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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

RM-8221

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To: The Commission

REPLY COMMENTS OF THE ALLIANCE FOR
COMMUNICATIONS DEMOCRACY; THE CITY OF ANN
ARBOR, MICHIGAN; THE CITY OF FORT WORTH,
TEXAS; MONTGOMERY COUNTY, MARYLAND;
SOMERVILLE COMMUNITY ACCESS TELEVISION; THE
CITY OF WACO, TEXAS; AND THE CITY OF
WADSWORTH, OHIO

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SUMMARY

The public interest requires provisions to facilitate PEG access to video dialtone systems. To the extent PEG access may impose a burden on an operator's First Amendment rights, that burden is outweighed by the important First Amendment interest in assuring diverse sources of information. Moreover, access requirements represent part of a reasonable compensation for the video dialtone operator's use and permanent occupation of the public rights of way for commercial purposes. PEG access does not conflict with the requirements of common carriage, because a common carrier may accommodate PEG programmers through the establishment of just and reasonable classifications.

Bell Atlantic's "will carry" proposal is not sufficient to meet these public interest concerns, insofar as it appears the operator could terminate such an arrangement at will. In addition, the provision of network capacity alone is not sufficient to make PEG access possible.

If a video dialtone operator engages in programming on its own system, it becomes a cable operator by the plain language of the Cable Act, consistent with both the NCTA court decision and the decisions striking down the cross-ownership ban. The Commission appears to have ignored this fact in framing the question in its new rulemaking and in granting Bell Atlantic's Northern Virginia application, in violation of its own current rules.

Allowing telephone companies to buy out cable systems in their service areas would tend to decrease rather than increase competition, and would require stringent regulation of any resulting monopolist.

The Commission should apply to every video dialtone grant express conditions requiring compliance with such requirements as may be developed in the course of this proceeding and any further proceedings.

I. NONCOMMERCIAL ACCESS RULES ARE REQUIRED BY THE PUBLIC INTEREST AND CONSISTENT WITH APPLICABLE LAW.

The initial comments in this rulemaking demonstrated that the public interest requires provisions to facilitate public, educational, and governmental ("PEG") access to video dialtone systems.² In particular, the affidavits from numerous access programmers submitted with the PEG Access Coalition Comments provided a wealth of detail regarding the diversity of programming that has sprung from access provisions in the cable television regulatory framework.

Nothing in the comments opposing access requirements rebuts this showing that there is a strong public interest in favor of access. Such opposing comments primarily argue that PEG access would be somehow incompatible with the First Amendment or with a video dialtone operator's common carrier responsibilities. Neither of these arguments is valid.

²See Comments of the Alliance for Communications Democracy, the City of Ann Arbor, Michigan, the City of Fort Worth, Texas, Montgomery County, Maryland, and Somerville Community Access Television at 3-7 (Dec. 16, 1994) ("ACD Comments"); Comments of the Alliance for Community Media and the Office of Communication of the United Church of Christ (Dec. 16, 1994) ("PEG Access Coalition Comments"); Comments of the Center for Media Education, Consumer Federation of America, Media Access Project, and People for the American Way on the Third Further Notice of Proposed Rulemaking (Dec. 16, 1994) ("CME Comments"); Comments of the City and County of Denver, Colorado (Dec. 16, 1994); Comments of the Public Service Commission of the District of Columbia (Dec. 16, 1994); Comments of the National Association of Telecommunications Officers and Advisors and the City of New York (Dec. 16, 1994) ("NATOA Comments"). See also Comments of the Alliance for Communications Democracy, et al. at 8-11 (Feb. 3, 1992) ("ACD 1992 Comments"); Reply Comments of the Alliance for Communications Democracy et al. at 8-11 (March 5, 1992) ("ACD 1992 Reply Comments").

A. Mandatory PEG Access to Video Dialtone Systems Promotes First Amendment Interests.

PEG access directly serves the purposes of the First Amendment by allowing access to speakers who would otherwise not be able to participate fully in network communications, and thus increasing opportunities to speak and enhancing the diversity of information sources available to the public. This substantial governmental interest is thoroughly documented in the filings referred to above, and is supported by the conclusion of Congress that such provisions were vital in the cable context.³ In that context, courts have held that to the extent PEG access imposes a burden on an operator's First Amendment rights, that burden is outweighed by the important governmental interest in assuring that the public has diverse sources of information.⁴ A fortiori, the First Amendment permits access requirements in the video dialtone context, where the system is by definition a common carrier and hence the speech it carries is not the speech of the carrier.⁵

³See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 85 (1992) ("PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas], and an informed and well-educated citizenry"); H.R. Rep. No. 934, 98th Cong., 2d Sess. 30, reprinted in 1984 U.S.C.C.A.N. 4655, 4667 (1984).

