

over the platform and, in turn, affording programmers and packagers nondiscriminatory access to all subscribers.

B. A VDT Operator Should Be Precluded From Allocating An Undue Share Of Its Limited Channel Capacity To Affiliated Packagers

Equally fundamental to fulfilling the open access principle embodied in the video dialtone framework, LEC-affiliated packagers -- or any packagers, for that matter -- must not be allotted an undue share of the limited capacity available on the LEC's VDT system.³¹ Viacom has previously noted that video dialtone's promise for greater multichannel video competition depends directly on the VDT framework's guarantee of both readily available capacity for, and nondiscriminatory treatment of, all packagers and programmers desiring carriage.³² Because the Commission recognizes that both elements are required if video dialtone is to succeed as a means for intramodal competition, it has already determined that a VDT operator may not allocate "all or substantially

³¹ Policymakers have hoped that digital capacity on VDT systems will be both abundant and readily accessible by subscribers. Should this expectation comes to pass, there would be no need to limit allocation of digital capacity. However, indications now point to possible constraints on digital capacity during the early years of VDT network deployment. If this is indeed the case, the Commission must impose similar limitations on allocation of analog and digital capacity until such shortfalls are eliminated.

³² See Viacom Opposition at 3.

all" of its analog capacity to one predominant packager.³³ This safeguard should apply all the more where the LEC or its affiliate emerges as one such packager on its VDT platform.

The prospect of a LEC serving as a packager on its own VDT platform sharply heightens the risk that the LEC could seek to preempt or otherwise frustrate the emergence of a serious rival to its affiliate. Because the technical configuration of and demand for VDT capacity will vary among systems, the level of LEC-affiliate use of available channels which would unduly compromise the FCC's open access or nondiscrimination principles is fundamentally a fact-specific question. The Commission has interpreted the outer limits of its "all or substantially all" safeguard to preclude the allocation of more than 50% of analog capacity to any one packager. This 50% cap offers a reasonable starting point in limiting a LEC where the predominant packager could well be its own affiliate.³⁴ Should it appear, however, that the FCC's regulatory framework will not effectively constrain the LEC's ability to discriminate against unaffiliated packagers, the Commission may need to consider the necessity of applying

³³ Memorandum Opinion & Order on Recon., 10 FCC Rcd. at 258-60.

³⁴ If limitations are warranted with respect to both analog and digital capacity (see supra note 31), a separate cap should apply to each. Furthermore, all LEC or LEC-affiliate uses of a VDT platform's limited capacity would appropriately count against the applicable cap.

a more strict cap to the LEC-affiliated packager.³⁵ The FCC must tailor its approach, in any event, to ensure that unaffiliated packagers are able to compete fairly with the LEC's own program package without unduly limiting the LEC's incentive to construct, and ability to make fair use of, its VDT platform.

C. The Positioning Or Presentation Of Program Offerings To Subscribers On The VDT Platform Must Not Disfavor Unaffiliated Packagers And Programmers

Seeking to promote its fundamental common carrier principle of nondiscrimination, the Commission has appropriately asked if the potential for LEC favoritism of affiliated packagers or program services warrants the imposition of "channel positioning" rules similar to those currently applied to cable operators.³⁶ Although it is not clear how or whether the specific "channel positioning" rules promulgated for cable would directly translate to the VDT mode of channel offerings, the concept behind the rules -- to ensure that unaffiliated programmers and packagers are not

³⁵ Should any stricter cap be applied to a LEC's allotment of capacity to an affiliated packager, the Commission could mitigate the potential for unused capacity by allowing a LEC to allot capacity to its affiliate in excess of the presumptive cap where the LEC can make an affirmative demonstration that no other programmer or packager desired to use that capacity.

³⁶ Fourth Further Notice at ¶ 23.

disfavored as to their ready accessibility to subscribers -- translates readily.

The VDT framework was designed to allow a multiplicity of programmers and packagers to offer their services to subscribers free of improper discrimination. Viacom submits that in order to preserve this vision, the FCC's rules must ensure that independent packagers and programmers utilizing the VDT platform are not subjected to unfavorable positioning or presentation with regard to subscriber access to their programming. Accessibility, in the VDT context, reasonably relates not only to the initial presentation of the various program offerings available to subscribers, but also to a subscriber's ability to navigate through -- and access quickly -- the offerings of different packagers.

