

does not alter what the NCTA court called the "essence" of VDT common carriage service: "the obligation to provide service to all would-be video programmers" on a nondiscriminatory basis.⁴¹ While the case before the NCTA court may thus have been simplified by the absence of LEC involvement in programming, a court squarely addressing this issue would be confronted with several Cable Act definitions using the term "cable" that did not contemplate a LEC programming role conditioned on the provision of an enhanced common carrier video platform serving multiple, competing packagers and programmers.⁴² Given this bifurcated form of providing video programming authorized under Titles I and II but never contemplated by the Cable Act, the Communications Act does not automatically compel the application of Title VI regulation to VDT.⁴³

⁴¹ National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994).

⁴² Cf. House Committee on Energy and Commerce, H.R. 934, 78th Cong., 2d Sess. 57 (1984) (indicating 1984 Cable Act contemplated channel services arrangements whereby common carrier simply constructs and leases video transport facilities to franchised cable operator).

⁴³ Some commenters attempt to argue that the applicability of "concurrent" Title II and Title VI regulation of LECs operating under the rural exemption to the telco/cable cross ownership ban somehow compels Title VI regulation of any LEC video service in the wake of the ban. See, e.g., Comments of the National Cable Television Ass'n, CC Docket No. 87-266, at 17-18 (filed Mar. 21, 1995). But the rural exemption could be read just as easily to demonstrate that the drafters viewed traditional cable service as something other than a common carriage service. Thus, the Commission's reasonable determination that the VDT platform should be regulated on a common carrier basis may itself place VDT outside the

III. THE RECORD CONFIRMS THAT THE COMMISSION SHOULD NOT UNDULY BURDEN THE DEVELOPMENT OF VIDEO DIALTONE, BUT RATHER SHOULD MERELY REFINE OR ADD TO ITS VDT FRAMEWORK A LIMITED NUMBER OF SPECIFICALLY TAILORED SAFEGUARDS NECESSARY TO PROMOTE FAIR COMPETITION AMONG VIDEO PROGRAMMERS AND PACKAGERS

Whether commenters look to Title II, Title VI, or some combination thereof, the record demonstrates broad support for the proposition that, at the least, minimal safeguards of the sort Viacom has proposed are necessary given the LECs' new role in providing video programming directly to subscribers within their service areas. As discussed more fully below, however, the record evidences often widely divergent views regarding, first, the stringency of these limited safeguards and, second, the need for a wide range of additional safeguards.

In its comments, Viacom sought to balance the often conflicting needs of preventing the potential for abuse, on the one hand, and enhancing the ability of LECs to provide an economically viable alternative to cable, on the other. As discussed above, Viacom believes that a Title II-based VDT framework is well suited to strike this balance and to promote competition in multichannel video distribution. In assessing the appropriateness of any proposal to supplement or supplant the existing VDT framework, however, Viacom urges the Commission to weigh carefully whether the proposed safeguard at issue is warranted. If so, the Commission should then tailor such a

contemplated scope of the Title VI cable definitions.

safeguard in a manner that serves its goals without unnecessarily undercutting the ability of VDT to emerge as a viable distribution alternative. With this approach in mind, Viacom respectfully submits that the Commission should adopt the limited number of tailored proposals set forth below and discussed in its prior comments in this proceeding -- but refrain from the far more sweeping panoply of regulations addressed in Section IV below.

A. The Record Points Toward a VDT Affiliation Standard that Promotes LEC Investments While Capturing Only Those Interests that Cause a Significant Risk of Misconduct

A key threshold issue raised by the Commission and addressed by several commenters is the level of LEC interest in an affiliated packager. The record, with few exceptions, reflects strong support for relaxing the current five percent equity standard, in part to provide reasonable flexibility for video programming and packaging entities to benefit from limited LEC investment. Yet debate has emerged over the extent to which the attribution standard may be relaxed without undermining the efficacy of the regulations guarding against LEC anticompetitive conduct.

