

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

MM Docket No. 92-261

Equal Employment Opportunities

REPLY COMMENTS
OF THE OFFICE OF COMMUNICATION
OF THE
UNITED CHURCH OF CHRIST

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SUMMARY

The telephone companies have opposed regulation under the Cable Act's EEO provisions on grounds that video dialtone carriers do not originate programming. This position is indefensible for two reasons.

The Commission has carved out an exception to the general ban against crossownership saying that a video dialtone carriers may originate programming that is dissimilar to broadcast TV in 1984 (e.g. two-way interactive programming). Some telephone companies have even argued that their planned deployment of video-on-demand fits within this exception.

Secondly, even if video dialtone service is deemed a common carrier, the Commission has long since exerted EEO jurisdiction over common carriers - two years before the adoption of cable TV EEO regulations. In our initial comments, the Office of Communications discussed the various shortcomings of the Commission's common carrier EEO regulations. They are totally inadequate for achieving Congress' goal of "increased numbers of females and minorities in position of management authority".

In the following Comments the Office of Communication raises these additional points:

- 1) The Commission must examine the overall employment practices of television broadcast stations during the mid-term review. Anything short of a comprehensive investigation would amount to a waste of administrative resources and would not be of assistance to

television licensees;

2) the Commission should follow the recommendation of the NAACP to issue a Further Notice of Proposed Rulemaking. Many additional issues of critical importance that were omitted from this proceeding could be examined in the context of a Further Notice; and

3) The Office of Communication supports inclusion of a narrative statement in the Annual Employment Report. Contrary to the position of Time Warner and others, the requested information is not redundant and would not overburden record-keeping efforts required to conduct self-assessment.

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I. INTRODUCTION.

The Office of Communication of the United Church of Christ ("OC/UCC") respectfully submits the following Reply Comments in response to the Commission's Notice of Proposed Rulemaking, (FCC 92-539, released January 5, 1993, ("NPRM")) in connection with the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, ___ Stat___ (1992) ("Cable Act of 1992" or "1992 Cable Act"). OC/UCC filed Comments in this proceeding February 16, 1993.

II. AS TELEPHONE COMPANIES ENTER THE MULTICHANNEL VIDEO MARKETPLACE WOMEN AND MINORITIES MUST BE AFFORDED AN EQUAL EMPLOYMENT OPPORTUNITY FOR THE TENS OF THOUSANDS OF NEW JOBS.

Both GTE and Bell Atlantic - companies that eagerly seek to compete in the cable marketplace¹ - have argued that they are not subject to the EEO provisions of the 1992 Cable Act. OC/UCC is dismayed that the same companies that have in the past argued for

¹. See Broadcasting and Cable, March 1, 1993 at 10, summarizing the video dialtone, video-on-demand, and fiber-optic ventures of GTE, Bell Atlantic, NYNEX, Southwestern Bell, US West, and Pacific Telesis.

a "level playing field" in the multichannel video marketplace now seek to be exempted from regulations that apply to their competitors.² Instead of taking a leadership role in the cause for equal employment opportunity they have taken a back seat and have argued for lax regulations.

As corporate America prepares to modernize the telecommunications infrastructure it must also prepare for a culturally diverse workplace. Comments on the record of this proceeding, more than public relations rhetoric, will be the best gauge of how prepared telephone companies are to face the challenges of the 21st century workplace.

A. THE ISSUE OF WHETHER VIDEO DIALTONE ORIGINATES OR TRANSMITS PROGRAMMING IS NOT RELEVANT TO THIS PROCEEDING. IN DETERMINING WHETHER THE EEO PROVISIONS OF THE ACT APPLY TO VIDEO DIALTONE, THE COMMISSION SHOULD BE GUIDED BY THE GOAL OF CONGRESS TO INCREASE THE NUMBER OF WOMEN AND MINORITIES IN THE "NEW, EMERGING AND ALTERNATIVE TECHNOLOGIES."

GTE makes the argument that "[e]ntities that merely provide channel capacity for the transmission of video programming ultimately sold by others should be excluded from the MVPD definition."³ OC/UCC maintains that the question of whether video dialtone transmits or originates programming is irrelevant. More than 20 years ago the Commission determined that it was proper to extend EEO jurisdiction over companies that serve in a mere common

². Thus far, Ameritech is not a party in this proceeding, however, in its recently filed Petition for A Declaratory Ruling, it hastened to say that Ameritech "seeks to compete on the same basis as its competitors." Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, Ameritech, filed March 1, 1993 at 16.

³. Comments of GTE at 2.

carrier capacity.⁴ Those regulations are totally inadequate to achieve the goal of "increased numbers of women and minorities in positions of management authority". Section 25(a) of the Cable Act of 1992; see Comments of OC/UCC at 18.

