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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 to 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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REPLY COMMENTS OF
THE CALIFORNIA CABLE TELEVISION ASSOCIATION
ON THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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REPLY COMMENTS OF
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The California Cable Television Association ("CCTA") hereby submits its reply comments in the above-captioned proceeding.¹ CCTA hereby responds to comments filed by Pacific Bell² ("Pacific") and GTE Service Corporation³ ("GTE") on capacity and preferential access issues.⁴

¹ 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., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269, (released Nov. 7, 1994) ("Reconsideration Order"), appeal pending sub. nom., Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. 1992).

² Comments of The Pacific Telesis Group, Pacific Bell and Nevada Bell, CC Docket No. 87-266, filed December 16, 1994 ("Pacific Comments").

³ Comments of GTE, CC Docket No. 87-266, filed December 16, 1994 ("GTE Comments").

⁴ CCTA suggests that LEC control over conduit, pole attachments, rights-of-way and other pathways remain a

(continued...)

I. The Commission's Rules On Both Shared Capacity And Preferential Access Must Be Consistent With Past Decisions Of The Commission And The Courts

The hallmark of video dialtone is the Commission's predicate that this service is designed to be a common carrier service. Video dialtone was designated a common carrier service in the Commission's original Video Dialtone Order⁵ and clarified as such by the D.C. Circuit Court of Appeals in NCTA v. FCC.⁶ The Commission reiterated this classification in its Reconsideration Order.⁷

In the Reconsideration Order, the Commission specifically rejected the anchor programming proposals put forth by the local exchange carriers ("LECs").⁸ In its comments, Pacific asks the Commission to create rules that: (1) give the LECs flexibility to name channel administrators⁹, (2) give the LECs permission to design the allocation of channels between analog channels and digital channels on the basis of its own VDT offering¹⁰, (3) and authorize carriers to offer preferential treatment, including

⁴(...continued)
fundamental bottleneck. LEC misconduct or manipulation in this area can defeat the development of open local competition. CCTA therefore supports the safeguard proposals presented in the comments of AT&T, NCTA and Continental et al. on these issues in their December 16, 1994 filings.

⁵ Video Dialtone Order, 7 FCC Rcd at 5783.

⁶ 33 F.3d 66 (D.C. Cir. 1994).

⁷ Reconsideration Order at ¶ 30-33.

⁸ Id. at ¶ 35.

⁹ Pacific Comments at 5.

¹⁰ Id. at 6.

discounted prices, at the carrier's option.¹¹ Similarly, GTE requests flexibility with respect to its control over the analog and digital mix¹² and the ability to provide "video distribution services in a manner that accommodates the immediate requirements of video programmers such that they will be able to effectively compete with entrenched cable system offerings."¹³ These requests are antithetical to the FCC's often restated common carrier goals for, and principles underlying, video dialtone.

II. Proposals For Control By Pacific and GTE Over The Capacity Of Their Proposed Video Dialtone Systems Are Contrary To The Common Carrier Nature Of Video Dialtone

Both Pacific and GTE continue to propose rules that amount to a repackaged version of the already-rejected anchor programmer proposals.¹⁴ These LECs condone programming preferences that are contrary both to the concept of common carriage and to the First Amendment.¹⁵

The level of flexibility that Pacific proposes in designing its network could easily be used to undercut the common carrier attributes of video dialtone.¹⁶ Pacific's channel sharing

¹¹ Id. at 8.

¹² GTE Comments at 9.

¹³ Id. at 10.

¹⁴ Reconsideration Order at ¶ 35.

¹⁵ Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994).

