

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)

CC Docket No. 87-266

and

Amendments of Parts 32, 61, 64,)
and 69 of the Commission's Rules to)
Establish and Implement Regulatory)
Procedures for Video Dialtone Service)

RM-8221

AMERITECH'S REPLY COMMENTS ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Michael J. Karson
Michael S. Pabian

Room 4H88
2000 West Ameritech Center Dr.
Hoffman Estates, IL 60196-1025
(708) 248-6082

Its Attorneys

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SUMMARY

Ameritech believes that the marketplace must drive the deployment of video dialtone (“VDT”) technology and the provision of VDT service. Accordingly, VDT capacity issues should be addressed if and when they arise in a particular market and should be resolved on the basis of the requirements of that particular market, not on the basis of generic regulatory rules. The Commission should not mandate an all digital VDT platform. Instead, a local exchange carrier (“LEC”) should be given the option of increasing channel capacity by means which best suit the particular market being served by the platform, including a common channel sharing arrangement.

In addition, an LEC should be able to acquire cable facilities, or jointly construct such facilities, in its service area for purposes of providing VDT service in those locations which cannot support more than one wire-based, broadband video delivery system. This would be in the public interest because customers are better served by competition among programmers on a VDT platform than by one closed-end cable system.

Finally, Ameritech does not believe that the record in this docket supports any mandatory preferences to VDT access or additional rules relating to access to telephone poles or conduit space.

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AMERITECH'S REPLY COMMENTS ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

Ameritech¹ offers this Reply to the Initial Comments filed on the Third Notice of Proposed Rulemaking which the Commission issued earlier in these dockets.² Attached is a list of the Initial Comments to which this Reply is directed.

¹ Ameritech means: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc.

² 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. Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266 and RM-8221 (rel. November 7, 1994) ("VDT Recon Order") ("Third NPRM").

I.

INTRODUCTION.

Customers and the marketplace must drive the deployment of a video dialtone (“VDT”) platform and the provision of VDT service and that is the central principle which should govern the Commission’s deliberations in this rulemaking. There are, of course, public policy implications which flow from deployment and service-related decisions which the Commission will make in this and other related dockets. Ameritech appreciates that, in making these decisions, the Commission will struggle to ensure that VDT service is provided in a manner that promotes competition, investment in the infrastructure and diversity in video programming. However, those laudable goals could well be jeopardized if the Commission prescribes rules which undermine the basic economics of the VDT platform.

This could happen easily enough, albeit unintentionally. VDT currently is in an embryonic state. Although a handful of trials are underway, neither the industry nor the Commission can specifically quantify the market for VDT until a commercial application is in operation for a period of time and customers have a reasonable opportunity to evaluate the service.

As a result, it is easier for some offering comments in this docket to argue for immediate deployment of an all digital VDT platform, than it is for the LECs -- that will supply considerable capital for the construction of a VDT

platform and assume the risk associated with that investment -- to produce empirical evidence to show that today's market will not support exclusive reliance on an all digital technology. Likewise, it is easier for some commenting parties simply to stake their claim for a plethora of mandatory "preferences" on the VDT platform³ than it is for the LECs to present empirical evidence on how the collective effect of all these preferences will adversely impact the economics of a VDT platform. The most that can be said with certainty is that the additional burdens on the VDT platform could become so onerous that the underlying business case no longer justifies the investment. Having so recently authorized Ameritech's construction of a VDT platform,⁴ the Commission should be especially careful not to impose new obligations which undermine the economics of the investment before construction even begins.⁵

II.

VDT CAPACITY ISSUES SHOULD BE ADDRESSED IF AND WHEN THEY ARISE AND SHOULD BE RESOLVED ON THE BASIS OF MARKET REQUIREMENTS NOT REGULATORY RULES.

³ It would be very easy for any programmer to claim eligibility for a mandatory preference based on the desirability of diversity and the alleged "public interest" aspects of programming which the viewing public in the marketplace might not support for a variety of reasons.

⁴ In the Matter of the Application 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, Order and Authorization, File Nos. WPC 6926, 6927, 6928, 6929, 6930 (rel. January 4, 1995) ("214 Authorization Order").

⁵ See also, AT&T at 2.

