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

In the Matter of )  
)  
TELEPHONE COMPANY- )  
CABLE TELEVISION )  
Cross-Ownership Rules, )  
Sections 63.54-63.58 )  
)  
and )  
)  
Amendments of Parts 32, 36, )  
61, 64, and 69 of the )  
Commission's Rules to )  
Establish and Implement )  
Regulatory Procedures for )  
Video Dialtone Service )

CC Docket No. 87-266

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DEC 16 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

RM-8221

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AT&T COMMENTS

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December 16, 1994

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## SUMMARY

In analyzing comments and in developing rules for LEC provision of video dialtone services, the Commission should be cognizant of the fact that these services, with the potential to offer a vast array of new and imaginative applications to the public, are still in their infancy. The Commission should, therefore, be extremely careful that it does not impose such onerous provisions on local exchange companies that the development of video dialtone is stifled. On the other hand, because this market is so new the Commission must ensure that the LECs are not permitted to develop a market structure which, either inadvertently or by design, arbitrarily disadvantages some potential programmers.

In light of these principles, AT&T believes the Commission should neither mandate digital video dialtone systems nor should it allow LECs to provide preferential access or rates to certain classes of customers. AT&T supports the concept of channel sharing, subject to appropriate safeguards to ensure even handed treatment of all programmer customers. AT&T also supports a requirement that LECs make pole attachments and conduit space available to nonaffiliated entities.

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AT&T COMMENTS

Pursuant to the Commission's Third Further Notice of Proposed Rulemaking ("FNPR") released November 7, 1994,<sup>1</sup> AT&T Corp. ("AT&T") submits these comments on various topics proposed by the Commission.

INTRODUCTION

In this proceeding, one in a series that have spanned a number of years, the Commission once again seeks comments on various issues for the purpose of

<sup>1</sup> Telephone Company-Cable Television Cross-Ownership Rules, CC Docket No. 87-266, Memorandum Opinion And Order On Reconsideration And Third Further Notice Of Proposed Rulemaking, FCC 94-269, released November 7, 1994 ("Reconsideration Order").

developing rules that will be applicable to the provision of video dialtone service by local exchange companies. In analyzing comments and in developing rules for LEC provision of video dialtone services, the Commission should be cognizant of the fact that these services, with the potential to offer a vast array of new and imaginative applications to the public, are still in their infancy. The Commission should, therefore, be extremely careful that it does not impose such onerous provisions on local exchange companies that the development of video dialtone is stifled. On the other hand, because this market is so new the Commission must ensure that the LECs are not permitted to develop a market structure which, either inadvertently or by design, arbitrarily disadvantages some potential programmers.

For its part, AT&T supports the development of a regulatory environment which will facilitate the rapid and efficient deployment of video dialtone services, subject to appropriate safeguards which preclude cross-subsidization and ensure availability of services on a nondiscriminatory basis. With these general principles in mind, AT&T addresses specific questions posed by the Commission relating to (1) digital capacity and costs,

(2) channel sharing, (3) preferential access proposals and (4) pole attachments and conduit rights.

A. DIGITAL CAPACITY AND COSTS.

In the FNPR (§§ 268, 271) the Commission recognized that a number of proposed video dialtone systems intend to rely, at least initially, on analog channel delivery systems. It noted that using analog technology the systems would be able to deliver only a relatively few channels (from sixty to eighty channels (FNPR, § 271)). The Commission, therefore, requested comments on a GTE proposal which might dramatically expand the number of channels which ultimately could be made available to potential video dialtone programmers. This expansion of channels would greatly expand the potential number of programmer customers who could be accommodated on a given system.

GTE has suggested using digital compression as an alternative means to make available a significantly larger number of video channels to video programmers. On the surface, digital compressed channels appear to present a reasonable substitute for analog channel delivery of video dialtone. There are, however, concerns associated with this type of channel expandability. If one makes the assumption that National Television Standard Committee ("NTSC") quality can be achieved with 3 Mbps compression, then eight compressed digital channels can fit in the 6 Mhz bandwidth required for a

single analog channel. That would be an 8 to 1 analog bandwidth savings that, all other things being equal, would significantly reduce, if not eliminate concerns relating to the ability of video dialtone systems to handle the demands of programmer customers.

