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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	)	CC Docket No. 87-266
	)	
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	)	RM-8221

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AT&T COMMENTS

Mark C. Rosenblum
Robert J. McKee
Clifford K. Williams

Attorneys for AT&T CORP.

Room 3245H1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-4069

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List A B C D E

TABLE OF CONTENTS

	Page
SUMMARY	i
INTRODUCTION	1
I. LECS THAT PROVIDE VIDEO PROGRAMMING DIRECTLY TO SUBSCRIBERS OVER VIDEO SYSTEMS WHICH ARE CONTROLLED BY THEM, OR BY AN AFFILIATE, ARE SUBJECT TO TITLE VI REGULATION	4
II. LECS THAT DIRECTLY PROVIDE VIDEO PROGRAMMING TO SUBSCRIBERS SHOULD BE REQUIRED TO DO SO THROUGH A SEPARATE SUBSIDIARY	9
CONCLUSION	16

SUMMARY

Because of the significant change which has taken place in the competitive dynamics of the video programming market since the adoption of video dialtone rules, the Commission should now implement measures to prevent LECs using their control of video dialtone facilities to stifle potential independent competitors. Where previously the LEC, which had been precluded by the cross-ownership restriction from directly offering video programming to subscribers, could be expected to focus upon providing the switching and transport of video dialtone service, along with assorted ancillary and enhanced services, to independent video programmers; now many LECs apparently plan to concentrate on the packaging and sale of video programming which will be offered by them to their subscribers over LEC-owned video dialtone platforms in direct competition with these same independent video programmers.

Consumers would be ill served if the significant effort now being made to develop competition in video programming simply resulted in a cable company-local telephone company duopoly which, either inadvertently or by design, was able to disadvantage independent video programmers.

The decision of at least some LECs to seek to provide video programming directly to subscribers also raises the issue of what scope of regulation must be

applied to them. A review of the salient provisions of Title VI of the Communications Act discloses that the Commission has no choice but to apply Title VI regulation to those telephone companies who choose to engage in the direct provision of video programming to subscribers over cable or video dialtone facilities, that are owned by them or by an affiliate.

LECs that wish to provide video programming directly to their subscribers over a video system owned by them or by an affiliate should be required to do so through a separate subsidiary. Requiring a separate subsidiary is the only mechanism which will ensure that a LEC providing video programming over its own video dialtone platform does not cross-subsidize its unregulated video programming affiliate with revenues from regulated services, discriminate against competing video programmers in the provision of access to its platform, or misuse customer information which comes into its possession in its role as monopoly provider of local exchange and access services.

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AT&T COMMENTS

Pursuant to the Commission's Fourth Further Notice of Proposed Rulemaking ("FNPR") released January 20, 1995,[1] AT&T Corp. ("AT&T") submits these comments on the various issues raised by the Commission.

INTRODUCTION

In this proceeding, the Commission is once again attempting to develop rules concerning the provision of video dialtone service by local exchange companies ("LECs"). The catalyst for this particular

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1 Telephone Company-Cable Television Cross-Ownership Rules, CC Docket No. 87-266, Fourth Further Notice Of Proposed Rulemaking, FCC 95-20, released January 20 1995 (synopsis at 60 Fed. Reg. 8996 (1995)).

round of rulemaking is a series of judicial rulings[2] invalidating the cross-ownership restrictions contained in the 1984 Cable Act.[3] Because the cross-ownership restrictions were inexorably linked to the analysis used by the Commission to develop the earlier video dialtone rules, the Commission has correctly concluded that this further rulemaking is needed to determine if the existing video dialtone rules should be revised, and, if so, how.

Although video dialtone service, with the potential to deliver a vast array of new and imaginative applications to the public through a myriad of competitive video programmers, should not be hamstrung by needless regulation, the Commission must now recognize the significant change which has taken place in the competitive equation with the movement of LECs into the direct packaging and sale of video programs to subscribers and must adopt meaningful safeguards to

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2 See, e.g., Chesapeake & Potomac Tel. Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994)(C&P Tel. Co. v. U.S.); U S WEST, Inc. v. United States, 1994 WL 719064, 63 USLW 2428 (9th Cir. 1994)(U S WEST v. U.S.); BellSouth Corp. v. United States, 868 F. Supp 1335 (N.D. Ala. 1994)(BellSouth v. U.S.); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994) (Ameritech v. U.S.); NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994)(NYNEX v. U.S.).