Not surprisingly, the LECs generally argue that the current 5% threshold is a "vestige" of the cross-ownership ban and that the attribution standard should now more properly be equated with

control, defined as ownership interests greater than 50%.⁴⁴ Conversely, a public interest coalition commenting in this proceeding opposes any relaxation of the current standard so as to minimize any potential for abuse;⁴⁵ of course, the current standard also minimizes any potential for much-needed capital formation.

In its comments, Viacom proposed a middle ground that would allow LECs to serve as an important source of capital for video packagers or programmers while still protecting against the potential for anticompetitive conduct. Specifically, Viacom urged the Commission to (1) allow a LEC to hold up to a 10% equity interest in a programmer or packager before the LEC's ownership is deemed attributable, and (2) define "control" for purposes of the rules as the ability to control the vote of the board of directors of a corporation or otherwise control the actions of an entity's management.⁴⁶

This approach would be consistent with recent legislative (and, in other areas, FCC) proposals for a 10% interest that would allow for increased capital formation while still capturing interests that could give rise to misconduct. By providing as well a definition of "control" that directly targets de facto

⁴⁴ See, e.g., Ameritech Comments at 17; BellSouth Comments at 39.

⁴⁵ See CME Comments at 11.

⁴⁶ Viacom Comments at 14.

control,⁴⁷ this approach would effectively look behind mere equity levels, and yet still avoid an overbroad standard that could capture interests (such as common directors that fall far short of a board majority) that do not afford either of the two entities at issue the ability to control the action of the other's management.

B. The Record Highlights the Need to Ensure that the Set-Top Box (or Functionally Equivalent Network Elements) Is Not Used as a Vehicle to Handicap Unaffiliated Programmers and Packagers on the VDT Platform

The comments in this proceeding reaffirm the importance that the set-top box will play in the development of VDT and underscore the need to ensure that the set-top box (or functionally equivalent network elements)⁴⁸ does not emerge as a bottleneck on the VDT platform between unaffiliated programmers and the subscriber. As discussed more fully *infra* and in Viacom's prior comments,⁴⁹ the record presents no compelling

⁴⁷ Viacom would endorse, and indeed has urged, a similar "reality check" for the attribution standards that govern cable operators' interests in program services. Whether or not the Commission is prepared to revisit its attribution rules in that context, however, any standard applied to VDT should be tailored to reflect the Commission's express interest in encouraging the relative newcomer LECs as sources of financial support for suppliers of diverse programming fare.

⁴⁸ For purposes of this pleading, references to the set-top box should be read broadly to include any functionally equivalent elements of the VDT network.

⁴⁹ See Viacom Comments at 16-20.

reason for the Commission to deny commenters' calls for express safeguards for this critical interface.⁵⁰

Other potential VDT programmers and packagers have joined Viacom in highlighting the need for regulatory attention to the potential for a LEC's (or a favored packager's) effective control over the set-top box to empower LECs to act as "gatekeepers" for the services available to subscribers over the VDT platform.⁵¹ In its comments, Viacom similarly urged the Commission to ensure that set-top boxes do not serve to deprive unaffiliated programmers and packagers on a VDT platform of the ability to gain access to subscribers on a nondiscriminatory basis.⁵²

LEC commenters have generally suggested that existing regulations are adequate to prevent such a result. Yet the LECs have not disputed the critical importance of this subscriber interface, nor have they suggested that the set-top box could not become a potential bottleneck in the delivery of programming to subscribers over the VDT platform.⁵³ If unaffiliated packagers

⁵⁰ Indeed, as noted by Viacom in its initial comments, it is necessary to ensure that the ability of all programmers and packagers to reach subscribers on a nondiscriminatory basis is not handicapped at any point throughout the entire VDT distribution system. Viacom Comments at 17.

⁵¹ See EMC3 Comments at 23. Of course, Chairman Hundt himself has identified the set-top box as a critical potential bottleneck. Speech of FCC Chairman Reed E. Hundt, COMNET - 1995, Washington, D.C., Jan 26, 1995.

⁵² Viacom Comments at 16.

