

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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JAN 17 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
TELEPHONE COMPANY-)
CABLE TELEVISION)
Cross-Ownership Rules.)
Section 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 FOR CENTER FOR MEDIA EDUCATION,
CONSUMER FEDERATION OF AMERICA, MEDIA ACCESS PROJECT
AND PEOPLE FOR THE AMERICAN WAY**

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SUMMARY

Center for Media Education, Consumer Federation of America, Media Access Project and People for the American Way (“CME/CFA/MAP/PFAW”) argued in their initial comments that video dialtone (“VDT”) services must be designed to promote the free flow of information through strict separation of ownership of content and the means of transmission. CME/CFA/MAP/PFAW also argued that rate structures for these new technologies can and must be designed to facilitate access for noncommercial civic discourse.

Cable and telephone industry comments in this proceeding have advocated policies which would largely nullify the possibility of competition by permitting LEC’s to obtain existing cable systems by merger or acquisition. These proposals overlook that the objective of creating competition was the policy imperative which motivated the very creation of VDT. Permitting such buyouts in communities of 50,000 or less would deny competitive choice to *two-thirds* of Americans. Southwestern Bell’s proposal to extend such waivers to communities of 100,000 would extend to *three-quarters* of the nation’s TV homes. GTE’s suggestion that existing anti-trust standards laws give adequate protection ignores the fact that telecommunications is a highly concentrated industry only now emerging from the grip of the decades-long AT&T monopoly. CME/CFA/MAP/PFAW suggest that population density is an important consideration in establishing standards for waiver what should be a very strong prohibition on telco buyouts.

CME/CFA/MAP/PFAW also respond here to suggestions that preferential rate schemes are inconsistent with the Communications Act and may be unconstitutional. What the statute forbids, however, is *unreasonable* discrimination. Using rate structures to en-

hance opportunity for noncommercial civic discourse advances the First Amendment goals of creating a well-informed electorate. Thus, the Supreme Court's recent *Turner* decision actually supports the establishment of rates which provide preferential access for such speech. Operators of VDT platforms stand in a wholly different constitutional position than the cable operators involved in *Turner*. As common carriers they have no right to make editorial decisions about the viewpoint of speakers. To the extent that the so-called *O'Brien* test is applicable, preferential rate and access measures easily meet this intermediate level of constitutional scrutiny. They serve regulatory goals of promoting competition that are unrelated to content. Far from burdening speech more than may be necessary to serve these interests, they actually create more speech. Promoting diversity in the marketplace of ideas is a compelling governmental interest of the highest order.

Nor is likely that there will be adequate diversity in these new public fora absent such affirmative action. Commercial price levels are unlikely to incubate noncommercial speech; this is certainly the experience in broadcasting, where noncommercial service was obtained only by reservation of spectrum for this purpose. It is no solution to suggest that the Commission await the unlikely action of Congress to provide funding to purchase such access at commercial rates.

With respect to the claim of NCTA, Southwestern Bell and others that preferential rates for noncommercial use are not content-neutral, and thus require more exacting judicial scrutiny, they are wrong. Rate schemes do not involve selection of speech on the basis of content, but would cover *all* speakers similarly situated.

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**REPLY COMMENTS FOR CENTER FOR MEDIA EDUCATION,
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The Center for Media Education (CME), Consumer Federation of America (CFA), Media Access Project (MAP) and the People for the American Way (PFAW) hereby reply to comments filed in the above referenced proceeding.

I. The Commission Must Continue to Prohibit the Acquisition of Cable Companies By Local Exchange Carriers, Except in Cases of Extreme Economic Distress.

In seeking to permit very liberal exceptions to the proposed ban on acquisition of cable operators by LECs, both LECs and the cable industry would have the minnow swallow the whale. With the notable exception of SNET, they advocate an anti-

competitive model for the video and full service networks of the future. Southwestern Bell and GTE would preserve and expand the telephone monopoly into video. NCTA would permit cable monopolies to be handed over to the LECs at greatly inflated prices. These anti-competitive proposals fly in the face of the goals of increased competition throughout all segments of the telecommunications industry.