3 Cable Communications Policy Act of 1984, § 601 et seq., 47 U.S.C. § 521 et seq. ("Cable Act" or "Title VI")(telco-cable cross-ownership ban or restriction at § 533(b)).

prevent LECs from using their control of video dialtone facilities to stifle potential competitors.

The LEC common carrier video dialtone platform will be able to attract multiple independent video programmers only if independents are convinced that they will be able to compete with LEC affiliated video programmers on an equal basis; with access and price terms which are equal to those provided by the LEC to its own programmers and with customer and technical information being made available to them on the same terms and conditions as it is being made available to LEC programmers. Without these assurances, independent programmers will shun or be foreclosed from the LEC video dialtone platform. Consumers would not be well served if the significant effort now being made to develop competition in video programming simply resulted in a cable company-local telephone company duopoly, deterring independent video programmers from making differentiated offers. This would frustrate the intent of both Congress and the Commission to increase competition in the provision of video services.[4]

AT&T continues to support the deployment of broadband services, including video dialtone, so long as

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[4] Cable Act, 47 U.S.C. §§ 521(6), 543(a)(2); Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, 7 FCC Rcd. 5781 (1992).

it is accompanied by appropriate safeguards which preclude cross-subsidization and ensure availability of those services on a nondiscriminatory basis. Subject to these general principles, AT&T addresses various issues raised by the Commission.

I. LECS THAT PROVIDE VIDEO PROGRAMMING DIRECTLY TO SUBSCRIBERS OVER VIDEO SYSTEMS WHICH ARE CONTROLLED BY THEM, OR BY AN AFFILIATE, ARE SUBJECT TO TITLE VI REGULATION.

As noted above, the catalyst for this proceeding has been the virtual elimination by the courts of the cross-ownership restrictions contained in § 553 of the Communications Act, and the decision, by at least some local exchange companies, to begin to provide their own video programming over their own video systems to subscribers within their serving territories.[5] This has caused the Commission to readdress the issue of the scope of regulation to apply to LEC video program providers and to seek comments on whether Title VI regulation would apply to those LECs who are directly engaged in the provision of programming to subscribers over a video system which is controlled by the LEC, either directly or through an affiliate.[6]

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[5] See, e.g., Bell Atlantic Telephone Companies Tariff F.C.C. No. 10, Transmittal No. 471.

[6] FNPR, ¶¶ 14-15 (60 Fed. Reg. at 8997).

A review of the salient provisions of Title VI of the Communications Act discloses a simple answer to the question posed by the Commission. The Commission has no choice but to apply Title VI regulation to those telephone companies who choose to engage in such video programming, without regard to whether the companies doing so use a non-common carrier cable system or a common carrier video dialtone platform.

Title VI establishes the regulatory framework applicable to cable service, systems and operators. It defines "cable service" as:

> (A) the one-way transmission to subscribers of (i)video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service. 47 U.S.C. § 522(6).

Moreover, Title VI defines "cable operator" as:

> any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system. 47 U.S.C § 522(5).

It further defines a "cable system" as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. 47 U.S.C. § 522(7).

Finally, although the Cable Act specifically exempts the "facility of a common carrier" which is subject to

Title II of the Communications Act from the definition of a cable system, this exception is conditioned by the further caveat:

> except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers . . . 47 U.S.C. § 522(7). (Emphasis added.)

These provisions clearly evidence the Congressional intent to bring within the scope of Title VI those LECs who elect to provide video programming using a common carrier video dialtone platform controlled by it or by an affiliate rather than using a non-common carrier system.[7] This conclusion is consistent with the conclusions previously reached by the Court of Appeals in National Cable Television Association, Inc. v. Federal Communications Commission.[8] In that case, the Court accepted the analysis of the Commission that LECs offering video dialtone service were neither "cable operators" nor providing "cable service" as these terms were defined in the Cable Act. As such, the Court refused to overturn the Commission's decision that LECs offering dialtone service were not subject to the franchise requirements of the Cable Act. The

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[7] See NCTA v. FCC, 33 F.3d 66, 74.