This fundamental premise of nondiscrimination thus could be compromised in numerous ways -- including ways that will not be known until the ultimate form of the VDT platform is in place -- were a LEC intent on favoring its affiliate.³⁷ For example, a LEC could structure its VDT service so that, as a default, the first "directory screen" that appears before a subscriber accessing VDT service presents only (or at least most conspicuously) the offering of the LEC-affiliated packager. Similarly, it is possible that a

³⁷ This is partly due to the fact that the basic menus and navigational tools that will be offered by VDT operators to allow subscribers to access programming are still being developed and tested.

subscriber obtaining programming from a LEC affiliate could be induced to pre-subscribe to a LEC navigational aid that bypasses nondiscriminatory unaffiliated "master menus" or otherwise inhibits the accessibility of unaffiliated programmers and packagers.

In order to prevent such potential for abuse, the Commission should, consistent with the common carriage framework for VDT, state that the duty to provide service on a fair, nondiscriminatory basis applies with full force in the specific context of the presentation of video programming to subscribers. Because this general framework may well need to be fine-tuned as VDT develops, the key to successful implementation of this policy will be a commitment on the FCC's part to undertake rapid processing of video dialtone complaints under Section 208 so that aggrieved competitors can obtain prompt relief from any abuses, along with continued FCC monitoring.

D. The Commission Must Safeguard Against "Channel-Sharing" Arrangements Which Allow A LEC, In Its Dual Role As VDT Operator And VDT Packager, To Restrict Packager Competition Or To Impinge Upon Unaffiliated Programmers' Control Over The Licensing Of Their Product

The Commission appropriately asks how the LEC's role as packager on its own VDT platform could or should affect permissible channel-sharing arrangements designed to address

analog capacity shortfalls.³⁸ Many interested parties have already demonstrated that -- even in the absence of a LEC-affiliated packager on the VDT platform -- certain channel-sharing proposals would undermine the fundamental licensing authority of programmers and potentially discriminate against unaffiliated packagers and programmers. Viacom's previously stated position on channel-sharing is only more compelling when the VDT operator and packager are one and the same.³⁹

Viacom has never opposed the use of channel-sharing for the legitimate purpose of making the most efficient use of limited analog capacity. As Viacom has previously urged, however, the FCC should explicitly recognize that channel-sharing essentially requires only three fundamental acts: a programmer's voluntary decision to license its service to more than one packager on the VDT platform; the additional packagers' notice to the VDT operator of the program service for which they are licensed; and the VDT operator's delivery of that program service to subscribers authorized by the packagers.

The new circumstances of LEC entry as a VDT packager -- and the attendant increase in the potential for LEC support

³⁸ Fourth Further Notice at ¶¶ 20-22.

³⁹ Viacom Comments at 8, Viacom Reply at 9-10, Viacom Opposition at 9-11. Accord, e.g., Comments of AT&T, CC Docket No. 87-266, at 6-7; Comments of Home Box Office, CC Docket No. 87-266, at 5-11; Comments of Joint Cable Commenters (Adelphia Communications Corp., et al.), CC Docket No. 87-266, at 5-7 [all filed Dec. 16, 1994].

of a particular packager -- provides greater urgency for the Commission to clarify what permissible channel-sharing arrangements may entail. Thus, the FCC should expressly declare that channel-sharing does not require, and should not be countenanced as a pretense for, packager demands for exclusivity rights or any other terms that would either (1) impinge on the programmer's right to control the distribution of its programming or to establish the terms and conditions of that distribution, or (2) unfairly impede the emergence of a competing packager. The FCC should make clear that such attempts would be unlawful and actionable under the expedited VDT complaint process proposed above.⁴⁰