The issue in this proceeding is whether the EEO provisions of the 1992 Cable Act or the Commission's existing EEO common carrier regulations are more appropriate for video dialtone. Both the statutory definition and legislative history support the application of the Cable Act's EEO provisions.

The Act defines a multichannel video programming distributor ("MVPD") as,
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.
Section 2(c)(12) of the Cable Act of 1992.

MMDS, DBS, and TVRO, as itemized in the above definition, are all examples of services that are primarily channel capacity providers. These services do not ordinarily engage in program origination. Therefore, it seems clear that it was not Congress' intent to exclude companies that are in the common carrier business from the definition of "MVPD".

The explicit goals of the EEO law are to promote diversity of viewpoint in the electronic media, and to increase the number of

⁴. Report and Order, 24 FCC 2d 725 (1970); see 47 C.F.R. 21.307 concerning point-to-point microwave (i.e. the transmission of radio and TV signals), 47 C.F.R. 22.307 governing cellular and mobile telephone, and 47 C.F.R. 23.55 governing international transmissions.

minorities and women in management positions in the "new. emerging and alternative technologies."⁵ It is logical to include, not exclude, video dialtone in the definition of "MVPD". Once deployed, video dialtone will have a much greater impact on viewer audiences than the services itemized in the definition of "MVPD". OC/UCC agrees with NCTA that,

There is no basis for consciously excluding video dialtone systems and multichannel-programmers from EEO obligations, while broadcasters, cable operators, SMATVs, DBS, MMDS and other video services are covered.
Comments of NCTA at 10.

Current EEO common carrier regulations are inadequate for achieving the goal of equal employment opportunity for video dialtone. As noted in our earlier Comments, current common carrier regulations will not enable the Commission to monitor employment trends in the six new decision-making job categories. Comments of OC/UCC at 18. Given this and other short-comings in the common carrier regulations OC/UCC maintains that the only action that is consistent with the will of Congress is to apply the EEO provisions of the 1992 Cable Act to video dialtone.

B. VIDEO DIALTONE SERVICE IS NOT COMPLETELY PROHIBITED FROM PROVIDING PROGRAMMING.

In support of its contention that video dialtone should not be classified as a "MVPD", GTE has said video dialtone "will not, in all likelihood, actually sell programming and interact with the home viewer." Comments of GTE at 2. This assertion is contrary to

⁵. Section 22(a) 1992 Cable Act; House Committee on Energy and Commerce, H.R. Rep. No. 102-628. 102d Cong., 2d. Sess., ("House Report") at 113.

the description of video dialtone service provided by the Commission. The video dialtone Second Report and Order explicitly permits telephone company ownership and control over two-way interactive video programming.⁶

By adopting a narrow interpretation of the statutory ban against crossownership, the Commission has carved out an exception that allows the telephone industry to compete directly in the multichannel video marketplace.⁷ According to the video dialtone order, "we expect new services to develop" that offer viewers the opportunity for two-way interaction. Adopting a new "severability test", the Commission said that as long as the elements of interactive programming are not severable and cannot be independently offered as programming comparable to broadcast TV in 1984, they will be considered to be exempt from the statutory crossownership ban.

We conclude that Congress intended for video services involving...complex viewer interaction generally to fall outside the scope of [prohibited] "video programming". Second Report and Order, para. 75. (emphasis provided).

The Commission has named several specific video services that will be permitted by video dialtone carriers (i.e. multimedia graphics, interactive home shopping, one-way videotext news

⁶. Second Report and Order, CC Docket No. 87-266, FCC 92-327 (1992) ("Second Report and Order") para. 75.

⁷. According to the Commission, Congress intended to ban crossownership against one-way contemporary television programming. We interpret this to mean that Congress intended to prohibit only telephone company provision of programming comparable to that provided by broadcast television stations in 1984. Second Report and Order, para. 75 (emphasis provided)

service, video games and computer software, and on-line airline sales). In addition to these services, the telephone companies have insisted that it is permissible for telephone companies to offer video-on-demand (a form of pay-per-view).⁸

Throughout the video dialtone proceeding the telephone industry consistently expressed the need to offer programming directly. The ability to provide programming was characterized as essential to the economic success of video dialtone. Contrary to the remarks of GTE,⁹ the record comments of the telephone industry clearly signal the intent to take full advantage of the interactive programming loophole that has been adopted by the Commission. Far from serving as a pure channel capacity provider, video dialtone provides various types of interactive and videotext programming and must be subject to the EEO provisions of the 1992 Cable Act.

