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

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 )  
\_\_\_\_\_ )

MM Docket No. 92-264

OPPOSITION OF BELLSOUTH  
TO PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc., ("BellSouth")  
hereby files its opposition to the Petition for  
Reconsideration ("Petition") of the Second Report and Order  
in this docket filed jointly by the Center for Media  
Education and the Consumer Federation of America  
("Petitioners") on December 15, 1993.

Petitioners propose that the Commission include  
"telephone subscribers of a combined cable and telephone  
company... within the horizontal limits." Petitioners'  
proposal is based solely upon their assertion that recent  
mergers of cable operators ("MSOs") and telephone companies  
will enable cable operators to acquire "excess market

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power."<sup>1</sup> Elsewhere in the Petition they correctly state that the purpose of the horizontal limits is to prevent large MSOs from impeding the flow of video programming from programmers to consumers.<sup>2</sup> They make no attempt, however, to show how the inclusion of telephone subscribers within the horizontal limits will serve that purpose. They craftily avoid any analysis of the situations in which telephone companies might be involved in the distribution of video programming. If they had attempted such analysis, the fallacy of their proposal would have been obvious. This opposition to the Petition provides the foregone analysis for the Commission's consideration.

Situation 1: The telephone company operates a cable system.

If the telephone company with which a MSO merges operates a cable system, that cable system would obviously be subject to the horizontal limits. Petitioners seek, however, to have the horizontal limits apply when the affiliated telephone company does not operate a cable

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<sup>1</sup> Petition at 13.

<sup>2</sup> Id. at 2.

system--even though the statutory mandate for horizontal limits applies only to cable systems.<sup>3</sup>

Situation 2: The telephone company does not provide video services to consumers.

Petitioners initially state that the horizontal limits should apply to "traditional cable systems and affiliated telephone systems capable of transmitting video programming."<sup>4</sup> From that point on, however, they ignore that qualification and assert that the horizontal limits should include "telephone subscribers."<sup>5</sup>

To suggest that the mere affiliation of a MSO and a telephone company increases the MSO's ability to impede the flow of video programming from programmers to consumers without regard to whether the telephone system provides video services to consumers is patently absurd.

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<sup>3</sup> Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 requires the Commission "to prescribe rules and regulations establishing limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person...." 47 U.S.C.A. § 533(f)(1)(a). The term "cable system" is defined in 47 U.S.C.A. § 522(6) as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include... (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system... to the extent that such facility is used in the transmission of video programming directly to subscribers...."

<sup>4</sup> Petition at 2.

<sup>5</sup> Id. at 12.

Furthermore, telephone systems that do not provide video services to consumers do not fall within the statutory definition of "cable system."<sup>6</sup> They are, therefore, beyond the scope of the statutory mandate for horizontal ownership limits on the number of cable subscribers served by cable systems.

Petitioners assert that including telephone subscribers in the horizontal ownership limits is necessary to prevent mergers of cable companies and telephone companies from eliminating the potential for "direct competition in their overlapping areas...."<sup>7</sup> The horizontal ownership limits are not designed to prevent mergers of companies with overlapping service areas. Indeed, a merger could involve complete overlap of serving areas and be unconstrained by the horizontal limits. Moreover, if such mergers present actual anticompetitive concerns, the government already has adequate tools for addressing those concerns in reviewing specific merger proposals.

Situation 3: The telephone company offers video transmission under the Commission's video dialtone rules.

Petitioners argue that telephone companies' authority to provide video dialtone services is a sufficient reason for regarding telephone subscribers as "potential" cable subscribers for purposes of applying the horizontal

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<sup>6</sup> See footnote 3, supra.

<sup>7</sup> Petition at 13.

ownership limits.<sup>8</sup> Petitioners ignore the fundamental differences between cable systems and video dialtone as the latter will be provided by telephone companies under the Commission's rules. The public policy concerns that prompted Congress to require the Commission to adopt horizontal ownership limits simply do not exist in the video dialtone context.

Telephone companies providing video dialtone services must "make available to multiple service providers a basic common carrier platform that can deliver video programming and other services to end users."<sup>9</sup> That "common carrier platform must... offer sufficient capacity to serve multiple service providers on a nondiscriminatory basis...."<sup>10</sup> The Commission has carefully designed the video dialtone rules to assure that programmers will have unrestrained access to this new means of video distribution:

[I]n contrast to the video distribution mechanisms available today [e.g., cable systems], video programmers will have guaranteed access on a nondiscriminatory basis to consumers through the common carrier platform.<sup>11</sup>

\* \* \*

Unlike other video distribution regulatory schemes, the bedrock common carrier nature of video dialtone... will

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<sup>8</sup> Id. at 13.

<sup>9</sup> Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, ("Second Report and Order"), CC Docket No. 87-266, 7 FCC Rcd 5781 (1992).

<sup>10</sup> Id. See also ¶ 29 et seq.

<sup>11</sup> Id.

require unfettered access for all program providers, regardless of their nature and, in this way, will directly promote the goals access rules have historically been designed to meet.<sup>12</sup>

Operators of cable systems have no such non-discriminatory, common carrier obligations. They are free to select the programming that they offer over their cable systems and to exclude almost any programming they wish. This power is the basis for the concern expressed in the Senate Report, which Petitioners quote,<sup>13</sup> that increased concentration of ownership in the cable industry will lead to "concentration of the media in the hands of a few who may control the dissemination of information."<sup>14</sup>

The video dialtone rules withhold from telephone companies the ability to "control the dissemination of information." They withhold from telephone companies the ability to be "media gatekeepers," who can "slant information according to their own biases", who can exclude "unorthodox or unpopular speech," and who can exercise anticompetitive, monopsony power over producers of programming.<sup>15</sup> Petitioners' arguments completely disregard the significance of the telephone companies' common carrier obligations as they apply to video programming distribution.

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<sup>12</sup> Id.

<sup>13</sup> Petition at 2-3.

<sup>14</sup> S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1992).

<sup>15</sup> See id. at 32-33.

Finally, Petitioners' proposal to include telephone company subscribers in the cable system horizontal ownership limits ignores the statutory definition of "cable system." The definition of "cable system" plainly excludes the facilities of common carriers unless they are "used in the transmission of video programming directly to subscribers."<sup>16</sup> The Commission has already determined that a telephone company providing video dialtone services is not providing video programming service directly to subscribers.<sup>17</sup> Therefore, facilities used by a telephone company to provide video dialtone services do not constitute a "cable system."

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<sup>16</sup> See footnote 3, supra.

<sup>17</sup> Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, ("Reconsideration Order"), CC Docket No. 87-266, 7 FCC Rcd 5069 (1992)

**CONCLUSION**

Petitioners' proposal to include telephone subscribers in the application of horizontal ownership limits for cable systems ignores the terms of the statutory mandate for this rulemaking. It represents bad public policy and manifests a remarkable disregard for the Commission's video dialtone framework. The Commission should reject it.

Respectfully submitted,

**BELLSOUTH TELECOMMUNICATIONS, INC.**  
By its Attorneys:



**M. Robert Sutherland  
Michael A. Tanner  
4300 Southern Bell Center  
675 W. Peachtree Street, N.E.  
Atlanta, Georgia 30375  
404 529-3854**

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