III. THE EXISTING VDT REGULATORY FRAMEWORK SHOULD BE SUPPLEMENTED WITH CERTAIN SPECIFICALLY TAILORED SAFEGUARDS PROMOTING FAIR COMPETITION AMONG VDT PACKAGERS, BUT NOT WITH EXCESSIVE RESTRICTIONS ON THE ABILITY OF VDT TO EMERGE AS A VIABLE COMPETITOR TO CABLE

In addition to refining those safeguards already embodied in the existing VDT policy framework, the FCC should revise its position or approach to two interrelated safeguard policies -- concerning so-called "inbound telemarketing" and customer proprietary network information -- so as to allow unaffiliated packagers to compete fairly with LEC-affiliated packagers. However, the existing VDT framework need not, nor should not, be encumbered by excessive or unwarranted

⁴⁰ See supra note 19.

regulation, such as the cable program access rules, that would impede video dialtone from emerging as a viable, competitive multichannel distribution technology.

A. The Commission Should Require LECs Engaged In Inbound Telemarketing To Affirmatively Disclose The Availability Of Alternative VDT Packagers And Programmers

The Commission reasonably determined, early on, that LECs could engage in the joint marketing of basic and enhanced video services, as well as the joint marketing of basic video and non-video services.⁴¹ That decision was rendered, of course, in a context where LECs had little or no incentive to favor a particular packager or programmer.⁴² The LECs' dual role as both VDT operator and VDT packager raises new joint marketing scenarios that could undermine fair competition among affiliated and unaffiliated packagers or programmers. The FCC's joint marketing policy should therefore be revised to ensure that the VDT operator does not inhibit subscribers' nondiscriminatory access to, and knowledge of, all competing services offered over its VDT platform.

Inbound telemarketing, i.e., the marketing of services by telephone to a customer or potential customer who

⁴¹ Memorandum Opinion & Order on Recon., 10 FCC Rcd. at 356.

⁴² Id. at 357.

initiated the call, presents the primary opportunity for anticompetitive LEC self-favoritism. A LEC could easily exploit its position as the provider of local exchange service and VDT platform service to give its affiliated programmer an unwarranted advantage over competitors in the marketing of video programming when a potential VDT subscriber calls the LEC seeking basic VDT or telephone service. As discussed below, Viacom recommends that the Commission modify the joint marketing rules to prevent the potential for abuse of this opportunity.

Of course, joint marketing -- particularly outside the inbound telemarketing setting -- can be fairly used to raise the overall visibility of video dialtone service. As the Commission has recognized, such marketing naturally supports VDT efforts to become an effective competitor to cable and other distribution technologies.⁴³ The FCC should thus seek to balance the need to ensure competitive fairness among affiliated and unaffiliated packagers and programmers with the desire to promote the viability of VDT.

Viacom therefore proposes, at a minimum, that a LEC desiring to engage in inbound telemarketing should have an affirmative obligation to disclose explicitly -- and with equal prominence -- that other programmers, packagers, and gateway service providers are available to the potential VDT

⁴³ Fourth Further Notice at ¶ 29.

subscriber. This minimal requirement would at least mitigate the potential for joint marketing to undercut the Commission's policy of nondiscriminatory access to the VDT platform for all packagers and programmers. The FCC should then continue to monitor the LECs' marketing efforts to determine whether this approach proves inadequate or impractical and to evaluate the need for additional or different safeguards.

B. The Commission Should Modify Its Customer Proprietary Network Information Rules To Ensure That LEC-Affiliated Packagers Cannot Obtain Any Such Information Not Available To Unaffiliated Packagers On The VDT Platform

The Commission has posed the significant question of whether its existing customer proprietary network information ("CPNI") rules, crafted to apply to quite distinct enhanced services and later extended to video dialtone,⁴⁴ should be modified in light of the LECs' emerging role as a packager of video programming.⁴⁵ Viacom submits that the FCC should indeed modify or supplement its existing CPNI rules as necessary to ensure that LEC-affiliated packagers cannot obtain any such information not available to unaffiliated packagers on the VDT platform.

⁴⁴ Id. at ¶ 31.

⁴⁵ Id.

