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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
COMMUNICATIONS DIVISION

In the Matter of )  
TELEPHONE COMPANY-CABLE )  
TELEVISION Cross-Ownership Rules, )  
Sections 63.54-63.58 )  
  
and )  
  
Amendments of Parts 32, 36, 61, 64, and 69 of )  
the Commission's Rules to Establish and )  
Implement Regulatory Procedures for Video )  
Dialtone Service )

CC Docket No. 87-266

RM-8221

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**REPLY SUPPLEMENTAL COMMENTS OF SBC COMMUNICATIONS INC.**

Comes now SBC Communications Inc. ("SBC")<sup>1</sup> and files these Supplemental Reply Comments in response to the request of the Cable and Common Carrier Bureaus on April 3, 1995.<sup>2</sup> SBC did not file initial supplemental comments because it thoroughly briefed the legality and necessity of applications under Section 214 for the construction or acquisition of cable facilities by telephone companies in its comments on the Commission's *Fourth Further Notice of Proposed Rulemaking*. Additionally, SBC (together with Bell Atlantic,

<sup>1</sup>On April 28, 1995, the shareowners of Southwestern Bell Corporation approved a change in the corporation's name to SBC Communications Inc.

<sup>2</sup>By this filing, SBC does not waive any right it may have to challenge any procedural irregularity in the request by the Cable and Common Carrier Bureaus for supplemental comments, including the arguments made by NCTA (see letter of Daniel L. Brenner, Vice President, NCTA, to Chiefs of Common Carrier and Cable Bureaus, dated April 10, 1995).

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BellSouth, the United States Telephone Association, and the Organization for the Protection of Small Telephone Companies), in an action in the Eastern District of Virginia, has challenged the legality and constitutionality of imposing any such requirement.

Notwithstanding that challenge, however, certain statements made in this supplemental comment round deserve a brief response. The Commission should not take SBC's silence on any argument made in the initial supplemental comments, therefore, as assent, nor should these comments with regard to the policy implications of Section 214 regulation be interpreted to mean that SBC believes that the FCC has the legal right to impose such regulation.

Entertainment Made Convenient ("EMC<sup>3</sup>") remarks that regulation by means of requiring a Section 214 application is necessary so as not to "retard the development of a competitive broadband services market and would put at risk the national goal of an Information Superhighway." *Initial Supplemental Comments* at p. 4. In so doing, of course, EMC<sup>3</sup> ignores the fact that every other cable company is permitted to choose whether to operate as a common carrier or not. There is no denying that the Communications Act creates two models of regulation, one a common carrier model (for telecommunications services) and the other a private carriage model (for video services). Whatever the merits of a common carrier platform for video services, Congress simply has not given the FCC the authority to mandate it. Instead, if the FCC believes that the common carrier model is so necessary to developing the information superhighway, the Commission should try to make it sufficiently attractive so as to entice telephone companies to choose this model. However, making detailed, competitively sensitive information public, endless wrangles with opponents over costing and pricing, insistence on building capacity despite a lack of market indication of

demand, and a promise that much of the fruits of a successful endeavor will remain with the regulated services' subscriber while all of the risk will be placed on the company's stockholders, do not make this model attractive to anyone. EMC<sup>3</sup> as much as admits this conclusion when it urges the Commission to streamline or eliminate the 214 process for video dialtone but not for cable service. *Initial Supplemental Comments* at p. 5.<sup>3</sup>

Continental Cablevision *et al.* ("Joint Commenters")<sup>4</sup> claim in vitriolic tones that the Section 214 process should be maintained because "...after decades of manipulating costs and revenues under traditional rate-of-return regulation, LECs have amassed billions of dollars in assets, all obtained at the expense of captured telephone ratepayers." *Supplemental Comments* at p. 4. Such unsupported allegations are an insult not only to the LECs so accused but to the FCC as well. The proper remedy for any over-earnings under the discredited rate of return regulation, of course, is the filing of a complaint, not holding an entire line of business and its eager customers hostage. As noted above, a proper cost allocation process and the adoption of pure price caps for telephony will eliminate the possibility of any cross-subsidization.<sup>5</sup>

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<sup>3</sup>Of course, requiring a Section 214 application for the provision of pure cable service makes even less sense than requiring one for the provision of video services pursuant to a video dialtone construct.

<sup>4</sup>Continental was joined by Western Communications, Inc.; Benchmark Communications, L.P.; Columbia Associates, L.P.; Helicon Corp.; Atlantic Cable Coalition; Cable Television Association of Georgia; Great Lakes Cable Coalition; Minnesota Cable Television Association; Oregon Cable Television Association; New Mexico Cable Television Association; Tennessee Cable Television; and Texas Cable TV Association.

