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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Implementation of Section 22)
of the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Equal Employment Opportunities)

MM Docket No. 92-261 ✓

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. A 'CORPORATE OFFICER' IS A SENIOR EXECUTIVE, AS DEFINED BY THE COMPANY, WITH RESPONSIBILITY FOR THE OVERALL OPERATION OF THE COMPANY	4
II. VIDEO DIALTONE PROVIDERS, AND CUSTOMER-PROGRAMMERS USING MULTIPLE CHANNELS ON THESE SYSTEMS, SHOULD BE SUBJECT TO THE CABLE EEO RULES	7
III. THE COMMISSION SHOULD WORK WITH THE DEPARTMENT OF LABOR TO ELIMINATE UNNECESSARILY DUPLICATIVE EEO REQUIREMENTS	10
CONCLUSION	11

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THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

The Cable Communications Policy Act of 1984 ("1984 Cable Act") requires cable systems to provide equal opportunity in employment. The law directs entities involved in the management and operation of a cable system to establish "a positive continuing program of specific practices designed to ensure equal

1/ NCTA is the principal trade association of the cable television industry. Its members provide cable television service to more than 90 percent of the nation's more than 58 million cable television subscribers.

opportunity in every aspect of its employment policies and practices."^{2/} The Commission is directed to adopt rules to implement this program, which includes the continuing supervision of employment practices.

The 1984 Cable Act requires all employment units to define the responsibility of each level of management; to inform employees and employee organizations of the EEO program; to communicate its employment policies and needs to qualified applicants without regard to race, color, national origin, age or sex; to conduct a continuing program to exclude every form of discrimination from personnel policies; to conduct a continuing review of job structure and employment practices; and to adopt positive measures needed to ensure genuine equality of opportunity for employees to participate in all organizational units, occupations and levels of responsibility.

Since the 1984 Cable Act took effect, local cable systems and headquarter units with five or more full time employees have filed annual reports that describe their EEO practices. In addition, every five years cable systems file a Supplemental Investigation Sheet that provides additional information regarding recruitment efforts and job classifications. The Commission also examines any complaints against the system's practices and conducts on-site reviews.

2/ Cable Communications Policy Act, 47 U.S.C. Sec. 554(b) (1984).

The system is granted a certificate if, based upon these measures, it appears to be in compliance. Where the system is not in compliance, certification is denied and the Commission may impose sanctions. At the Commission's discretion, sanctions may include admonishment of the system, imposition of special reporting requirements and, in exceptional cases, forfeitures.

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") left the 1984 law's cable EEO provision largely intact, but made three noteworthy changes. First, broadcast stations are made subject to a review of their EEO practices at the mid-point of their five year license terms. Second, cable systems are required to report results for, and to comply with, EEO procedures for fifteen instead of the existing nine job categories. Finally, the definition of "cable operator" for EEO purposes is expanded to encompass not just cable systems, but also "multichannel video programming distributors."

Our specific comments make the following points. First, we generally endorse the proposed job category definitions, but believe that "corporate officer" should be defined as "senior executives" rather than "fiduciaries." Second, the Commission should explicitly hold that video dialtone systems, and customer-programmers employing multiple channels on these systems, are subject to the cable operator EEO rules. Finally, while the issue is not explicitly before the Commission in this proceeding, we nevertheless ask the Commission to consider entering into negotiations with the Department of Labor to reduce or eliminate duplicative EEO requirements that arise for cable systems located

on military installations, which are subject to the EEO requirements of both agencies.

I. A 'CORPORATE OFFICER' IS A SENIOR EXECUTIVE, AS DEFINED BY THE COMPANY, WITH RESPONSIBILITY FOR THE OVERALL OPERATION OF THE COMPANY

The 1992 Cable Act requires the Commission to establish six new job categories, expanding the number of categories for which separate hiring information is required from nine to fifteen. The new categories -- corporate officers, general manager, chief technician, comptroller, general sales manager and production manager -- are added to the nine existing categories. These nine categories are officials and managers, professionals, technicians, sales persons, office and clerical personnel, skilled craft persons, semiskilled operatives, unskilled laborers and service workers. By adding the new categories, Congress required more specific information and, as a result, more careful scrutiny, of cable industry EEO practices at the more senior levels. The legislation directs the Commission to define the new positions.

