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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 Section 19 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)
)
Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)

CS Docket No. 94-48

COMMENTS OF BELL ATLANTIC

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COMMENTS OF BELL ATLANTIC¹

I. Introduction and Summary

The unavoidable conclusion of the Commission's 1994 annual report to Congress must be that there is little evidence of increased competition in the local delivery of video programming since 1992. To the contrary, the delivery of video programming is becoming increasingly concentrated in the hands of a few large cable operators that face minimal local competition.

Absent competition from local telephone companies, moreover, cable will not face competition from a complete competitive alternative for the local delivery of video programming in the foreseeable future. Cable operators do not compete with one another, and instead are consolidating operations and forming cooperative ventures in order to move rapidly into local telephone

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., and Bell Atlantic-West Virginia, Inc.

services. Meanwhile, attempts to overbuild cable incumbents have stalled or proven unsuccessful, and satellite delivery systems -- which at best provide only a partial alternative to cable -- for the most part are not yet available.

In addition, competition from telephone companies is languishing because of continuing legal and regulatory barriers. In fact, cable operators have succeeded in their efforts to game the regulatory process, and have managed to block action on any of the 22 pending applications by local telephone companies to provide competing video dialtone service on a commercial basis. In order to break this logjam, it is critical that the Commission and Congress identify and eliminate remaining legal and regulatory barriers to telephone company competition with cable.

In particular, the specific steps that must be taken include repeal of the 1984 Cable Act's ban against telephone companies providing video programming, elimination or streamlining of the Section 214 application process for telephone company video dialtone services, continued resistance to the imposition of additional regulatory burdens at the local level that would impede competitive entry, and establishing parity of regulatory requirements between cable and telephone companies.

II. There is Little Evidence of Increased Competition in the Market for Delivery of Video Programming.

In the two years since passage of the 1992 Cable Act, cable operators have not faced any significant increase in competition. Cable's three most-heralded potential competitors --

direct broadcast satellite ("DBS") systems, cable overbuilds, and video dialtone -- have made little headway, for different reasons. More importantly, even within the cable industry, mergers and acquisitions have resulted in an increased concentration of market power among a small number of large cable operators.

Within the last month alone, two major acquisitions have made headlines: Comcast's \$1.27 billion purchase of Maclean Hunter's cable properties, and Cox Communication's agreement to buy Times Mirror's cable system division for \$2.3 billion. In each case, the acquiror purchased systems in areas where it already had a substantial market presence.² Many smaller acquisitions, or swaps to "cluster" operations, have also occurred,³ and others are

² Comcast bought Maclean Hunter operations that have 115,111 subscribers in Detroit, 72,500 subscribers in Ft. Lauderdale, and 265,000 subscribers in New Jersey. Comcast is already the largest operator in the Detroit suburbs, has a large presence in Florida and owns systems in 16 New Jersey communities. See "Clustering Is Key; Comcast's \$1.27-Billion Bid is Tops for Maclean Hunter Systems," Communications Daily (June 21, 1994) at 1.

The Cox-Times Mirror deal will "boost [Cox's] cable portfolio from 1.8 million subscribers to 3 million...[giving] Cox a gigantic, 600,000-subscriber system cluster south of Los Angeles that includes San Diego and affluent Orange County . . ." "Times Mirror Goes to Cox for \$2.3B," Multichannel News (June 6, 1994) at 1.

³ See, e.g., John M. Higgins, "Deal Frenzy Paints Contrasting Views," Multichannel News (June 27, 1994) at 1 (Hallmark sells Crown Media cable unit to Marcus Cable and Charter Communications); "MASS MEDIA: Adelphia agrees to buy 75% interest in Tele-media," Communications Daily (June 9, 1994) at 4 (purchase moves Adelphia to 7th-ranked MSO); "Acton's Cable TV Sale," The Wall Street Journal (Dec. 31, 1993) at 14 (Acton Corp. sells 76,000 subscriber cable system in Maryland to Intermedia Partners III); "MASS MEDIA: Booth America and TCI Complete Swap," Communications Daily (Jan. 5, 1993) at 4 (Booth American swaps South Dakota system with TCI in return for 50% interest it did not already own in cable systems in Michigan).

reportedly the subject of current negotiations.⁴

While this consolidation was occurring within the cable industry, robust competition from competing video delivery systems did not materialize. Direct broadcast satellite ("DBS") operations have not become head-to-head competitors with cable service.⁵ More fundamentally, DBS is not - and is unlikely to become - a complete alternative to cable, because DBS systems do not transport local programming.