[8] National Cable Television Association, Inc. v. Federal Communications Commission, 33 F.3d 66 (D.C. Cir. 1994)("NCTA v. FCC").

linchpin of the Court's analysis, however, was the fact that LECs offering video dialtone service would not be permitted to directly provide video programming to subscribers over their video dialtone systems. Thus, for example, the Court accepted the Commission's analysis that "cable service" excluded video dialtone service because

> in the Commission's lexicon "the term 'transmission' . . . requir(es) active participation in the selection and distribution of video programming."[9]

As such, the Court concluded that:

> the Commission reasonably interpreted the Act to require that an entity obtain a cable franchise "only when that entity selects or provides the video programming to be offered."[10]

To the extent that various LECs now intend to "select," "distribute" and "provide" video programming directly to subscribers, under the NCTA v. FCC rationale, they will be offering "cable service" as "cable operators."

The Commission also requests comments on whether, in the absence of the cross ownership restriction, it has the authority to require LEC-owned or controlled video programmers to provide programming only over a video dialtone platform provided on a common

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[9] NCTA v. FCC, 33 F.3d 66, 71.

[10] NCTA v. FCC at 72 (internal citations omitted).

carrier basis.[11] Nothing in Title II or Title VI of the Communications Act grants such authority to the Commission. With the removal of the cross-ownership restriction, the LEC, or its affiliate, is permitted under the Cable Act to build a non-common carrier cable system in order to provide its own video programming.

If the LEC chooses to build a non-common carrier cable system, the LEC would, of course, be required to comply with the franchise and other applicable provisions of the Cable Act. In addition, in order to ensure that a LEC, through its regulated Title II operations, is not subsidizing or in some other way advantaging its cable operations, the LEC would be subject to all applicable provisions of the Commission's rules and regulations regarding the separation of regulated and non-regulated activities.[12]

Although the Commission cannot require a local exchange company to provide video programming as a common carrier, it has the authority under Title II of the Communications Act[13] to allow a local exchange company to

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[11] FNPR, ¶¶ 11-13 (60 Fed. Reg. at 8997).

[12] See, e.g., Separation of Costs of Regulated Telephone Service From the Costs of Non-Regulated Activities, CC Docket No. 86-111, Report and Order (released February 6, 1987).

[13] See, e.g., 47 U.S.C. §§ 201, 214.

do so. However, in this situation, in addition to the requirements of Title VI which would apply to the LEC because of its involvement in the direct provision of video programming to its subscribers,[14] the LEC, because of its operation of a common carrier video dialtone platform, would also be subject to the provisions of Title II of the Communications Act, including any rules or regulations developed by the Commission specifically with respect to video dialtone service.[15]

II. LECS THAT DIRECTLY PROVIDE VIDEO PROGRAMMING TO SUBSCRIBERS SHOULD BE REQUIRED TO DO SO THROUGH A SEPARATE SUBSIDIARY.

The Commission also seeks comments on what, if any, regulatory safeguards it should apply to LECs who plan to provide video programming to customers, beyond those safeguards already adopted in the various Video Dialtone Orders.[16] Specifically, the Commission seeks

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[14] Independent video programmers who used the LEC video dialtone platform to deliver video programming would not, however, be subject to Title VI regulation. NCTA v. FCC, 33 F.3d 66, 74-75 (D.C. Cir. 1994).

[15] Even though the Commission cannot require the LEC to provide video programming over common carrier facilities, once the LEC has made such a choice and has secured § 214 authority to operate a video dialtone platform, the LEC would have to secure the approval of the Commission if the LEC thereafter wished to remove those facilities from common carriage. 47 U.S.C. § 214(a).

[16] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of

(footnote continued on following page)

comment on whether it should now require that LEC video programmers offer such programming through a separate subsidiary.[17] For the reasons discussed below, the Commission should apply a separate subsidiary requirement to LECs which wish to provide video programming directly to their subscribers over a video system owned by it or by an affiliate.