⁵³ See, e.g., Southwestern Bell Comments at 38.

or programmers are indeed already protected from discriminatory tactics by existing rules, then an express interpretation to this effect by the Commission should be sufficient.⁵⁴ If, however, existing regulations applicable to LEC provision of enhanced services would not serve to protect against such discrimination, then it will be necessary -- and not unduly burdensome -- for the Commission to promulgate regulations that further the goal of creating a transparent interface between the ultimate subscriber and the VDT network.

Thus, because of the fundamental importance of the set-top box in the creation of fair competition over the VDT platform, Viacom reaffirms the need for the Commission in any event (1) to require that the full technical specifications or parameters for set-top boxes necessary for programmers and packagers using the VDT platform to reach subscribers in a nondiscriminatory manner be made publicly available within a meaningful time frame, and (2) to ensure that neither technological nor economic obstacles to the use of the VDT platform are created around the set-top box. Such safeguards are necessary if VDT is to truly afford subscribers the ability to obtain nondiscriminatory access to all services offered over the platform and, in turn, afford programmers and packagers using the VDT platform the ability to

⁵⁴ It must again be stressed that the need for these safeguards does not turn on whether or not the set-top box is considered a part of the VDT network or customer premises equipment ("CPE"). The potential for abuse of the VDT platform exists in any event.

obtain nondiscriminatory access to all subscribers -- free of any set-top box bottleneck. These proceedings provide the FCC the opportunity to address this issue before significant investments in technology are made by LECs and manufacturers of set-top boxes and other VDT network elements, and before LECs and their affiliated packagers secure an insurmountable head-start in intramodal competition.

C. There is Little Dispute Over the Need to Ensure That the Positioning or Presentation of Program Offerings to Subscribers Does Not Disfavor Unaffiliated Packagers and Programmers

The parties to this proceeding -- LECs included -- generally evidence a clear understanding that the VDT goals of fair access and nondiscrimination contemplate that the placement and positioning of competing program services on the VDT platform should be free of affiliate favoritism. The dispute, to the extent there is any, revolves solely around the question of whether additional regulations are necessary to prevent abuse in this area.

This issue is of critical importance because the presentation and positioning of programming represent the ultimate means by which subscribers will obtain access to the offerings available over the VDT system. INTV, for example, notes that "menu screen bias . . . and a host of yet unknown potential avenues of discrimination and favoritism would enable the LECs to give their own services a competitive boost while

deflating the real or apparent value of competitive services."⁵⁵

Some LECs nonetheless oppose the adoption of any specific regulations as unnecessary and duplicative of the general nondiscrimination requirements of VDT.⁵⁶ Given the broad recognition of the importance of this issue and the fact that express regulations would impose no greater restriction on LECs than they concede already, Viacom urges the Commission to address this issue explicitly. Such regulations should affirmatively state that the LECs' duty to provide service on a fair, nondiscriminatory basis applies with equal force in the specific context of the presentation of video programming to subscribers, including the placement and positioning of all unaffiliated programming on both VDT menus and the VDT platform itself.⁵⁷

⁵⁵ Comments of the Association of Independent Television Stations, Inc., CC Docket No. 87-266, at 15 (filed Mar. 21, 1995) (hereinafter "INTV Comments"). It is for this same reason that NCTA calls for extending nondiscrimination safeguards to (a LEC's) "Level 2" VDT gateways -- e.g., menus, directories and navigational devices that are supplied on a competitive basis. Comments of NCTA at 54. Viacom agrees with NCTA that the still uncertain nature of the LEC's emerging role as video gateway provider could present opportunities to discriminate against unaffiliated programmers and packagers utilizing the basic VDT platform.

⁵⁶ See, e.g., Ameritech Comments at 19.

⁵⁷ See Viacom Comments at 23 (noting, for example, potential ability of LEC to cause the "directory screen" to default to a listing of the programming of the LEC or its affiliate.)

D. The Record Suggests That Channel Capacity Rules Should Effectively, But Not Uneconomically, Limit a LEC's Allocation of Capacity to Affiliated Packagers

Allocation and utilization of a VDT system's channel capacity is another area in which the Commission must balance the need to protect unaffiliated programmers and packagers from discrimination with the need to avoid imposing onerous conditions that will hamper or unduly delay the emergence of VDT as a competitive distribution technology. The comments regarding this issue again generally reflect starkly different conclusions based on the interests of the various commenters.