<sup>5</sup>Joint Commenters also allege that the LECs "...have compiled a mountainous record of anticompetitive and anti-ratepayer activities," again without citation or detail. Until and unless the charges are supported by facts, the Commission should disregard these

NCTA argues that the same reasons for requiring applications under Section 214 for the construction of telecommunications facilities would support requiring prior applications by telephone companies only for the construction of cable facilities, suggesting that the Commission might be concerned that the construction might be "wasteful" or "unnecessary." *Supplemental Comments* at p. 12. Of course, the FCC has already crossed that bridge by finding that telephone company entry into video services in competition with NCTA's members is in the public interest. Whenever competitive facilities are permitted, the risk of abandoned investment is always present. This Commission, however, has judged that the public interest permits this risk to be incurred because of the beneficial effects of competition on price and other terms of service. As for insulating telephone subscribers from paying for such abandoned plant, the cost allocation process is the appropriate measure to prevent such results. Any "mistake" the FCC might make by "permitting" facility construction will be alleviated by ensuring that the direct costs of providing video services are allocated to video service provision, whether as a Title II or a Title VI service. More importantly, as the Commission shifts to a pure price cap mode of regulating telephone companies<sup>6</sup>, cost allocation becomes a moot issue.

NCTA also suggests that the Section 214 approval process is somehow justified

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inflammatory statements.

<sup>6</sup>One must wonder what the term "telephone company" means when a company offers both telephony and video, especially over the same facilities. SBC contends that the term cannot mean "a company which offered telephony before it offered video, but not one which offered video before it offered telephony." Yet if the Commission is not quite precise in both creating and applying its rules for the rapidly converging businesses of video and telephony, two companies offering the same services to the same customers could be subject to much different sets of regulation.

*Telephone of California*, 14 FCC 2d 448, 456 (1968). In so doing NCTA ignores several points. First, the very date of the decision points that the cable companies have a nearly 20 year head start on telephone companies in occupying or building poles, lines and conduit and otherwise securing right of way. Any harm which might have been feared surely has been dispelled by this period of statutory cable company protection. Second, the strength of this "government interest" was dismissed by several courts which adjudged the telco/cable cross-ownership restriction unconstitutional and was found to be insignificant compared to the free speech interests of the telephone companies. *U S West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd*, 1994 WL 719064, No. 94-35775 (9th Cir. Dec. 30, 1994) (as amended).

Most important, of course, cable companies have just as much right (and opportunity) to obtain public and private rights of way as do telephone companies. This straw man argument simply continues the protective umbrella over some of the most powerful and financially successful companies in the country.<sup>7</sup> As for NCTA's allegation that "regulatory scrutiny under Section 214 is...necessary to enforce...nondiscrimination in common carrier services,"<sup>8</sup> such concerns apparently do not apply to cable companies, in NCTA's view. The partisan nature of these comments is obvious and should lead the FCC to entirely reject NCTA's position.

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<sup>7</sup> See, e.g., *Attachment A to SBC's Initial Comments on the FCC's Fourth Further Notice of Proposed Rulemaking* herein, filed March 21, 1995.

<sup>8</sup>*Supplemental Comments of NCTA* at p. 14.

The California Cable Television Association ("CCTA") suggests that the FCC does not have enough experience with telephone company applications for construction of cable systems in their telephone service region to warrant streamlining or eliminating the Section 214 application process. However, the argument completely ignores the fact that telephone companies have for nearly 20 years been constructing such systems outside of their telephone service areas. Furthermore, the very experience cited by the CCTA in quoting Common Carrier Bureau Chief Wallman,<sup>9</sup> together with the recent promulgation of guidelines for such filings,<sup>10</sup> suggests that the FCC should be completely confident that it has encountered enough such applications to be comfortable with a blanket authorization. It is also not surprising that a suggestion rejected by the FCC in the *Video Dialtone Reconsideration Order*<sup>11</sup> in November of 1994 as premature should be adopted in May of 1995. The FCC has worked hard to resolve all pending applications for video dialtone service. The agency might well conclude that the new applications coming through the door are sufficiently routine to warrant a blanket process.

Finally, LenFest West, LenComm, Inc., and Suburban Cable TV Co., Inc. ("LenFest") contends that the FCC should not issue blanket authorizations to telephone companies for cable service because they are "dominant carriers" under the *Competitive*

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<sup>9</sup>See *Supplemental Comments* at p. 12.

