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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

MM Docket 92-264

In the Matter of )  
 )  
Implementation of Sections 11 )  
and 13 of the Cable Television )  
Consumer Protection and Competition )  
Act of 1992 )  
 )  
Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-trafficking Provisions )

OPPOSITION OF BELL ATLANTIC<sup>1</sup>  
TO PETITION FOR RECONSIDERATION

The petition for reconsideration filed by the Center for Media Education and the Consumer Federation of America (collectively "CFA") largely rehashes arguments that the parties previously addressed and that the Commission has already decided. The petition does, however, raise one new argument that cannot go un rebutted. Specifically, CFA argues that telephone and video dialtone subscribers of a combined cable and telephone company should be counted against the cable horizontal ownership limit adopted by the Commission.<sup>2</sup> CFA's argument is wrong as a matter of law, and is contrary to sound public policy.

<sup>1</sup> "Bell Atlantic" includes The Bell Atlantic Telephone Companies of Delaware, the District of Columbia, Maryland, Pennsylvania, New Jersey, Virginia and West Virginia.

<sup>2</sup> See Petition for Reconsideration of Center for Media Education and Consumer Federation of America, MM Dkt No. 92-264 at 11-13 (filed Dec. 15, 1993) ("Pet.").

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1. CFA's Argument Is Wrong As A Matter of Law

CFA's argument that telephone and video dialtone subscribers should be counted against the horizontal limit is foreclosed by the terms of the 1992 Cable Act. The Act only authorizes the Commission to adopt reasonable limits on the number of "cable subscribers" that an entity may reach through "cable systems" it owns.<sup>3</sup> It does not authorize extending these limits to also encompass telephone subscribers.

CFA itself apparently recognizes this fatal flaw in its argument, and argues that telephone subscribers should nonetheless be counted because they have the "potential" to become cable subscribers if a telephone company upgrades its network to provide video dialtone.<sup>4</sup> But as the Commission has held, a telephone company's common carrier video dialtone network is not a "cable system" and does not provide "cable service."<sup>5</sup> Under these circumstances, there can be no "cable subscriber" reached by a "cable system." And while CFA points out that Bell

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<sup>3</sup> 47 U.S.C. § 533(f)(1)(A). This provision has been struck down as unconstitutional, see Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1, 10 (D.D.C. 1993), appeal pending, No. 93-5349 and consolidated cases (filed Nov. 12, 1993), and is being addressed here in the event the decision is overturned or modified on appeal.

<sup>4</sup> Pet. at 12.

<sup>5</sup> Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 300 (1991), on recon., 7 FCC Rcd 5069 (1992) ("Recon. Order"); see also Brief of Respondents in Nat'l Cable Television Ass'n v. FCC, No. 91-1649 et al. (D.C. Cir.) (filed Dec. 23, 1993) ("FCC Appeal Br.").

Atlantic recently won the right to be one of the programmers on its video dialtone networks,<sup>6</sup> this does nothing to change the result.

First, a telephone company's video dialtone network is not a "cable system." This is so because a telephone company's common carrier facilities are expressly exempted from the definition of a "cable system."<sup>7</sup> While the statute's common carrier exemption does include an exception, the Commission has correctly interpreted this exception to apply only to the extent a telephone company acts as a traditional cable operator (under a rural exemption or waiver) by both controlling its network and deciding what will be carried over that network.<sup>8</sup> In contrast, where a telephone company provides a common carrier video dialtone service, it can play no role in deciding what

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<sup>6</sup> See The Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), appeal pending, Nos. 93-2340, 93-2341 (filed Oct. 18, 1993); id., Amended Final Order, Civ. No. 92-1751-A (Oct. 7, 1993). To the extent that Bell Atlantic provides programming to subscribers within its current telephone service area, it will do so through a corporate entity that is separate from its operating telephone companies.

<sup>7</sup> See 47 U.S.C. § 522(7)(c).

<sup>8</sup> See Recon. Order, 7 FCC Rcd. at 5072; see also FCC Appeal Br. at 41 ("A common carrier thus fits within the exception if and only if it provides cable service itself pursuant to a waiver or in a rural area.") (emphasis added).

programmers are carried on its network.<sup>9</sup> As a result, the common carrier exemption applies regardless of whether Bell Atlantic's programming affiliate is one of the programmers using its network.

