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March 14, 1994

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MAR 14 1994

The Hon. Reed E. Hundt
The Hon. James H. Quello
The Hon. Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Dear Chairman Hundt and
Commissioners Quello and Barrett:

I am writing in response to a March 4 letter
addressed to you from the NCTA and CFA.

The letter purports to ask for "prompt" action on an
NCTA/CFA petition to start a new rulemaking on video dialtone.
In reality, it is the latest in a long series of efforts by
NCTA to prevent or delay competition from video dialtone, and
to block the benefits it will provide to consumers and the
economy as a whole.

In fact, while the letter claims NCTA "never
opposed" competition from video dialtone, the truth is that
NCTA or its members opposed such competition at every turn.
Not only did they oppose adoption of the Commission's video
dialtone rules, but they also opposed 20 of the 21 video
dialtone applications filed since those rules were adopted.

The rulemaking petition referred to in the letter is
just another example. It asks that video dialtone competition
be held in abeyance for an indefinite period of years while
the Commission overhauls its entire regulatory structure, and
convenes a joint board to overhaul existing separations rules.
These same arguments were previously rejected by the
Commission, were thoroughly rebutted by Bell Atlantic and
others, and need not be addressed further here.

The letter does raise one issue that must be
addressed. NCTA gloats that its strategy of gaming the
regulatory process has succeeded in "stall[ing]" a competing
commercial video dialtone service since August of 1992. The
result is that several pending Bell Atlantic projects have
reached a crisis stage and are in danger of being lost.

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The most immediate examples are two New Jersey Bell section 214 applications that were filed in the fall of 1992, and amended in September of last year to resolve concerns expressed by the Commission. While it is understandable that the Commission would want to consider carefully these initial commercial applications, these projects are now at risk of losing their critical first customers.

In one case, the customer is an entrepreneurial start-up company that has announced its intention to offer innovative new services in competition with the cable incumbent. But after 16 months, its financial backing for this project is in jeopardy because of uncertainty about whether the video dialtone network it needs to deliver its services will be approved. In the other case, the customer is under an order from state regulators to improve the service it is currently offering. But it is now past the deadline, and is in jeopardy of being held in default because it cannot show that the video dialtone network it will use to deliver improved service has been approved.

Another example is our application to conduct a market trial of video dialtone over existing copper loops in northern Virginia. This application was filed in early November of last year. Absent approval by the end of this month, we will not be able to meet the service date for the programmers participating in the trial.

In addition to emphasizing the need for expedited action on these three applications, these examples also highlight the need to reinvent the video dialtone approval process.

Today, telephone companies that want to provide video dialtone must first file a section 214 application. Of the 21 such applications filed to date, 17 are still pending and more will soon be filed to add to the backlog. In addition, after obtaining 214 approval, telephone companies must file tariffs and litigate many of the same issues a second time. This duplicative process provides the cable incumbents ample openings to game the regulatory process, which in turn threatens to overwhelm the Commission and stymie competitive entry.

The best solution to this problem would be to eliminate the separate 214 application process, and address any relevant issues in a single proceeding at the tariffing stage. This would preserve the Commission's oversight

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authority, while lowering redundant hurdles in the path of competitive entry.

At a minimum, however, the 214 process must be streamlined. While there are a number of ways to do so under existing rules, the best approach may be to draw on procedures that have proven themselves in a similar context -- specifically, the Commission's approach to handling amendments to approved comparably efficient interconnection plans.

Tailoring this approach to the 214 process, approval of a telephone company's initial application for a particular video dialtone system plan would serve to approve its use of that system generally (as well as in any initial locations identified in the application). These initial applications should be handled under a 45 day review process as certain video channel service applications are today. Once a generic system plan is approved, deployment of the system in additional locations would be approved by filing "me too" amendments subject to a 14 day review process. Likewise, approval of a generic plan for one applicant would enable other telephone companies to use the "me too" process to obtain approval of plans that are the same in all material respects. This would maintain a separate 214 oversight process, but substantially lessen the burden on the Commission and streamline the process for new competitors to move into the marketplace.