⁴"Enabling a broad range of speakers to reach a television audience that otherwise would never hear them is an appropriate goal and a legitimate exercise of federal legislative power." Daniels Cablevision, Inc. v. U.S., 835 F. Supp. 1, 6 (D.D.C. 1993).

⁵The "speaker" in a given common carrier transmission is not the video dialtone operator, but the programmer. Thus, access requirements do not burden a video dialtone operator's First

The First Amendment does not authorize a telephone company to deprive a community of property rights. Access requirements represent part of a reasonable compensation for the video dialtone operator's use and permanent occupation of the public rights of way for commercial purposes.⁶ Indeed, use of public property in this way by a video dialtone operator without a fair return to the community would constitute an expropriation of the community's property by the telephone company (and the Commission, to the extent the Commission purports to authorize such a taking).⁷ And given that the community has a right to expect some return for the video dialtone operator's use of its resources, access capacity and facilities have been recognized as appropriate and effective forms of in-kind benefits.⁸

In other words, asking the video dialtone operator to provide some of its compensation in the form of enhanced opportunities for speech obviously promotes, rather than hinders, First Amendment goals. By the same token, such enhanced opportunities for speech also serve the goal of diversity that

Amendment rights at all. (The possibility that the video dialtone operator is itself a programmer on its own system is discussed below.)

⁶See, e.g., ACD Comments at 6-7; PEG Access Coalition Comments at 13-16, 22-23; Comments of the Alliance for Communications Democracy et al. at 4-8 (July 12, 1994); ACD 1992 Comments at 3-6; ACD 1992 Reply Comments at 19-21.

⁷See, e.g., City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893).

⁸See sources cited at n. 3 above.

the Commission has proclaimed as one of the central purposes of video dialtone.⁹

B. Mandatory PEG Access Is Consistent With Title II of the Communications Act.

The Commission has authority to impose appropriate conditions on video dialtone operators under its general authority to regulate common carriers in the public interest.¹⁰ Contrary to the suggestions of several commenters, PEG access does not conflict with the requirements of common carriage. As the initial comments pointed out, a common carrier may accommodate PEG programmers through the establishment of just and reasonable classifications.¹¹

Section 201(b) of the Communications Act provides that "All . . . classifications, and regulations for and in connection with such communication service, shall be just and reasonable. . ."¹² Section 202(a) of the Communications Act provides that "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices,

⁹See, e.g., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at ¶ 3 (Nov. 7, 1994) ("Third FNPRM").

¹⁰See 47 U.S.C. §§ 151 and 214.

¹¹See ACD Comments at 7-8. See also PEG Access Coalition Comments at 15-16; Comments of the Association of America's Public Television Stations at 2-12 (Dec. 16, 1994); CME Comments at 7-14; NATOA Comments at 4-7.

¹²47 U.S.C. § 201(b).

classifications . . . for like communication service. . ."¹³
Thus these provisions prohibit only unjust or unreasonable
classifications.

Within the anti-discrimination provisions of the
Communications Act, several classifications are explicitly
recognized as being reasonable. For example, Section 201(b)
clearly contemplates certain reasonable classifications of
customers such as the press, government and commercial
entities.¹⁴ Given the vital governmental interest in providing
for a diversity of speakers, a classification that would provide
preferential access for PEG programmers is consistent with the
anti-discrimination provisions of the Communications Act.

II. "WILL-CARRY" IS NOT AN ADEQUATE SOLUTION TO THE NEED TO PROVIDE FOR ACCESS.

In its Comments, Bell Atlantic once again advances its "will
carry" proposal, under which the company "will voluntarily
provide analog capacity without charge to local broadcasters and
PEG programmers."¹⁵ While Bell Atlantic's apparent willingness
to provide access capacity must be applauded, this proposal is
not sufficient to meet the public interest concerns described
above. If access arrangements are to serve the public interest

¹³47 U.S.C. § 202(a).

¹⁴47 U.S.C. § 201(b).

¹⁵Comments of Bell Atlantic on Third Further Notice of
Proposed Rulemaking at 8 (Dec. 16, 1994) (emphasis added).

reliably, they should be fixed in definite terms for a definite period, so that programmers and end users alike can depend on those arrangements. However, if PEG service is "voluntary" and may be terminated at will by Bell Atlantic, one cannot assume that Bell Atlantic will continue to make it available.¹⁶ Access responsibilities must be binding, and not purely voluntary, if they are to reliably fulfill the public interest.

Moreover, the provision of network capacity alone is not sufficient to make PEG access possible. Other costs, such as the rates a video dialtone operator will charge to bring the programmer's signal into the headend, could still price noncommercial users out of the video dialtone market.¹⁷ By contrast, a cable franchise typically provides for the upstream lines and facilities needed to get access programming onto the system. Thus, to the extent that "will carry" provides network capacity alone, it is insufficient.¹⁸

¹⁶See PEG Access Coalition Comments at 23; CME Comments at 16-18.