A telephone company's video dialtone network also is not a "cable system" because there is no single "facility" that includes all the necessary components to fall within the statutory definition.<sup>10</sup> Specifically, a video dialtone network will not include "the necessary signal generation, reception and control equipment."<sup>11</sup> On the contrary, this equipment will generally be provided by one or more of the programmers providing programming over the network, and "[i]t will be the video programmers ... who will generate and control the signal sent over [the] transmission facilities."<sup>12</sup>

Second, in its capacity as a video dialtone provider, a telephone company does not provide "cable service" because it

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<sup>9</sup> FCC Appeal Br. at 21 (video dialtone "embodies the central function of common carriage, i.e., providing service to all persons indifferently.... LECs providing video dialtone cannot determine the composition of the video programming that is transmitted over their facilities and therefore cannot function as cable operators.").

<sup>10</sup> FCC Appeal Br. at 37 (citing Recon. Order, 7 FCC Rcd at 5072-73).

<sup>11</sup> Id.

<sup>12</sup> See id. at 37-38 (quoting Recon. Order, 7 FCC Rcd at 5073).

does not engage in the "transmission" of video programming directly to subscribers.<sup>13</sup> On the contrary, the telephone company merely "acts in its common carrier capacity as a transparent conduit that enables its customers to 'send and dispatch' video programming directly to subscribers."<sup>14</sup> This is true regardless of whether an affiliate happens to be one of the programmers using the telephone company's common carrier transport service.

2. CFA's Argument Is Contrary To Sound Public Policy

In addition, counting the telephone or video dialtone subscribers of a combined cable and telephone company against the limit would foreclose the very competition that Congress and the Commission have sought to promote.<sup>15</sup>

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<sup>13</sup> Id. at 30.

<sup>14</sup> Id. (quoting Franchise Order, 7 FCC Rcd at 327).

<sup>15</sup> See 47 U.S.C. § 533(f) (authorizing the Commission to adopt reasonable limits "[i]n order to enhance effective competition"); see also Statement of Chairman Reed E. Hundt Before the House Subcommittee on Telecommunications and Finance on H.R. 3636 and 3626 (Jan. 27, 1994) at 16 ("Direct, facilities-based competition between cable and telephone companies will produce substantial benefits for the American public."); Remarks of James H. Quello Before the San Diego Communications Council (Dec. 16, 1993) at 4 (cable and telephone company alliances "have the positive potential of acting to expedite the initiation of competitive super electronic highways....").

As a group of this country's most prominent economists recently explained,<sup>16</sup> alliances between cable and telephone companies provide the most certain road to head-to-head competition for local telephone and cable services. Contrary to CFA's claims, moreover, Bell Atlantic's proposed merger with TCI and Liberty Media provides perhaps the best example of the procompetitive nature of these alliances.

Specifically, outside Bell Atlantic's telephone service area, the new Bell Atlantic will upgrade TCI's existing cable systems to provide telephone service in competition with the incumbent telephone companies.<sup>17</sup> Inside Bell Atlantic's telephone service areas, TCI cable properties will be divested, and Bell Atlantic will upgrade its telephone networks to compete

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<sup>16</sup> These economists include Alfred E. Kahn, the country's foremost authority on regulatory economics; Gary S. Becker, winner of the 1992 Nobel Prize in economics; Robert W. Crandall from the prestigious Brookings Institute; Robert G. Harris, a well-known telecommunications specialist from the University of California at Berkeley; and William E. Taylor, an expert on the economics of the telecommunications industry. They made their statements in affidavits filed in support of the interexchange relief sought by Bell Atlantic in connection with its proposed merger with TCI and Liberty Media. See Bell Atlantic's Request for an Expedited Waiver Relating to Out-Of-Region Interexchange Services and Satellite Programming Transport, United States v. Western Electric Co., Inc., Civ. No. 82-0192 (Jan. 20, 1994) (filed with the Dept. of Justice).