As the Commission has recognized, video dialtone will provide consumers the benefits of increased competition in the video marketplace and promote development of the advanced information infrastructure of the future; by doing so, it will also promote economic efficiency and growth. These benefits will not materialize, however, if the cable incumbents succeed in their efforts to use the regulatory process to keep video dialtone from leaving the starting gate.

By acting quickly to approve pending 214 applications and to reinvent the approval process for video dialtone, the Commission can ensure that the regulatory process is used to promote, rather than hinder, competition. We urge your help in leading this effort.

Sincerely,

A handwritten signature in dark ink, appearing to be "R. E. Hundt", written in a cursive style.

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

In the Matter of)	
)	
Amendments of Parts 32, 36, 61,)	
64 and 69 of the Commission's)	RM 8221
Rules to Establish and Implement)	
Regulatory Procedures for Video)	
Dial Tone Service)	
)	
Petition for Rulemaking)	

OPPOSITION OF BELL ATLANTIC

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OPPOSITION OF BELL ATLANTIC¹

1. Introduction and Summary

In an effort to delay the introduction of competition in any form, the monopoly cable industry and its new-found bedfellow resurrect the same arguments that the Commission rejected in its video dialtone order only eight short months before the petition was filed.² The petitioners offer nothing new to support their untimely request for reconsideration, except their own mischaracterizations of the video dialtone applications now pending before the Commission. Nevertheless, they ask the Commission to deny consumers the benefits of competition for several more years while the Commission overhauls the entire

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company and New Jersey Bell Telephone Company.

² See Telephone Company-Cable TV Cross-Ownership Rules, 7 FCC Rcd 5781, 5788, 5827-32 (1992) ("Video Dialtone Order").

regulatory structure that applies to local telephone companies, and awaits the results of a joint board.

The petition comes at a time when the cable industry is struggling desperately to avoid any meaningful regulation of its monopoly services, while also promising to so overload the Commission that it will be unable to implement any regulations that are adopted.³ Meanwhile, cable operators continue to reap monopoly profits to the detriment of consumers, and to use their cable monopolies as a protected base from which to move into telephony.⁴

Moreover, because cable operators are subject to none of the regulatory safeguards that apply to telephone companies,

³ According to the CEO of NCTA's largest member, cable's response to rate regulation "will end up swamping the FCC with cost hearings," and "[w]hen the smoke clears, there will be higher rates in most cities." Farhi, Cable Firms to Battle Rate Cuts; FCC to be Flooded With Hearing Pleas, THE WASHINGTON POST, May 6, 1993, at B12. And the president of NCTA warns that the Commission "has left itself open to a huge number of cost-of-service hearings, which they are totally unequipped to handle;" "[t]hese chickens will come home to roost." Id. at B14.

⁴ Nearly every day a new development emphasizes the convergence of the two industries as cable moves rapidly into telephony. See, e.g., Carnevale, et al., Cable-Phone Link Is Promising Gamble; US West Move Puts Pressure On Its Rivals, WALL ST. J., May 18, 1993 at B1 (announcing plans to upgrade Time Warner's cable systems to provide voice, data and video services); Robichaux, Tele-Communications to Unveil Plan to Rewire Cable Systems for \$2 Billion, WALL ST. J., Apr. 12, 1993 at B5 (announcing plans to upgrade 90 percent of TCI's cable systems by the end of 1996 to provide voice, data and video services); Wilke, Digital Unveils Cable Technology For Network Access, WALL ST. J., May 17, 1993, at B6 (announcing technology for high speed data service over cable "in direct competition with local telephone companies").

they are free to fund the system upgrades needed to launch their move into telephony on the backs of captive cable subscribers.⁵ As a result, the real issue for the Commission is not what additional regulatory burdens should be imposed on telephone companies to cable's competitive advantage; the Commission has already determined that existing rules are adequate. The real issue is how to provide a similar degree of protection to customers of the monopoly cable industry; the answer is to apply to cable the same rules that already apply to telephone companies.