¹⁷See, e.g., Application of New England Telephone and Telegraph Co. for authority pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 of the Commission's Rules, to construct, operate and maintain facilities to provide video dialtone service to communities in Massachusetts, W-P-C-6983, Exhibit G (Illustrative Tariff) at §§ Y.1.2, Y.3, Y.4.1(A), Y.4.3(B), Y.4.5(A), Z.1.1(A) (July 8, 1994) (enumerating charges that may be applicable to PEG programmers' use of proposed video dialtone system).

¹⁸Moreover, cable operators, who have agreed to support such facilities, may argue that they will be placed at a competitive disadvantage if their competitors, video dialtone operators, do not share in the costs.

III. INVOLVEMENT IN PROGRAMMING WOULD MAKE A VIDEO DIALTONE OPERATOR A CABLE OPERATOR.

If a video dialtone operator engages in programming on its own system, it becomes a cable operator by the plain language of the Cable Act, consistent with both the NCTA decision and the decisions striking down the cross-ownership ban.¹⁹ The Commission appears to have ignored this fact in framing the question regarding the applicability of Title VI in its new rulemaking adopted January 12, 1995, and, still more disturbingly, by granting Bell Atlantic's application to provide video programming directly to subscribers over a video dialtone system in Northern Virginia, in violation of its own current rules.²⁰

The decisions striking down the telco-cable ban would be fully satisfied by allowing local exchange carriers to provide video programming directly to subscribers as cable operators, a role fundamentally different from that of a video dialtone

¹⁹See, e.g., ACD Comments at 8-11; Comments of the Joint Parties Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises, Inc., and Jones Intercable, Inc., at 4-7 (Dec. 16, 1994); Letter from Michael S. Schooler to William E. Kennard, Esq., dated Nov. 9, 1994, filed ex parte in this docket on Dec. 15, 1994; Joint Comments Regarding Video Dialtone filed by Cole, Raywid & Braverman, L.L.P., at 9-13, 21-23 (Dec. 16, 1994).

²⁰"Commission Adopts Fourth Further Notice in Video Dialtone Rulemaking Proceeding to Examine Telephone Companies [sic] Provision of Video Programming (CC Docket 87-266)," FCC press release (Jan. 12, 1995); "Commission Approves Bell Atlantic Application for Video Dialtone Market Trial in Arlington, Virginia; Affiliated Programming Permitted With Safeguards," FCC press release (Jan. 12, 1995).

carrier. Thus, the Commission cannot claim that those decisions require it to allow Bell Atlantic to provide programming over its own video dialtone system in violation of Commission rules currently in force.²¹ Unless the Commission proposes openly to declare video dialtone a sham designed to defeat local franchising of cable systems, it will be necessary for the Commission to act expeditiously to bring its rules and Section 214 grants into compliance with the franchising requirements of the Cable Act, which remain fully in effect.

IV. IF THE COMMISSION PERMITS VIDEO DIALTONE BUYOUTS OF CABLE SYSTEMS, IT WILL NEED TO REGULATE THE RESULTING MONOPOLY COMMUNICATIONS PROVIDERS MORE STRICTLY.

As the initial round of comments demonstrated, allowing telephone companies to buy out cable systems in their service areas would tend to decrease rather than increase competition, and thus would require stringent regulation of any resulting monopolist. Such a monopolist would stand as a single

²¹"No telephone common carrier . . . shall provide channels of communications . . . to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provision of video programming to the viewing public in the telephone service area of the telephone common carrier." 47 C.F.R. § 63.54(b). A telephone company may exceed the carrier-user relationship only if the telephone company does not determine how video programming is presented for sale to consumers or otherwise have a cognizable financial interest in, or exercise editorial control over, such video programming. *Id.* at § 63.54(d)(3)-(4).

"gatekeeper" for both voice and video communication in the affected areas.²²

V. CONCLUSION

During the pendency of this rulemaking, the Commission has granted video dialtone construction applications without expressly conditioning those grants on the rulemaking's results -- for example, with respect to potential access requirements.²³ These actions raise the disturbing possibility that the Commission has prejudged the results of this rulemaking and is disregarding the arguments expressed therein. The Commission should apply to every video dialtone grant express conditions

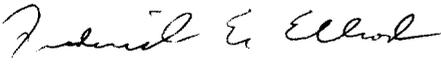
²²See ACD Comments at 11-14; CME Comments at 2-7; NATOA Comments at 15-18.

²³In addition to the Jan. 12, 1995, grant referred to above, see In re Applications of Ameritech Operating Companies for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within geographically defined areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin, W-P-C-6926 through -6930, Order and Authorization (Jan. 4, 1995).

requiring compliance with such requirements as may be developed in the course of this proceeding and any further proceedings.

Respectfully submitted,

THE ALLIANCE FOR COMMUNICATIONS
DEMOCRACY; THE CITY OF ANN ARBOR,
MICHIGAN; THE CITY OF FORT WORTH, TEXAS;
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