C. THE TESTS SET FORTH IN THE BROADCAST SIGNAL CARRIAGE NPRM REQUIRE VIDEO DIALTONE TO BE CLASSIFIED AS A "MVPD".

Both GTE and Bell Atlantic rely upon the Commission's Broadcast Signal Carriage NPRM¹⁰ to support their contention that

⁸. For example, BellSouth has argued that under the Commission's "severability test", [t]he subscriber's ability to manipulate and control the video images [of video dialtone] is so intertwined with the delivery of those video images that there is no effective way to sever the interaction functionality. Petition for Reconsideration, BellSouth (filed October 9, 1992) at 4 (emphasis provided).

⁹. Seeking reconsideration of the Commission 5% limit on program ownership, GTE has recommended the telephone companies be allowed a 49% ownership in video programmers. Petition for Reconsideration, GTE (filed October 9, 1992) at 15.

¹⁰. Broadcast Signal Carriage Issues Notice of Proposed Rulemaking, 7 FCC Rcd 8055 (1993) ("Broadcast Signal Carriage NPRM") paras. 41-42.

the EEO obligations of the Cable Act do not apply to video dialtone.¹¹ In fact, the criteria in the Signal Carriage proceeding supports a conclusion opposite that proposed by the telephone companies.

As a preliminary matter, tentative conclusions in the Signal Carriage NPRM are not binding upon the EEO proceeding. The Commission must be guided by the intent of Congress which has made it unequivocally clear that "new, emerging and alternative technologies" must be included in the definition of "MVPD".¹²

To the extent that it is relevant to this proceeding, the Commission has tentatively concluded that an entity is subject to retransmission consent obligations and should be classified as a "MVPD", if it "directly sells programming" and "interacts with the public". OC/UCC maintains that video dialtone satisfies both of these tests and therefore should be deemed a "MVPD".

As fully explained above, the Commission expects video dialtone to develop new programming services that are exempt from the crossownership ban. Such programming will be directly sold to

¹¹. Comments of GTE at 2; Comments of Bell Atlantic at 2.

¹². Providing specific guidance to the use of the term "multichannel video programming distributor" for EEO purposes, the House Committee on Energy and Commerce said,

This provision reflects the Committee's belief that it is important to ensure females and minorities equal employment and promotional opportunities in new, emerging, and alternative technologies.

House Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong. 2d Sess., (1984) at 113 (emphasis provided). See also

Comments of OC/UCC at 18, Comments of NCTA at 9.

the public by the video dialtone carrier.¹³

With respect to programming subject to the crossownership ban, there is nothing prohibiting video dialtone carriers from marketing and promoting such programming in much the same way that theaters advertise movies to the general public. In instances involving both prohibited and exempted programming video dialtone carriers can be expected to sell directly to the public.

The video dialtone decision also contemplates a high degree of "interaction" with the public. The Second Report and Order permits telephone companies to provide billing and collection, order processing, sale installation and maintenance of customer premises equipment. These direct public dealings are in addition to the many interactive services that will allow the viewer to create tailored menus, and access advanced search and navigational capabilities.¹⁴

The example provided in the Signal Carriage NPRM at para. 42 of a leased MMDS facility is analogous to channel service.¹⁵ The Commission has clearly indicated a preference not to confuse video dialtone with channel service.¹⁶ The level of viewer interaction and direct marketing activities permitted video dialtone distinguish it from a service providing purely a signal

¹³. A video dialtone carrier may offer its own proprietary gateway service on the second tier. Second Report and Order, para. 2.

¹⁴. Second Report and Order, para. 22.

¹⁵. Broadcast Signal Carriage NPRM para. 42.

¹⁶. Second Report and Order, para. 30.

transmission function.

Classifying video dialtone as a "MVPD" satisfies the Commission's objective of creating "regulatory parity among entities that are "in the same market" and generally, in the same distribution level with cable systems." Signal Carriage NPRM at para. 42. If the Commission chooses to apply the "direct selling" and "public interaction" tests set forth in the Broadcast Signal Carriage NPRM, video dialtone, for the reasons described above, must be classified as a "MVPD".

III. IF THE COMMISSION FAILS TO EXAMINE THE OVERALL EMPLOYMENT EFFORTS OF BROADCAST LICENSEES, THE MID-TERM REVIEW WILL AMOUNT TO A MEANINGLESS EXERCISE.

NAB has supported the Commission's tentative conclusion to review the mid-term employment practices of broadcasters by comparing the profile of the station's workforce with the relevant labor market. Such a review would amount to a meaningless exercise for the Commission for a number of reasons.

First, only by examining the overall EEO efforts of the licensee can the Commission intelligently advise licensees of the appropriate action that they must take. An examination of a station's employment profile does not provide enough information to determine why the Commission's processing guidelines have not been satisfied or whether the station could do more to achieve 100 percent parity. The problem could be that a station performs inadequate self-assessment, or fails to maintain an EEO record-keeping system. These are only a few of the areas that contribute to a poor employment profile. It is evident then that the

Commission would be unable to carry out the second part of its statutory mandate - "to inform...licensees of necessary improvements in its recruitment practices identified as a consequence of such review", unless a comprehensive examination of overall efforts is undertaken. 47 USC 334(b).