The plans of many municipalities to "overbuild" the systems of cable incumbents have also failed to come to fruition. Some municipalities have been stymied by the delaying tactics of incumbent cable operators;⁶ others have been awaiting the

⁴ See, e.g., John M. Higgins, "TCI Amassing Giant Bay Area Cluster," Multichannel News (May 23, 1994) at 1 (TCI, with 469,000 subscribers in the San Francisco-San Jose area, reportedly "quietly maneuvering to consolidate its huge cluster in the San Francisco Bay area, moving to swap, merge or buy systems.")

⁵ Primestar, the only DBS operation offering nationwide service, is owned by six of the largest U.S. cable operators. Not surprisingly, its primary target market excludes most homes passed by cable. In fact, only about 5% of Primestar's subscribers live in homes passed by cable. See Bulletin: Yankeevision - Consumer Communication, The Yankee Group, 11:4 (March 1994) at 1-3 ("Yankee Group Report"). Initiation of nationwide service by DirectTV and United States Satellite Broadcasting Co. is not scheduled to begin until the fall of 1994. See "DSS Beaming Down to Miss.," The Hollywood Reporter (June 16, 1994); "Companies Serving Up Tasty Satellite Dish Packages," Chicago Tribune (June 10, 1994) at 76; "DIRECTV Inc. Aims for 1 Million in DSS Sales by March 1995," Satellite News (May 30, 1994); Cable TV Gets Competition Via Satellite," The Boston Globe (May 26, 1994), at Economy, p. 1. A fourth proposed DBS venture, SkyPix, never made it off the drawing board. Yankee Group Report at 1.

⁶ See, e.g., "Florida Municipal Overbuilders in Wait Mode," Multichannel News (Oct. 18, 1993) at 37 (describing Niceville, Florida's 7-year legal battle with Warner Cable).

Commission's implementation of rate regulation or are deterred by lack of capital or expertise.⁷ Some overbuilders have even sold (or tried to sell) their system to the incumbent cable provider.⁸

The mayor of one large city that had hoped to overbuild its incumbent cable operator summed up the situation in a letter last fall to then-Acting Chairman Quello:

"Let me urge you and the other Commissioners to carefully consider lifting the ban on telephone company entry into cable services. Our experience in searching for cable competition has been extremely frustrating. It seems that only a large economically strong entrant will be able to successfully compete with the growing economic and marketing power of the cable industry."⁹

III. Removing Legal and Regulatory Barriers Facing Telephone Companies Would Substantially Increase Competition in the Video Market.

Delivery of video services by local telephone companies would offer consumers a true alternative to cable, making available a full range of traditional broadcast and cable television programming, as well as such innovative, interactive services as video-on-demand, telemedicine, and transactional services.

⁷ Id.

⁸ See, e.g., "Group Takes Aim at Cable Company," St. Petersburg Times (May 6, 1994) at 1 (noting that cable incumbent called off deal to purchase overbuilder's operations); "MASS MEDIA: Booth America and TCI completed swap," Communications Daily (Jan. 5, 1993) at 4 (Booth America purchases cable overbuild in California); "MASS MEDIA: Huntsville will pay Cable Alabama estimated \$8 million," Communications Daily (Nov. 23, 1992) at 5-6 (City of Huntsville, Alabama to pay damages to cable overbuilder due to city's refusal to approve sale of overbuilder's system to cable incumbent).

⁹ Letter from St. Petersburg, Florida Mayor David Fischer to then-Acting FCC Chairman James Quello, dated September 22, 1993, quoted in "Florida Municipal Overbuilders in Wait Mode," Multichannel News (Oct. 18, 1993) at 37.

Incumbent cable operators, however, have successfully delayed the onset of real competition by opposing every video dialtone application filed with the Commission,¹⁰ rearguing fundamental aspects of the Commission's video dialtone orders,¹¹ and seeking initiation of entirely new proceedings to impose additional regulatory restrictions on the telephone companies' ability to compete.¹² As a result, 22 applications seeking authorization to provide commercial video dialtone service in direct competition with cable systems are languishing before the Commission, tying up over \$3.3 billion in proposed investment and depriving more than 8 million consumers of the benefits of choice and competition in the video marketplace.

In its 1990 report to Congress on cable, the Commission identified those requirements it deemed "essential to the continued and successful development of wireless cable as a competitive alternative to cable television systems."¹³ In its 1994 report to

¹⁰ For example, the cable trade association, the National Cable Television Association ("NCTA"), has filed petitions to deny every Section 214 application for commercial video dialtone service that has been filed to date (other than those for which the date for filing such petitions has not yet expired).

¹¹ See Television Company-Cable Television Cross-Ownership Rules, CC Docket No. 87-266, Petition for Reconsideration of NCTA (Oct. 9, 1992).