In short, the current petition is merely the latest episode in cable's continuing efforts to "game" the regulatory process to its competitive advantage. As such, it should be dismissed.

2. The Commission Has Correctly Found That Its Existing Rules Are Adequate

The petitioners' argument that an entirely new regulatory regime should be adopted for video dialtone is nothing new. In an effort to block competitive entry, the cable incumbents have invoked the same baseless claim to oppose the

⁵ Before its conversion to the cause of the cable industry, one of the petitioners here explained that cable operators have a "monopoly in practically every market in the country . . . [which] puts them in a position which can ultimately lead to abuse of consumers." See Ex Parte Comments of CFA, Cable Home Wiring, MM Dkt No. 92-260 at 2 (Dec. 18, 1992).

Commission's video dialtone rules,⁶ and to oppose every video dialtone application that has been filed since the rules were adopted.⁷ The Commission, however, has recognized the argument for the red herring that it is, and correctly found that its existing rules are adequate.⁸

a. **There Is No Basis For Treating Video Dialtone Differently Than Other Regulated, Common Carrier Services**

The petitioners' entire argument rests on the faulty premise that video dialtone is different from other telephone company services just because it transports video signals. They

⁶ E.g., Comments of NCTA, Telephone Company-Cable TV Cross-Ownership Rules, CC Dkt 87-266 at 23-37 (filed Feb. 3, 1992) ("NCTA VDT Comments"); Petition for Recon. of NCTA, Telephone Company-Cable TV Cross-Ownership Rules, CC Dkt 87-266 at 7-10 (filed Oct. 9, 1992).

⁷ See, e.g., Petition for Clarification or to Deny of NCTA, Application of The Chesapeake and Potomac Tel. Co. of Va., W-P-C-6834 at 12-17 (filed Dec. 4, 1992); Petition to Deny of NCTA, Application of New Jersey Bell Tel. Co., W-P-C-6838 at 10 (filed Dec. 28, 1992); Petition to Deny of NCTA, Application of New Jersey Bell Tel. Co., W-P-C-6840 at 12-15 (filed Jan. 22, 1993); Petition to Deny of Time Warner Cable, Application of New York Tel. Co., W-P-C-6836 at 25-29 (filed Dec. 14, 1992).

⁸ Video Dialtone Order at 5788 ("our existing regulatory safeguards will...effectively guard against anticompetitive behavior by telephone companies in the video marketplace"), 5827-32 ("[w]e conclude that existing safeguards against discrimination and cross-subsidization in the provision of basic services...should effectively protect against potential anti-competitive conduct by local telephone companies providing video dialtone"); see also The Chesapeake and Potomac Tel. Co. of Va., W-P-C-6834, Order and Auth. at 8-10 (rel. Mar. 25, 1993) ("C&P Order") ("we believe that our existing safeguards...are adequate to protect against anticompetitive conduct by C&P").

claim that additional safeguards are needed because of the supposedly unique nature of this service. The petitioners are wrong.

Video dialtone is a regulated, common carrier service just like the many other regulated voice and data services that telephone companies already provide.⁹ As the Commission previously found, concerns about possible anticompetitive conduct do not vary from one common carrier service to another, "whether voice, data, or video."¹⁰ According to the Commission, therefore, the same safeguards that are adequate for other regulated, common carrier services are also adequate for video dialtone.¹¹ There simply is no legitimate basis for singling out video dialtone to shoulder additional regulatory burdens.

⁹ The petitioners cannot distinguish video dialtone from other common carrier services on the grounds that it will compete with another service provider. Many other common carrier services -- such as high capacity access service to cite just one example -- already face intense competition; much of it from cable. See Shapiro, Cable As The Alternative; MSOs Are Forming Competitive Access Provider (CAP) Subsidiaries As A First Step Into The Phone Business, CABLEVISION, Mar. 22, 1993, at 30. Nor can they distinguish video dialtone on the grounds that it will use some of the same facilities that are used to provide other services. Telephone companies already provide a wide variety of voice, data, and video services (such as video conferencing) over the same facilities. The addition of video dialtone to the mix does not suddenly render worthless the same Commission rules that have proven adequate for all these other services.