The LEC and cable commenters overlook the principal policy imperative which motivated the creation of video dialtone at all -- the belief that telephone companies offering video services would expedite competition -- with all of its benefits -- to the video market. A policy which would turn two wires into one for a significant portion of the country is simply incapable of meeting this critical pro-consumer, procompetitive objective. Not surprisingly, the cable and telephone commenters urge adoption of an in-region buy-out policy so liberal that monopoly would become the rule and not the exception. GTE and NCTA would permit such buy-outs in all communities of at least 50,000 or less. Southwestern Bell supports buy-outs in all communities of at least 100,000 or less. The companies would also permit the Commission to extend buy-out authority to even larger communities.

The industry's proposals would subject most Americans to monopoly prices from a single provider. In fact, if buy-outs were permitted in communities of 50,000 or less, *two-thirds* of the population of the country could be forced to live in a one-wire monopoly world for all video and telecommunications services. If the limit were raised to 100,000 or less, the portion of the population at risk approaches *three-quarters*.¹ The

¹ *Id.*

Commission simply could not claim, by any stretch of the imagination, to be advancing a pro-competitive policy or protecting the public interest by supporting such a rule.

To understand how extreme the proposals are, it is instructive to examine the Commission's current waiver policy regarding provision of video services by a common carrier in its own telephone service area.² Among the requirements for a waiver is "a demonstration that the proposed service area has a density of fewer than 30 households per route mile of coaxial cable trunk and feeder line."³ CME, CFA, MAP and PFAW's preliminary analysis shows that less than one-quarter of the population lives in areas where low density affects costs. Only 5 percent of the population lives in areas where low density *significantly* affects costs.

GTE suggests that existing anti-trust standards, *i.e.*, the Clayton Act, are sufficient to serve as a guide as to whether waivers of the anti-buyout provisions should be granted. This, however, is no standard at all, since it is a standard which would exist even in the absence of the Communications Act. The anti-trust laws are only part -- albeit an important part -- of the Commission's consideration of what is in the public interest. To the extent that telecommunications is a highly concentrated industry only now emerging from the grip of the decades-long AT&T monopoly, with established loci of monopoly power remaining in local telephone, cable TV and other sectors, it is far too early to treat telecommunications as if it were no different than other industries with no similar structure or history.

² See 47 C.F.R. 63.56

³ *Id.* at §63.56(b)(2).

In their initial comments, CME, CFA, MAP and PFAW proposed rules which would spur vigorous competition for video and other services. The goal should be to create an environment that will require local exchange carriers that offer video services in their region to be forced to try to compete with other video services providers, not to want to buy them out. Under this proposal, the benefits of competition flow to the public. A liberal buy-out policy, like the one advocated by much of the industry, assures that the benefits all flow from the pocket of the captive ratepayer to the pockets of monopoly companies and their shareholders. This is unacceptable public policy which does not meet the statutory requirement that the Commission's actions serve the public interest.

The guiding principle for the Commission should be to stress competition in every segment of every market for every service possible. A conservative policy for in-region buy-outs of cable systems advances that objective by forcing down prices, increasing innovation and improving customer service for all segments of the telecommunications marketplace.

Southern New England Telephone Company (SNET) takes a more rational and responsible view than the others in advocating allowance for in-region buy-outs only in communities where the Commission has identified low population density and substantially below average income levels. While this approach rejects the monopolistic proposals of the other commenters, it has another shortcoming because it fails to take into account the dynamic nature of the industry. As technology improves and costs for providing telecommunications services continue to decline, it is likely that the population density

required to make a service financially viable will continue to drop. The Commission's buy-out policy must reflect this economic reality

While CME, CFA, MAP and PFAW believe it would be in the public interest to limit acquisitions to cases of economic distress, if the Commission chooses a population figure such as 2,500 as a community in which a cable system buy-out would be permitted, it is critical that the Commission create procedures to prevent evasion. A 2,500 cut-off would cover a little less than one-third of the population, which is consistent with our understanding of the economics of delivering video services in low density markets. But there are many ways to manipulate a system based solely on community size by the companies involved. Citing just two of many potential examples, a policy should be adopted requiring divestiture of cable facilities bought out by the telephone company if the population in the relevant community increases above permissible levels. Protections are also needed to prevent telephone companies from acquiring cable systems in adjoining communities that individually fall under the artificial number selected by the Commission, but together do not.