¹² See Amendment of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, RM-8221, Joint Petition for Rulemaking and Request for Establishment of a Joint Board of Consumer Federation of America and NCTA (Apr. 8, 1993).

¹³ See Implementation of Section 19 of the Cable Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48 (rel. May 19, 1994) at 8 ("Notice of Inquiry").

Congress, the Commission should identify the requirements for the successful development of telephone company-provided video services as a competitive alternative to cable. There are four principal requirements.

First, the 1984 Cable Act's ban on provision of video programming by telephone companies should be lifted,¹⁴ as the Commission and the Department of Justice have previously recommended,¹⁵ to permit the telephone companies to compete on equal footing with cable. As the Commission has correctly concluded, lifting the ban will "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public."¹⁶

Second, the Section 214 video dialtone application process should be streamlined to expedite the decision process, facilitate delivery of competing video services to the marketplace

¹⁴ The existing prohibition has been declared unconstitutional, and its enforcement against Bell Atlantic and its affiliates enjoined. See The Chesapeake and Potomac Tel. Co. v. United States, 830 F.Supp. 909 (E.D.Va. 1993), id., Amended Final Order, Civ. No. 92-1751-A (Oct. 7, 1993), appeal docketed, Nos. 93-2340 and 93-2341 (4th Cir. Oct. 18, 1993). See also U S West v. United States (No. C93-1523R), 94 U.S. Dist. Lexis 8357 (W.D.Wash. June 15, 1994).

¹⁵ See Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendations to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5847 (1992) ("Second R&O"); Reply Comments of the United State Department of Justice, Telephone Company-Cable Television Cross-Ownership Rules, CC Dkt. 87-266, at 44-45 (Mar. 13, 1992).

¹⁶ Second R&O, 7 FCC Rcd at 5847.

more quickly, and lessen the administrative burden on the Commission and applicants alike. Under the procedure proposed by Bell Atlantic in recent filings with the Commission,¹⁷ approval of an initial application for a particular video dialtone system also would serve as "generic" approval of that system under the Section 214 rules. Authority to deploy the same system elsewhere would be obtained by filing "me too" amendments, subject to a 14-day review process.

Third, Congress and the Commission should continue to resist efforts by local authorities to impose local barriers to entry that the Commission has recognized would impede competitive entry.¹⁸ Such efforts include attempts to reverse the Commission's determination that neither video dialtone platform operators nor programmer-customers offering video programming over a video dialtone platform require a franchise.¹⁹

Finally, the Commission's regulations must ensure regulatory parity between the cable and video dialtone industries in order to ensure that the outcome of competition between the two video delivery services is dictated by the market, not by

¹⁷ See Application of the Bell Atlantic Tel Cos., (filed June 16, 1994); Application of The Chesapeake and Potomac Tel Co., W-P-C 6912, Amendment (filed June 16, 1994).

¹⁸ Notice of Inquiry at 8; see also Telephone Company-Cable Television Cross-Ownership Rules, Further Notice of Proposed Rule Making, First Report and order and Second Notice of Inquiry, 7 FCC Rcd 300 at para. 52, n.86 (1991).

¹⁹ Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on reconsideration, 7 FCC Rcd 5069 (1992); see also Brief of Respondents, Nat'l Cable Television Ass'n v. FCC, No. 91-1649 et al. (D.C. Cir.) (filed Dec. 23, 1993).

government regulations that unfairly handicap one competitor. Bell Atlantic has supported, in other proceedings, reduction of the regulatory burdens that adversely affect the telephone industry's ability to compete as cable, telephony, computer and other communications technologies converge. Until Congress or the Commission lifts these regulatory burdens, the cable industry should be required to comply with similar regulations in order to avoid artificially favoring one competitor over another in the marketplace.

IV. Future Data Collection Should Seek to Demonstrate Whether Individual Cable Systems Face Effective Competition for Delivery of Video Programming.²⁰

As the Commission observed in its Notice of Inquiry,²¹ it is seeking to gather information concerning the "extent and growth of effective competition" to cable systems to determine whether the Commission can withdraw cable rate regulation in a given market.²² The 1992 Cable Act's criteria for determining whether a cable system is subject to effective competition concern availability and utilization of alternative delivery systems within a cable

²⁰ Evidence concerning competition in non-video and other services is not relevant to Congress' request for a report on competition in the delivery of video programming. Similarly, information concerning technical or market trials of competing delivery systems provides only indications of potential competition, and therefore is irrelevant to the question whether increased competition in the market for delivery of video programming actually exists.

²¹ Notice of Inquiry at 6-7.