¹⁰ Video Dialtone Order at 5828. As the Commission recognized, moreover, with advanced digital technologies "it will be increasingly impractical to distinguish between voice, data, graphics or video transmissions." Id.

¹¹ Id.; see also C&P Order at 8-10.

b. There Is No Basis For The Specific Rule Changes Sought By The Petitioners

Just as the petitioners' argument is flawed at a general level, it is also flawed in the specifics. In fact, the Commission has already rejected the need for the specific rule changes sought by the petitioners.

First, the petitioners repeat cable's usual claim¹² that an entirely new set of cost allocation, accounting and price cap rules specific to video dialtone are needed to prevent cross-subsidization of one regulated service by another. This, however, is precisely the function that is served by the existing regulatory scheme.

As the Commission has emphasized, video dialtone must be provided under a tariff approved by the Commission,¹³ and the Commission's rules require the filing of cost support to justify the tariffed rates.¹⁴ The standards applied in reviewing this cost support are well established, and are designed to ensure that consumers benefit from reasonable rates while also

¹² E.g., NCTA VDT Comments at 21-25.

¹³ Video Dialtone Order at 5827 ("As we have stated, the basic common carrier platform will be provided by the local telephone companies under tariff and subject to Title II non-discrimination requirements.").

¹⁴ See 47 C.F.R. §§ 61.38, 61.49 (prescribing cost support to be filed with non-price cap and price cap filings, respectively).

protecting against predatory pricing of competitive services.¹⁵ There is no need for an additional layer of video dialtone specific rules.¹⁶

Moreover, the Commission's price cap rules already include a separate service category for video services in the special access basket.¹⁷ Once rates are established at reasonable levels, therefore, any subsequent rate changes are subject to the constraints imposed by the Commission's price cap rules.¹⁸ As the Commission previously found, it is not necessary under these circumstances to revamp the price cap rules to create an entirely separate basket just for video dialtone as the petitioners urge.¹⁹

¹⁵ See, e.g., Amendment of Part 69 of the Commission's Rules, etc., 6 FCC Rcd 4524, ¶ 42 (1991) ("a LEC introducing new services will be required to...identify the direct costs of providing the new service, absent overheads...."); 7 FCC Rcd 5235, ¶ 1 ("the direct cost showing provides sufficient protection against predatory pricing").

¹⁶ The argument that telephone companies should be required to price their video dialtone services based on fully allocated costs is frivolous. The sole effect of doing so would be to artificially inflate telephone company costs, and create a price umbrella under which competing cable operators would be able to reap supra-competitive profits.

¹⁷ See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6811 (1990).

¹⁸ Id.

¹⁹ Video Dialtone Order at 5828.

Second, the petitioners repeat what is perhaps cable's most outrageous claim²⁰ -- that competition should be delayed for years while a joint board addresses jurisdictional separations issues specific to video dialtone. The Commission, however, has already rejected this call for delay, and has recognized that any separations issues would be better addressed "in the context of a more comprehensive review of those rules rather than on a piecemeal basis...."²¹ As competition intensifies, moreover, a global reform of these rules is increasingly important since the Commission's existing rules over-assign costs to the interstate jurisdiction in a number of respects wholly apart from video dialtone.

In the interim, the Commission's existing rules are adequate to ensure that there will be no jurisdictional mismatch in the assignment of video dialtone costs and revenues. In fact, the Commission's rules require that the costs of wideband services be "directly assigned where feasible."²² Under existing rules, therefore, video dialtone costs can be directly assigned to the appropriate jurisdiction.

²⁰ E.g., NCTA VDT Comments at 25-27.

²¹ Video Dialtone Order at 5840.

²² 47 C.F.R. § 36.155.