Secondly, because the Cable Act prevents the review letter from being treated as a sanction it literally serves no purpose. The Commission has said that the letter constitutes "nothing more than an early warning". NPRM para. 10. Diverting administrative resources to issuing "early warning" letters based upon a superficial examination of employment practices amounts to a waste of taxpayer money and a meaningless exercise for the Commission and licensees.

Finally, Congress did not bar the FCC from fully reviewing the EEO efforts of broadcast licensees. The legislative history was only intended to ensure that the Commission did not alter its processing guidelines when conducting the review (e.g. 50% of the relevant labor market). The Commission is not constrained by the statutory language or the legislative history from broadly examining the EEO efforts of licensees in the same manner that it conducts end-of-term reviews. In fact, the obligation to notify licensees about how to improve their recruitment practices necessitates that a thorough examination of employment practices be undertaken.

If a more comprehensive investigation is undertaken the review letter: 1) can serve the useful purpose of advising stations of

exactly what steps should be taken to improve their recruitment efforts, and 2) would be a relevant factor for the purpose of determining an appropriate sanction, should the Commission find that the station failed to have taken corrective measures at the time of end-to-term license review. See Comments of OC/UCC at 24.

IV. OC/UCC SUPPORTS NAACP'S PETITION FOR A FURTHER RULEMAKING.

NAACP has proposed that the Commission issue a Further Notice of Proposed Rulemaking in order to address a broad number of issues that are critically important to the public interest. OC/UCC totally supports the issuance of a Further Notice.

Certain matters that must be completed within the statutory timeframe can be finalized during the first phase of this proceeding. Other issues such as shrinking the zone of reasonableness - which OC/UCC supports - can be considered in the context of a Further Notice in keeping with Commission procedures.

Should a further notice be issued, OC/UCC urges the Commission to consider implementation of the requirements of the Americans for Disabilities Act. Disabled citizens are generally absent from the viewing screens of television sets as though they are to be hidden and kept away from view. Neither are persons with disabilities employed in the media industry in any number approaching parity. Disabled citizens account for 43 million of the American population, a fact that is inappropriately reflected in the employment practices of the cable TV and television media as well as those industries prepared to offer video dialtone. This proceeding is an appropriate forum for exploring ways in which

cable TV and broadcasters can adequately represent members of the disabled community.

IV. THE INFORMATION CALLED FOR IN THE PROPOSED NARRATIVE STATEMENT OF FORM 395-A IS THE MINIMUM THAT SHOULD BE MAINTAINED IN A CABLE OPERATOR'S RECORDS IN ORDER TO DO MEANINGFUL SELF-ASSESSMENT. THIS INFORMATION CAN BE EASILY TRANSFERRED TO FORM 395-A ON AN ANNUAL BASIS.

Time Warner and several cable operators referring to themselves as the "Companies" have stated that the proposed narrative statement concerning the six upper level job categories (Form 395-A, Section VIIB) is "overly burdensome". Time Warner at 7, Companies at 7. OC/UCC submits that the information requested would be ordinarily collected by operators if they are conducting a meaningful self-assessment of their EEO efforts. Secondly, the narrative statement will enable the Commission to effectively monitor efforts to - "increase the numbers of females and minorities in positions of management authority". Section 22(a)(2) of the Cable Act of 1992.

Contrary to the comments of Time Warner, the proposed recruitment narrative is not redundant of other information reported in the Annual Employment Report. Time Warner incorrectly states that Section III of the report requires the cable operator to provide a narrative response that would be duplicative of the information proposed for Section VIIB. Time Warner at 7.

As indicated in Section IVA of our previous Comments, OC/UCC has examined over 85 Annual Employment Reports. Exceptionally few reports had narrative explanations for any questions on the report. Moreover, none of the explanations provided the recruitment data

that would be obtained by the proposed Section VII narrative statement.

In addition to supporting the Commission's objective of monitoring employment practices, the proposed narrative will ensure that every cable operator conducts a meaningful self-assessment of their employment practices as required by Section 76.75(f) of the Commission's rules. The information called for in the proposed Section VII narrative statement is the minimum that an operator should maintain in its records in the ordinary course of complying with the self-assessment requirement. This information can be easily transferred to Form 395-A on an annual basis.

V. CONCLUSION.

For the above reasons OC/UCC urges the Commission to disregard the unfounded comments of GTE and Bell Atlantic and classify video dialtone as a "MVPD" for the purposes of EEO. Further, the Commission should examine the overall EEO efforts of broadcasters during the mid-term review, issue a Further Notice of Proposed Rulemaking and adopt the proposed narrative statement as part of the Annual Employment Report.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Anthony L. Pharr", is written over a horizontal line.

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