As the Commission recognizes,[18] there is a need to ensure that a LEC providing video programming over its own video dialtone platform does not cross-subsidize its unregulated video programming affiliate with revenues from regulated services, or discriminate against competing video programmers, or favor its own video

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(footnote continued from previous page)

Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) (First Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) (Memorandum Opinion and Order on Reconsideration), aff'd, NCTA v. FCC, 33 F.3d 66 (D.C. Cir. 1994); 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) (Second Report and Order), aff'd, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994), 1994 WL 617593 (1994), (Video Dialtone Reconsideration Order), appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992).

[17] FNPR, ¶ 39 (60 Fed. Reg. at 9000).

[18] FNPR, ¶¶ 37-38 (60 Fed. Reg. at 9000).

programming operation, in providing access to its video dialtone platform.

The Commission's proposal to permit providers of video dialtone platforms to act as both platform providers and video programmers will dramatically increase the incentive and opportunity for video dialtone platform providers to discriminate against unaffiliated video programmers. A LEC providing both video programming and video dialtone platform could, for example, manipulate the timing of development and introduction of platform features to maximize the competitive advantage for its video programming arm intending to use those services.[19] Additionally, the LEC could assign its "in-house" video programming operation unique co-location or interconnection arrangements[20] as

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[19] See, e.g., The Commission's Investigation Into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service, Docket No. 4000-U (Georgia Public Service Commission, June 4, 1991) (Georgia PSC Investigation)(Public Service Commission finds that BOC delayed introduction of network features to advantage its enhanced services affiliate). See also State of California v. Federal Communications Commission, 39 F.3d 919 (9th Cir. 1994).

[20] For example, in the absence of a rule prohibiting it, a LEC could make a preferential assignment of collocated space to its video programming operation while providing less desirable space, or even no space, to independent programmers. This action would provide significant cost advantages, in the form of access cost savings, to the LEC-affiliated programmer as compared to independent programmers.

that video programming operation seeks to deploy equipment to provide new services or features, such as video gateways.[21] Moreover, a LEC that provides both the video platform and video programming has the ability to subsidize its video programming operation by allocating common or other costs attributable to its unregulated video operation to its regulated video dialtone platform services.[22]

An appropriate structural separation requirement will limit a LEC's ability to use its control over the video dialtone platform to advantage its video programming affiliates. Such a structural separation requirement will act to quarantine the LEC's regulated provision of the video dialtone platform from its unregulated provision of video programming. At a minimum, the LEC should be required to: maintain separate operations (including a separate sales force),

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[21] See, e.g., Georgia PSC Investigation (Georgia Public Service Commission finds that BOC refused to permit competing enhanced service providers to co-locate equipment).

[22] See, e.g., Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-263, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174, 177, ¶¶ 18-20 (Computer II Remand Proceedings)(citing, inter alia, Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177, 4179-4184, ¶¶ 12-52 (1990)).

books of account, personnel, and property; conduct separate commercial activities, including planning, marketing, and promotion; purchase all video dialtone platform services at tariffed rates; and incur all debts on the basis of its own finances, without regard to the revenues of its parent. Additionally, the separate subsidiary should be required to receive all network interface and customer information on terms and conditions equal to those afforded unaffiliated video programmers, and to receive processing of its service requests on similar terms and conditions.[23]

Together, these conditions will discourage LEC discrimination and cross-subsidization and will facilitate the monitoring and detection of anti-competitive conduct. Because the video programming affiliate will be formally separated from the video platform provider, opportunities for the LEC to misallocate costs and to otherwise cross-subsidize will be minimized.[24] In addition, because the separate

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[23] The Commission's proposal to permit LECs to provide video programming over their video dialtone platforms will only increase LEC incentives to discriminate against unaffiliated video programmers. Accordingly, the Commission should also require that LECs provide access to pole attachments, conduits, and rights-of-way to all unaffiliated video programmers on the same terms and conditions as those afforded its separate video programming subsidiary.

[24] Although not specifically addressed in the FNPR, the Commission should also apply a separate subsidiary

(footnote continued on following page)

subsidiary will be required to deal with the platform provider as a separate entity, and at arms length, the LEC's ability to provide preferential pricing, service, or information to its programming affiliate will also be significantly reduced.