CPNI consists of "information about customers' network services and customers' use of those services that a LEC possesses by virtue of its provision of network services."⁴⁶ Because the Commission has recognized that unrestricted access to CPNI would give a LEC (or its affiliate) an unfair advantage over competitors in marketing enhanced services,⁴⁷ the current CPNI rules limit (at least to some degree) the LEC's ability to use information acquired about ratepayers, through the provision of network services, for the benefit of affiliated enhanced service providers.

The existing CPNI rules bar affected LECs from using in their enhanced services operations CPNI acquired from customers with more than 20 telephone lines, unless they have obtained the consent of that customer. With respect to customers with fewer than 20 lines, however, the LEC (or its affiliate) is permitted to use CPNI for its own marketing purposes without any prior authorization, unless the customer has affirmatively requested that its information be withheld. Other enhanced service providers, meanwhile, cannot obtain

⁴⁶ Memorandum Opinion & Order on Recon., 10 FCC Rcd. at 353 n. 428.

⁴⁷ See, e.g., Computer III Remand Proceedings, 6 FCC Rcd. 7571, 7609 (1991) (hereinafter "Computer III Remand").

CPNI for any customer without the affirmative consent of the customer.⁴⁸

Several telephone companies have now filed their comments in response to the FCC's request for further information regarding CPNI in the VDT context.⁴⁹ These comments recognize that information will flow to the LECs from two sources. One source is the LECs' relationship with the packagers and programmers obtaining tariffed service on the VDT platform. The other source is the consumer who will subscribe to and view the programming delivered by the packagers and programmers over the VDT platform.⁵⁰ Viacom is concerned that information about either class of customers, including network usage, viewing patterns (e.g., time of day, duration, and channel selection), and other data that a LEC obtains as the VDT network manager, could -- if shared with a LEC-affiliated packager -- provide that packager an unwarranted and unfair competitive advantage over

⁴⁸ Id. at 7611. The rules reflect the Commission's attempt to balance, in the context of enhanced services, considerations of efficiency, competitive equity, and customer privacy. Id. at 7609.

⁴⁹ The Commission, in the Third Further Notice that accompanied the Memorandum Opinion & Order on Recon. in this proceeding, directed each Bell Operating Company and GTE to file a description of the types of CPNI that would be available in the VDT context.

⁵⁰ See, e.g., Information Submission of U S WEST Communications, Inc., CC Docket No. 87-266 (Mar. 10, 1995) at 4 (hereinafter "U S WEST Submission"); Response of Bell Atlantic to Notice of Inquiry, CC Docket No. 87-266 (Mar. 10, 1995) at 2-3 (hereinafter "Bell Atlantic Response").

unaffiliated competitors on the VDT platform. As discussed below, this competitive concern exists whether or not the information is obtained through a relationship governed by a tariff or, indeed, whether the relevant information is deemed to fit within the traditional definition of CPNI.

The LEC responses to the Third Further Notice seem to generally concur that information derived as a result of the LEC's relationship with packagers or programmers should be considered proprietary to those parties and is not to be shared by the LEC with its affiliated packagers.⁵¹ There is some dispute, however, as to whether certain types of information that will be obtained by the LEC as a result of this relationship constitutes "CPNI" at all.⁵² Viacom nonetheless agrees that, however CPNI is defined, the LEC should not be allowed to provide to any entity, including its own affiliate, information the LEC obtained through its role as the provider of common carrier capacity to VDT packagers or programmers.

⁵¹ See, e.g., U S WEST Submission at 8.

⁵² For example, U S WEST suggests that information concerning subscribers' use of the VDT platform derived through the LEC's relationship with the VDT packager or programmer (as opposed to the LEC's direct relationship with the subscriber) is not "CPNI" because the information is not associated with the programmer/packager's "use" of the VDT platform. Id. at 8-9. Yet U S WEST appears to agree that, whether or not this information constitutes "CPNI" for purposes of the Commission's rules, it should not be provided to the LEC-affiliated packager. Id. at 14.

With regard to information derived from VDT subscribers, the LECs generally downplay the significance or usefulness of any attainable information and claim that application of existing CPNI rules will be adequate.⁵³ Viacom strongly disagrees. The existing scope of the prior consent requirement, limited to customers with at least 20 telephone lines, was premised on the belief that the key arena for enhanced services competition was among large business customers, not residential ratepayers.⁵⁴ That premise simply does not translate to the VDT context.