In an era when the goal is to maximize competition, expanding monopoly control over transmission facilities for video services is unacceptable public policy. CME, CFA, MAP and PFAW urge the Commission to adopt the conservative buy-out policy based on principles of economic distress advocated in our initial Comments.

II. The Commission Should Require Preferential Rates or Access Terms for Non-Profit and Governmental Entities Providing Noncommercial Programming.

In their December 16, 1994 comments, CME, CFA, MAP and PFAW argued that mandated preferences for nonprofit and governmental entities providing noncommercial services to the public are consistent with *Turner*⁴ and other Supreme Court decisions, do not violate the Communications Act and are desirable as a matter of public policy.⁵ The following discussion on preferential access is intended to clarify the points that were made earlier, in response to the industry's comments.

A. Preferential Rates or Access Terms are Consistent with the Non-Discrimination Requirements of Title II of the Communications Act.

Several commenters allege that preferential rates are inconsistent with Sections 202(a) and 201(b) of the Communications Act⁶. However, as CME, CFA, MAP and PFAW explained in their original comments, Section 202(a) does not prohibit all differential rates, 47 U.S.C. 202(a); it prohibits only those that are "unreasonable" and "discriminatory." *Id.* Section 201(b) provides that "communications ... may be classified ... as the Commission may decide to be just and reasonable, and different charges may be

⁴ *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994).

⁵ Comments of CME, CFA, MAP and PFAW at 7-12. CME, CFA, MAP and PFAW support the comments of the Michigan Public Service Commission (MI-PCS) favoring preferential access for schools and nonprofit groups that use the facilities for public training, education or public meeting access. Comments of MI-PCS at 5. MI-PCS also support preferential access for libraries, government and healthcare information services. *Id.*

CME, CFA, MAP and PFAW also support the Community Broadcasters Association's (CBA) proposal that reduced access rates should apply to all local programming services. Comments of CBA at 3. They agree that low power television (LPTV) stations should have access to video dialtone on a must carry basis, the same as full power television stations.

⁶ See, e.g., Comments of National Cable Television Association, Inc. (NCTA) at 21; Comments of Southwestern Bell (SBC) at 17-18.

made for the different classes of communications” 47 U.S.C. 201(b). Applying § 201(b) in conjunction with § 202(a), the Courts and the Commission have held that not every case of price difference or preference is unlawful.⁷ And, as made clear in CME, CFA, MAP and PFAW’s earlier comments, there are numerous examples of reduced rates for common carrier services based on the needs of the users and the promotion of universal service.⁸ In addition to the examples previously cited, the Commission has repeatedly upheld mechanisms such as AT&T’s reduced rate for “government or government supported customers” under Section 201(b). *See AT&T, Tariff F.C.C.*, No. 16, 4 FCC Rcd. 2231 (1989); *AT&T, Revisions to Tariff F.C.C.* No. 16, 5 FCC Rcd 468 (1990). Application of that tariff today enables AT&T to provide 60 percent of the world’s largest private network, the Federal Telecommunications System 2000 (FTS-2000), to federal government agencies at a reduced rate. More importantly, the tariff provides yet another example of preferential rates endorsed by Congress and established by the Commission to further the Commission’s goal of ensuring broad access to communications services. In light of these examples and those cited in our earlier comments, it is appropriate, and indeed necessary, for the Commission to create a class of non-profit programmers entitled to preferential rates or access terms without violating the nondiscrimination requirements of Title II.

⁷ *See Associated Press v. FCC*, 452 F.2d 1290 (D.C. Cir. 1971).

⁸ Comments of CME, CFA, MAP and PFAW at 13-14.

