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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 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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RM-8221

To: The Commission

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**OPPOSITION OF VIACOM INTERNATIONAL INC.  
TO PETITIONS FOR RECONSIDERATION  
OF AMERITECH OPERATING COMPANIES AND  
LIBERTY CABLE COMPANY**

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February 9, 1995

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Viacom International Inc. ("Viacom") hereby opposes the petitions filed by the Ameritech Operating Companies ("Ameritech") and Liberty Cable Company ("Liberty Cable") [collectively, the "Petitioners"]<sup>1</sup> seeking reconsideration of the Commission's Memorandum Opinion and Order in the above-captioned "video dialtone" ("VDT") proceeding.<sup>2</sup>

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<sup>1</sup> Ameritech's Petition for Reconsideration and Clarification, CC Docket No. 87-266 (filed Jan. 11, 1995) ("Ameritech Petition"); Petition for Reconsideration of Liberty Cable Company, CC Docket No. 87-266 (filed Jan. 12, 1995) ("Liberty Cable Petition").

<sup>2</sup> Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266 (released Nov. 7, 1994) ("Memorandum Opinion & Order" or "Third Further Notice").

**INTRODUCTION AND SUMMARY**

Petitioners essentially call for reversal of the FCC's fundamental determination that allocation of "all or substantially all" of the analog capacity -- which the FCC has since interpreted as meaning more than 50% -- of a VDT system to one program packager would undermine the common carrier framework upon which the Commission's VDT policy is predicated. Petitioners make this request in the name of promoting the "competitiveness" of one predominant anchor programmer on each VDT system. In doing so, however, they rely on arguments repeatedly rejected by the Commission as inherently inconsistent with the fundamental policy goal of eliminating potential bottlenecks to VDT platforms and thus fostering vigorous competition among rival packagers on a single VDT system.

Moreover, by linking the notion of an "anchor programmer" with its favored channel-sharing scheme, Liberty Cable wrongly suggests that a predominant packager with ultimate control over channel-sharing arrangements is somehow necessary to ensure that VDT analog capacity is used efficiently. In the pending Third Further Notice in this proceeding -- where channel-sharing is squarely at issue -- Viacom and others have already demonstrated that efficient use of capacity can be achieved without elaborate schemes that (1) impinge upon the programmer's role in determining

who may carry its service and on what terms and conditions, and (2) undercut competition among multiple packagers on a VDT system.

**I. AS THE COMMISSION HAS ALREADY AFFIRMED, THE COMMON CARRIER NATURE AND COMPETITIVE PROMISE OF VIDEO DIALTONE NECESSARILY PRECLUDE ALLOCATION OF "SUBSTANTIALLY ALL" OF A VDT SYSTEM'S ANALOG CAPACITY TO ONE PROGRAM PACKAGER**

The Commission has made plain that its common carrier regulatory model is "critical to our determination that video dialtone is in the public interest."<sup>3</sup> Viacom agrees that the promise of VDT for fostering greater multichannel video competition depends directly on this regulatory model's guarantee of both readily available capacity for, and nondiscriminatory treatment of, all users desiring carriage.<sup>4</sup>

The Petitioners, in seeking an automatic right to allocate substantially all of a system's analog capacity to one predominant packager, have effectively asked the

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<sup>3</sup> Memorandum Opinion & Order at ¶ 31. The Commission explicitly reaffirmed that "maintaining common carrier obligations on the basic video dialtone platform is fundamental to achieving" the FCC's goals of "enabl[ing] multiple video programmers to obtain access on nondiscriminatory terms to [local exchange carrier ("LEC")] video delivery capabilities, thereby fostering new and diverse sources of video programming and generating competition in the provision of such programming to end users." Id. at ¶ 32.

<sup>4</sup> "[T]he basic common carrier platform will provide an important check against unreasonably discriminatory treatment of video programmers by telephone companies offering video dialtone service." Id. at ¶ 31.

Commission to discard one of the two fundamental prongs in its vision for video dialtone as a meaningful competitive force in the multichannel programming marketplace.<sup>5</sup> Yet VDT systems are not to be merely a competitor to cable systems; the FCC has attempted to ensure that VDT systems also provide the means for multiple program packagers to compete against each other on the same VDT facility.<sup>6</sup>

Because sufficient analog capacity apparently will not be readily available to all users requesting carriage on proposed VDT systems, the Commission has placed an important

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<sup>5</sup> Liberty Cable Petition at 1 (calling explicitly for the Commission to reverse its "anchor programmer decision"); Ameritech Petition at 1-2 (requesting authority to allocate the analog capacity "that is necessary to provide ... the number of channels that the market requires to effectively compete with the incumbent cable operator in the market being served").

