over video programming [would be limited] to a fixed percentage of the channels available; the telephone companies would be required to lease the balance of the channels on a common carrier basis to various video programmers.'' In short, the courts of appeals have held that a complete ban on editorial control over video programming in a telephone company's service area ''burden[s] substantially more speech than is necessary,'' especially since there appeared to be an ''obvious less-burdensome alternative[]''—allowing the telephone company to provide some video programming in their telephone service areas on a video dialtone system.

3. We now conclude, as we previously proposed in the *Fourth NPRM,* that we have the authority to grant waivers to telephone companies pursuant to Section 613(b)(4) allowing them to provide video programming directly to subscribers in their telephone service areas over video dialtone networks. Section 613(b)(4) provides that upon a showing of ''good cause'' the Commission may waive the cable-telco cross-ownership restriction where a waiver is ''justified by the particular circumstances * * *, taking into account the policy'' underlying the cross-ownership restriction.

4. Construing the waiver provision to authorize telephone companies to provide video programming over video dialtone networks avoids the constitutional infirmity identified by the Fourth and Ninth Circuits by making available the '' 'obvious less-burdensome alternative' '' referenced by those courts. Moreover, it is our duty to so construe the statute. The Supreme Court has recently reiterated in *United States* v. *X-Citement Video, Inc.,* 115 S. Ct. 464, 467 (1964), that ''a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.'' [1]

5. In light of the ongoing litigation concerning the constitutionality of Section 613(b), we have decided to adopt the construction of Section 613(b)(4) that we proposed in the *Fourth FNPRM* before answering the other questions presented in this rulemaking.

6. *Discussion.* In the *Fourth FNPRM,* we asked for comment on the terms and conditions under which local telephone companies should be permitted to provide video programming directly to subscribers in their local service areas. For instance, we asked whether we should permit them to do so over video dialtone systems. While we construe Section 613(b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions, the remaining issues raised in the *Fourth FNPRM* will be resolved in a further order in this proceeding.

7. Two statutory issues are presented in construing Section 613(b)(4): (1) whether ''good cause'' exists to waive the statutory restriction to permit a telephone company that wants to provide programming in its service area to do so over a video dialtone system, and (2) whether ''the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection,'' when a telephone company requests waiver of Section 613(b) to provide video programming over a video dialtone system.

8. As the D.C. Circuit recognized in its 1990 *NCTA* v. *FCC* decision, ''the policy [of Section 613(b)] is to promote competition.'' When the Commission adopted its cable-telco cross-ownership rules in 1970, it sought to prevent the telephone companies from using their monopoly position to preempt the market for cable service by excluding others from entry. Since 1970, however, the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households and Congress's interest in ensuring that the cable industry not be extinguished before it is established is no longer relevant. ''Good cause'' is a phrase that is commonly associated with changed circumstances. The relevant circumstances have changed greatly since the Commission adopted its cross-ownership rules in 1970 and Congress ''modeled [Section 613(b)] after the FCC['s] rules'' in 1984.

9. We also conclude that significant advances in technology have changed the circumstances relevant to determining whether telephone companies should be permitted to provide video programming directly to subscribers in their service areas. These developments have made it possible for a multitude of programmers to reach end user customers and have mitigated to a fair degree the competitive concerns that led the Commission and Congress to adopt the cross-ownership ban. These technological developments also support the conclusion that ''good cause'' exists to authorize telephone companies to provide video programming within their service areas where that will promote competition in the multichannel video programming market.

10. We also conclude that the rules we will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute ''particular circumstances * * *, taking into account the policy'' of Section 613(b). While we have not yet adopted definitive rules governing the conditions under which telephone companies may be permitted to act as video programmers over their video dialtone systems, the outline of two of those requirements is clear. First, video dialtone necessarily includes a common carriage element, and we have previously concluded that a telephone company may not allocate all or substantially all of its capacity to a single ''anchor programmer.'' Second, our current video dialtone rules contain provisions intended to ensure that telephone companies providing video programming directly to subscribers do not discriminate in favor of their affiliated programmers and do not subsidize video programming operations with rates collected from their provision of monopoly telephone services. These restrictions are intended to promote the underlying purpose of Section 613(b) by fostering fair competition in the multi-channel video programming market.[2]

11. Construing the waiver provision to authorize telephone companies to provide video programming pursuant to our video dialtone rules obviates the constitutional difficulties associated with Section 613(b). Specifically, the Fourth Circuit and Ninth Circuit have held that the cable-telco cross-ownership restriction ''burden[s] substantially more speech than is necessary'' to promote the government's interest in promoting a competitive multi-channel video programming market. Waiving Section 613(b), however, constitutes implementation of the ''obvious less burdensome alternative'' to the ban identified by the

[1] While the courts have identified video dialtone as a possible means by which telephone companies could provide programming in their service areas to remedy the constitutional infirmities of Section 613(b), and while we agree with the suggestion of these courts that waiving Section 613(b) as discussed above will cure these constitutional infirmities, we will address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order addressing the other issues raised in the *Fourth FNPRM.*

[2] It is possible that we will decide in the ongoing rulemaking proceeding that telephone companies ought to be permitted to provide traditional cable service, rather than participate as programmers on video dialtone systems, under ''particular circumstances'' that will promote competition in the multichannel video programming market.