NCTA also argues that affording equal access to all is a prerequisite to a competitive video dialtone marketplace.⁹ It claims that any form of preferential treatment for some will prevent other programmers from being able to disseminate their programs. Significantly, NCTA directs this argument to preferential treatment of *commercial* entities -- treating preferential access to video dialtone like the must carry provisions of § 611 of the 1992 Cable Act. In the case of *noncommercial* programmers, however, it is the failure of the Commission to require preferential rates or access terms for non-profit producers of noncommercial programming that would truly chill speech. These noncommercial program producers would be virtually excluded from disseminating their programs and the total number of voices would be decreased. The Communication Act's principles of nondiscrimination and the First Amendment values of maximizing free flow of information require policies which establish fora for speech on issues and ideas.

B. The Rights of Common Carriers as Speakers are Not Implicated by Preferential Rates or Access Terms.

Because the Commission has properly determined that LECs will operate video dialtone platforms as common carrier services, it is indisputable that the operators of video dialtone platforms stand in a wholly different constitutional position than cable operators and do not have similar First Amendment rights.¹⁰ Nonetheless, Southwestern Bell (SBC) and AT&T among others, claim that the Supreme Court's *Turner* decision prevents the Commission from imposing mandatory access rates for non-profit

⁹ Comments of NCTA at 22-23.

¹⁰ Comments of Southwestern Bell at 14; Comments of AT&T at 7-8.

programmers. As stated in the initial comments on CME, CFA, PFAW and MAP, by definition, a common carrier must provide access to all potential providers of programming on video dialtone platforms. Common carriers have no right to make editorial decisions about the carriage viewpoints of particular speakers, and *Turner* confers no claim to First Amendment rights on LECs as such. By contrast, cable operators and programmers have limited First Amendment rights as editors and selectors of programming. *Turner*, 114 S. Ct. at 2470, citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991). Indeed, the Court in *Turner* described cable operators and programmers as “‘see[king] to communicate messages on a wide variety of topics in a wide variety of formats’ [t]hrough ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire [sic].’” (citation omitted). This is precisely what common carriers, by definition, do not do.

C. To the Extent That First Amendment Rights are Implicated, Preferential Rates or Access Terms Should be Analyzed Under an Intermediate Scrutiny Standard.

Because video dialtone preferential rates arguably implicate the rights of video programmers as well as common carriers, it may be contended that such rates or access terms implicate important First Amendment rights of video programmers and that *Turner* is controlling. Even assuming that this were true, it is clear that only intermediate scrutiny would apply to these content-neutral regulations, and that the regulations would be held constitutional.¹¹ In *Turner*, the court applied the test set forth in *United States v.*

¹¹ AT&T and NECTV both contend that preferential access provisions would not withstand intermediate scrutiny. Comments of AT&T at 8; Comments of New England Cable Television Association (NECTA) at 7. See also, Comments of NCTA at 27 and Southwestern Bell at 15 which alternatively propose that intermediate scrutiny be applied.

O'Brien, 391 U.S. 367 (1968), which held a “content neutral regulation will be sustained if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of the that interest.” *Turner*, 114 S. Ct. at 2469. Preferential rates and access terms serve a regulatory goal, unrelated to content, a goal that represents a compelling governmental interest that does not burden more speech than necessary to serve these interests.¹²

1. Preferential access furthers an Important and Substantial Governmental Interest.

The Commission recognized three public interest objectives in support of its video dialtone policies: “facilitating competition in the provision of video services; promoting efficient investment in the national telecommunications infrastructure; and fostering the availability to the American public of new and diverse sources of video programming.” Reconsideration Order at 3:¹³ *See also* Telephone Company-Cable Cross Ownership Rules, §§63.54-58, *Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry*, 7 FCC Rcd 300, 304 (1991). CME, CFA, MAP and PFAW made clear in their Comments of December 16, 1994, that this last objective has repeatedly been recognized as a compelling governmental interest and was recently held to be a governmental “purpose of the highest order.”¹⁴ CME, CFA, MAP and PFAW

¹² See discussion of *Turner* as applied, *infra* at 10-13.

