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March 16, 1995

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Docket CC 92-77

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FEDERAL COMMUNICATIONS COMMISSION
BY TELE SECRETARY

VIA HAND DELIVERY

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

On behalf of the Atlantic Cable Coalition, I am writing in response to the letter from Raymond W. Smith, Chairman of Bell Atlantic Corporation, to you dated March 7, 1995. Mr. Smith's letter expresses his general frustration with the Commission's failure to provide Bell Atlantic *carte blanche* entry into the video services market. Particularly, Mr. Smith expresses his deep frustration with delays in Bell Atlantic's becoming a programmer on its own systems. To that end, Mr. Smith charges that "If Bell Atlantic wants to engage in constitutionally protected speech, it must build a video dialtone system two to four times larger than the market demand may require." Smith Letter at 4. Mr. Smith's statement, and his concern in general, are based on a misunderstanding of the fundamental law that governs the Commission and entities that provide video programming directly to subscribers over their own facilities.

Section 602 of the Cable Act plainly defines a "cable operator" as any entity that provides "cable service" over a "cable system" in which it directly or through an affiliate owns a significant interest. 47 U.S.C. § 522(5). Section 602 defines "cable service" as the transmission of video programming directly to subscribers, and a "cable system" as a facility designed to provide cable service, including the facilities of a common carrier to the extent

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used to provide cable service. 47 U.S.C. § 522(6)&(7). Accordingly, to the extent Bell Atlantic were to provide video programming directly to subscribers, either itself or through an affiliate, over its facilities, under the plain language of the Cable Act, Bell Atlantic would be a cable operator providing cable service over a cable system. As such, under Section 621 of the Cable Act, Bell Atlantic is required to obtain a cable television franchise. 47 U.S.C. § 541(b). To the extent Mr. Smith wishes for Bell Atlantic to engage in constitutionally protected speech, by providing programming directly to subscribers over its own system, it must do so in compliance with the franchising and other requirements of the Cable Act. Indeed, it is the Commission's duty to require Bell Atlantic to comply with the franchising and other provisions of the Cable Act. 47 U.S.C. § 151.

When Mr. Smith originally proposed getting into the video business in Alexandria, Virginia, it was through an application for a cable television franchise from that city.¹ After being denied the franchise, based on the cross-ownership ban, Mr. Smith's company began the litigation which resulted in the first district court and appellate decisions finding the cross-ownership ban unconstitutional. One would have expected then that Bell Atlantic would have reapplied for the cable television franchise that it had been denied. But it did not. Instead, it preferred to pursue the video dialtone model, avoid a cable television franchise and now the entirety of the Common Carrier obligations that go with video dialtone.

The Commission's original proposal for the video dialtone model was conditioned on a separation of "content" and "conduit" — a separation critical to finding that a cable television franchise was not necessary to provide video programming.² Once that separation is destroyed, and the ownership and control over content and conduit is merged, under the Cable Act you have a traditional cable television operator. Nothing entitles Bell Atlantic to be exempt from Title VI of the Communications Act while the cable television industry must continue to comply.

The Atlantic Cable Coalition is also concerned that *ex parte* filings and meetings, while helpful in resolving these issues, has become the preferred mode of operating for Bell Atlantic. Information about Bell Atlantic's applications and its proposed systems has been dribbled out over time in bits and pieces, and only in response to the industry's demonstrations and the Commission's questions. If video dialtone is so unpleasant for Bell Atlantic, we simply do not understand why it continues to pursue it.

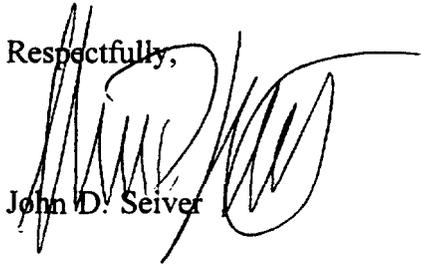
¹Chesapeake & Potomac Tel. Co. v. United States, 830 F.Supp. 909, 911 (E.D. Va. 1993), *aff'd*, 42 F.2d 181 (4th Cir. 1994).

² National Cable Television Ass'n v. F.C.C., 33 F.2d 66, 73-74 (D.C.Cir. 1994).

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We have vigorously reviewed the applications and pointed out the inadequacy of the information provided by Bell Atlantic for the Section 214 process. The Commission has apparently agreed, returning certain applications -- including Bell Atlantic's for Dover and Florham Park in 1993 -- that failed to comply with the Commission's video dialtone policies. If true common carriage video dialtone is not what Bell Atlantic wants, it should abandon its 214 applications and revert to its initial strategy of obtaining cable television franchises. There is nothing unconstitutional about that.

Respectfully,


John D. Seiver

cc: Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle Chong
Commissioner Susan Ness
Kathleen Wallman
Raymond Smith
(By Hand Delivery)