

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

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**JAN 17 1995**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

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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

**REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, INC.**

Judith A. McHale  
Senior Vice President and  
General Counsel  
Mark Hollinger  
Deputy General Counsel  
DISCOVERY COMMUNICATIONS, INC.  
7700 Wisconsin Ave.  
Bethesda, MD 20814

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**REPLY COMMENTS OF DISCOVERY COMMUNICATIONS, INC.**

Discovery Communications, Inc. ("Discovery"), hereby submits its reply comments on the *Memorandum Opinion and Order On Reconsideration and Third Further Notice of Proposed Rulemaking*<sup>1</sup> in these proceedings. In developing further its video dialtone ("VDT") policies, the Commission should:

- Recognize that channel sharing is a matter of network management and in no way affects the right of programmers to determine who may carry or "share" their programming on a particular VDT system;
- Preserve the openness of and unrestricted access to VDT systems by ensuring that there are no artificial constraints on the interoperability of set-top equipment with the VDT system; and

<sup>1</sup> FCC 94-269 (released Nov. 7, 1994), *summary published*, 59 Fed. Reg. 63,971 (Dec. 12, 1994) ("*Third Further Notice*").

- Consistent with its longstanding determination that VDT is to be a common carrier service, not mandate or tolerate preferential access to or carriage upon VDT systems for any particular technology.

Discovery owns and operates The Discovery Channel,<sup>2</sup> The Learning Channel<sup>3</sup> and several new program services.<sup>4</sup> Discovery also is developing Your Choice TV ("YCTV"), a satellite-based interactive multi-channel video program package and delivery system offering user-friendly use of a set-top box and a specially-designed user interface. Accordingly, Discovery has a keen interest in the terms and conditions by which program services will obtain carriage on video dialtone systems.

**I. CHANNEL SHARING ON A VIDEO DIALTONE SYSTEM IS A NETWORK MANAGEMENT ISSUE THAT IS UNRELATED TO, AND DOES NOT OVERRIDE, A PROGRAMMER'S RIGHT TO CONTROL THE CARRIAGE, AND TERMS OF CARRIAGE, OF ITS PROGRAMMING**

Discovery concurs with those commenters who pointed out that issues of program "channel sharing" over video dialtone systems should not be confused with issues of control

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<sup>2</sup> The Discovery Channel features nonfiction documentaries about science, nature, technology, human events, and history. The Discovery Channel now reaches about 62 million subscribers and is one of the most enjoyed and appreciated non-broadcast program services in the country.

<sup>3</sup> The Learning Channel features educational programs on subjects such as history, science, archeology, and anthropology for viewers of all ages. It also provides six hours of commercial-free educational programming for preschoolers every weekday morning.

<sup>4</sup> These channels are: QUARK!, a channel devoted to science; Animal Planet, a channel devoted to animals and their environment; Living, a channel devoted to the way people live, including cooking programs, how-to shows, travel, crafts, gardening, fashion, and collectibles; and Time Traveler, a history channel.

over the distribution of programming.<sup>5</sup> Channel sharing is simply a network management issue that arises as a possible short-term technological "fix" for the problem of insufficient VDT system capacity. It is not a regulatory tool to override programmers' property rights in their content.

Programmers such as Discovery own significant intellectual property rights in their services. Not only does the law of intellectual property give programmers the right to determine how and by whom its programming will be distributed to consumers, but it is also of critical importance to their business that programmers be able to control the terms under which their programming. In the particular case of a VDT system, these rights mean, *inter alia*, that a VDT system manager, whether a local exchange telephone carrier or a third-party packager, may not place a program service on, or provide access to program services carried on, a "shared" channel without the consent of the programmer. In short, the Commission's VDT rules cannot, and should not purport to, infringe upon the right of programmers to determine who may carry their services and the terms of such carriage.

This is fully consistent with the Commission's adoption of a common carrier regime to govern video dialtone. Channel sharing on a VDT system is analogous in some respects to a virtual private telecommunications network. It is the responsibility of the network

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<sup>5</sup> See, e.g., *Comments of Pacific Telesis Group, Pacific Bell, and Nevada Bell; Comments of Viacom International, Inc.; Joint Cable Comments of Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises, Inc., and Jones Intercable, Inc.*

manager to ensure that the system works;<sup>6</sup> at the same time, however, the telephone company that manages a virtual private network does not have the authority to grant access to the private customer's databases without the customer's consent. Similarly, the manager of shared channels on a VDT system has no right to allow use of a particular channel unless the programmer has licensed that use.

Given that video dialtone is a common carrier service, issues of network management and issues of control over access to programming are wholly separate. The Commission should avoid blurring these distinct issues in the course of resolving the matter of "channel sharing."