Because the vast majority of VDT subscribers are likely to have only one line, the 20-line standard offers no real protection to unaffiliated VDT packagers and programmers. The LEC-affiliated packager would end up with exclusive access to the CPNI of virtually every potential VDT subscriber. Despite claims by the LECs that little of the subscriber information obtained will be worthwhile, competitive equity mandates that unaffiliated packagers and programmers have the same access to this information as that (if any) provided to LEC affiliates.

In sum, Viacom submits that the Commission must modify its CPNI rules in this context to ensure that (1) a LEC affiliate is unable to obtain from the LEC information

⁵³ See, e.g., Report of GTE, CC Docket No. 87-266 (Mar. 13, 1995) at 2; Bell Atlantic Response at 2.

⁵⁴ Computer III Remand, 6 FCC Rcd at 7611.

relating to competing packagers or programmers, absent their express consent; and (2) all packagers and programmers have the same access to information concerning VDT subscribers as is provided to LEC-affiliated packagers or programmers. Without such safeguards, fair intramodal competition in the provision of VDT service cannot emerge.

C. The Application Of The Cable Program Access Rules To VDT Would Hamper Its Development As An Alternative Multichannel Distribution Technology

In listing a wide variety of possible safeguards that might be added to the VDT framework once LECs join the ranks of packagers and programmers, the Commission has asked whether it should impose certain restrictions currently applicable to cable operators, including the program access rules.⁵⁵ Viacom submits that subjecting VDT to the program access rules, in particular, would not serve to promote competition, but rather would hamper the ability of VDT to emerge and compete effectively as an alternative video distribution technology.

The program access rules were adopted because Congress perceived that cable operators, through horizontal concentration and vertical integration, were able to limit the development of competition in the distribution of video

⁵⁵ Fourth Further Notice at ¶ 16.

programming through alternative multichannel technologies.⁵⁶ Even assuming that the rules were necessary in the cable context, there is no reason to impose such requirements in the VDT context. VDT, after all, represents a competing multichannel video distribution technology of the very sort the legislation sought to promote, not encumber. Because there is no basis to conclude that denial of access to LEC-owned programming could significantly constrain competition in the distribution of multichannel video programming, there is no reason to subject VDT operators to such regulation.

In short, the perceived factors that prompted the adoption of program access rules for cable operators simply are not present in the video dialtone setting. Applying to VDT program access rules designed to combat perceived abuses in the cable industry would, far from serving the rules' goal of promoting video distribution competition, prevent video dialtone from fulfilling its potential as a viable alternative to cable. Accordingly, the FCC should refrain from imposing program access rules on VDT.

CONCLUSION

The public interest benefits of LECs entering into the direct provision of video programming in their telephone

⁵⁶ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 3359, 3365 (1993).

service areas can be obtained most assuredly through application and refinement of the Commission's video dialtone framework. This vehicle would amply serve LECs' First Amendment interests while also serving the government's interest in bolstering vigorous and fair competition among sources of video programming and encouraging deployment of advanced telecommunications infrastructure.

LEC entry as a rival to other packagers and programmers via its own VDT platform thus requires that the Commission tailor its video dialtone safeguards to address the new opportunities for anticompetitive conduct that could undermine video dialtone's promise as a truly open, nondiscriminatory distribution mechanism. Yet the FCC need not, and should not, undertake a wholesale importation of restrictions applicable to cable operators where competitive conditions in the VDT context do not now warrant such limitations. In short, the Commission must tailor its safeguards for the next stage of video dialtone in a manner that addresses the increased potential for favoritism inherent in the dual LEC role of VDT operator and VDT

packager or programmer -- while nonetheless allowing VDT to flourish as an alternative provider of multichannel video programming.

Respectfully submitted,

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March 21, 1995

CERTIFICATE OF SERVICE

I, Rosemary C. Harold, certify that the original and five copies of the foregoing "COMMENTS OF VIACOM INC." were served via hand-delivery on this 21st day of March, 1995, to the following:

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Rosemary C. Harold