¹⁶ Pacific Comments at 2-4.

proposal¹⁷ is flatly untenable so long as it has an option to purchase both its broadcast channel manager and the analog anchor programmer, as pointed out by CCTA in its initial comments.¹⁸ Video dialtone providers should not "be permitted to design the allocation of channels to be shared."¹⁹

While GTE's proposal that the FCC should not mandate all-digital systems before their viability²⁰ may be reasonable, its GTE's notion that this means that GTE should have control over how channel sharing takes place on its analog system cannot be accepted. Moreover, GTE's claim that such plans for channel sharing should not be submitted in detail with video dialtone applications, but at the tariff stage,²¹ is inconsistent with the FCC's decision that the Section 214 process was the critical stage for ensuring that video dialtone is implemented in a way that best serves the public interest.²² As proposed, GTE's channel sharing scheme is contrary to the commission's nondiscriminatory requirements.

Without any factual support or compelling showing of need,²³ GTE claims that broadcast stations and governmental entities

¹⁷ Id. at 5-7.

¹⁸ See CCTA Comments at 5-8.

¹⁹ Pacific Comments at 6.

²⁰ GTE Comments at 10.

²¹ Id. at 11.

²² Reconsideration Order at ¶ 136.

²³ Id. at ¶ 255.

should be accorded preferential treatment with respect to channel sharing.²⁴ As the Commission recognized, exceptions to the general principle of nondiscrimination in the provision of common carrier services are based upon a "compelling showing of need and strong public policy concerns."²⁵ Preferential treatment is also contradictory to the public policy considerations the FCC took into account in originally creating a first-come, first-served common carrier service.

GTE urges the FCC to take into account three considerations in determining who should get access to shared channels: (1) initial capacity, (2) expandability, and (3) market demand.²⁶ The notion that market demand plays any role in considering which programmers should be involved in GTE's channel sharing arrangement is totally in conflict with common carriage first-come, first-served requirements. Essentially, GTE's proposal closely resembles a cable television system, which, by definition, packages, bundles, and prices programming based on market demand.

Moreover, GTE's channel allocation scheme proposal²⁷ is nothing more than an anchor programmer proposal. Particularly suspect is GTE's proposal to allow an existing programmer, or programmers, to utilize as much space available if, after six months from the effective date of the tariff, any analog capacity

²⁴ GTE Comments at 11.

²⁵ Reconsideration Order at ¶ 255.

²⁶ GTE Comments at 12.

²⁷ Id. at 12-13.

remains unused.²⁸ This is inconsistent with of the FCC's Ameritech Order.²⁹

The rules the FCC ultimately adopts for channel sharing, should limit LEC control over channel sharing, given the public policy that video dialtone is a common carrier service.

III. Proposals By GTE And Pacific With Respect To Preferential Access Are Also Contrary To The Common Carrier Attributes Of Video Dialtone

Neither Pacific nor GTE support FCC-mandated preferential access.³⁰ However, Pacific's proposal that preferential access should be voluntarily given by Pacific at discounted prices,³¹ if adopted, would make Pacific a program packager on a video dialtone network. Similarly, GTE proposes that it be allowed to give local broadcasters and not-for-profit corporations preferential access on VDT systems.³² As pointed out in CCTA's original comments, and as discussed above, any plan that allows preferential access for broadcasters does great harm to cable programmers, is contrary to common carriage principles, and cannot be approved.³³

²⁸ GTE at 13.

²⁹ Ameritech Operating Companies, W-P-C 6926-6930, FCC 94-340 at ¶ 28 (rel. January 4, 1995).

³⁰ Pacific Comments at 8; GTE Comments at 18.

³¹ Pacific Comments at 8.

³² GTE Comments at 16-17.

³³ See CCTA Comments at 12-16; Turner v. FCC, 114 S.Ct. at 2469-72.

Conclusion

Nothing in either the Pacific or GTE comments addresses how they will, as video dialtone operators, meet the common carrier goals of the Commission's video dialtone orders and the D.C. Circuit's decision in NCTA v. FCC. In fact, their proposals represent blatant end-runs on the common carrier goals that have been stressed both by the Commission and the court.

Respectfully submitted,



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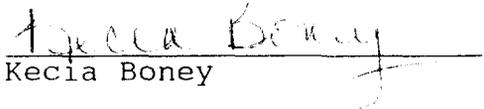
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CERTIFICATE OF SERVICE

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

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