The NPRM solicits views on two ideas which relate to the capacity on a VDT platform. The first has to do with a GTE proposal that would make extensive use of digital technology to increase the capacity on its VDT platform.⁶ The second involves “channel sharing arrangements” that would allow a number of popular channels to be made available to all programmers on the platform without unnecessary channel duplication.⁷ The Commission is exploring these two ideas as potential ways in which VDT capacity might be expanded.

However, in evaluating these ideas, the Commission should bear in mind that VDT capacity has not yet manifested itself as a problem. Indeed, an LEC cannot be certain that there will be a capacity shortfall on a commercial VDT platform until a tariff with terms and conditions is approved and programmers actually begin writing checks and making a firm financial commitment to their participation on such a platform. Until it becomes apparent that ready, willing and able programmers are going to be turned away from a VDT platform because of lack of capacity, the Commission should be circumspect in mandating a particular technology which the marketplace may not support.

⁶ Third NPRM, par. 270. GTE is reevaluating the economic feasibility of its initial plans for the digital VDT platform contained in its Section 214 application and may opt instead for a common channel sharing arrangement to increase the capacity on its VDT platform. GTE at 3-4. GTE agrees that the demands of the market should drive deployment of digital technology. GTE at 10.

Third NPRM, par. 271-74.

A. THE COMMISSION SHOULD NOT MANDATE AN ALL DIGITAL VDT PLATFORM.

Ameritech's Initial Comments explained why the Commission should not mandate an all digital VDT system.⁸ Analog channels are necessary to stimulate end-users' interest in VDT service because that is what they are accustomed to now and that is what, at a minimum, they will expect to see until they become more familiar with emerging digital or interactive services.⁹ In addition, programmer-customers will want to offer analog channels because that will be necessary if VDT is to gain a level of marketplace acceptance relatively quickly. In any event, many customers may not be willing to shoulder the expense associated with encoding/decoding equipment necessary for digital applications.¹⁰

If the market requires additional capacity on a VDT platform, it is in everyone's interest to expand that capacity as long as such an expansion is technically feasible and economically reasonable.¹¹ But the decision to

⁸ Some parties offered cost data for the digital system GTE has proposed. AT&T at 4-5; see also, United/Central at 5; SWB at 3-4. GTE says in its Initial Comments that "the placement of digital equipment at each and every television set on a subscriber's premise is likely to be cost prohibitive until the 1998 timeframe." GTE at 8; see also, Compression at 7.

⁹ Ameritech at 2-3.

¹⁰ Ameritech at 3.

¹¹ The Commission recently adopted this "technically feasible and economically reasonable" standard for capacity expansion. VDT Recon Order, par. 38. This standard, by definition, must be applied on a market specific basis and, therefore, Ameritech questions how the Commission lawfully could adopt a general rule requiring an all digital VDT system based on the non-market specific comments which constitute the record in this rulemaking.

expand, using a digital technology or otherwise, must be based on the demands of the market not a regulatory mandate.¹²

Several parties offering comments would preordain market requirements in different ways. For example, some argue that the Commission should require LECs to maintain analog capacity on a VDT platform,¹³ with no qualification about potential demand. Others suggest that the Commission should encourage LECs to move away from analog technology for broadcast services and towards technology which supports switched analog or digital services.¹⁴ Some in the cable industry insist that an LEC's initial offering of VDT service should be deferred entirely until all issues associated with potential shortfall in platform capacity are finally resolved.¹⁵ The one common denominator in all of these differing views is that each of these parties wants to substitute its judgment for that of customers and the marketplace,¹⁶ sometimes to serve its own commercial interest.

Under a more general public interest standard, the Commission should neither mandate the general deployment of technology for VDT which a particular market may not support, nor should it adopt a general prohibition

¹² Accord, AT&T at 5; GTE at 4-5; EIA at 6.

¹³ NATOA at 20.

¹⁴ MPSC at 4; Broadband at 25-30.

¹⁵ NCTA at 12.

against certain technology for VDT which a particular market might support. Instead, the Commission simply should reaffirm its earlier determination that it will not dictate technology decisions for VDT.¹⁷ If capacity becomes a problem in the future, the Commission has a process in place to deal with that problem in light of all the circumstances which will be present at that time.¹⁸

B. AN LEC SHOULD BE GIVEN THE OPTION OF USING OR NOT USING A COMMON CHANNEL ARRANGEMENT DEPENDING ON THE NEEDS OF THE MARKETPLACE.

