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FEDERAL COMMUNICATIONS COMMISSION
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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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RM-8221

AMERITECH'S PETITION FOR RECONSIDERATION AND CLARIFICATION OF
THE MEMORANDUM OPINION AND ORDER ON RECONSIDERATION
AND THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

The Ameritech Operating Companies¹ submit this Petition for Reconsideration and Clarification of two aspects of the Commission's Memorandum Opinion and Order on Reconsideration adopted in this docket on October 20 and released November 7, 1994.² First, the Commission should reconsider its channel capacity restrictions and allow any video programmer to utilize the analog capacity on a video dialtone platform that is necessary to provide, and continue to provide on an on-going basis, the number

¹The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. (herein referred to as "the Companies").

²Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Video Dialtone Order), Recon. FCC 94-269 (rel. Nov. 7, 1994) (YDT Recon Order), appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

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of channels that the market requires to effectively compete with the incumbent cable operator in the market being served. Second, the Commission should reconsider the Part 69 waiver requirement because it is inappropriate and unnecessary. Commission reconsideration on these two points is necessary to fully realize the public interest goals of increased competition, improved infrastructure and greater diversity in video programming which the Commission has adopted in this docket.

I.

ANY PROGRAMMER ON A VIDEO DIALTONE PLATFORM SHOULD BE ALLOWED TO UTILIZE, ON AN ON-GOING BASIS, THE NUMBER OF ANALOG CHANNELS THAT THE MARKET REQUIRES TO EFFECTIVELY COMPETE WITH THE INCUMBENT CABLE OPERATOR.

In affirming the basic common carrier regulatory construct for the video dialtone delivery platform which was adopted in its Video Dialtone Order, the Commission decided in its VDT Recon Order that local exchange carriers (LECs) may not allocate "all or substantially all" of the analog capacity of such a platform to a single "anchor programmer."³ The Commission said that an "anchor programmer" is inconsistent with the obligations of a common carrier and the requirement that LECs offer sufficient capacity to accommodate multiple video programmers.⁴

However, having decided that an LEC may not allocate "all or substantially all" of the analog capacity on a video dialtone platform to an "anchor programmer," the Commission should not also prohibit an LEC from assigning sufficient analog capacity to permit any new video programmer to provide, on an on-going basis, the number of

³VDT Recon Order at par. 35.

⁴*Id.* Many of the restrictions in the VDT Recon Order on the LEC's ability to provide video programming (see, e.g., pars. 3, 9, 56, 64, 77 and 110) were based on the Commission's desire to remain consistent with the telephone-cable cross-ownership rules contained in the 1984 Cable Act (47 U.S.C. Sec. 533(b)), rules which now have been declared unconstitutional. E.g., *Ameritech Corp. v. United States*, Nos. 93-C-6642 and 94-C-4089 (N.D. Ill. Oct. 27, 1994). This development constitutes substantial and compelling reason for the Commission to grant reconsideration. The Commission should not adopt rules in this docket based on a statutory provision which is unconstitutional.

channels that the market requires to effectively compete with the incumbent cable operator, particularly where additional capacity is available for other programmers. Such a prohibition actually could frustrate, not advance the Commission's goals of increased competition, improved infrastructure and greater diversity in video programming.

The most critical challenge facing video programmers on the video dialtone network is to provide a package of programming which is fully competitive with the incumbent cable operator. This means that video programmers, at a minimum, must have the ability to match the entrenched competitor's offering. Customers will likely find unattractive a new video programmer offering that does not equal what is available today. Market conditions should determine the appropriate number of channels video programmers will need to effectively compete. Placing any artificial restrictions on the number of channels made available to a single video programmer could threaten its ability to attract customers and jeopardize its participation on a video dialtone platform.

For example, Ameritech's video dialtone system will compete against incumbent cable operators with a wide variety of channel capacity as detailed below. Many of these cable operators are expected to upgrade these systems in the near future to increase capacity.

<u>Community</u>	<u>Cable Operator</u>	<u>Analog Channel Capacity⁵</u>
Indianapolis, IN	Comcast	37
Naperville, IL	Jones	60
Columbus, OH	Time Warner	77
Greenfield, WI	Time Warner	108
Troy, MI	TCI	120

⁵ Television & Cable Fact Book, Cable Vol. No., 62, 1994 Edition, Warren Publishing.

A would-be video programmer on a video dialtone platform will not be able to effectively compete if it cannot utilize the capacity the market demands to be competitive with the incumbent cable operator, and have some assurance that it will be able to secure additional capacity to offer more channels as the menu of its cable-competitor expands.

In its VDT Recon Order, the Commission specifically clarified that LECs will be required to expand the capacity of their video dialtone networks "whenever, and [only] to the extent that, expansion is technically feasible and economically reasonable."⁶ Without such a limitation, the Commission reasoned, LECs might be discouraged from constructing and operating a video dialtone network because of the risk of excessive idle investment.⁷ That same logic suggests that the Commission should not adopt any upper limit on the use of analog channel capacity which would prevent a video provider from effectively competing over a video dialtone platform with the incumbent cable operator.