Third, the petitioners repeat cable's claim²³ that new cost allocation rules should be adopted for enhanced services provided in connection with video dialtone. As the Commission has repeatedly found, there is already in place a comprehensive set of cost allocation and accounting rules that "constitute an effective means of preventing cross-subsidization between regulated and unregulated services."²⁴ These safeguards apply fully to any enhanced services that may be provided in connection with video dialtone, and the Commission has expressly rejected the need for some special regulatory burden in the video dialtone context.²⁵

Fourth, the petitioners repeat cable's claim²⁶ that video dialtone specific joint marketing and CPNI rules should be adopted. There are already CPNI rules in place that apply to enhanced services offered in connection with video dialtone, and the Commission has expressly rejected claims that joint marketing of enhanced services and basic video dialtone services should be restricted.²⁷ As the Commission found, the "efficiencies and innovations" that arise from joint marketing of basic and enhanced services will produce "significant public interest

²³ E.g., NCTA VDT Comments at 32-34.

²⁴ See, e.g., Video Dialtone Order at 5829.

²⁵ Id. at 5828-29.

²⁶ E.g., NCTA VDT Comments at 34-37.

²⁷ Video Dialtone Order at 5830.

benefits."²⁸ The additional claim that restrictions should be adopted against joint marketing of basic video dialtone service and other basic services must also be rejected for the same reason.

Finally, the Commission has scheduled a review of its rules beginning three years from the date its video dialtone rules became effective. This will provide the Commission with an opportunity to reassess the need for its rules based on concrete experience, rather than just the cable monopolists' Chicken Little predictions of impending doom if the Commission opens the door to fair competition.

3. The Video Dialtone Applications Now Pending Before The Commission Demonstrate That Existing Rules Are Adequate

Contrary to the claims of the petitioners, the two New Jersey Bell video dialtone applications that are pending before the Commission do not support the claim that existing rules are inadequate. In fact, the exact opposite is true.

According to the petitioners, New Jersey Bell's applications prove that video dialtone specific cost allocation rules are required because New Jersey Bell proposes to allocate none of the fiber costs for its systems to video. In fact, however, New Jersey Bell has not yet even proposed a method of allocating costs to video for purposes of setting rates, nor has

²⁸ Id.

it proposed final rates.²⁹ This is because the Commission has held that these issues are not properly part of a § 214 proceeding, and should be addressed during the tariffing process.³⁰

Although New Jersey Bell did provide an "economic justification" as required by the Commission's rules,³¹ this is something different than an allocation of costs for pricing purposes. In a § 214 proceeding, the cost of the project for which authority is requested is relevant only to determine whether cost is so substantial relative to benefits that the project is not in the public interest.³² It has nothing to do with setting prices, and nothing to do with how costs will be allocated in setting prices. The petitioners have simply mischaracterized New Jersey Bell's applications.

²⁹ See, e.g., Opposition of New Jersey Bell to Petitions to Deny, Application of New Jersey Bell Tel. Co., W-P-C-6840 at 15-16 (filed Feb. 4, 1993) ("NJB Opp.").

³⁰ As the Commission has held, "[c]laims related to the reasonableness of the rates and the recovery of costs incurred to provide the service" should be made as part of the tariff process. AT&T Request for Authorization, W-P-C 5560, Mem. Op. and Order at ¶ 8 (rel. Mar. 10, 1986). Addressing these issues during the § 214 process would result in "duplicative processes" and "delay service to a customer whose needs are not at issue." Id. In fact, the Commission has eliminated the requirement that § 214 applicants file even an illustrative tariff with their applications as "burdensome and unnecessary." See "Commission Amends Rules," FCC News, No. CC-513 (May 17, 1993).

³¹ 47 C.F.R. § 63.03(m).

³² AT&T Request for Authorization, Mem. Op. and Order at ¶¶ 3, 7.

In fact, New Jersey Bell's applications actually demonstrate that existing rules are adequate to accommodate video dialtone. For example, New Jersey Bell proposes to separately account for the direct costs of video dialtone, and to directly assign these costs to its video dialtone service.³³ This will ensure that these costs are recovered from New Jersey Bell's video dialtone revenues, and are not borne by New Jersey Bell's other regulated services.³⁴ All of this will be done within the confines of the Commission's existing rules.