The Commission cannot rely exclusively on non-structural safeguards to prevent potential anti-competitive conduct by LECs.[25] The Commission has nonetheless proposed to adopt the safeguards established in the Bell Atlantic Market Trial, which are essentially existing accounting and cost allocation rules used for enhanced services, including current open network architecture ("ONA") safeguards.[26] As has been recognized, however, it is not at all clear that the ONA

(footnote continued from previous page)

requirement to a LEC who chooses to provide video programming over a cable system owned by it, or by an affiliate. This would limit the ability of the LEC to use regulated Title II resources to cross subsidize its cable operation.

[25] The limited protection provided by accounting rules is demonstrated by the Commission's recent issuance of Orders to Show Cause against several LECs. In these Orders, the Commission addresses apparent violations of accounting rules which took place in 1988 and the first quarter of 1989.

[26] FNPR, supra ¶ 5, n.15. The Commission has indicated that these safeguards may consist of the non-structural safeguards that the Commission has adopted for BOC provision of enhanced services, as well as additional safeguards imposed by the Commission as part of the Bell Atlantic Video Dialtone Market Trial.

safeguards, as modified by the BOC Safeguards Order, are sufficient to prevent BOCs or other LECs from discriminating in the provision of access.[27] Moreover, as the Commission itself has acknowledged, its ability to use accounting and cost allocation rules to prevent cross-subsidy in the context of enhanced services is the result of extensive experience that the Commission developed over a number of years while those services were provided on a fully-separated basis.[28] Because the Commission currently lacks similar experience with video dialtone services, the Commission should, at least initially, impose a structural separation requirement on LECs.

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[27] See California v. F.C.C., 39 F.3d 919, 929 (9th Cir. 1994). Indeed, it appears that the Commission's ability to assure accurate allocation of costs will be continually tested, as LECs have already begun to file video dialtone tariffs that do not provide adequate cost information. See Petition of AT&T to Reject or, In the Alternative, to Suspend and Investigate Bell Atlantic Telephone Companies' Revisions to Tariff F.C.C. No. 10, Transmittal No. 741, filed February 13, 1995.

[28] See Computer III Remand Proceedings, CC Docket No. 90-623, Notice of Proposed Rulemaking and Order, 6 F.C.C. Rcd 174, 176, ¶ 16 (1990).

CONCLUSION

The Commission should apply Title VI regulations to those LECs which provide video programming directly to subscribers over cable systems or video dialtone platforms controlled by the LEC or by an affiliate. In addition, the Commission should require those LECs who wish to provide video programming directly to subscribers to do so through a separate subsidiary.

Respectfully submitted,

AT&T CORP.

By _____

Mark C. Rosenblum
Robert J. McKee
Clifford K. Williams

Its Attorneys

Room 3245H1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-4069

March 21, 1995

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 21st day of March, 1995 a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

Ann Marie Abrahamson

Ann Marie Abrahamson

SERVICE LIST
(Docket No. 87-266, RM-8221)

Peter H. Feinberg
Michael S. Schooler
Dow, Lohnes & Albertson
1255 Twenty-Third St., NW, Suite 500
Washington, D.C. 20037
Attorneys for Adelphia
Communications Corp.,
Comcast Cable Communications, Inc.,
Cox Enterprises, Inc.,
Jones Intercable, Inc.

Nicholas P. Miller
Joseph Van Eaton
Frederick E. Ellrod III
Miller, Canfield, Paddock and Stone
1225 19th St., NW, Suite 400
Washington, D.C. 20036
Attorneys for: Alliance for Communications
Democracy; The City of Ann Arbor,
Michigan; The City of Fort Worth, TX,
Montgomery County, Maryland; and
Somerville Community Access Television

Jeffrey S. Hops
Alliance for Community Media
666 11th St., NW, Suite 806
Washington, D.C. 20001

James N. Horwood
Spiegel & McDiarmid
1350 New York Ave., NW
Washington, D.C. 20005
Attorneys for PEG Access Coalition

Diane Smith
ALLTEL Telephone Services Corp.
655 15th St., NW, Suite 220
Washington, D.C. 20005

Larry A. Peck
Michael S. Pabian
Pamela J. Andrews
Ameritech
2000 W. Ameritech Center Dr., Rm. 4H74
Hoffman Estates, IL 60196-1025

Helen E. Desenhaus
Gene DeJordy
Swidler & Berlin, Chtd.
3000 K St., NW, Suite 300
Washington, D.C. 20007
Attorneys for AOC
Telecommuications, Inc.