As noted infra at note 8 and the accompanying text, the Commission's limitation on allocation of "all or substantially all" analog capacity simply refines its long-standing decision that VDT systems must accommodate multiple video packagers. The Petitioners attempt here to recast old arguments advanced by Southwestern Bell Telephone and other LECs against the FCC's requirement that VDT operators provide carriage for multiple packagers on each system. See Memorandum Opinion & Order at ¶¶ 26-38. Given that the Commission has already considered and rejected these arguments, reconsideration is unwarranted as a matter of both policy and procedure.

<sup>6</sup> Fostering "intramodal" competition through provision of carriage service for multiple video programmers on one system "was and remains one of the key purposes of [the Commission's] video dialtone policy." Id. at ¶ 33 ("without this requirement, it is not clear that video dialtone service would differ materially from channel service, which telephone companies were able to provide ... even before we adopted the video dialtone framework").

safeguard on the allocation of analog channels in order to preserve -- to the greatest degree possible -- the common carrier goal of providing capacity on a nondiscriminatory basis.<sup>7</sup> In reaffirming its decision that VDT systems must accommodate multiple packagers, the FCC specifically ruled that VDT operators may not allocate "all or substantially all" of their analog capacity to one predominant packager.<sup>8</sup> In reviewing Section 214 applications, in turn, the Commission has interpreted its safeguard to preclude VDT operators from allocating more than 50 percent of their analog capacity to any one packager.<sup>9</sup> These determinations

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<sup>7</sup> Id. at ¶¶ 35-36. Readily available capacity is truly key to whether VDT systems function as a common carrier service. Because capacity availability has a direct relationship with the potential for discriminatory treatment, the Commission has also insisted that

the expandability of video dialtone systems is a critical factor in reducing the ability of LECs to discriminate in their provision of video dialtone service. Specifically, it precludes LECs from limiting capacity or avoiding further investment in their video dialtone systems in order to insulate certain video programmers from competition.

Id. at ¶ 36.

<sup>8</sup> Id. at ¶¶ 2, 30-35 (specifically rejecting LEC proposals for allocation of most analog channels to a predominant "anchor programmer").

<sup>9</sup> See, e.g., Order and Authorization for New Jersey Bell Telephone Company (Commercial Service, Dover Township, NJ), 9 FCC Rcd. 3677 (rel. July 18, 1994); Order and Authorization for BellSouth Telecommunications, Inc. (Technical and Market Trial, Suburban Atlanta, GA), Report No. CC-95-14, DA 95-181 (Com. Car. Bur., rel. Feb. 7, 1995).

thus preserve the opportunity for at least two significant packagers to emerge on each system.

This decision to prohibit a single predominant programmer from occupying a majority of available analog channel capacity is not -- contrary to Ameritech's suggestion -- an "artificial restriction" on the absolute number of analog channels apportioned to a packager.<sup>10</sup> The Commission has appropriately applied its VDT capacity test with a focus on the relative number of channels allotted to any one packager. The actual numerical limit which emerges is a function of the VDT operator's own network design which, the Commission has made clear, must be expanded to reasonably accommodate growing demand for capacity.<sup>11</sup>

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<sup>10</sup> Ameritech Comments at 3.

<sup>11</sup> Ameritech wrongly asserts that the "same logic" that led the Commission to require VDT capacity expansion only when "technically feasible and economically reasonable" also would support allowing VDT operators to allocate all or substantially all of their analog capacity to one program packager. Id. at 4. In reality, the logic buttressing the Commission's decisions on these two matters is quite distinct. The expandability decision is grounded in the FCC's commendable desire to ensure that VDT operators' network investment resources are efficiently expended. (VDT operators nevertheless remain obligated to expand the capacity of their systems over time, and presumably increased demand for carriage will provide considerable economic justifications for doing so.) In contrast, the safeguard on analog allocation is premised on fostering intramodal competition among rival packagers on the same system, from the moment that VDT service is initiated, for the sake of all users of the system.