LECs generally argue that the imposition of overly restrictive limits on their ability to utilize the VDT platform could result in the creation of unused capacity that would serve only to make VDT an uneconomic endeavor.⁵⁸ Those seeking to gain access to the VDT platform, however, argue that allocating a significant portion of capacity to a single packager -- particularly a LEC-affiliated packager -- would preclude the development of intramodal competition, and they therefore call for caps ranging from 5% to 25% of the VDT system's capacity.⁵⁹

The Commission has previously addressed the channel capacity allocation issue, finding that a 50% cap was sufficient in the

⁵⁸ Comments of NYNEX, CC Docket No. 87-266 at 16 (filed Mar. 21, 1995); Pacific Bell Comments, CC Docket No. 87-266 at 20 (filed Mar. 21, 1995) (hereinafter "PacTel Comments").

⁵⁹ EMC3 Comments at 21 (urge 25% cap); NATOA Comments at 33-4 (25% cap); CME Comments at 11 (5% cap).

context where LEC direct provision of video programming was prohibited.⁶⁰ If VDT is to fulfill its potential to provide increased competition to existing distributors, the Commission should not lightly dismiss the LECs' claims that overly restrictive caps will hamper the economic viability or delay the emergence of VDT. Moreover, unused capacity could artificially increase the share of transport and other costs passed on to programmers that are carried on the VDT platform. Commenters are unpersuasive in arguing that the cap applied to a LEC affiliate should, from the outset, be more restrictive than that applied to other packagers, particularly to the extent that unaffiliated packagers and programmers retain a Title II right of access to the system. Accordingly, Viacom submits that it is appropriate at this time for the Commission simply to extend to LEC affiliates its limit of no more than 50% of a VDT system's analog capacity for any one packager.⁶¹ Maintaining the 50% rule, particularly at this early stage of VDT development, seems to be an appropriate initial approach which should allow sufficient capacity for unaffiliated programmers and packagers to gain

⁶⁰ See Memorandum Opinion and Order on Recon., 10 FCC Rcd. at 260.

⁶¹ If limitations are warranted with respect to both analog and digital capacity, 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. See Viacom Comments at 21.

access to the VDT platform, while providing LECs with the financial incentive to invest in VDT.

Moreover, Viacom would support PacTel's further proposal to allow a LEC packager to exceed the 50% cap if capacity is left unused after a specified period of time and the LEC packager is obligated to relinquish that capacity to another programmer whose request for access could not be accommodated immediately or through prompt expansion of platform capacity.⁶² This proposal goes to great lengths to ensure the economic viability of VDT, while still safeguarding access for unaffiliated programmers and packagers.⁶³

At the same time, the Commission also should not dismiss the possibility of LEC conduct or capacity constraints that could impede access to the video platform for unaffiliated programmers and packagers. The Commission should therefore expressly reserve the right to revisit this issue should it appear that LEC usage of capacity is indeed handicapping the development of intramodal competition.

⁶² PacTel Comments at 19.

⁶³ This approach would also mitigate any claims by LECs that channel capacity limitations constitute an impermissible "taking" under the Constitution.

E. The Record Supports Commission Clarification of the Impermissibility of Channel-Sharing Proposals That Compromise Packager Competition or a Programmer's Control Over the Licensing of its Product

The record reflects the evolution of the "channel-sharing" issue over the course of the Commission's VDT proceedings. As Viacom has acknowledged, channel-sharing arrangements can avoid inefficient use of channel capacity by allowing multiple VDT packagers to offer subscribers the same program service utilizing a single channel. Yet, in no event should any packager on a VDT system have the right, through a channel-sharing arrangement, to offer any program service without first entering into a license agreement with the programmer. Indeed, there no longer appears to be much room to dispute that channel-sharing arrangements should neither compromise the rights of a programmer to license its product to multiple packagers nor serve to undermine, rather than enhance, the viability of competing packagers.