Ameritech explained in its Initial Comments why a common channel arrangement should be one of the permissible, though not mandatory, vehicles for maximizing the analog capacity of a VDT platform in a manner which is technically feasible and economically reasonable.¹⁹ Ameritech also explained its view of a reasonable way to administer channel sharing.²⁰

Some have argued in their comments that a common channel arrangement would inappropriately involve the LEC in the programming

¹⁶ Some argue in favor of expanding capacity on the VDT platform to meet the demands of programmers, but then go on to argue that customers who subscribe to that programming should be insulated somehow from the platform expansion costs associated with that programming. New York at 20.

⁷ Accord, Compression at 3.

⁸ See VDT Recon Order, par. 38.

¹⁹ Ameritech at 5-7. Others include a "local delivery" option which would limit the transmission of an analog signal to a specific geographic area thereby making additional analog capacity available for other programmers. Or digital channels could be reallocated within the VDT platform to increase the number of analog channels.

²⁰ Ameritech's Ex Parte Statement to A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau, dated May 9, 1994, from Anthony M. Alessi, Ameritech, Director of Federal Relations, p. 9.

delivered over the VDT. This is not true. Potential common channel managers can be evaluated on the basis of objective criteria which limits the LEC's discretion in selecting the manager. In the end, programming on the shared channels of a VDT platform will be determined, not by the common channel manager, but directly by the preferences of the viewing audience and, indirectly, by programmers who are determined to satisfy those preferences.²¹ This is a customer focused, market driven process and that is exactly how VDT platform should work.

In addition, to the extent that the Commission's concern about common channel manager arrangements was based on the cross-ownership rules contained in the 1984 Cable Act,²² those rules have been determined to be unconstitutional²³ and no longer create any alleged constraint on the Commission's ability to approve such arrangements.²⁴

In any event, no basis has been demonstrated on this record for the Commission to adopt a hard and fast rule on channel sharing that would govern the provision of all VDT service in all markets. Instead, the Commission should maintain a flexible approach so that different methods may be tested. If capacity on a VDT platform becomes an issue, then channel sharing should be an option, but not a requirement, to address that issue. If an LEC chooses to offer a channel sharing arrangement, the tariff review

²¹ The nature of VDT is that programmers decide what programming to present to the viewing public. The common channel manager would have no power to coerce a programmer to participate on a shared channel to the viewing public if the programmer chose not to offer its programming in that manner.

²² 47 U.S.C. Section 533(b)(1).

²³ E.g., Ameritech Corp. v. United States, Nos. 93-C-6642 and 94-C-4089 (N.D. Ill. Oct. 27, 1994).

²⁴ AT&T generally supports the option of channel sharing (AT&T at 6), but is wrong when it suggests that LECs should be barred from the role of common channel manager in order to ensure "even handed" administration of a channel sharing arrangement. AT&T at 7.

process is the appropriate forum to examine the specifics of that particular proposal.²⁵

III.

AN LEC SHOULD BE ABLE TO ACQUIRE CABLE FACILITIES, OR JOINTLY CONSTRUCT SUCH FACILITIES, IN ITS SERVICE AREA FOR PURPOSES OF PROVIDING VDT SERVICE IF THE AREA CANNOT SUPPORT MORE THAN ONE WIRE-BASED, BROADBAND VIDEO DELIVERY SYSTEM.

The VDT Recon Order maintained the Commission's current prohibition against a LEC acquiring cable facilities in its service area for the purpose of providing VDT service. In the Third NPRM, the Commission asked for comments on its new proposal to modify that prohibition and allow an LEC to acquire such cable facilities or jointly construct a VDT platform in those areas of the LEC's service area where the market will not support two wire-based, multichannel video delivery systems.²⁶ The Commission sought comments on the criteria that could be used to identify those areas which would be eligible for this relief and the procedural process by which the relief might be obtained.²⁷

In its Initial Comments, Ameritech agreed that there undoubtedly are markets which will not support more than one wire-based system for multichannel video delivery and, where true, an LEC should be permitted to

²⁵ Accord, GTE at 11.

²⁶ Third NPRM, pars. 277; 279. With respect to this particular proposal, Ameritech applauds the Commission for its acknowledgment of, and sensitivity to, the market differences which exist in the various areas where a VDT platform may be deployed. The more the Commission relies on these market forces when crafting the rules for VDT, the more likely it is that the Commission will promote competition, investment in the infrastructure and diversity in video programming.