There are some significant limitations associated with the use of digital technology as a video dialtone delivery system. Initially, it is not certain that digital technology will be able to achieve equivalent NTSC quality within the context of the physical plant in existence today. Second, and of equal importance, there are significant additional costs associated with the use of digital compression technology. AT&T estimates these additional costs to be, at least, \$100,000 per derived channel on the network side. Applying this cost estimate specifically to the GTE proposal of using 500 Mhz of the 700 Mhz to transmit 80 analog channels and 200 Mhz of the 700 Mhz to carry 168 digital compressed channels, the estimated cost to compress will be about \$16.8 million. This estimate does not include any costs associated with upgrading local plant to accommodate digital technology. Finally, as noted by the Commission in the FNPR, the use of digital technology will impose an additional cost on the consumer

in the form of a set top device with a cost of approximately \$300.<sup>2</sup>

The Commission has also requested comment on whether or not it should require the development of all digital video dial tone systems. It is AT&T's belief that the Commission should not do so. In its Second Video Dialtone Order the Commission, correctly, took the position that it would allow LECs responding to the marketplace to determine the network architecture to be used in video dialtone systems rather than attempting to control development through regulatory fiat.<sup>3</sup> There is absolutely no reason for the Commission to reverse itself on this issue at this time.

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<sup>2</sup> The use of the set top device may require a change in the Commission's rules as they relate to customer provided equipment ("CPE"). Because the set top device is located on the customer's premises and is on the customer's side of the demarcation point, it would appear to be CPE under the Commission's present rules. This would preclude the LEC from offering the set top device as part of a tariffed video dialtone service. Such a result could affect the potential viability of any video dialtone service utilizing digital technology.

<sup>3</sup> Telephone Company-Cable Television Cross-Ownership Rules, 7 FCC Rcd 5781, 5785. ("It is not our intent, nor our proper role, to specify the technology, network architecture, or functions that a telephone company would offer under video dialtone.")

B. CHANNEL SHARING.

Recognizing that analog technology allowed only a relatively limited number of channels, a number of LECs, in their Section 214 applications, proposed using a so-called "anchor programmer" to administer a number of channels which would provide those programs thought to be desired by a majority of potential end user customers. In the Reconsideration Order, the Commission prohibited this practice.<sup>4</sup> The Commission now has solicited comments on the much more limited concept of channel sharing as a method to conserve scarce channel resources.

AT&T supports the general concept of channel sharing as a means by which programming redundancies could be eliminated and analog channels more efficiently used. Using such a mechanism the LEC could set aside a specified number of channels to be used to carry locally available commercial and non-commercial TV as well as other specialty programming that is demanded by a significant number of potential end user customers.

If channel sharing is used, it is essential that it be done so in a manner that promotes rather than inhibits competition. For example, although channel sharing would promote efficiencies, assigning too many channels for sharing could potentially restrict the

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<sup>4</sup> Reconsideration Order, ¶ 35.

ability of individual programs to develop packages which would be attractive to the market. In addition, it is extremely important that the sharing be administered in an even handed fashion. For this reason, the administrator of the shared channels should be an individual or group which is not associated, either directly or indirectly, with the LEC, or any enhanced service provider affiliated with the LEC. In order to function effectively, however, the administrator should be familiar with the video programing environment.

The administrator would provide the services needed to identify and track usage on the shared channels and to provide management services with respect to those channels to various participating programmer customers on a nondiscriminatory basis. The administrator would charge the video programmers for such services and these costs would be ultimately reflected in end-user rates. The contract between the administrator and LEC should identify all specific terms and condition applicable to that arrangement. The LEC\Administrator contract, as well as the contracts between the administrator and customer programmers, should be filed with the Commission.

C. PREFERENTIAL ACCESS.

In addition, the FPNR seeks comment on whether the Commission should mandate, or permit, preferential video dialtone access and\or reduced video dialtone rates

to certain classes of potential customers. As discussed below, it is AT&T's position that the Commission should not do so.

Issues relating to preferential access and/or reduced rates can be sub-divided into two groups; those relating to legal concerns and those associated with public policy. Initially, the authority of the Commission to mandate either preferential access or reduced rates for certain classes of customers is, at best, questionable. As noted by the Commission, mandating preferential access would be a functional equivalent of the cable "must carry" rules. Because of this, any preferential access rule would fall within the Turner v. FCC doctrine.<sup>5</sup> In that case, the Supreme Court determined that the cable "must carry" rules would have to be justified under:

the intermediate level of scrutiny applicable to content neutral restrictions that impose an incidental burden on speech.<sup>6</sup>

The Court further held that the government could not support its position simply by abstract assertions but, instead, was required to present sufficient facts to demonstrate the need for the

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<sup>5</sup> Turner Broadcasting Systems, Inc. v. FCC, 114 S.Ct. 2445 (1994).

