

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

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JAN 17 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

CC Docket No. 87-266

RM-8221

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REPLY COMMENTS OF
THE NEW ENGLAND CABLE TELEVISION ASSOCIATION
ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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INTRODUCTION AND SUMMARY

The New England Cable Television Association ("NECTA") hereby submits its reply comments in the above-captioned proceeding.¹⁷ NECTA is responding principally to the initial comments of NYNEX and the Southern New England Telephone Company ("SNET"). While NECTA does not oppose the general concept of channel sharing as a method of more efficiently using scarce analog channel resources, any local exchange carrier ("LEC") involvement in the transmission of video programming services to subscribers, such as that proposed by NYNEX and SNET in their

¹⁷ Telephone 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) ("Reconsideration Order"), appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

initial comments in this proceeding, would be inconsistent with their FCC-mandated role as providers of direct unfettered access to video dialtone platforms. As proposed, these LECs' shared channel arrangements fail to satisfy the Commission's video dialtone requirements.

Similarly, permission to grant preferential treatment for certain classes of programmers by LECs, as requested by both NYNEX and SNET, whether mandatory or voluntary, is irreconcilable with NYNEX's and SNET's Title II obligations to provide nondiscriminatory access. Such preferential treatment would result in economic distortions that would reduce the demand for video dialtone channels by other video information providers.

Finally, contrary to the views of NYNEX that no additional regulatory safeguards are necessary for pole and conduit access, the Commission should establish specific rules for the video dialtone application process just as it has done for the channel service application process. As NECTA demonstrated in its comments, the behavior of NYNEX and other LECs shows their disposition and ability to use their control over pole attachments and conduit space to prevent or reduce competition from cable operators.

Moreover, the Massachusetts Attorney General has recently accused NYNEX of "unfairly using telephone customers to pay for its expansion into cable television."² This should make the FCC mindful that NYNEX will use any opportunity to engage in

^{2/} See attached January 13, 1995 Boston Globe article and January 12, 1995 press release from Attorney General Scott Harshbarger.

predatory activities to disadvantage competitors in the video business.

I. NYNEX OR SNET PARTICIPATION IN THE ADMINISTRATION OF CHANNEL SHARING MECHANISMS WOULD CONFLICT WITH BASIC FCC VIDEO DIALTONE RULES AND COMMON CARRIER PRINCIPLES

In permitting LECs to participate in the video marketplace through the provision of video dialtone service, the Commission specifically provided that LECs must be able to provide a basic common carrier platform to multiple video programmers on a nondiscriminatory basis.^{3/} LEC proposals that attempt to "manage" or "administer" shared channel arrangements, such as those proposed by NYNEX and SNET in their comments, rather than merely provide access to video dialtone networks, miss the mark. Such involvement by NYNEX and SNET in the selection, as well as the transport, of video programming to subscribers, would violate common carrier principles, the 1992 Cable Act and the FCC's Video Dialtone Order.

As proposed, the LECs' channel sharing arrangements involve extensive participation by LECs over the administration of shared channel mechanisms by a select customer-programmer. NYNEX's proposal, now before the FCC in the form of Section 214 applications in Massachusetts and Rhode Island, is a case in point.^{4/} These channel sharing arrangements, which are directly analogous to several LECs' previously-rejected anchor programmer

^{3/} Video Dialtone Order, 7 FCC Rcd at 5783.

^{4/} See e.g., Applications of NYNEX for Video Dialtone Authority Under Section 214 of the Communications Act, W-P-C 6982, 6983, Exhibit G, Illustrative Tariff (filed July 8, 1994).

proposals,^{5/} are fundamentally at odds with the Commission's basic common carriage policy for video dialtone.

Channel sharing schemes such as that of NYNEX jeopardize achievement of the Commission's goals to increase competition, further the development of telecommunications infrastructure, and enhance the diversity of video services by increasing the inherent risk of discrimination in the selection of programming to occupy the favored capacity. The Commission has recently acknowledged in its Ameritech Order that analog channel sharing schemes implicate serious legal and policy issues, "including unreasonable discrimination."^{6/} The Commission's rejection of Ameritech's channel sharing proposal demonstrates the degree of the Commission's proper concerns regarding LEC involvement in channel sharing arrangements.

Contrary to NYNEX's statement that channel sharing mechanisms require no further rules or policies,^{7/} the Commission's Reconsideration Order and Ameritech Order both confirm legitimate concerns by cable operators about LEC involvement in channel sharing mechanisms. As proposed, all the LECs' channel sharing proposals present a threat of discriminatory treatment by proposing impermissible LEC involvement in decision-making regarding the provision of

^{5/} Reconsideration Order at ¶ 35.