In short: the Commission should avoid setting a fixed limit on the number of channels assigned to any individual video programmer. The number needed to effectively compete will vary according to dynamic market factors. It is in the public interest to ensure that video dialtone systems afford any video programmer the flexibility to acquire network capacity needed to be successful in the marketplace. Thus, the Commission should make clear that by prohibiting an allocation of "all or substantially all" of the capacity on a video dialtone platform to an "anchor programmer," it is not prohibiting an LEC from allocating sufficient analog capacity to any video programmer so that the programmer can, on an ongoing basis, provide the

⁶VDT Recon Order, par. 38.

⁷Id.

number of channels that the market requires to effectively compete with the incumbent cable operator.

II.

THE COMMISSION'S PART 69 WAIVER REQUIREMENT IS INAPPROPRIATE AND UNNECESSARY GIVEN THE COMMISSION'S STATED GOAL.

The Commission decided in the VDT Recon Order:

...that access to the basic video dialtone platform is a form of interstate access to the extent it is used to route interstate video programming to end users...

[and,] as the Commission has done in the past with other new services, we will require local telephone companies that wish to offer video dialtone services to file petitions for waiver of our Part 69 rules prior to the establishment of a permanent video dialtone structure.⁸

Imposing a blanket requirement for a Part 69 waiver in the context of a video dialtone tariff filing is inappropriate for two reasons. First, it is not clear that the Commission's access rules are appropriate for video dialtone. The access charge regulatory structure was developed over ten years ago in response to a known, deliberate and fundamental restructuring of the long distance telephone industry and the corresponding need for a uniform nationwide tariff structure to provide for access by interexchange carriers to the existing, ubiquitous local exchange network. That circumstance is entirely different from the context of video dialtone, where local networks are only now beginning to be deployed, using new technology, to address an uncertain market.

Second, even if the Commission determines that its access charge rules should apply despite the radical difference in environments of access and video dialtone, it is obviously inappropriate to apply the switched services waiver requirement to services

⁸Id., pars. 195; 197.

which are not switched. Ameritech's video dialtone platform will offer three basic types of service: Analog Multicast, Digital Multicast, and Switched Digital. Neither Analog Multicast nor Digital Multicast utilize any switching and, therefore, are comparable to Special Access services in the access charge environment. The Commission, recognizing the broad range of non-switched services offered under Special Access and the impossibility of crafting specific rules to apply to the multitudinous rate elements which comprise that category, decided not to promulgate the same kind of specific rules for Special Access that it adopted for a handful of Switched Access services. Dedicated services can be and have been added to the Special Access tariffs of LECs without need for a Part 69 waiver throughout the entire eleven-year history of access charges. To now require such a waiver for dedicated video dialtone services is not appropriate.

Furthermore, the Part 69 waiver requirement is unnecessary. The protections cited by the Commission in requiring application for a Part 69 waiver are already provided for in the existing process of bringing video dialtone service to market. The Commission declared that the Part 69 waiver requirement will provide interested parties with an opportunity to challenge rate structure and cost allocation proposals. Yet, in rejecting commentors' arguments seeking detailed review of the same issues in its authorizations to construct video dialtone networks, the Commission has pointed out that the tariff review process provides the appropriate forum, and ample opportunity, for challenges of rate structure and cost allocations.⁹

The Commission has outlined a cost accounting and reporting process for video dialtone which provides for cost allocations to be performed in the Part 32 process, much earlier in the process than the point where Part 69 rules would be applied. Costs

⁹ In the Matter of the Applications of Ameritech Operating Companies For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and main advanced fiber optic facilities and equipment to provide video dialtone service within geographically defined areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin, File Nos. WPC-6926, WPC-6927, WPC-6928, WPC-6929, WPC-6930, Order and Authorization, (released January 4, 1995) at ¶ 59.

associated with video dialtone, including appropriate overhead loadings, will be segregated from traditional telephony-related costs through this process. Thus, the primary concern which might be addressed through the waiver process -- cross-subsidy of video dialtone services by traditional telephony services -- will have been addressed much earlier in the process. Further, issues of cost allocation between video dialtone rate elements themselves are appropriately addressed in the review of the actual video dialtone tariff.

Since the tariff review process already provides opportunity for challenges to rate structure and cost allocations, there is no public interest benefit to be gained by inserting another step in the process through the Part 69 waiver requirement. The waiver requirement will not provide additional information, but will only duplicate existing protections while providing yet another opportunity for competitors to further delay the public benefits the Commission has already acknowledged will derive from video dialtone.

III.

CONCLUSION

For these reasons, the Commission should reconsider and clarify the decisions it reached in the VDT Recon Order regarding the capacity a video programmer may utilize in a video dialtone platform and the Part 69 waiver requirement.

Respectfully submitted,



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