²⁷ Id. par. 278.

acquire cable facilities for the provision of VDT service.²⁸ Ameritech also explained two useful criteria for identifying such markets, to-wit: number of homes per plant mile (“density”) and percentage of aerial versus buried distribution facilities (“composition”). The lower the density and percent aerial, the more unprofitable a market and the more likely it is that an overbuild would not be an economically rational decision.²⁹ However, given the number of variables which could impact on this equation, Ameritech suggested that the Commission may want to use a case-by-case approach where the characteristics of the particular market could be examined.

In that context, the Commission could invoke a rebuttable presumption that the rule will be waived upon a showing of a particular density and/or composition. This would increase somewhat the level of certainty for those who are trying to make business plans in a changing market and still leave the Commission with the flexibility it may need to evaluate all of the circumstances in a particular application.

Regardless of the criteria the Commission uses to identify those markets which will not support more than one wire-based, broadband video delivery system, the customers in such markets would be better served by competition among programmers on a VDT platform than they are currently through a closed cable television system.

²⁸ In fact, given the unconstitutionality of the cross-ownership rules (see note 23, supra), there is nothing to bar an LEC from acquiring cable facilities even without such a showing.

²⁹ Others agreed that there are markets which will not support two, wire-based broadband video delivery systems, but disagreed on the criteria that should be used to identify those markets. E.g., United/Central at 8; NCTA at 29-30; GTE at 15; US West at 19-22. Still others argue in favor of a case-by-case analysis. Center at 5.

IV.

THE RECORD IN THIS DOCKET DOES NOT SUPPORT ANY MANDATORY PREFERENCES FOR VDT ACCESS.

In the Third NPRM, the Commission asked interested parties for their views on several questions relating to whether certain classes of programmers should be given preferential access to a VDT platform. The classes identified in the NPRM include public, educational and governmental (PEG) or not-for-profit video programmers.³⁰ Can such a preference legally be mandated? How much of a preference should be mandated? Should an LEC be permitted to voluntarily accord a preference to certain programmers?³¹

Ameritech believes that requiring an LEC to provide certain programmer-customers with preferential access to a VDT platform is difficult to reconcile with the common carrier nature of VDT service.³² Such preferences may have played a role in the evolution of cable television, but the Commission has made it clear that VDT service is not cable television. So have the courts.³³ Many of those filing comments in this docket recognize this basic fact.

Others, however, continue to argue that VDT service should be equated with cable television for purposes of preferential access. These parties want cable television requirements applied to telephone companies which

³⁰ Third NPRM, par. 281.

³¹ Id., pars. 281-84.

³² Accord, AT&T at 9-10. Others have argued against preferences, as well. E.g., NCTA at 3; Cable Associations at 21-28; HBO at 11-14.

³³ NCTA v. FCC, 33 F.3d 66 (DC Cir. 1994). This fact undercuts arguments that VDT preferences should be administered at the local level because that is the forum for administering cable preferences. Denver at 6; DC-PSC at 2. As long as this basic difference remains, LECs should not be saddled with both common carrier and cable television requirements.

offer VDT service, including preferential access for certain programmer-customers.³⁴ Some of the same parties which bristle in one context at the idea of an LEC exercising any control over the video programming on a VDT platform would have an LEC, in another context involving preferences, engage in what those parties describe as “cooperative” programming activity because there it may be in those parties’ interests.³⁵ Others would have an LEC provide free transport outside the VDT platform, VDT “public phone booths” and VDT “town squares,” as well as free studio facilities and contributions to “PEG funds” in spite of the fact that only 20% of cable systems have community channels.³⁶

None of these requirements “is justified by a compelling showing of need and public policy concern”, the standard which the Commission has used in the past with respect to preferential access rules which help ensure low-income access to basic telephone service.³⁷ In the absence of such a showing, the Commission should not adopt mandatory preferences.

Mandating preferential access would be especially inappropriate given the other less intrusive alternatives which are available to achieve the desired goal. For example, as Ameritech explained in its Initial Comments,³⁸ a gateway operator or programming aggregator at Level 2 of the VDT platform

³⁴ There is no consensus, however, about which particular customers should be given preferential access. For example, some argue that state and local governments and non-commercial non-profit organizations should be eligible. Center at 14. Others say that preferences should be given for public training, education, public meetings, libraries, government and health care information services. MPSC at 5.