<sup>17</sup> See Statement of Raymond W. Smith Before the Senate Subcommittee on Antitrust, Monopolies and Business Rights (Oct. 27, 1993) at 3; Statement of James G. Cullen Before the House Subcommittee on Economic and Commercial Law (Feb. 2, 1994) at 2-3.

with existing cable companies.<sup>18</sup> Other cable and telephone company alliances will do the same.<sup>19</sup>

By counting telephone and video dialtone subscribers against the horizontal limit, CFA would have the Commission stifle this budding competition. The only effect of adopting CFA's proposal would be to impose an arbitrary limit on new entry by the very companies that are most capable of succeeding as new

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<sup>18</sup> Id.

<sup>19</sup> For example, Time Warner and US West have announced plans to upgrade Time Warner's cable systems to add voice capabilities, while US West upgrades its telephone networks to add a video dialtone capability. See "US West & Time Warner Entertainment in Strategic Partnership to Accelerate Building Full Service Networks," PR Newswire, May 17, 1993; "US West to Roll Out VDT Network Regionwide Beginning in 1994," Communications Daily, Feb. 5, 1993 at 1. Cox and Southwestern Bell have announced plans to offer telephony over Cox's cable systems in several large cities as early as possible. See "Southwestern Bell, Cox Cable Form a Marriage of Convenience," Telco Business Report, Dec. 20, 1993. Through its purchase of a minority equity stake, British Telecom is financing MCI's plans to enter the local telephone business in 20 major cities. See J. Keller, "MCI Proposes a \$20 Billion capitol Project," Wall St. J., Jan. 5, 1994 at A3. Likewise, Bell Canada has purchased a stake in Jones Intercable, and has announced it will "expand into wireline local exchange communications and broader telecommunications services both in [Jones's] cable markets and elsewhere." See "Jones Intercable, Inc. and BCE Telecom International Announce Strategic Relationship," Press Release, Dec. 2, 1993, at 2.

entrants against the incumbent providers.<sup>20</sup> As a result, CFA's proposed modification would affirmatively disserve the Commission's objective of promoting new competition and should be rejected.

Moreover, in addition to rejecting CFA's proposed modification, the Commission should expressly hold that its horizontal ownership limit does not apply to competitive systems. There simply is no conceivable rationale to justify applying the limits to these systems. On the contrary, applying the limits to competitive systems will serve only to prevent the introduction of such systems.

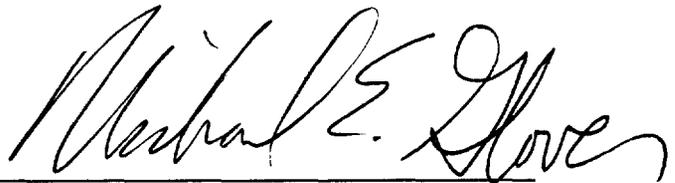
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<sup>20</sup> In particular, if the Commission were to count video dialtone subscribers against the limit, the effect would be to severely limit the extent to which a combined cable and telephone company could upgrade its existing telephone network to add a video dialtone capability. This would hinder widespread deployment of an advanced telecommunications infrastructure, put at risk the jobs it would create, and deny consumers the benefit of the competitive new services it would produce. See Video Dialtone Order, 7 FCC Rcd 5781, ¶ 18 (1992) (video dialtone will "further the Commission's goals of creating opportunities and incentives to develop an efficient, nationwide, publicly accessible, advanced telecommunications infrastructure, facilitating robust competition and fostering a diversity of video services").

CONCLUSION

The telephone and video dialtone subscribers of a combined cable and telephone company cannot and should not be counted against the Commission's horizontal ownership limits. Consequently, CFA's petition for reconsideration should be denied.

Respectfully submitted,



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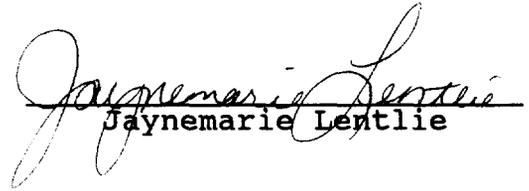
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February 14, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opposition of Bell Atlantic to Petition for Reconsideration" was served this 14th day of February, 1994, by first class mail, postage prepaid, on the parties on the attached list.

  
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