^{6/} Ameritech Operating Companies, W-P-C 6926, 6927, 6928, 6929, 6930, at ¶ 23 (rel. Jan. 4, 1995) ("Ameritech Order").

^{7/} NYNEX Comments at 12-13.

programming to subscribers and discrimination against customer-programmers.

NYNEX's proposal to allocate all of its shared analog broadcast channels to one administrator, for example, is simply a re-formulated anchor programmer proposal. NYNEX's analog channel administrator proposal does not "comfortably fit[] within the Commission's concept of channel sharing."^{8/} NYNEX would allocate all of its shared analog channels to the shared analog "administrator," in direct contravention of the Commission's explicit rejection of the allocation of all analog capacity to one entity.^{9/} NYNEX attempts to circumvent the Commission's prohibition by simply changing the name of the entity from "anchor programmer" to "administrator."

Further, while NYNEX expresses concern over the ability of video programmers "to be able to afford or have the means to deliver programming"^{10/} without channel sharing, that same proposal requires that programmers commit to a one-year minimum service period.^{11/} NECTA has previously pointed out to the FCC that this one year minimum service requirement for video dialtone service discriminates among video programmers.^{12/} In fact, the Commission has recently confirmed that a one-year programming

^{8/} Id. at n.26.

^{9/} Reconsideration Order at ¶ 35.

^{10/} NYNEX Comments at 10.

^{11/} NYNEX Applications, Illustrative Tariff at y-3.

^{12/} See NECTA Petition to Deny NYNEX's Section 214 Applications, File Nos. W-P-C 6982, 6983, at 26-28 (filed September 9, 1994).

requirement for video programmers is unreasonable.^{13/} NYNEX's one-year programming requirement, along with the remainder of its channel sharing administrator arrangement, should be stricken from its applications.

Similarly, SNET's comments reflect an undisguised attempt to obtain rules that would permit SNET to control the details of the transmission of video programming to subscribers. SNET proposes a shared channel arrangement that would result in the LEC serving as the default "shared channel customer" in the event that no programmer seeks the position.^{14/} At the same time, SNET's proposed regulations governing the shared channel customer are designed to ensure that independent video programmers do not find the position desirable.

By proposing that the shared channel customer be prohibited from reselling video services at a profit,^{15/} NYNEX provides very little incentive for anyone other than SNET to assume management of all of the shared analog channels and provide access to other video programmers on a common carrier basis, and on a channel-by-channel basis, if it can only recover its costs.^{16/}

Of course, in the event that no programmer applies for the shared channel customer position, SNET believes that there would be "good cause" to permit the LEC to serve as the customer.^{17/}

^{13/} Ameritech Order at ¶ 30.

^{14/} SNET Comments at 6.

^{15/} Id. at 8.

^{16/} Id. at 7-8.

^{17/} Id. at 10.

While a shared channel manager may offer benefits to consumers and video programmers, it is not essential to the viability of video dialtone. This is evidenced by the Commission's recent rejection of Ameritech's shared channel arrangement.

II. PREFERENTIAL TREATMENT, WHETHER OFFERED BY NYNEX OR SNET ON A MANDATORY OR VOLUNTARY BASIS, IS CONTRARY TO THE COMMUNICATIONS ACT

NYNEX agrees with NECTA's argument that the Commission does not have the authority to impose preferential video dialtone treatment for commercial broadcasters or other classes of speakers.^{18/} At the same time, however, NYNEX and SNET argue that they should be permitted to provide preferential access to certain speakers.^{19/} But preferential treatment in any form has the same result: discrimination among video programmers as certain programmers are favored over others in terms of preferred channel positioning and cost cross-subsidization by other programmers and consumers. No preferential schemes proposed thus far can be reconciled with the LECs' common carrier obligations under the Communications Act.

NYNEX's and SNET's proposals to set aside analog capacity for certain customers do not square with their obligations under Section 202(a) of the Act to provide a system nondiscriminatory

^{18/} NYNEX Comments at 14; see also Comments of U S West, CC Docket No. 87-266, (filed December 16, 1994); Comments of Southwestern Bell Telephone Company, CC Docket No. 87-266, (filed December 16, 1994).