<sup>6</sup> Id., p. 2469.

requirement.<sup>7</sup> As such, it is extremely unlikely that a rule requiring mandatory preferential access could be justified on the record of this proceeding to date.

More fundamentally, any rule mandating the provision of video dialtone access to certain classes of customers at reduced rates would be beyond the Commission's power and would violate the Congressional directive that rates are to be "carrier initiated."<sup>8</sup> Although the Commission certainly has the right to examine rates once they are filed, it does not have the authority to direct carriers to file specific rates.

Legal analysis notwithstanding, the Commission should reject all claims for preferential access or rates on simple public policy reasons. Whether it is in access or rates, a preference to a group of customers to the exclusion of others is simply a form of subsidy. As such it inherently distorts the competitive process. Moreover, provision to certain favored programmer customers of video dialtone services at reduced rates will certainly exacerbate the problems regarding analog capacity already identified by the Commission. Given the fact that video dialtone services are in their infancy, there is absolutely no reason for the Commission to tilt

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<sup>7</sup> Id., p. 2470.

<sup>8</sup> American Telephone And Telegraph Company v. FCC, 487 F.2d 865 (2d Cir 1973).

the marketplace in an effort to favor one group of customers over another. Moreover, there is no reason why the Commission should permit LECs to do so. The competitive market should be permitted to operate in a nondiscriminatory fashion to determine the shape which video dialtone services will take.

D. POLE ATTACHMENT AND CONDUIT RIGHTS.

The FNPR (§ 205) also seeks comment on whether a rule similar to Section 63.57 of the Commission's Rules, 47 C.F.R. § 63.57, should apply to LECs providing video dialtone service. As the Commission explains, Section 63.57 requires "LECs seeking to provide channel service to show in their Section 214 application that the cable system for which the LECs would be providing channel service had available, within the limitations of technical feasibility, pole attachment rights or conduit space at reasonable charges and without undue restrictions on" use (§ 285) (citation omitted). The rule's purpose is to "prevent LECs [that provide channel service] from denying cable systems reasonable access to their pole or conduit space for the purpose of preventing competition from the cable systems" (id.) (citation omitted). For the same pro-competitive purpose, the Commission should apply a similar rule to LECs providing video dialtone service.

Specifically, the LECs have acquired access to, and control over, a vast network of conduit, pole

attachments, rights-of-way, and other pathways. Rights to these pathways could only be reproduced, if at all, at great, if not prohibitive, costs. These pathways may, therefore, be the quintessential bottleneck on which all other providers must rely. As such, the LECs have the clear ability and incentive to use their control over these essential pathways -- and their potential competitors' dependence on these pathways -- to disadvantage rivals. For example, by discriminating in the terms and conditions of access to, use of, and information about these pathways, the LECs could substantially disadvantage those video programmers that seek to use their own facilities to deliver their programming in competition with the LECs' video dialtone platforms.

To reduce these risks, the Commission should either: (i) require the LECs to transfer their control over conduit, pole attachments, rights-of-way, and other pathways to a disinterested third party that would make those assets generally available on reasonable and nondiscriminatory terms and conditions; or (ii) mandate that the LEC itself provide to unaffiliated entities access to, and use of, conduit, pole attachments, rights-of-way, and other pathways on terms and conditions (including price) identical to the terms and conditions pursuant to which the LEC provides itself access to, and use of, those pathways. By reducing the risks that

unique LEC control over these pathways could be used to stifle or distort competition, these requirements could at least enhance the potential for facilities-based competition to the LEC video dialtone platform.

Claims that capacity constraints preclude such equal access to conduits, pole attachments, rights-of-way, and other pathways are not persuasive. As a threshold matter, equal access to these pathways would be even more important to the potential for facilities-based competition if, in fact, capacity constraints do exist. Moreover, here where the LECs are just beginning to plan and deploy their video dialtone networks, the opportunities to minimize the impact of any capacity constraints should be greatest, so long as the LECs are aware of their obligation to provide equal access to these pathways and design and deploy their video dialtone networks accordingly.

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CONCLUSION

Based upon the above comments, the Commission should adopt rules with respect to video dialtone services which maximize the operation of the marketplace.

Respectfully submitted,

AT&T CORP.

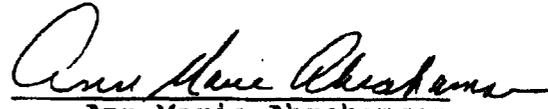
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December 16, 1994

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I, Ann Marie Abrahamson, do hereby certify that on this 16th day of December, 1994, a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

  
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