²² Section 623 of the Communications Act of 1934, as amended, codified at 47 U.S.C. § 543.

operator's franchise area.²³ The Commission should therefore evaluate the presence of competition within a cable operator's local franchise area.

Much of the data that the Commission seeks in this proceeding regarding other potential competing delivery systems,²⁴ including the location of each system, its total estimated subscriber base, existing and projected channel capacity, pricing and similar information, must already be provided by the telephone companies in their Section 214 applications and tariffs for video dialtone service. In fact, the public disclosure required by these filings provides valuable competitive intelligence that cable operators use to upgrade their own operations in the areas in which they know they will face video dialtone competition,²⁵ while actively seeking to delay the onset of that competition through regulatory gamesmanship.²⁶ As cable, telephony, computer and other communications technologies converge, any further information the Commission may seek concerning video dialtone systems (such as

²³ Section 623(1)(1) of the Communications Act of 1934, as amended, codified at 47 U.S.C. § 543(1)(1).

²⁴ See, e.g., Notice of Inquiry at 18-19.

²⁵ For example, in the period since Bell Atlantic-New Jersey, Inc. filed its application for authorization to construct video dialtone facilities in Dover Township, the incumbent cable operators in the Dover service area (Adelphia and Monmouth) announced that they will construct high capacity fiber optic links in order to share programming and to provide the capability to begin offering interactive services. See Fiber Optic Plan Links Local Firms in Cable Hookup, "Ocean County Observer" (Oct. 6, 1993); "Central Jersey May Be First With Interactive Television," The Asbury Park Press (Oct. 5, 1993).

²⁶ See supra at 5-6.

market share, numbers of subscribers or programmer-customers, or other data) should be sought from all competing delivery systems -- direct broadcast satellite, wireless cable, cable, competitive access providers, and other providers. Any proprietary data should be given confidential treatment and reported as aggregate statistical data, where possible.

With regard to pricing comparisons, any meaningful pricing comparisons between video dialtone and cable offerings would require the Commission to attempt to compare "like" services.²⁷ For example, the Commission could ask video dialtone programmer-customers to share with the Commission their programming offerings, prices and subscriber numbers.²⁸ The Commission itself could then compare those offerings with the offerings of the cable incumbent and determine, from the end user's point of view, what a comparable "package" of video dialtone service would cost. Such a fictional package would include the cost of programming offered over a video dialtone system that is most comparable to that offered by a cable incumbent, plus any end user access charge that may apply.

With regard to the timing of the availability of broadband service utilizing traditional telephone technology²⁹,

²⁷ See Notice of Inquiry at 21,

²⁸ For the reasons stated supra with regard to collection of data from video dialtone platform operators, the Commission should also provide confidential treatment of proprietary information provided by programmer-customers.

²⁹ See Notice of Inquiry at 21.

Bell Atlantic is completing a current technical trial in which it has successfully demonstrated the viability of delivering prerecorded, pre-encoded video programming over existing copper loops utilizing digital compression techniques³⁰, thereby allowing consumers to enjoy true video-on-demand, and other innovative, two-way interactive services. Recent innovations in encoding, compression and multiplexing technology are expected to permit delivery of "live" broadcast programming over copper loops as well beginning in 1995.³¹ Conversely, Bell Atlantic's proposed hybrid fiber-coaxial cable architecture will provide analog and digital broadcast capabilities from the outset of service, with digital pointcast capability using Asynchronous Transfer Mode technology becoming generally available beginning in 1996.³² The combination of broadcast and interactive capabilities over Bell Atlantic's video dialtone systems will provide not only a complete competitive alternative to cable service, but also an expanded service offering.

³⁰ See Chesapeake and Potomac Telephone Co., Order and Authorization, 8 FCC Rcd 2313 (1993); Letter granting Special Temporary Authority to extend Technical Trial through Sept. 25, 1994 from James R. Keegan, Chief, Dom. Fac. Div., CCB, to Marie Breslin, Dir., Fed. Relations, Bell Atlantic (Mar. 21, 1994).

³¹ See Application of The Chesapeake and Potomac Tel Cos., W-P-C 6912, at 7-8 and n.8.

³² Bell Atlantic expects to begin testing digital pointcast capability over a hybrid system in the Washington area beginning in 1995. See Id., Amendment (filed June 16, 1994) at 15.

V. Conclusion

In its 1994 report to Congress on cable competitiveness, the Commission should inform Congress of the continued lack of competition in the market for delivery of video programming. The Commission and Congress should also take the necessary steps to eliminate remaining legal and regulatory barriers that prevent the telephone companies from becoming effective competitors to cable.

Respectfully submitted,

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