^{19/} See NYNEX Comments at 14; SNET Comments at n.11.

access.^{20/} The Commission previously declined to favor certain groups of speakers over others, including discounts or free access for certain video programmers.^{21/} Nothing has changed since the Commission originally concluded that preferential treatment contravened principles of common carriage. As the Commission recognized in its Reconsideration Order,

"preferential treatment is generally inconsistent with a Title II common carrier regime, the cornerstone of which is the provision of service to the public on the basis of rates, terms, and conditions that are not unreasonably discriminatory."^{22/}

Economic distortions would result from both mandatory or voluntary preferential schemes. If the Commission required or allowed NYNEX or SNET to subsidize video dialtone service for certain video programmers, then rates for other programmer-customers would presumably have to be raised, suppressing programmers' desire to use the service to deliver their programming.^{23/} As a result, these higher prices would be passed on to consumers, which would stifle their demand for purchasing video dialtone service from non-sharing and non-subsidized programmers.^{24/}

The record does not reflect a compelling showing of need or strong Congressional public policy behind preferential access

^{20/} 47 U.S.C. § 202(a).

^{21/} Video Dialtone Order, 7 FCC Rcd at 5804-05.

^{22/} Id. at ¶ 254.

^{23/} Id. at n.480.

^{24/} Id.

treatment in this particular context.^{25/} There is no sound basis upon which to create an exception to the general principle of nondiscrimination for LECs, such as NYNEX and SNET, to provide video dialtone as a common carrier service. NYNEX and SNET have not, and cannot, justify a distinction for purposes of discrimination and cross-subsidy concerns between preferential treatment mandated by the FCC and preferential treatment voluntarily provided by a LEC.

III. THE HISTORY OF ABUSE OF TELEPHONE COMPANY CONTROL OVER CABLE POLE AND CONDUIT ACCESS, CONTRARY TO NYNEX'S CLAIMS, REQUIRES ADOPTION OF SPECIFIC RULES IN ORDER TO FOSTER FAIR COMPETITION

Contrary to NYNEX's unsupported claim that the existence of Section 224 is sufficient to resolve pole attachment issues,^{26/} the existing regulatory structure for pole attachments does not protect cable operators from the LECs' ability to leverage their monopoly control over poles and conduit to prevent cable operators from competing with the LECs' own provision of video dialtone service. In its initial comments, NECTA demonstrated that LECs such as NYNEX clearly have both the incentive and the ability to prevent or reduce competition from cable operators.^{27/}

For the same competitive reasons that the Commission requires LECs to demonstrate that independent cable systems have

^{25/} Reconsideration Order at ¶ 255.

^{26/} NYNEX Comments at 18-19.

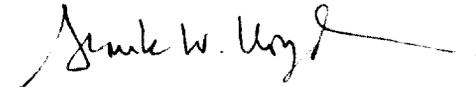
^{27/} NECTA Comments at 14-20.

pole attachment rights or conduit space at reasonable rates in their applications for channel service,^{28/} it should also do so in the context of video dialtone applications. NYNEX has not proffered any evidence to refute this argument. SNET does not even choose to address this issue.

CONCLUSION

For the above reasons, NECTA urges the Commission to (1) prohibit any degree of LEC involvement in analog channel sharing as contrary to the Communications Act and video dialtone principles, (2) prohibit any preferential treatment schemes for certain programmers, and (3) insure that LECs provide pole attachments and conduit space at reasonable rates to cable operators.

Respectfully submitted,



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^{28/} 47 C.F.R. § 63.57.

State urges 23% cut in Nynex rate

By Chris Reidy
GLOBE STAFF

Accusing Nynex Corp. of unfairly using telephone customers to pay for its expansion into cable television, the state attorney general yesterday asked regulators to slash phone rates in Massachusetts by 23 percent, or \$400 million a year.

Attorney General Scott Harshbarger said Nynex has failed to pass along savings that result from efficiencies to its customers and instead is using the money to "subsidize" its plans to move into the cable business.

■ **FCC OK's Bell Atlantic's trial of video services. Page 36.**

Nynex spokesman Jack Hoey disputed Harshbarger's claim, saying it "ignores the realities of the telecommunications industry" and "jeopardizes" Nynex's ability to build a piece of the "information superhighway" that would benefit the entire commonwealth.

Harshbarger's statement yesterday was his latest response to an offer Nynex made to the Department of Public Utilities in April.

In return for sweeping changes in the way it was regulated, Nynex offered to cap basic telephone rates for residential customers until the year 2001.