In the Notice of Proposed Rulemaking ("NPRM"), the Commission sets forth proposed definitions of the new job categories. One of these definitions, "corporate officer", is particularly troubling to the cable industry. The Commission proposes to define "corporate officer" as an "Employee with official authorization to represent the company in a fiduciary capacity." NCTA believes that, while encompassing persons

certainly targeted by the Act, this definition is overly broad and imprecise.

A fiduciary is commonly understood as one who acts for the corporation in a capacity of confidence or trust. In the cable industry, and in industry generally, different company personnel may act in a fiduciary capacity.^{3/} For example, in addition to a corporation's top executives, all in-house counsel, at whatever level of responsibility, are likely to act as fiduciaries. All persons with authority to sign checks for even minor amounts, to oversee accounting, to enter into agreements for goods and services, and to speak on behalf of the corporation, may qualify as fiduciaries. In the cable industry, local system general managers and those to whom they delegate responsibility may stand in a fiduciary relationship with subscribers, franchising authorities and suppliers.

As seen from these examples, employees falling within any number of categories -- general manager, comptroller, such "professionals" as in-house counsel, certain "office and clerical" employees and others -- may qualify as "corporate officers" for purposes of the EEO rules if the proposed definition is adopted. But that result would be inconsistent

3/ See e.g., In Re Allegheny International, Inc., 954 F.2d 167, 180 (3d Cir. 1992) ("[Corporate executives] ... are agents of the corporation, their principal. Like all other agents, they are fiduciaries and, as such, occupy positions of trust and confidence on which other corporate officials must rely.") (emphasis added).

with Congress' goal of ensuring that employees are categorized accurately, and "only principal decision makers and employees with supervisory authority" are included in the most senior categories.^{4/} Some definition, other than "fiduciary," is required.

NCTA proposes, in lieu of the Commission's proposal, that the Commission define a "corporate officer" in relation to his or her level of overall responsibility for the operation of the company. Under this definition, a "corporate officer" is

a senior executive, as defined by the company, with responsibility for the overall operation of the company. "Corporate officers" may include, but are not limited to, persons with the title of Chairman of the Board, Chairman of the Executive Committee, President, Executive Vice President, Senior Vice President, Vice President, Vice President for Marketing, Vice President for Programming, Vice President for Human Resources, Secretary, Treasurer and General Counsel. Different companies may employ different titles for particular positions. Corporate officers are generally located at corporate headquarters rather than at the local level. The general manager of a local cable system will normally not be treated as a corporate officer for purposes of these rules.

Defining "corporate officer" as a "senior executive" with overall responsibility for the operation of the company is more likely to reflect the role of the employee in the company, without resulting in significant overlap with other positions. It also differentiates between local managers and executives with

4/ See House Committee on Energy and Commerce, Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 862, 102d Cong., 2d Sess. 112 (1992) ("1992 House Report").

company-wide responsibility. Finally, by providing examples of senior executive job titles while at the same time giving individual companies the flexibility to classify personnel as "senior executives" or within other categories, the proposed definition can facilitate categorization "in an accurate and uniform manner."^{5/}

II. VIDEO DIALTONE PROVIDERS, AND CUSTOMER-PROGRAMMERS USING MULTIPLE CHANNELS ON THESE SYSTEMS, SHOULD BE SUBJECT TO THE CABLE EEO RULES

NCTA believes that video dialtone systems, and customer-programmers that arrange for the use of multiple channels on these systems, should be subject to the EEO rules. By its terms, the EEO provision of the 1984 Cable Act applies "to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system." 47 U.S.C. Sec. 554(a). It also applies to operators of SMATV systems. 47 U.S.C. Sec. 554(h)(1).^{6/} The 1992 Cable Act extends the coverage of the EEO provision to "any multichannel video distributor."

The new law covers many existing and contemplated multichannel video programming distributors explicitly. Under the Act,

5/ Id.

6/ Systems with fewer than 50 subscribers are exempt. See. 47 U.S.C. Sec. 554(h)(2).

the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.^{7/}

The Act does not identify video dialtone systems, and customer-programmers leasing multiple channels on these systems, as within the scope of the rules.

The Commission proposes to adopt the statute's definition of "multichannel video programming distributor" in its rules. NCTA supports this approach, so far as it goes, but urges adoption to explicitly incorporate video dialtone systems and multichannel lessors of video dialtone system capacity. This approach is fully consistent with congressional intent to cover video providers to the home.

Video dialtone systems and customer-programmers leasing multiple channels certainly qualify as multichannel video programming distributors. Telephone companies that provide video dialtone service will engage in "video distribution."^{8/} Video dialtone systems allow customer-programmers "to distribute their services to subscribers."^{9/} Video dialtone system providers and

7/ 47 U.S.C. 522(12) (emphasis added).