Viacom has been concerned, however, that the interest in channel-sharing could be used in an attempt to justify a LEC-affiliated packagers's pursuit of exclusive arrangements that could handicap the ability of competing packagers to obtain programming and provide effective intramodal competition. The Commission now has ample record basis for clarifying that channel-sharing may not be used as a pretense for demands of exclusivity or other terms that impinge on a programmer's

authority over the terms and conditions of the licensing of its services or that impede the emergence of competing packagers.

F. The Record Warrants Tailoring of the Joint Marketing and CPNI Rules to Ensure Competitive Fairness Among VDT Packagers and Programmers

The comments also diverge sharply over the need to impose joint marketing restrictions on VDT or to modify customer proprietary network information ("CPNI") rules to meet the new demands of LEC entry into the direct provision of video programming. Between the predictable extremes urging non-regulation, on the one hand,⁶⁴ and complete prohibition of joint marketing and use of CPNI, on the other,⁶⁵ there clearly exist approaches that would allow LECs to promote the competitive -- but not the anticompetitive -- potential of their distribution of video programming to their local telephone customers.

Indeed, Viacom has urged the Commission to adopt an approach that would tailor -- but not wholly reverse -- the Commission's existing joint marketing and CPNI rules in light of the LECs' new dual role on the VDT platform. Specifically, rather than prohibiting all forms of joint marketing as advocated by many cable operators, Viacom urges the Commission to require LECs engaged in in-bound telemarketing to affirmatively disclose

⁶⁴ See, e.g., Bell Atlantic Comments at 25; NYNEX Comments at 20-23.

⁶⁵ NCTA Comments at 51; CME Comments at 21.

explicitly -- and with equal prominence -- that other packagers, programmers and gateway service providers are available to potential VDT subscribers. Viacom believes that this approach appropriately addresses the LECs' ability to exploit their dual roles and unfairly undercut rival packagers, while still allowing LECs generally to market VDT and enhance their ability to compete with existing distributors.

With regard to CPNI, there is strong support from all quarters (other than the LECs) for the notion that additional safeguards are needed.⁶⁶ For their part, the LECs generally claim that there is no need to change the CPNI rules because the information the LECs derive will be of little value to their VDT operations or, in any case, will not be unfairly used.⁶⁷

As discussed more fully in Viacom's initial comments,⁶⁸ the rules which the LECs deem adequate were not designed with the particular needs of VDT in mind. The competitive context of VDT -- with its focus on individual, residential subscribers -- is significantly different from the enhanced services that generally target business customers for which the Commission structured the current CPNI rules. While Viacom agrees that VDT systems should not be subjected to unnecessary regulations that serve only to

⁶⁶ See, e.g., Cox Comments at 19; CME Comments at 22.

⁶⁷ See, e.g., Bell Atlantic Comments at 25; NYNEX Comments at 20.

⁶⁸ Viacom Comments at 29-34.

hamper their ability to compete with other distribution technologies, it must also be recognized that some regulations are necessary to ensure that fair intramodal competition develops on the VDT platform. Thus, Viacom suggests that the CPNI rules be modified to meet the particular demands of VDT.

In joining others calling for revised CPNI safeguards tailored to VDT, Viacom has specifically proposed rules to ensure that (1) a LEC affiliate is unable to obtain from the LEC information relating to competing VDT 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.

IV. THE RECORD PROVIDES NO JUSTIFICATION FOR IMPOSING ON VDT RESTRICTIONS, SUCH AS PROGRAM ACCESS RULES, THAT WOULD SERVE ONLY TO HINDER THE COMPETITIVE POTENTIAL OF LECs AS MULTICHANNEL VIDEO DISTRIBUTORS

As discussed above, Viacom believes that VDT rules should be tailored to balance the need to allow LECs to offer an economically viable distribution alternative with the need to impose additional specifically-tailored safeguards necessary to prevent LEC abuse. Thus, Viacom has urged the Commission not to incorporate a panoply of safeguards without first individually assessing the need and appropriateness of each. In particular, because the Cable Act and the FCC's implementing rules were designed to address specific concerns that simply may not apply

in a common carrier-based VDT framework, wholesale -- as opposed to selective -- application of cable regulations to VDT could impede, rather than promote, LEC entry into the distribution of video programming.