The change, Nynex said, would allow it to build a high-capacity network that could deliver both interactive and video services to Massachusetts customers who would pay only for the services they use.

The regulatory change, Nynex has said, would give it greater financial incentives to offer services similar to a cable television company.

And as Nynex evolved into a new form, risks

NYNEX, Page 30

Boston Globe - 1/13/95

23% Nynex rate cut is urged by state

■ NYNEX

Continued from page 29
would be shifted away from rate payers to investors, Hoey said.

Harshbarger has fought Nynex's proposal. In September, he said it was a bad deal and offered an alternative that he said would cost consumers less than Nynex's proposed rate cap.

Yesterday Harshbarger addressed Nynex's existing rates, which he said Nynex plans to use as the starting point for its rate-cap proposal. Existing rates, his office said, are artificially high.

"Basic telephone customers shouldn't have to subsidize Nynex's effort to compete with cable television companies," Harshbarger said.

"The costs of telephone service have been dropping and will continue to drop," he said. "Nynex has failed to pass those cost savings on to its customers, especially residential and small business customers whose rates have risen sharply in recent years."

According to Hoey, Massachusetts customers have not been hit with a Nynex rate increase since 1981, though many have faced a periodic "rate restructuring."

Since 1980, he said: "Some rates have gone up, some have gone down, but the overall effect has been neutral. The goal of restructuring is to bring rates in line with the cost of service."

DPU is expected to rule Nynex's proposed rate cap in the spring.



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NEWS RELEASE

FOR IMMEDIATE RELEASE
JANUARY 12, 1995

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HARSHBARGER URGES 23 PERCENT CUT IN NYNEX TELEPHONE RATES

Attorney General Scott Harshbarger is urging the Department of Public Utilities to cut the rates of NYNEX telephone service by 23 percent or \$400 million.

In a brief filed late yesterday in a DPU proceeding examining a proposal by NYNEX to change its method of setting rates, Harshbarger urged the rate cut and suggested the department reject NYNEX's proposed rate plan. Instead, he recommended adoption of an alternative plan proposed by experts he retained to respond to NYNEX's proposal.

"The costs of telephone service have been dropping and will continue to drop," Attorney General Harshbarger said. "NYNEX has failed to pass those cost savings on to its customers, especially residential and small business customers whose rates have risen sharply in recent years. We urge the DPU to adopt our recommendations and order rate reductions immediately.

"Our proposal for an alternative form of rate regulation would ensure that all of NYNEX's customers will benefit in the future from continuing decreases," Harshbarger added. "Basic telephone customers shouldn't have to subsidize NYNEX's efforts to compete with cable television companies."

Both Harshbarger's and NYNEX's proposals would replace the traditional model with a so-called "price-cap" scheme. That would allow

-more-

NYNEX to change the average level of its rates by an amount equal to the rate of inflation minus the projected productivity increase in the telecommunications business.

Harshbarger's proposal differs from NYNEX's on how much flexibility the company should have to raise non-competitive service rates, the level of expected productivity increases, whether NYNEX should have to share excess earnings with its customers and the proper starting rates under an alternative regulation plan.

Harshbarger's experts recommend the DPU allow NYNEX to increase its average prices only to the extent that inflation exceeds 6.2 percent. NYNEX, in contrast, would allow increases when inflation exceeds 2.5 percent. Over five years, Harshbarger's higher productivity factor would result in rates being about \$300 million or 15 percent less than under the NYNEX proposal.

Harshbarger's plan also requires the price of individual services for which NYNEX currently does not face competition, such as residential and small business service, be reduced each year to the extent that inflation is less than 6.2 percent. NYNEX has proposed its residential rates be frozen for seven years, but their plan would allow annual increases in rates for small businesses and in the price of residential optional calling plans.

Harshbarger's plan would also require NYNEX to share its earnings with customers to the extent that earnings exceed 10.7 percent. NYNEX's plan includes no provision for any sharing and would prohibit the DPU from examining its earnings again until 2005.

A DPU decision on this case is not expected until spring.

Assistant Attorneys General George Dean, Ted Bohlen, Dan Mitchell, Joe Rogers and Bill McAvoy, as well as utility analysts Tim Newhard and Rachel Edelman, are working on the case for Harshbarger.

CERTIFICATE OF SERVICE

I, Kecia Boney, hereby certify that on this 17th day of January, 1995, a copy of the foregoing Reply Comments of the New England Cable Television Association was sent by first-class mail, postage prepaid, to the following parties:

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