¹³ *See* Telephone Company-Cable Cross Ownership Rules, §§63.54-58, *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd 300, 304 (1991)

¹⁴ *Turner*, 114 S. Ct. at 2469-70.

stated and maintain that for more than half a century, Congress and the Commission have frequently taken affirmative actions to increase the availability of noncommercial programming to the public in order to increase the breadth of information available. The importance of such actions to the general public is indisputable.

2. The governmental interests implicated by preferential access to video dialtone are unrelated to the suppression of free expression.

Regulations that give preferential treatment to non-profit producers of noncommercial programming are unrelated to the suppression of free expression. *Turner*, 112 S.Ct. at 2469, citing *O'Brien*, 391 U.S. at 377. As CME, CFA, MAP and PFAW stated in more detail in their initial comments, for the better part of this century, Congress and the Commission have repeatedly established methods for ensuring that important noncommercial programming is afforded meaningful fora for program dissemination and none has been held unconstitutional.¹⁵

Indeed, all of the three objectives of the Commission's video dialtone policies -- promoting competition, fostering efficient investment, and increasing availability -- are

¹⁵ Comments of CME, CFA, MAP and PFAW at 10-11. *See also*, Cable Television and Consumer Protection Act of 1992, 47 U.S.C. § 615 (noncommercial "must carry"); 47 U.S.C. § 335 (set aside for noncommercial programmer on direct broadcast satellites); Cable Communications Policy Act of 1984, 47 U.S.C. § 531 (public, educational and governmental access channels); 73 C.F.R. § 502 (reservation of spectrum for noncommercial broadcast stations). NECTA and CCTA argue that in enacting the 1992 Cable Act, Congress did not impose broadcast carriage requirements or preferences for DBS or MMDS or VDT and therefore did not intend such set asides. This is wrong insofar as it relates to DBS or MMDS. In as much as Congress did not address requirements for video dialtone at all in the 1992 Cable Act, the assertion is not meaningful. It is the Commission that has developed the regulatory scheme for video dialtone and given the Commission's intention to make available a diversity of programming to the public, preferential rates or access terms or noncommercial programming is entirely consistent with the Commission's regulatory scheme

unrelated to the suppression of free expression. Nonetheless, several commenters contend that preferential rates or access terms would operate to infringe upon the speech rights of others and are therefore unconstitutional. However, as the Court made clear in *Ward v. Rock Against Racism*,¹⁶ content neutral regulations that have an incidental effect on speech are not *per se* unconstitutional. Instead, where, as here, a regulation is promulgated to promote an important government interest that can be most effectively advanced through such regulation, the relationship to speech is not fatal.

Indeed, the potential effects on speech that might result from preferential rates or access terms for video dialtone not only do not “infringe” on the speech rights of other programmers, they also operate to ensure more speech overall. Unfortunately, several commenters who are members of industries trying vigorously to be the providers of broadband communications systems now and in the 21st Century approach this First Amendment question as if it were a zero sum game. However, where more speech is available, all citizens win. Indeed, the First Amendment, read literally, states that Congress shall not “abridge” freedom of the press or freedom of speech. This “abridgment” section does not, as does the Establishment Clause, prevent Congress or the Commission from establishing a policy that encourages *more* speech. The sort of affirmative encouragement espoused here is at the heart of the First Amendment and the jurisprudence interpreting it. If, as industry promises, America will soon operate in a world of virtually unlimited network capacity, promoting noncommercial speech on a content-neutral basis so as to increase the diversity of information sources available to the

¹⁶ 491 U.S. 781 (1989)

American public does not abridge the free speech rights of anyone. Instead, it promotes the fundamental values of the First Amendment -- it enriches society, enhances education and invigorates our democratic processes