4. **The Commission Should Apply The Same Safeguards To Cable That Already Apply To Telephone Companies**

Unlike telephone companies, cable companies are subject to none of these regulatory safeguards, and are free to pay for the upgraded cable systems that are needed to provide telephone services with revenues extracted from their captive cable customers. The Commission should address this problem by applying the same rules to cable operators entering the telephone business that already apply to telephone companies entering the video business. This will safeguard consumers, and establish a measure of regulatory parity between these two industries.

³³ See NJB Opp. at 14.

³⁴ Id. In New Jersey, moreover, state regulators recently approved an incentive regulation scheme that bars New Jersey Bell from charging higher rates to basic telephone ratepayers to recover the costs of video dialtone. See Petition of New Jersey Bell Tel. Co. for Approval of its Plan for an Alternative Form of Regulation, Decision and Order, Dkt No. T092030358 (May 6, 1993).

First, cable operators providing interstate communications services should be required to file tariffs, and to provide cost support justifying their rates on the same basis as telephone companies that seek to provide video transport services.³⁵ This will ensure that cable's telephone services are covering an appropriate level of costs, and are not being subsidized by monopoly cable revenues.

Second, cable operators providing interstate communications services should be required to seek authority under § 214 to construct, operate, or acquire interstate lines of communications to the same extent as telephone companies.³⁶ This will ensure that operation of these lines is in the public interest.

Third, cable operators should be required to follow a uniform accounting system like the one that applies to telephone companies.³⁷ Absent such a system, cable companies would be free

³⁵ The Communications Act provides no basis for treating cable companies differently than telephone companies. 47 U.S.C. § 203(a) ("n]o carrier...shall engage or participate in such communications unless schedules have been filed and published"); see American Tel. & Tel. Co. v. FCC, 978 F.2d 727, 735-36 (D.C. Cir. 1992).

³⁶ Again, the Communications Act provides no basis for treating cable companies differently than telephone companies. 47 U.S.C. § 214(a) ("n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line...until there shall first have been obtained from the Commission a certificate....").

³⁷ See 47 C.F.R. § 32.1, et seq.

to take widely differing approaches, and the Commission would be handicapped in its efforts to ensure that costs are recovered appropriately.

Fourth, cable operators should be required to comply with cost allocation rules like those that apply to telephone companies.³⁸ For example, cable operators should be required to allocate costs between regulated cable and telephone services, and any unregulated services they provide.

Fifth, cable operators should be required to comply with affiliate transaction rules like those that apply to telephone companies.³⁹ These rules will ensure that cable operators do not evade the Commission's rules through transactions with their programming or other affiliates.

Sixth, cable operators should be subject to an annual attestation audit to independently verify that cable operators comply with the Commission's cost allocation and affiliate transaction rules.

Seventh, cable operators should be subject to the same depreciation rules as telephone companies. This will eliminate a regulatory disparity between these two industries that increasingly are deploying the same technologies and providing the same services.

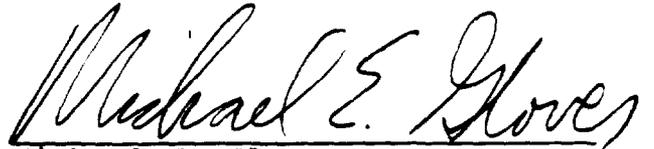
³⁸ 47 C.F.R. §§ 64.901(b)(2)-(4).

³⁹ 47 C.F.R. §§ 32.27, 64.902.

CONCLUSION

As the Commission has previously concluded, its existing rules are adequate to protect against anticompetitive conduct in the context of video dialtone and the petition for rulemaking should be dismissed. Unlike telephone companies, however, cable companies are subject to none of these safeguards as they move into telephony. As a result, the Commission should apply to cable the same rules that already apply to telephone companies.

Respectfully submitted,



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