## **II. THE COMMISSION SHOULD ADOPT VIDEO DIALTONE POLICIES THAT PRESERVE AND PROMOTE OPENNESS AND INTEROPERABILITY**

Discovery supports the adoption of policies that ensure that video dialtone systems are open and transparent to users.<sup>7</sup> Local telephone companies should not become video "gatekeepers" or otherwise impose artificial barriers to consumer access. Instead, a consumer should be able to interconnect his or her set-top box equipment and access, as a technical matter, any service provider carried on a VDT system without impediments arising

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<sup>6</sup> See, e.g., *AT&T Communications: Revisions to F.C.C. Tariff No. 12*, CC Docket No. 87-568, FCC 89-116 (April 18, 1989) (holding that "turnkey" nature of Tariff 12 offering distinguished it from component services), *rev'd sub nom. MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), *reaffirmed on remand AT&T Communications, Revisions to Tariff No. 12*, 6 FCC Rcd 7039 (1991), *aff'd sub nom. Competitive Telecommunications Association v. FCC*, 998 F.2d 1058 (D.C. Cir. 1993).

<sup>7</sup> See *Comments of Viacom International Inc.*, at 3-8 (Dec. 16, 1994).

from the design or operation of the VDT system.

This principle flows directly from the Commission's reaffirmation of VDT as a common carrier service. Indeed, the Commission's experience in regulating the interconnection of private equipment to the telephone network provides a useful precedent that should apply in the VDT context as well. Regulations governing the interconnection of user equipment in common carrier telecommunications are set forth in Part 68 of the Commission's rules.<sup>8</sup> The Commission should ensure that the principles of the Part 68 rules apply in the VDT context as well.<sup>9</sup>

**III. THE RECORD DOES NOT SUPPORT PREFERENCES, IN THE FORM OF EITHER ACCESS OR RATES, FOR CARRIAGE ON VIDEO DIALTONE SYSTEMS ON THE BASIS OF TECHNOLOGY**

Throughout this proceeding, the Commission has consistently ruled that video dialtone is a common carrier service and that preferential access or rates for carriage on VDT

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<sup>8</sup> 47 C.F.R. § 68 *et seq.* In general, the Part 68 rules permit the interconnection of any customer premises equipment ("CPE") so long as the CPE does not technically harm the network.

<sup>9</sup> Another analogy, drawn from the video experience, is the All Channels Receiver Act, enacted in 1962, that required all televisions sold in the United States to be capable of receiving UHF as well as VHF over-the-air broadcast signals. *See* 47 U.S.C. § 303(s); *see also* 47 U.S.C. § 303(u) (codifying the Television Decoder Circuitry Act of 1990, which authorizes the FCC to require television sets to be equipped with built-in circuitry to display closed-captioned television equipment). That legislation effectively removed an artificial equipment barrier to the ability of consumers to "access" all broadcast channels

systems are "inconsistent with a Title II common carrier regime."<sup>10</sup> Thus, the Commission has steadfastly declined to modify the "bedrock common carrier nature" of VDT to accommodate requests that certain groups of speakers be favored over others.<sup>11</sup> The *Third Further Notice* invited comment once again on this issue.<sup>12</sup>

Discovery submits that the parties seeking preferential access or rates to VDT systems have failed to make the requisite "compelling showing of need and strong public policy concerns" necessary to justify discriminatory treatment.<sup>13</sup> Therefore, the Commission should not mandate nor tolerate preferential access or rates for any particular technology.<sup>14</sup>

In particular, the Commission should not mandate or allow any particular technology to have preferential access to analog channels. No party has demonstrated any persuasive basis for discriminating among program services on the basis of how the signal is transmitted

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<sup>10</sup> *Third Further Notice*, ¶ 254; *Second Report and Order, Recommendation To Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992), *petition for review pending sub nom. Mankato Citizens Telephone Company v. Federal Communications Commission*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

<sup>11</sup> *Second Report and Order*, 7 FCC Rcd at 5805 ¶ 44.

<sup>12</sup> ¶ 255.

<sup>13</sup> *See Third Further Notice*, ¶ 255 (discussing standard Commission has applied in recognizing limited exceptions to the principle of nondiscrimination in the provision of common carrier telecommunications services). Many commenters requested either that the Commission mandate preferential access to video dialtone systems or that it allow the local exchange companies to confer preferences. Presumably these commenters seek preferences either (1) in access to the currently more desirable analog channels, or (2) in rates.

<sup>14</sup> *See Comments of the National Cable Television Association, Inc.*, at 19-23 (filed Dec. 16, 1994); *Comments of the New England Cable Television Association on Third Further Notice of Proposed Rulemaking*, at 13-14 (filed Dec. 16, 1994).

to the VDT system. There is no showing that delivery of a program service to the VDT system by wire or via the electromagnetic spectrum (whether "over the air" or via satellite) justifies preferential access or rates. Moreover, local news, public affairs, childrens' programming, and entertainment are routine fare on traditionally "cable" channels as much as they are on conventional broadcast television. Thus, the record simply does not support conferring any particular technology with preferential access to VDT, including favorable access to or rates for carriage on the currently preferable analog channels.

#### IV. CONCLUSION

For the foregoing reasons, Discovery Communications, Inc., respectfully urges the Commission to implement its video dialtone policies in accordance with these reply comments.

Respectfully submitted,

DISCOVERY COMMUNICATIONS, INC.

By: /s/ Mark Hollinger

Judith A. McHale

Senior Vice President and  
General Counsel

Mark Hollinger

Deputy General Counsel

DISCOVERY COMMUNICATIONS, INC.

7700 Wisconsin Ave.

Bethesda, MD 20814

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