³⁵ Compare ACD at 7 with ACD at 14.

³⁶ PEG Access Coalition at 21.

³⁷ VDT Recon Order, par. 255; Third NPRM, par. 281.

³⁸ Ameritech at 9.

could offer “time slots” or similar arrangements that would allow lower cost access for certain customers. In another approach, local delivery channels provide certain cost-efficiencies by allowing a programmer to access only a portion of the area-wide sites passed.³⁹ Given these types of alternatives, there can be no “compelling showing of the need” for mandatory preferences.

Nor under these circumstances can mandatory preferences be supported on the basis of public policy. Mandatory preferences will result in economic distortions because the cost of providing preferences must be recovered from programmers and that, in turn, will drive up the price of programming to the general viewing public. This actually could reduce the diversity in programming on the VDT platform. That would not constitute sound public policy.

In addition, now that the courts have recognized an LEC’s First Amendment rights with respect to the provision of video programming and operation of a VDT platform, the Commission should be especially careful not to abridge those rights by mandating burdensome preferential access requirements for the VDT platform. The record in this docket simply does not support any such mandates under the Turner v. FCC decision because proponents have not shown that mandatory preferences promote important governmental interests without creating greater restrictions on speech than is necessary to achieve those interests.⁴⁰

³⁹ This approach was reflected in the illustrative tariff provided with Ameritech’s Section 214 application.

⁴⁰ Turner v. FCC, 114 S.Ct. 2445, 1994 U.S. Lexis 4831, 129 L.Ed.2d 497 (1994); See also, SWB at 13-17. Accord, AT&T at 8-9. Advocates of mandatory preferences usually base their argument on the “public interest” nature of their programming and the level of constitutional scrutiny given to a mandatory preference based on content would undoubtedly be stricter than that used in Turner v. FCC.

Instead of mandating preferences, the Commission simply should evaluate the reasonableness of any service classifications which an LEC may propose voluntarily in the context of the tariff approval process.

V.

CURRENT RULES ARE MORE THAN ADEQUATE TO ENSURE REASONABLE ACCESS TO TELEPHONE POLES AND CONDUIT SPACE AND THE COMMISSION SHOULD NOT MANDATE ANY ADDITIONAL REQUIREMENTS FOR SECTION 214 APPLICATIONS.

An LEC seeking to provide channel service to a cable company must show in its Section 214 application that the cable company-customer has available, where technically feasible, telephone pole attachment rights and conduit space on reasonable terms and conditions. The Commission asks in its Third NPRM whether this requirement should be made an additional Section 214 requirement of LECs seeking to provide VDT service.⁴¹

Ameritech said in its Initial Comments that this proposal is unnecessary.⁴² Cable access to LEC poles and conduit has not been a significant problem in recent years, evidence the fact that over 90% of the country has access to cable television service. In those cases where reasonable access may be a problem, the Pole Attachment Act provides a more than adequate remedy.⁴³ Therefore, this requirement would be little more than one more speed bump in an already tedious Section 214 approval process.

⁴¹ Id., par. 285.

⁴² Ameritech at 9-10.

⁴³ 47 U.S.C. Sec. 224(b).

Those supporting this additional requirement do not provide any substantial evidence or argument that this requirement is necessary.⁴⁴ Some parties offered anecdotal comments relating primarily to experiences they had in the 1960s and 1970s or to differences of opinion they may have had more recently with pole owners over the charges for fiber overlashes.⁴⁵ However, no party has identified any instances where they were denied reasonable access to telephone poles or conduit space and been left without a remedy at the appropriate state regulatory commission⁴⁶ or under the Pole Attachment Act.

Thus, the pole attachment and conduit rights proposal in the Third NPRM is a solution⁴⁷ in search of a problem and, accordingly, should not be adopted.⁴⁸

⁴⁴ E.g., NATOA at 18-19; DCPSC at 3-4. AT&T's argument that LECs have the "clear ability and incentive" to disadvantage competitors and, therefore, one option would be for the LECs to divest themselves of their pole, conduit and right-of-way rights (AT&T at 11), is more than just wrong, it is outrageous given the Commission's role in ensuring reasonable access to poles and conduit.

