not move out of the Senate and, in fact, the Senate Committee on Commerce, Science, and Transportation amended the bill and removed all language relating to national franchises. *See* Advanced Telecommunications and Opportunities Reform Act, H.R. 5252, 109th Cong. (2006).

acknowledge its continued existence in 2005.<sup>57</sup> Whether it would have been viable, however, is less than clear.

As will be remembered, the basic reasoning behind the *Southwestern* Court's invocation of reasonably ancillary jurisdiction was to prevent cable from adversely impacting "free" terrestrial broadcast television by attracting viewers and hence advertising dollars.<sup>58</sup> The conventional wisdom was that this would deprive many viewers of any television service since they would not be able to afford cable subscriptions—which then were about six dollars per month. The validity of this rationale seems somewhat questionable in hindsight since, in 2008, basic cable subscribership exceeded 64 million<sup>59</sup> and DBS subscribership exceeded 17 million,<sup>60</sup> thus leaving terrestrial broadcasting as a very minor player. Moreover, today's law and economics approach, as derived from the Coase theorem, presumably would frown upon government suppression of competition to preserve public service.<sup>61</sup> The FCC may have been right in predicting cable's popularity—referring to its "explosive growth" as early as 1966—but it was wrong in foreseeing how many viewers would be willing to pay for it.

The *Southwestern* Court was quite clear, however, that reasonably ancillary jurisdiction was a protectionist measure, pure and simple. It "emphasize[d]" that the FCC's jurisdiction covered only the "effective performance of the Commission's responsibilities for the *regulation of television broadcasting*."<sup>62</sup> And as indicated by the 1970s *Midwest Video* cases, the Court had little sympathy for the FCC's later efforts to achieve social policy goals unrelated to broadcast protectionism, such as program-origination and access channels.<sup>63</sup>

Under a close reading, reasonably ancillary jurisdiction seems to apply only to the protection of the terrestrial broadcasting industry—with the possible exception of

57. *See Brand X*, 545 U.S. at 975–76.

58. *Sw. Cable Co.*, 392 U.S. at 174–78.

59. National Cable & Telecommunications Association Statistics, <http://www.ncta.com/Statistic/Statistic/Statistics.aspx> (last visited Dec. 1, 2008). As of June 2008, with 64.7 million subscribers, cable was present in 57.1% of households. *Id.*

60. Press Release, DIRECTV Group, Inc., The DIRECTV Group Announces Second Quarter 2008 Results (Aug. 7, 2008), available at <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=326924> (placing subscribership at 17.2 million, a 6% increase from 2007); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-257, TELECOMMUNICATIONS (2005), available at <http://www.gao.gov/highlights/d05257high.pdf> (providing overall data on DBS growth rate). In January 2004, total DBS subscribership was 21.4 million, making DBS present in 17.4% of households. *Id.* at 6.

61. *See supra* note 14 and accompanying text.

62. *Sw. Cable Co.*, 392 U.S. at 178 (emphasis added).

63. *Midwest II*, 440 U.S. at 701 (invalidating access requirements for PEG and leased channels); *Midwest I*, 406 U.S. at 676 (Burger, C.J., concurring) (noting that the FCC's program-origination rule "strains the outer limits of even the open-ended and pervasive jurisdiction" granted to the Commission); *see also* discussion *supra* p. 1048.

the one-liner throw-away in *Brand X*.<sup>64</sup> But this is largely a moot subject today since Congress has not only codified the signal carriage rules at issue in *Southwestern*, but has also authorized cable carriage of both local and distant broadcast signals.<sup>65</sup>

These provisions naturally do not apply to FIOS/Lightspeed since they are not “cable systems.”<sup>66</sup> But there is a more important question: What would regulation of FIOS/Lightspeed be reasonably ancillary to? Even the broadcasting industry does not claim that FIOS/Lightspeed would have any adverse impact on it. And it is hard to imagine any competitive injury, since FIOS and particularly Lightspeed mainly sell premium programming, telephony, and Internet services—rather than advertiser-supported programming.

Ironically enough, the medium potentially most affected by FIOS/Lightspeed is cable. Both historically and legally, however, it seems a bit bizarre to invoke reasonably ancillary jurisdiction to protect the industry which the doctrine was originally created to limit. In terms of both precedent and practicality, it is unlikely that the reasonably ancillary doctrine is a viable jurisdictional basis for regulating FIOS/Lightspeed.

This seems to put any federal presence in this area on a typical *Chevron* basis.<sup>67</sup> Until Congress legislates to establish some form of federal jurisdiction, the FCC seems unlikely to have any rationale for taking any action—which may suit its preference for denial.