Furthermore, the authorization of a single predominant packager on a VDT system would not only significantly undermine vigorous intramodal competition but, perhaps even more important, it would significantly increase the likelihood of discrimination and favoritism. Even if little or no formal affiliation tied a predominant packager to the VDT operator, the sheer magnitude of that packager's business inevitably would encourage the operator to treat its largest customer more favorably than any other.<sup>12</sup>

This erosion in the nondiscriminatory nature of access to VDT systems would give rise to a potential bottleneck where the Commission has labored to ensure an open platform. As Chairman Hundt has recently explained, the Commission's "biggest concern" in fostering VDT systems and other new communications networks is "the possibility that bottlenecks will stymie the growth of networks" by "chok[ing] off the natural growth driven by market forces."<sup>13</sup> Like the

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<sup>12</sup> Obviously, the common carrier construct for VDT will become even more crucial in the event that LECs offer and package their own programming over their VDT systems. See Fourth Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 95-20 (rel. Jan. 20, 1995) (requesting comments on proposed regulatory changes in the wake of appellate court decisions invalidating the telco-cable cross-ownership restriction, 47 U.S.C. § 533(b)). Viacom will be submitting further comments on this subject in that proceeding.

<sup>13</sup> Speech of Chairman Reed E. Hundt, COMNET-1995, Washington, D.C., Jan. 26, 1995 (noting potential bottleneck in the set-top box, among other interface points along developing networks). Viacom has previously emphasized the  
(continued...)

Chairman, Viacom has long been concerned about both structural and technology-based barriers (such as the set-top box) to open access that could prevent end users from enjoying the fullest possible range of choice among competing program offerings.

A general rule permitting VDT operators to bestow all or substantially all of a system's available analog capacity to one packager would, however, erect just such a barrier between end users and the fullest possible range of VDT programming choices.<sup>14</sup> The Commission therefore should reject Petitioners' renewed call for the emergence of a

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<sup>13</sup>(...continued)

precise concerns articulated by the Chairman regarding the potential of the set-top box -- or functionally equivalent elements within VDT networks -- to thwart the nondiscriminatory access required for vigorous competition to emerge on each VDT system. See Comments of Viacom International Inc., CC Docket No. 87-266 (filed Dec. 16, 1994) ("Viacom Comments"); Reply Comments of Viacom International Inc., CC Docket No. 87-266 (filed Jan. 17, 1995) ("Viacom Reply Comments"); cf. Reply Comments of Viacom International Inc., ET Docket No. 93-7 (filed Feb. 16, 1994) (regarding cable consumer equipment compatibility); Testimony of Edward D. Horowitz, Senior Vice President, Viacom International Inc., before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, U.S. House of Representatives, February 1, 1994 (regarding pending telecommunications legislation).

<sup>14</sup> The Commission has made clear its view that the novelty of VDT service and the variety of network architectures being proposed for such systems warrants a case-by-case review of all but "generic" elements of each Section 214 application. See Memorandum Opinion and Order at ¶¶ 126, 136, 141-145 (noting that "such an approach will ensure that the safeguards imposed in each case will consider unique facts associated with that video dialtone request").

single predominant packager on a VDT system, and should instead reaffirm its commitment to the interests of programmers and consumers alike in promoting multiple outlets on a VDT platform.

**II. THE GOAL OF SPECTRUM EFFICIENCY DOES NOT REQUIRE, AND COMPETITION IS NOT PROMOTED BY, A CHANNEL-SHARING SCHEME THAT WOULD BOLSTER ONE PREDOMINANT PACKAGER AT THE EXPENSE OF OTHER PACKAGERS AND PROGRAMMERS**

While any plan for a predominant packager on a VDT system would compromise the competitive potential of VDT, Liberty Cable's particular proposal carries additional dangers by linking a favored packager with a troublesome scheme for channel-sharing. Because the policy and legal infirmities of any such arrangements already have been persuasively detailed in responses to the Third Further Notice in this proceeding,<sup>15</sup> Viacom will not belabor them here. However, Liberty Cable's apparent contention that programmer rights should be swept away in order to make efficient use of VDT analog capacity warrants at least a brief rejoinder.

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<sup>15</sup> See, e.g., Comments of AT&T, CC Docket No. 87-266, at 6-7; Comments of California Cable Television Association, CC Docket No. 87-266, at 4-7; Comments of Joint Cable Commenters (Adelphia Communications Corp. et al.), CC Docket No. 87-266, at 5-7 ("Joint Cable Comments"); Comments of the National Cable Television Association, CC Docket No. 87-266, at 15-18 ("NCTA Comments"); Comments of the Alliance for Communications Democracy, et al., CC Docket No. 87-266, at 14-15 [all filed Dec. 16, 1994].

