

to safeguard against abuses in transactions between LECs and affiliated video program providers. Specifically, we seek comment on whether we should amend Section 32.27 to clarify that any video program provider that is considered, because of a LEC's five percent ownership interest, to be a LEC affiliate for purposes of applying video dialtone safeguards will also be considered an "affiliate" for purposes of the affiliate transactions rule.

#### 5. Structural Separation

25. In the Computer III proceeding, the Commission replaced its requirement that BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards. Those nonstructural safeguards were intended to protect against discrimination and cross-subsidization while avoiding the inefficiencies associated with structural separation. We seek comment on whether our approach to these questions should differ when BOCs provide video programming. Specifically, we seek comment as to whether there are aspects of the video programming business that warrant our treating BOC provision of video programming differently from the way we treat BOC provision of customer premises equipment (CPE) and enhanced services generally. We also seek comment on whether any structural separation requirement should apply to LECs other than the BOCs. Commenting parties should specifically identify what aspects warrant different treatment, and what form of separation would be appropriate. Parties should also offer information concerning the relative costs and benefits of structural separation.

#### 6. Pole Attachments

26. Section 63.57 of our rules requires LECs seeking to provide channel service to show in their Section 214 applications that the cable system for which they would be providing channel service had pole attachment rights or conduit space available "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator." In the Third Further Notice of Proposed Rulemaking, the Commission sought comment on whether a similar rule should apply to LECs providing video dialtone service. We now seek additional comment on that proposal in light of *C&P Tel. Co. v. U.S.* and *US West v. U.S.* Parties should address whether incentives to abuse control over pole and conduit space are increased if a LEC decides to offer video programming within its telephone

service area. In addition, as requested in the Third Further Notice of Proposed Rulemaking, advocates of such a rule should propose specific language, and should explain how the rule would prevent anticompetitive conduct.

#### 7. Legal and Constitutional Issues

##### a. Waiver of the Cross-Ownership Ban

27. Section 533(b)(4) of the Communications Act provides that, upon a "showing of good cause," the Commission may waive the 1984 Cable Act's cross-ownership ban. Under Section 533(b)(4), a waiver "shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." In *GTE California v. FCC*, the United States Court of Appeals for the Ninth Circuit raises the question whether the Commission may establish conditions under which it will waive the telco-cable cross-ownership ban in order to obviate potential constitutional difficulties. We tentatively conclude that such a reading of Section 533(b)(4) is consistent with the terms of the statute. "Good cause" is commonly interpreted to include changed circumstances, and the circumstances that led us to institute the cross-ownership rule in 1970 have changed dramatically. The cable industry is no longer a fledgling industry. Instead, as the Supreme Court recently recognized, "Congress found that over 60 percent of the households with television sets subscribe to cable \* \* \* and for those households cable has replaced over-the-air broadcast television as the primary provider of video programming."

28. We also tentatively conclude that the safeguards we will establish will constitute "particular circumstances \* \* \*, taking into account the policy" of Section 533(b), under which waivers are warranted. We do not intend to waive the telco-cable cross-ownership rule altogether, so that telephone companies may purchase cable companies that do not face competition and offer their own programming via a monopoly cable system. Rather, and in fulfillment of the policy underlying Section 533(b), we intend to promote competition in the multi-channel video programming market by establishing particular conditions under which telephone companies may establish video dialtone systems that will compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems.

29. The United States Court of Appeals for the District of Columbia Circuit recognized, in *NCTA v. FCC (1990)*, that "the policy of this subsection is to promote competition." However, in that decision the D.C. Circuit also appeared to give a narrow reading to the scope of the waiver provision. Specifically, the court of appeals remanded a decision in which the Commission had granted a waiver because the court concluded that the Commission had not shown that the participation of an affiliate of a telephone company in constructing transmission facilities was "essential to the success" of an experimental video programming project. But at that time no court had declared Section 533(b) unconstitutional, and the D.C. Circuit did not consider whether a broader reading of Section 533(b)(4) was appropriate to render the provision constitutional. The Supreme Court has recently reiterated that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." A reading of the waiver provision that authorizes telephone companies that comply with the safeguards we will establish to provide video programming should render Section 533(b) constitutional, because in those circumstances any burden on speech by telephone companies will be minimal. Hence, under *U.S. v. X-Citement Video*, a broad interpretation of Section 533(b)(4) seems warranted. We seek comment on these tentative conclusions.

##### b. Constitutionality of Proposed Safeguards

30. As the Court of Appeals for the Fourth Circuit stated in *C&P Tel. Co. v. U.S.*, in order for a content-neutral government regulation of speech, such as the cross-ownership ban, to be constitutional, that regulation must be "narrowly tailored to serve a significant governmental interest, and \* \* \* leave open ample alternative channels for communication of the information." With respect to all proposals set forth above for safeguards on LEC provision of video programming, we seek comment on whether such safeguards, whether individually, or in any combination, would be consistent with the First Amendment, the Fourth Circuit's decision in *C&P Tel. Co. v. U.S.*, and the Ninth Circuit's decision in *U.S. West v. U.S.*

#### Ex Parte Presentations

31. This Fourth Further Notice of Proposed Rulemaking is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are