8/ Telephone Company/Cable Television Cross-Ownership Rules, 7 FCC Rcd. 5781, 5874 ("Statement of Chairman Alfred C. Sikes").

9/ Id. at 5787.

customer-programmers fall within the goals of the openly worded statutory definition.

There are, moreover, sound policy reasons for subjecting video dialtone systems and customer-programmers to the cable EEO rules. The legislative history of the 1984 Cable Act explains that

Because of the potentially large impact cable programming and other services provided by the cable industry have on the public, the employment practices of the industry has an importance greater than that suggested by the number of its employees. The [House Committee on Energy and Commerce] strongly believes that equal employment opportunity requirements are particularly important in the mass media area where employment is a critical means of assuring that program service will be responsive to a public consisting of a diverse array of population groups.^{10/}

By extending the reach of the EEO procedures to other multichannel video programming distributors, Congress decided that the rationale that led it to legislate EEO for cable applied equally to all multichannel distributors.

Furthermore, while Congress did not explicitly identify video dialtone systems and their customer-programmers as coming within the law's coverage, it did direct the Commission "to ensure women and minorities equal employment and promotion opportunities in new, emerging, and alternative technologies."^{11/}

10/ House Committee on Energy and Commerce, Cable Franchise Policy and Communications Act of 1984, H.R. Rep. No. 934, 98th Cong., 2d Sess. 85 (1984).

11/ 1992 House Report at 113.

Video dialtone qualifies on all three counts. There is no basis for consciously excluding video dialtone systems and multichannel customer-programmers from EEO obligations, while broadcasters, cable operators, SMATVs, DBS, MMDS and other video services are covered. The detriment to the opportunities in the workforce and the loss of benefits of the EEO program by such an omission cannot be justified.

III. THE COMMISSION SHOULD WORK WITH THE DEPARTMENT OF LABOR TO ELIMINATE UNNECESSARILY DUPLICATIVE EEO REQUIREMENTS

Finally, while the issue is not explicitly before the agency in this proceeding, NCTA asks the Commission to consider the initiation of negotiations with the Department of Labor ("DOL") to eliminate, so far as is possible, the requirement that cable systems fulfill overlapping EEO requirements of the FCC and the DOL's Office of Federal Contract Compliance Programs. Cable systems that serve military bases or other federal installations are subject to both sets of procedures. If the Commission and DOL were to conclude that reporting requirements can be reduced without sacrificing the EEO goals of each, adoption of revised procedures is appropriate.

There appear to be significant similarities between the FCC and DOL compliance programs. For example, both require annual reports showing the progress toward EEO goals, breakdowns of employees by job title, and an analysis of whether women and minorities are underutilized in particular positions. The Commission should, therefore, consider the possibility of

entering into a Memorandum of Understanding with DOL whereby DOL would, for example, accept the information provided by the Commission in lieu of certain independent DOL reporting requirements. Adopting this approach would not be unprecedented. For example, in 1978 the FCC and the Equal Employment Opportunity Commission ("EEOC") entered into a Memorandum of Understanding which resulted in the establishment of a joint EEO complaint reporting system.^{12/}

NCTA recognizes that the overlapping relationship between the Commission's and DOL's EEO programs is not directly before the Commission as a result of the 1992 Cable Act or the resulting NPRM. The topic is, however, germane to the issues raised. If the Commission is disinclined to address these issues here, it should nevertheless consider taking action independently of this proceeding.

CONCLUSION

The EEO provision of the 1992 Cable Act is straightforward. Only limited action by the Commission is required for its implementation. NCTA believes that administrative efficiency will be enhanced if a "corporate officer" is treated as a senior

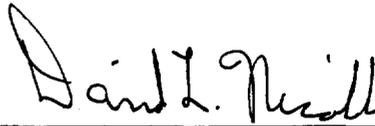
12/ See Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission, 43 R.R.2d 1505 (1978), petition for review dismissed sub nom., National Association of Broadcasters v. FCC, 46 R.R.2d 1175 (D.C. Cir. Dec. 17, 1979).

executive, as defined by the company, with responsibility for the overall operation of the company. Video dialtone companies, and customer-programmers providing multiple channels, should be made part of the regulations. And, the Commission should enter into discussions with the Department of Labor to determine whether it is possible to reduce or eliminate overlapping requirements that arise when cable systems operate on military bases or other federal installations.

Respectfully submitted,

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