3. The incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of the government's interests.

Some commenters argue that even if there is a governmental interest in increased access, preferential rates or terms are not necessary to serve those policy objectives.¹⁷ However, CME, CFA, MAP and PFAW believe the regulation is plainly necessary to achieve the Commission's goal of a diverse communications environment and is narrowly tailored to do so. When applying intermediate scrutiny, "the requirement of narrowly tailoring is easily satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Turner*, 114 S.Ct. at 1469. *citing Ward v. Rock Against Racism*, 491 U.S. at 799. Here, the governmental interest might not be satisfied at all absent rates or terms set now by the Commission. The preferential treatment sought here narrowly focuses on a class of video programmers that would otherwise be eliminated from the marketplace altogether due to the lack of mass audience necessary to compete

The rates for programming video dialtone systems are not known, since no commercial tariff has yet been filed. However, the history of telecommunications and media services strongly suggests that if the marketplace is left alone, nonprofit programmers will not be able to obtain access to these new television technologies. In

¹⁷ Comments of NCTA at 9; Comments of NFCTA at 8-9.

the broadcast regulatory framework, noncommercial programmers did not gain a significant presence on broadcast television, and on FM radio, until spectrum was reserved for nonprofit use. Indeed, the development of noncommercial programming was delayed for 30 years because government policy ignored nonprofit access in the 1930s.¹⁸ Without government set-asides or other corrective policy, AM radio, for example, has seen little noncommercial use.

Moreover, as we have argued elsewhere, the market for cable leased access has been prohibitive for nonprofits. Using the FCC's estimate of \$0.50/subscriber/month for leasing, it would cost around \$11 million per year for a community college to serve all the cable households in the Philadelphia metropolitan area.¹⁹ Using the same estimate, it would cost the National Audubon Society approximately \$336 million annually to lease a full time channel reaching all cable households -- almost seven times the organization's total operating budget.²⁰ Preliminary estimates of the cost of programming video dialtone systems suggest a similar danger. When Bell Atlantic gave preliminary figures to participants on its Stargazer video-on-demand trial in northern Virginia last year, it suggested that the cost of programming the system would be a penny per minute per viewer. Thus, if a million people watch only one 100-minute movie, Bell Atlantic will

¹⁸ Barnouw, *Tube of Plenty*, Oxford, 1990; McChesney, "The Battle for the Airwaves, 1928-35," 1990, *Journal of Communication*.

¹⁹ Petition for Reconsideration of CME, *et. al.* in MM Docket 92-266, June 21, 1993.

²⁰ *Ex Parte* Submission of CME/CFA in Docket MM 92-266, October 14, 1994.

charge the programmer one million dollars out of fees paid by the viewer.²¹ This fee structure concerns public television and other nonprofit entities that would like to provide their information services for free. WETA found the costs of putting its signal on such a video dialtone platform “absolutely prohibitive”²² And, while Bell Atlantic indicated willingness to accommodate WETA on the analog portion of its video dialtone network, its “will-carry” proposal offers no resolution to the important policy question about the availability of noncommercial interactive -- *i.e.*, digital -- applications.²³

If the telephone companies plan to recoup their sizable investment to provide video dialtone service, without having any of the cost fall on the captive telephone ratepayer, then the money must come from the subscribers and programmers of the system. Several telephone companies have filed revenue projections for video dialtone in response to queries by the FCC, most of which could be termed as very optimistic, with large percentages of growth for each of the next ten years.²⁴ In fact, for the telephone companies’ projections to be realized, they would have to enlist the same number of subscribers in a ten year period that it took the cable industry more than thirty years to

²¹ For example, a viewer would pay two dollars, with a dollar going to Bell Atlantic and a dollar going to the programmer.

²² “Based on tariff data provided by Bell Atlantic for the experimental services in Virginia, WETA estimated that it would have to pay approximately \$26,700 to distribute one-hour of a prime time program and that its entire program schedule would cost \$83 million on Bell Atlantic’s system per year.” *See*, Comments of APTS in CC Docket 87-266, December 16, 1994.

²³ *See, InfoActive*, September/October 1994 (Published by CME).

