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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rulemaking to
Adapt the Section 214 Process
to the Construction of Video
Dialtone Facilities

RM-8491

COMMENTS OF THE HENRY GELLER AND BARBARA O'CONNOR

The comments of the Alliance for Public Technology respond to the petition of the Center for Media Education, et al., filed on May 23, 1994. As members of the Alliance, we join fully in those comments. We file these separate comments in order to stress or raise additional points.[1] We take no position on the merits of these particular controversies, and of course, it would in any event be inappropriate for us to do at this stage before the telco responses have even been submitted Rather, we seek here to address some broader policy issues.

1. The appropriate relief. We certainly agree that whatever the resolution of the specific controversies, the Commission should of course state that video dialtone applicants must eschew redlining. Such an activity clearly violates the underlying purposes of the video dialtone and would be flagrantly inconsistent with the public interest standard.

We do not support the relief that there be a showing of equal deployment in each phase as to the low income groupings, and that this showing be accompanied by detailed plans based on

[1] The views expressed are those of the commentators alone, and do not reflect the views of any organization with which the commentators are associated.

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Census and other data. It would, we believe, lead to extended litigation and "micromanaging" by the governmental agency. What is called for is a reasonable and equitable effort to include the low income areas in a timely fashion, and a clear showing to that effect.

That is, we recognize, somewhat "mushy." But this is an area where the Commission cannot proceed as if the problem were one of "equal time" for rival candidates. There are many factors that the telco can reasonably take into account in formulating construction schedules. As just one example, competitive pressures may well be at work here; Telesis stated that its stepped-up broadband building plan would focus first on communities where it expected to have to meet the competition of companies like TCI and Time-Warner. See Telecommunications Reports, Nov. 15, 1993, at 1-2. What is critical is not equality but that throughout the build-out (including, for example, an initial five year phase, the middle and the end game), service be made available to areas of low income groupings in a reasonable and equitable fashion.

We strongly suspect that the problems will not come in the areas focused on in the petition but rather in two other respects: the financial ability of the low income resident to take the video dialtone service (discussed in 2, below) and the rural resident. Based on the experience in the narrowband telecommunications field, innovative service can clearly lag in rural areas since the costs can be so high in relation to

revenues because of the sparse population. The petition does not focus on this rural problem. The pending legislation does deal with this important issue.

State public utility commissions of course have a large role to play in this connection. To cite a most recent example, there is the draft order of the Pennsylvania PUC in connection with the alternative regulatory (price cap) plan for Bell Atlantic-Pennsylvania (Telecommunications Reports, June 13, 1994, at 27):

> "The draft order will direct the company to reach 20% of rural access lines with its broadband network by 1998, instead of the 7% deployment level proposed by the company. The Commissioners said that the originally proposed level would not fulfill the statutory requirement that broadband deployment be reasonably balanced among urban, suburban, and rural areas. They further indicated that they permit Bell Atlantic to exceed its target deployment in urban markets to meet competition..."

We suggest that the state commissions have both great interest and expertise in this field, and that therefore video dialtone applicants should serve the interested state commissions, so that they can add their views if they so desire.

It may be that experience will demonstrate the need for tighter and heightened governmental intervention in this area. But we believe that such intervention would be unwarranted and premature at this stage.

2. <u>The "have-not" problem.</u> Even if the video dialtone service is offered the low income grouping, precisely because they have little income, many will not be able to take such service. This is, of course, the larger universal service issue. The Alliance has been much concerned with that larger issue. It has issued a

vision statement, "Connecting Each to All: A Telecommunications Platform for the Information Age," February, 1993, which has been supplied to the Commission and the Congress, and it is now proposing an amendment to Section 1 of the Communications Act to incorporate that vision (so that the Act would seek "to make available, so far as possible, to all the people of the United States, regardless of location or disability, a high capacity, switched telecommunications network capable of enabling users to originate and receive affordable and accessible high quality voice, data, graphics, video and other types of telecommunications services").

We recognize that while it is important to set out this vision or goal, it will take time to be implemented -- that such a network will not become a vital component of universal service for many years. The House bill's definition in this respect is most instructive (H.R. 3636, Section 201(b)(6)(C)): (i) that the service has been taken by a substantial majority of residential customers; (ii) that denial to any person would unfairly deny educational and economic opportunities; (iii) that the service has been deployed on the public switched telecommunications network; and (iv) inclusion within carriers' universal obligation would otherwise be consistent with the public interest. It follows -- indeed, it is common sense -- that video dialtone, if successful, can be a large help in promoting the earliest possible achievement of a universal service concept that includes broadband services and thus would enable the low income customer

to obtain not just video entertainment but also broadband public service applications.