⁴⁵ E.g., NCTA at 32-33; NECTA at 18. Many of the pole attachment disputes which have been cited by some of the parties involve power companies, not telephone companies, and many others have not been resolved yet so it is premature to argue the merits of what at this point are little more than bare allegations.

⁴⁶ The Pole Attachment Act gives State regulatory commissions the opportunity to regulate the terms and conditions of pole attachments. If they do not do so, jurisdiction vests with this Commission.

⁴⁷ If the Commission adopts additional requirements in this area (and it should not), those requirements should apply to cable companies as well. See GTE at 19, fn. 7.

⁴⁸ Nor should the Commission adopt the unnecessary rules which some have proposed (see e.g., Cablevision et al., Attachment 1), including rules which constitute a self-serving effort by the cable industry to slow or avoid competition from a VDT, e.g., suspension of VDT construction authorization prior to allegations in the cable operator's complaint even being resolved. Id. A (2).

VI.

CONCLUSION.

The Commission's goal for VDT is to promote competition, investment in the infrastructure and diversity in video programming. Ameritech has explained in this Reply which of the proposals in this NPRM will advance those goals and which will not. If the Commission focuses on customers and the marketplace when making its decision in this docket, Ameritech is confident that the final outcome will serve the public interest.

Respectfully submitted,



Michael J. Karson
Michael J. Karson
Michael S. Pabian
Attorneys for Ameritech
Room 4H88
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
(708) 248-6082

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LIST OF PARTIES

Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises, Inc. and Jones Intercable, Inc. ("Joint Cable Interests")

Alliance for Communications Democracy, et al. ("ACD")

Alliance for Community Media and The Office of Communication of the United Church of Christ ("PEG Access Coalition")

Ameritech

Association of America's Public Television Stations ("Public TV Stations")

Atlantic Cable Coalition, The Cable Television Association of Georgia, The Great Lakes Cable Coalition, The Minnesota Cable Television Association, The Oregon Cable Television Association, The Tennessee Cable Television Association, and The Texas Cable TV Association ("Cable Associations")

AT&T

Bell Atlantic

BellSouth Telecommunications, Inc. ("BellSouth")

BroadBand Technologies, Inc. ("Broadband")

California Cable Television Association ("CCTA")

Center for Media Education, Consumer Federation of America, Media Access Project, and People for the American Way ("Center")

City and County of Denver, Colorado ("Denver")

Community Broadcasters Association ("CBA")

Compaq Computer Corporation ("Compaq")

Compression Labs, Inc. ("Compression")

Consumer Electronics Group of the Electronic Industries Association ("EIA")

Continental Cablevision, Inc., Greater Media, Inc., Jones Intercable, Inc., Western Communications, Inc., Adelphia Cable Communications, Charter Communications Group, Community Cable TV, Prime Cable of Chicago, Inc., The Florida Cable Television Association, The Cable Television Association, The Cable Television Association of New York, Inc., and The Texas Cable TV Association ("Cablevision")

GTE

Home Box Office ("HBO")

Liberty Cable Company, Inc. ("Liberty")

Michigan Public Service Commission Staff ("MPSC")

National Association of Broadcasters ("NAB")

National Association of Regulatory Utility Commissioners ("NARUC")

National Association of Telecommunications Officers and Advisors and the City of New York ("NATOA/New York")

National Cable Television Association, Inc. ("NCTA")

New England Cable Television Association ("NECTA")

NYNEX

Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO")

Pacific Telesis Group, Pacific Bell and Nevada Bell ("PacTel")

Public Service Commission of the District of Columbia ("DC-PSC")

Southern New England Telephone Company ("SNET")

Southwestern Bell Corporation ("SWB")

United and Central Telephone Companies ("United/Central")

United Video

U S West Communications, Inc. ("U S West")

Viacom International, Inc. ("Viacom")

CERTIFICATE OF SERVICE

I, Linda J. Jeske, do hereby certify that copies of the foregoing Ameritech's Reply Comments on Third Further Notice of Proposed Rulemaking were sent via first class mail, postage prepaid, on this 17th day of January, 1995 to the parties listed on the attached service list.