Michael Liebhold
Apple Computer, Inc.
20400 Stevens Creek Blvd. MS: 756J
Cupertino, CA 95014

Marilyn Mohrman-Gillis
Lonna Thompson
The Assn. of America's
Public Television Stations
1350 Connecticut Ave., NW, Suite 200
Washington, D.C. 20006

Jonathan D. Blake
John Duffy
Alane C. Weixel
Covington & Burling
1201 Pennsylvania Ave., NW
P. O. Box 7566
Washington, D.C. 20044-7566
Attorneys for The Assn. of
America's Public Television Stations

Norman M. Sinel
Stephanie M. Phillipps
William E. Cook, Jr.
Arnold & Porter
1200 New Hampshire Ave., NW
Washington, D.C. 20036
Counsel for the Local Governments

James J. Popham
Association of Independent
Television Stations, Inc.
1200 18th St., NW, Suite 502
Washington, D.C. 20036

Michael E. Glover
Edward Shakin
Betsy L. Anderson
Bell Atlantic
1320 North Court House Rd., Eighth Floor
Arlington, VA 22201

M. Robert Sutherland
Michael A. Tanner
Theodore R. Kingsley
BellSouth Telecommunications, Inc.
4300 Southern Bell Center
675 West Peachtree St., NE
Atlanta, GA 30375

Robert S. Lemle
Cablevision Systems Corp.
One Media Crossways
Woodbury, NY 11797

Howard J. Symons
Cherie R. Kiser
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., NW, Suite 900
Washington, D.C. 20004
Attorneys for Cablevision Systems Corp.

Joseph Tasker, Jr.
Compaq Computer Corp.
1300 I Street, NW
Washington, D.C. 20005

Herbert E. Marks
Jonathan Jacob Nadler
Squire, Sanders & Dempsey
1201 Pennsylvania Av.e, NW
Washington, D.C. 20044
Attorneys for Compaq Computer Corp.

Office of the Attorney General
55 Elm St., 7th Floor
Hartford, CT 06106

Peter Arth, Jr.
Edward W. O'Neill
Mark Fogelman
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Alan J. Gardner
Jeffrey Sinsheimer
Jerry Yanowitz
California Cable Television Assn.
4341 Piedmont Ave.
P. O. Box 11080
Oakland, CA 94611

Frank W. Lloyd
Kecia Boney
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Ave., NW, Suite 900
Washington, D.C. 20004
Attorneys for California Cable
Television Assn.

Robert L. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
1701 Pennsylvania Ave., NW, Suite 1000
Washington, D.C. 20006

Barbara N. McLennan
George A. Hanover
Consumer Electronics Group
Electronic Industries Assn.
2001 Pennsylvania Ave., NW
Washington, D.C. 20006

Joseph P. Markoski
Jeffrey A. Campbell
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., N.W.
P. O. Box 407
Washington, D.C. 20044
Attorneys for CEG/EIA

Bradley Stillman
Consumer Federation of America
1424 16th St., NW
Washington, D.C. 20036

William D. Baskett III
Thomas E. Taylor
Christopher J. Wilson
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Attorneys for Cincinnati Bell
Telephone Co.

Sherman Grossman
Community Broadcasters Assn.
c/o Irwin & Campbell, P.C.
1320 18th St., NW, Suite 400
Washington, D.C. 20036

Alonzo Matthews
General Services Administration
City and County of Denver
303 W. Colfax Ave., 17th Floor
Denver, CO 80204

Deborah L. Ortega
Hiawatha Davis, Jr.
City and County of Denver
City & County Building
Denver, CO 80202

Gary Demos
DemoGraFX
10720 Hepburn Circle
Culver City, CA 90232

Daryl L. Avery
Josephine S. Simmons
Howard C. Davenport
Public Service Commission
of the District of Columbia
450 Fifth St., NW
Washington, D.C. 20001

James R. Hobson
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser
1275 K St., NW, Suite 850
Washington, D.C. 20005

Frederick Thomas
Fairfax Cable Access Corp.
2929 Eskridge Rd., Suite S
Fairfax, VA 22031