If this service is to be of assistance to the low income customer -- a goal sought by petitioners and fully endorsed by us -- it must have its chance in the market place. But we are still talking today about a non-existent service because the applications are hung up at the Commission. We note that one application (that of Bell Atlantic in New Jersey) has just been granted, and hope that this indicates that the log jam is ending.

We recognize that there are significant issues to be resolved, such as those of cost allocation. But those issues must be dealt with, sooner or later. In light of the Commission's own declarations about the important contributions to the public interest that this service can make, we strongly believe that the Commission should resolve the issues sooner rather than later.

A second important factor obviously involves the pricing of these services, especially if they are to be more widely available to low income customers. In a prior letter to the Commission, we have urged that such pricing be based on long run incremental costs. See Letter of Barbara O'Connor, Donald Vial, and Henry Geller, dated April 29, 1994. Such a pricing approach would be similar to that urged by parties such as the Electronic Frontier Foundation for ISDN-type services. We would hope that there would be support for a similar approach in this important area.

3. <u>The need for the FCC to seek revision of S.1822.</u> S.1822 seeks regulatory parity between cable and telco by adopting the cable regulatory model for telco's video programming efforts. Thus, S.1822 has a provision that a "local exchange carrier that provides video programming directly to subscribers is a cable operator as defined in section 602" (section 613(C) in Title V, Regulatory Parity Between Telephone and Cable Companies, Sec. 501). If this provision is enacted into law, the franchising authority, not the FCC, would be considering the petition under Section 621(a)(3). We believe that this is wrong from a process standpoint -- that review should be done on a national or state level so that it encompasses the overall plans for the state or a region.

But it is also the wrong regulatory model substantively. As the petition soundly points out (at 11), an important goal of the video diattone action is to foster the development of greater diversity of video programming. Adopting the common carrier model for the video dialtone platform, as the House bill does (Part V), accomplishes that goal; the approach of S.1822, on the other hand, is most flawed because it applies the cable model to telco provision of video programming.

The Commission's findings in its 1990 Cable Report (FCC 90-276, at pars. 121-123) point up the serious consequences to the First Amendment if the cable model is adopted. In 1985, NBC sought to enter the general cable news market as a competitor to CNN. TCI declined to let NBC compete with CNN, and NBC was

forced to offer a different service, CNBC, a consumer and business channel. It did gain carriage, but as its chairman testified, "...a number of large MSOs insisted as a condition of carriage that CNBC not become a general news service in direct competition with CNN, which is owned in part by TCI, Time Warner, Viacom, and other MSOs" (id. at par. 120).

Last year, CBS, in connection with the retransmission consent situation, tried to get MSO acceptance for a competing news channel, and ran into a stonewall. At a recent conference, Rupert Murdoch, the Chairman of the News Corporation, stated: "I would have liked to start a news channel, but [TCI President] Malone and [Time Warner Chairman] Gerald Levin would not give me the time of day" (Broadcasting Mag., Jan. 17, 1994, at 8). In a Broadcasting Magazine interview a week later (Broadcasting Mag., Jan. 24, 1994, at 23), Murdoch stated:

> "There are at least four companies, perhaps five, that would like to start a 24-hour news channel. The only one that's made a serious effort has been CNBC. It is now getting distribution, but it had to limit itself to business news. They were very limited, and still are. But so long as they can't be sure of distribution, they're never going to get the chief executives or the chairman of those companies to take the risk and make the investment."

Think of the situation if because of the structure of the broadcasting industry, only one network were allowed to have a national news program. The cable model has serious First Amendment consequences: The underlying premise of the First Amendment is that the American people receive information from as diverse sources as possible -- yet in cable, the rising video

force, the American people are allowed to receive only only one 24-hour news channel because of the cable model.

Surely as move into the 21st Cenutry, we will want to adopt a regulatory model that insures access to all providers. That is the common carrier model. Any information provider can start a news letter today and send it out over the mails or fax it over the telco's narrowband facilities, and the market decides on its success or failure. Today and even more so tomorrow, it will be critically important to allow video publishing. It follows that Congress should require the telco to come as a common carrier -- to always have as a bedrock and prime responsibility affording nondiscriminatory access. If that obligation is met, and only if it is, the telco then should be allowed to provide any amount of its own content material through a separate subsidiary. As for regulatory parity, that should be achieved along the lines of the House bill (and the Administration's proposals); in any event, even if such parity could not be achieved, it should not be purchased at the expense of the much more important First Amendment goal.

It is our understanding that the Senate Commerce Committee will mark up its bill some time after the July 4th recess. We strongly urge the Commission to advise the Committee of its own findings, and to urge the adoption of the common carrier approach. We believe that this advice, coming as it does from the expert agency in the field, will carry great weight.

CONCLUSION

We hope that the foregoing discussion is of assistance to the Commission in its consideration of this matter and of the important issues raised in the universal service field. For the foregoing reasons, we urge action along the lines set out above.

Respectfully submitted,

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