As Viacom noted in its initial comments, the program access restrictions are a notable example of rules that, if applied to VDT, could have the perverse effect of directly undermining competition to cable.⁶⁹ The program access rules were premised on the view that cable operators were able to use their control over popular program services to impede the development of competition to cable by other distribution technologies. Application of those rules to VDT, far from enhancing the development of competition, could hobble the ability of VDT to build subscribership by offering consumers an attractive alternative to existing cable service.

The few commenters specifically arguing that program access rules should be applied to VDT offer no clear policy rationale for such a course. Home Box Office, for example, claims only that LECs would gain some "unjustified advantage" if not subject to the program access rules.⁷⁰ These claims, however, do not even attempt to identify the manner in which imposition of program access rules on LECs would serve the rules' underlying goal of promoting competition to cable. Accordingly, any calls

⁶⁹ Viacom Comments at 34-5.

⁷⁰ HBO Comments at 4.

to impose program access rules -- or any other unwarranted burdens on LEC entry into the distribution of video programming -- should be rejected.

Should the Commission nonetheless proceed to adopt program access restrictions for VDT, whether by application of Title VI or otherwise, the program access regulations promulgated by the FCC in the context of cable should not be incorporated wholesale but rather only after appropriate tailoring to the context of LEC entry into video programming distribution.⁷¹ As discussed in Section I, supra, central to the Commission's support for broadened LEC participation in video distribution was the goal of promoting a greater diversity of programming options for consumers. While this goal would be best served (for the reasons set forth immediately above) by simply refraining from grafting program access restrictions onto -- and hobbling the development of -- VDT, this goal at a minimum warrants the application of program access rules no more restrictive than necessary on LEC investments that would not give rise to the anticompetitive conduct the rules seek to regulate.

Accordingly, any program access rules governing LECs should be triggered only by LEC interests in program services that meet

⁷¹ Even if the Commission were to arrive at the result of applying program access rules to LECs by concluding that Title VI governed VDT, the Commission would retain the discretion to tailor non-statutory elements of its own program access regulations -- such as its attribution rules -- to this new LEC context.

a general LEC attribution standard of the sort Viacom has proposed for Commission adoption in Section III(A), supra. Viacom has set forth there its recommendation for an attribution standard that serves the Commission interest -- at the heart of the program access rules as well -- in opening up LEC capital as a funding source for greater programming diversity while still capturing any LEC interests substantial enough to warrant safeguarding. Such a balanced approach to safeguarding the broadened role of LECs in the video marketplace will serve the public interest in allowing this new source of competition and diversity to flourish.

V. CONCLUSION

The Commission has time and again concluded that VDT offers a viable framework for achieving the public interest benefits of broadened LEC entry into the provision of video programming in-region. VDT protects LECs' First Amendment interests and is designed to promote both vigorous and fair competition among multiple distributors of video programming and the deployment of advanced telecommunications infrastructure. Requiring LECs seeking to provide video programming in their telephone service areas to utilize this common carrier-based framework is also well within the Commission's established statutory authority.

As the record demonstrates, LEC entry into the provision of programming over the VDT platform does require the Commission to

tailor its existing safeguards to address the LECs' new opportunities for anticompetitive conduct that could undermine VDT's promise as a truly open, nondiscriminatory distribution technology. 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 VDT 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.

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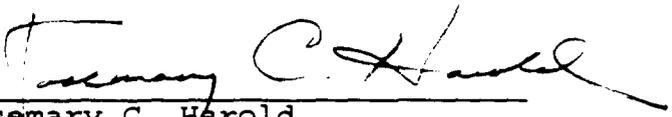
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April 11, 1995

CERTIFICATE OF SERVICE

I, Rosemary C. Harold, certify that the original and five copies of the foregoing " REPLY COMMENTS OF VIACOM INC." were served via hand-delivery on this 11th day of April, 1995, to the following:

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