This does not, however, leave FIOS/Lightspeed free from all regulation. Just as with the proto-history of cable, state and local governments have been quick to step in for several reasons. First, they clearly have authority to regulate the use of public property, which naturally includes streets and other rights of way. At the same time that the Supreme Court was creating reasonably ancillary jurisdiction for the FCC, it upheld, in a memorandum decision, the power of states and cities to regulate the local activities of cable systems.<sup>68</sup> This gave local governments a measure of land use

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64. *Brand X*, 545 U.S. at 996 (“[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under Title I ancillary jurisdiction.”).

65. *See* 47 U.S.C. § 534 (2006).

66. *See* discussion *supra* p. 1051.

67. *See supra* notes 38–39 and accompanying text.

68. *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970) (per curiam). The Court later held that the Cable Act authorized the FCC to prevent state or local governments from imposing upon cable operators any technical requirements more stringent than the FCC’s. *City of New York v. FCC*, 486 U.S. 57 (1988). In addition, section 253 of the Communications Act states rather vaguely that the FCC may preempt any state or local law which would preempt the offering of a telecommunications service:

(a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service . . . (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) . . . the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

control over towers, pedestals, and the like. More important, however, it gave them the authority to require the establishment of local franchises. This in turn became a convenient basis for local governments to charge cable operators a fee for using public property—first the FCC<sup>69</sup> and later Congress<sup>70</sup> capped this fee at five percent of annual gross receipts. This cap was essentially the result of a negotiated compromise between the National Cable Telecommunications Association and the National League of Cities.<sup>71</sup>

After almost forty years of a healthy revenue flow from cable franchise fees, state and local governments naturally are not inclined to forego similar fees from FIOS or Lightspeed. And there is no reason to; these media need public rights-of-ways as much as cable in order to lay their wires. From the moment of their emergence, FIOS and Lightspeed were met with state and local demands for franchises—including, of course, at least five percent franchise fees.

The problem for the new media was not so much the payments—which were anticipated—as the delay in negotiating literally thousands of separate franchise agreements. This obviously would have been a major impediment to a quick rollout of the new technology. The solution to this logjam, in many cases, was ultimately either the creation of state-wide franchises for both cable operators and FIOS/Lightspeed or state requirements that local governments impose the same franchise terms on both industries—including franchise fees, access channels, and the like. At present, more than half a dozen states have adopted one of these approaches.<sup>72</sup>

## V. CONCLUSION

FIOS/Lightspeed seems to be locked into a regulatory regime very similar to the first three decades of cable regulation. As with cable regulation, Congress does not appear to be in a hurry to act. After all, while FIOS/Lightspeed may be the newest entry in the media and telecommunications field, it has comparatively little importance in terms of broad national concerns ranging from war to economics. However, Congress may soon be forced to act. While the reasonably ancillary doctrine created a limited presence for the federal government during cable's interregnum, it does not seem applicable to FIOS/Lightspeed in any respect.

Due in large part to the lack of federal intervention, states and local governments have been free to make their own rules—just as they did with cable from the 1950s to the 1980s. As with the cable industry fifty years ago, this naturally may be a bit dysfunctional by creating different standards from one locale to another. However,

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47 U.S.C. § 253 (2006). However, the Supreme Court largely ignored the statute in its only invocation to date. *See Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).

69. 47 C.F.R. § 76.31 (1984) (repealed by 50 Fed. Reg. 18637 (1985)).

70. 47 U.S.C. § 542(b) (2006).

71. Michael Botein & Fredrik Cederqvist, *The 1992 Cable Television Act*, in 13 *ENCYCLOPEDIA OF TELECOMMUNICATIONS* 411, 419 (Fritz E. Froehlich & Allen Kent eds., 1997).

72. Crandall, Sidak & Singer, *supra* note 7, at 256 n.21. States that have passed legislation include Virginia, Texas, California, Indiana, Kansas, New Jersey, North Carolina, and South Carolina. *Id.*

it may not be unfair to observe that cable survived this regulatory diaspora in good financial health, as should FIOS/Lightspeed—if their underlying technological and economic assumptions are correct.

Moreover, it may be preferable to leave the federal issues in the hands of Congress. On a very general level, there may be some democratic value in taking time to build a consensus among competing industry groups, government, and the public. Perhaps more important, these technologies are still new and untested. Little is actually known about how they will function in long-term deployments—virtually no hard data exists as to the real capital expenditures, penetration rates, content, and maintenance. Government intervention in this field has a less than impressive record, as seen by the corpses of regulatory regimes littering the history of cable. Thus, it may not be necessary for this new technology to be regulated. If and when Congress, state and local governments, and administrative agencies move forward in attempting to regulate this technology, however, they would do well to heed the three decades worth of lessons that can be learned from the process of cable regulation.