Liberty Cable's scheme would give an anchor programmer control over at least 60 channels on any VDT system, require the anchor to predominantly fill the channels with "highly popular" program services, and then allow the VDT operator to require the anchor to resell each program service to any or all other packagers on the same VDT system -- which assumes that the severely limited remaining capacity would even be sufficient to allow for other packagers.<sup>16</sup> While at least acknowledging other legal and policy challenges which it clearly invites, Liberty Cable simply ignores the sweeping abrogation of programmer rights implicit in its proposal.

As Viacom and others already have pointed out, channel-sharing arrangements designed solely for the legitimate goal of efficiency need not interfere with the programmer's fundamental right to establish the terms and conditions for licensing its service.<sup>17</sup> In contrast to Liberty Cable's

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<sup>16</sup> Liberty Cable Petition at 4-6, 9-10 (citing initial discussion of proposal put forth in Comments of Liberty Cable Company, CC Dkt. No. 87-266, filed Dec. 16, 1994). Liberty Cable identifies Viacom's MTV and Nickelodeon program services among the "16 basic cable networks" that "[c]onsumers . . . almost certainly will demand that VDT programmer customers make available" to subscribers. While Viacom appreciates this recognition, it has no interest in delegating control over the licensing and packaging of its program services to Liberty Cable or any other entity that might become a favored anchor programmer.

<sup>17</sup> See Viacom Comments at 8-10; Viacom Reply Comments at 9-12; see also e.g., Comments of Pacific Telesis Group, CC Docket No. 87-266, at 6 n.12 (filed Dec. 16, 1994); Comments of Home Box Office, CC Docket No. 87-266, at 10-11 (filed  
(continued...))

intricate scheme, the appropriate framework for channel-sharing requires only three fundamental acts: a programmer's voluntary decision to license its service to a given program packager; the packager's notice to the VDT operator of the packager's licensing rights; and the VDT operator's delivery of the program service signal to subscribers authorized by that packager. These simple steps would advance the worthy goal of promoting efficient use of network capacity (1) without providing VDT operators or favored anchor programmers a guise for creating a new bottleneck and limiting competition over the VDT system and (2) without interfering with the programmer's fundamental right to establish licensing terms and conditions.

#### **CONCLUSION**

From the beginning of its video dialtone rulemaking, the Commission has correctly recognized that VDT's promise for vigorous intramodal competition requires safeguards that bolster the nondiscrimination principle embodied in common carrier regulation. Petitioners have advanced no justification for overthrowing this fundamental premise of video dialtone by allowing LECs to install predominant program packagers on their VDT systems. The FCC therefore

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<sup>17</sup>(...continued)  
Dec. 16, 1994); Joint Cable Comments at 6-7; NCTA Comments at 14-15.

should adhere to its decision preventing one packager from obtaining all or substantially all of analog capacity on a single VDT system. The ability to allocate up to 50% of a VDT system's analog capacity to a single packager should be sufficient to satisfy a VDT operator's goal of allowing such a packager to serve as a meaningful competitor to cable system operators. Furthermore, the agency should explicitly reject the notion that efficient use of analog capacity requires a channel-sharing scheme that either favors one predominant packager on each VDT system or abrogates the rights of programmers.

Respectfully submitted,  
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February 9, 1995

**CERTIFICATE OF SERVICE**

Pursuant to Section 1.429 of the Commission's Rules, I hereby certify that on this 9th day of February, 1995, I caused the foregoing "OPPOSITION OF VIACOM INTERNATIONAL INC. TO PETITIONS FOR RECONSIDERATION OF AMERITECH OPERATING COMPANIES AND LIBERTY CABLE COMPANY" to be delivered to the following:

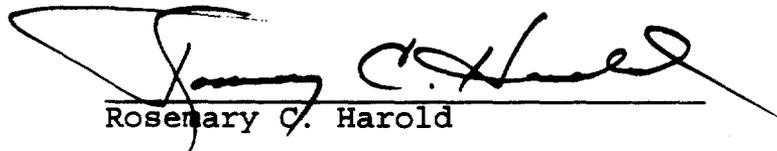
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