By: 
Linda J. Jeske

Leonard J. Kennedy
Peter H. Feinberg
Attorneys for Adelphia Communications
Corp., Comcast Cable Communications, Inc.,
Cox Enterprises, Inc., and Jones Intercable, Inc.
Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W., Suite 500
Washington, DC 20037

Mark C. Rosenblum
Robert J. McKee
Attorneys for
AT&T Corp.
Room 3244J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

M. Robert Sutherland
Michael A. Tanner
Theodore R. Kingsley
Attorneys for
BellSouth Telecommunications, Inc.
4300 Southern Bell Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

John D. Seiver
T. Scott Thompson
Attorneys for the Atlantic Cable Coalition, et al.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006

Lisa M. Zaina
General Counsel
The Organization for the Protection and
Advancement of Small Telephone Companies
21 Dupont Circle, N.W.
Washington, DC 20036

Jeffrey S. Hops, Esq.
Director, Government Relations
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, DC 20001

Janice Obuchowski
Counsel to
BroadBand Technologies, Inc.
Halprin, Temple & Goodman
1100 New York Avenue
Suite 650 East
Washington, DC 20005

Paul Glist
John Davidson Thomas
Attorneys for
Continental Cablevision, Inc., et al.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006

Andrew D. Lipman
Gene DeJordy
Attorneys for
Compression Labs, Inc.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, DC 20007

Deborah L. Ortega
President
City Counsel
City and County of Denver
City and County Building
Denver, CO 80202

Alonzo Matthews
Manager
General Services Administration
City and County of Denver
17th floor
303 West Colfax
Denver, CO 80204

Ward W. Wueste, Jr., HQE03J43
John F. Raposa, HQE03J27
Attorneys for
GTE Service Corporation and its affiliated
domestic telephone operating companies
P.O. Box 152092
Irving, Texas 75015-2092

Gail L. Polivy
Attorney for
GTE Service Corporation and its affiliated
domestic telephone operating companies
1850 M Street, N.W.
Suite 1200
Washington, DC 20036

Michael H. Hammer
Thomas Jones
Attorneys for
Home Box Office
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W., Suite 600
Washington, DC 20036

Ronald G. Choura
Policy and Planning Division Michigan Public
Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909

Norman M. Sinel
Stephanie M. Phillipps
Counsel for the Local Governments
National Association of Telecommunications
Officers and Advisors and the City of New York
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

Paul Rodgers
General Counsel
Charles D. Gray
Assistant General Counsel
National Association of Regulatory
Commissioners
1102 ICC Building
Post Office Box 684
Washington, DC 20044

Frank W. Lloyd
Kecia Boney
Attorneys for
New England Cable Television Association
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, DC 20004

Thomas K. Steel, Jr.
Vice President and General Counsel
New England Cable Television Association
100 Grandview Road, Suite 201
Braintree, MA 02184

Henry L. Baumann
Jack N. Goodman
Terry L. Etter
Counsel for
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Daryl L. Avery
General Counsel
Public Service Commission of
the District of Columbia
450 Fifth Street, N.W.
Washington, DC 20001

Josephine S. Simmons
Staff Counsel
Public Service Commission of
the District of Columbia
450 Fifth Street, N.W.
Washington, DC 20001

James P. Tuthill
Lucille M. Mates
Attorneys for Pacific Telesis Group,
Pacific Bell, Nevada Bell
140 New Montgomery Street, Rm. 1526
San Francisco, CA 94105

James L. Wurtz
Attorney for
Pacific Telesis Group, Pacific Bell
Nevada Bell
1275 Pennsylvania Avenue, N.W.
Washington, DC 20004

James D. Ellis
Paula J. Fulks
Attorneys for
Southwestern Bell Corporation
175 E. Houston, Room 1212
San Antonio, TX 78217

Michael E. Glover
Betsy L. Anderson
Attorneys for the Bell Atlantic Telephone
Companies
1710 H Street, N.W.
8th Floor
Washington, DC 20006

Rodney L. Joyce
Attorney for
The Southern New England
Telephone Company
1250 Connecticut Avenue, N.W.
Washington, DC

Madelyn M. DeMatteo
Alfred J. Brunetti
Attorneys for the Southern New England
Telephone Company
227 Church Street
New Haven, CT 06506

Jeff Treeman, President
United Video, a UVSG Company
One Technology Plaza
7140 South Lewis Avenue
Tulsa, Oklahoma 74136

Henry Rivera
Attorney for
Liberty Cable Company, Inc.
Ginsburg, Feldman and Bress
1250 Connecticut Ave., N.W.
Washington, DC 20036