²⁴ *See, e.g.*, Responses to Questions of the Common Carrier Bureau, December 16, 1994, NYNEX, Bell Atlantic, GTE, Pacific Telesis.

amass. Even if the subscribership of video dialtone service grows well, but at less than expected levels, this would threaten reasonable rates for programmers -- especially those noncommercial ones.

Several commenters alternatively contend that the Commission should decline to impose preferential rates or access terms for certain programmers and await Congressional or state action to appropriate funding directly to organizations in need of assistance to disseminate programming. While this argument may appear to be an attractive "way-out" for the Commission, it is neither a viable nor appropriate solution at this time. First, the Communications Act of 1934 imposes upon the Commission an *affirmative obligation* to facilitate the public's receipt of programming from a diversity of information sources and to ensure that this nation's communications systems do not operate to inhibit speech under guidelines that make only commercial speech viable. Without an act of Congress, the Commission does not have the authority to appropriate funds directly to noncommercial programmers. Yet, video dialtone systems are being deployed now and several applications have already been approved. There is no less restrictive way for the Commission to satisfy its duty. Second, those commenters claiming that Congress should appropriate money for access are engaged in nothing more than a "shell" game. It is clear that during this time of budgetary crises and deficit spending that is seen as out-of-control, when some are even advocating the elimination of federal funding for public broadcasting, the prospect of such additional funding is dubious at best. And, it is inappropriate to suggest that the Commission, whose

responsibility it is to use its authority and mandate to achieve statutory goals, should pass that job on to Congress.

D. Regulations Requiring Preferential Rates or Access Terms for Non-Profit Producers of Noncommercial Programming are Content-Neutral.

CME, CFA, MAP and PFAW believe that the content-neutrality of the preferences they seek is indisputable. Nevertheless, several commenters proceed to muddy the waters by claiming that a court would apply strict scrutiny in determining the constitutionality of preferential rates, because such rates are content-based. Both NCTA and SBC make these contentions.²⁵ These arguments are seriously flawed. As the Court in *Turner* stated, the “principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys. (citation omitted) ... As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.” *Turner*, 112 S.Ct. at 2459. Setting regulations that seek to protect noncommercial speech, which we have seen time and again is not commercially viable, is not intended to, nor does it, choose one set of speakers over another and is not based upon such speakers’ viewpoints or the content of their speech. Instead, regulations of this sort seek to increase the availability of speech sources generally, without reference to the content or nature of the speech. Indeed the preferential rates that CME, CFA, MAP and PFAW are advocating would cover all non-profit

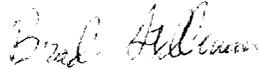
²⁵ Comments of NCTA at 24-27; Comments of Southwestern Bell at 15. NCTA claims that strict scrutiny applies as to the rights of “video programmers,” while SBC believes that both programmers and common carrier LECs have First Amendment rights that demand enhanced scrutiny for what they claim are content-based restrictions. *Id.*

producers of noncommercial programming. This broad category of organizations include many organizations created pursuant to 501(c)(3) of the Internal Revenue Code which currently number in the several thousands. Such organizations espouse and advance a diversity of political, social and cultural ideas that in many cases are diametrically opposed to one another. By giving access for the dissemination of all ideas by these programmers, the Commission would simply be turning up the volume on what would otherwise be silenced speech without preferring or endorsing particular views. Like the must-carry rules in the 1992 Cable Act, where the *Turner* Court concluded that “Congress’ overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to provide access to free television programming for the 40 percent of Americans without cable.” *Turner*, 114 S.Ct at 2461, the 501(c)(3) classification is content-neutral and applies to a category of speakers based upon their non-profit status, not content or viewpoint.

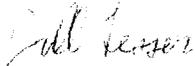
CONCLUSION

For the foregoing reasons, CME, CFA, PFAW and MAP request that the FCC (1) refuse to allow telephone company buyouts of cable systems except in circumstances of extreme economic distress; and (2) provide preferential rates or access terms for non-profit providers of noncommercial programming.

Respectfully Submitted.



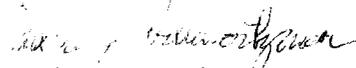
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