Ronald B. Mallard
Fairfax County Dept. of Consumer Affairs
3959 Pender Dr., Suite 200
Fairfax, VA 22030

Linda S. Gieseler
Farrow, Schildhause & Wilson
1400 16th St., NW, Suite 501
Washington, D.C. 20036

Francis Dummer Fisher
3208 Harris Park Ave.
Austin, TX 78705

Clifford M. Harrington
Fisher, Wayland, Cooper & Leader
1255 23rd St., NW, Suite 800
Washington, D.C. 20037

William E. Wyrough, Jr.
Florida Public Service Commission
101 East Gaines St.
Tallahassee, FL 32399-0850

Alexander P. Humphrey
GE Communications & Services
1331 Pennsylvania Ave., NW
Washington, D.C. 20004

Shirley Ann Bruno
Great Neck - North Shore
Public Access Television
705 Middle Neck Road
Great Neck, NY 11023

Ward W. Wuester, Jr., HQE03J43
John F. Raposa, HQE03J27
GTE Service Corporation
P. O. Box 152092
Irving, TX 75015-2092

Gail L. Polivy
GTE Service Corporation
1850 M St., NW, Suite 1200
Washington, D.C. 20036

The State of Hawaii
Department of Commerce
and Consumer Affairs
1010 Richards Street
P. O. Box 541
Honolulu, HI 96809

Michael H. Hammer
Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st St., NW, Suite 600
Washington, D.C. 20036-3384
Attorneys for Home Box Office

Darrell S. Townsley
Illinois Commerce Commission
160 North LaSalle St., Suite 810
Chicago, IL 60601

J. Lyle Patrick
Illinois Consolidated Telephone Co.
121 South 17th Street
Mattoon, IL 61938

Jack Tharp
The Illinois Telephone Assn.
300 East Monroe St.
P. O.Box 730
Springfield, IL 62705

Joseph P. Markoski
David Alan Nall
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., NW
P. O. Box 407
Washington, D.C. 20044
Attorneys for The Information
Technology Association of America

Angela Campbell
Ilene Penn
Institute for Public Representation
Georgetown Univ. Law Center
400 New Jersey Ave., NW
Washington, D.C. 20001

Margot Smiley Humphrey
Koteen & Naftalin
1150 Connecticut Ave,. NW
Washington, D.C. 20036

Henry Rivera
Ginsburg, Feldman and Bress
1250 Connecticut Ave., NW
Washington, D.C. 20036
Attorneys for Liberty Cable Co., Inc.

T. R. Borchert
Mankato Citizens Telephone Co.
221 East Hickory Street
P. O. Box 3248
Mankato, MN 56002

John M. Glynn
Maryland People's Counsel
231 East Baltimore Road
Baltimore, MD 21202

John M. Urban
Massachusetts Cable
Television Commission
100 Cambridge St., Room 2003
Boston, MA 02202

Ronald G. Choura
Michigan Public Service Commission
6545 Mercantile Way
P. O. Box 30221
Lansing, MI 48909

Cameron F. Kerry
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111

Linda K. Gardner
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Henry L. Baumann
Terry L. Etter
Jack N. Goodman
National Assn. of Broadcasters
1717 N St., NW
Washington, D.C. 20036

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
National Assn. of Regulatory
Utility Commissioners
1102 ICC Building
P. O. Box 684
Washington, D.C. 20044

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
The National Cable Television Assn., Inc.
1724 Massachusetts Ave., NW
Washington, D.C. 20036

Philip L. Verveer
Melissa E. Newman
Willkie, Farr & Gallagher
Three Lafayette Center
1155 21st St., NW
Washington, D.C. 20036
Attorneys for National Cable
Television Assn., Inc.

David Cosson
L. Marie Guillory
National Telephone Cooperative Assn.
2626 Pennsylvania Ave., NW
Washington, D.C. 20037

Thomas K. Steel, Jr.
New England Cable Television Assn., Inc.
100 Grandview Rd., Suite 201
Braintree, MA 02184

Frank W. Lloyd
Kecia Boney
Mintz, Levin, Cohn, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., NW, Suite 90
Washington, D.C. 20004
Counsel for New England
Cable Television Assn.