<sup>10</sup>Although SBC does not concur with these guidelines, they do suggest that the process has become more routine.

<sup>11</sup>*Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, aff'd in part and modified in part*, 10 F.C.C.R. 244, 309 (1994), *appeal pending sub nom. Mankato Citizens Telephone Company v. FCC*, No. 92-1404 (D.C. Cir. filed September 9, 1992).

*Carrier*<sup>12</sup> ruling. LenFest fails to note that the definition of "dominant carrier" in the FCC's rules is a carrier "found by the commission to have market power (i.e., power to control prices)." 47 C.F.R. § 61.3(o). The FCC has made no determination of the "market power" of telephone companies in the video services market for the rather obvious reason that telephone companies only recently have been permitted to provide video services. Because telephone companies are new entrants into the video services market, *a priori* they have no "market power" (i.e., power to set price) in the video services market. LenFest's argument should be rejected.

WHEREFORE, SBC respectfully submits that the FCC should withdraw its earlier tentative conclusion that applications under Section 214 should be required of telephone companies which propose to construct or acquire cable facilities in-region.

Respectfully submitted,

SBC Communications Inc.

By:   
ROBERT M. LYNCH  
PAULA J. FULKS

175 E. Houston  
Room 1212  
San Antonio, TX 78217  
(210) 351-3424

ATTORNEYS FOR  
SBC COMMUNICATIONS INC.

May 4, 1995

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<sup>12</sup>*Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980) ("Competitive Carrier")*.

**CERTIFICATE OF SERVICE**

I, Martha R. Kiely, hereby certify that copies of Reply Supplemental Comments of SBC Communications Inc. have been served by first class United States mail, postage prepaid, on the parties listed on the attached.

  
Martha R. Kiely

May 4, 1995

David L. Nace  
Lukas, McGowan, Nace  
and Gutierrez  
1819 H Street, N.W.  
7th Floor  
Washington, DC 20006

Robert L. Pettit  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Elizabeth A. Kusibab  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

John E. Ingle  
Federal Communications Commission  
1919 M Street, N.W.  
Room 614  
Washington, DC 20554

Francine J. Berry  
Mark C. Rosenblum  
American Telephone and  
Telegraph Company  
295 North Maple Avenue  
Basking Ridge, NJ 07920

Aaron I. Fleischman  
Aurthur H. Harding  
Fleischman and Walsh  
1400 16th Street, N.W.  
Suite 600  
Washington, DC 20036

Floyd S. Keene  
Michael S. Pabian  
Ameritech Operating Companies  
2000 W. Ameritech Center Drive  
Hoffman Estates, IL 60196

John R. Feore, Jr.  
Werner K. Hartenberger  
Dow, Lohnes and Albertson  
1255 23rd Street, N.W.  
Suite 500  
Washington, DC 20037

M. Robert Sutherland  
BellSouth Corporation  
4300 Southern Bell Center  
675 West Peachtree St., N.W.  
Atlanta, GA 30375

James R. Young  
Bell Atlantic Telephone  
Companies  
1710 H Street, N.W.  
Washington, DC 20006

Samuel Loudenslager  
Arkansas PSC  
1000 Center Street  
Little Rock, AK 72203

Thomas P. Cohan  
Office of Cable Communications  
Boston City Hall  
Boston, MA 02201

Joseph W. Waz, Jr.  
Wexler, Reynolds, Harrison  
and Schule, Inc.  
1317 F Street, N.W.  
Suite 600  
Washington, DC 20006

Ian D. Volner  
Ronald A. Siegel  
Cohn and Marks  
1333 New Hampshire Ave., N.W.  
Suite 600  
Washington, DC 20036

Janice E. Kerr  
J. Calvin Simpson  
California PSC  
505 Van Ness Avenue  
San Francisco, CA 94102

Frank DiGiammarino  
CT&CAC of Lexington  
1625 Massachusetts Avenue  
Lexington, MA 02173

Sally Goodgold  
Sidney W. Dean, Jr.  
City Club of New York  
33 West 42nd Street  
New York, NY 10036

Stephen R. Effros  
CATA  
P.O. Box 1005  
Fairfax, VA 22030

James F. Meehan  
Bill Kowalski  
Connecticut Office of Consumer  
Counsel  
136 Main Street, Suite 501  
New Britain, CT 06051

Frank W. Lloyd  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo  
701 Pennsylvania Ave., N.W.  
9th Floor  
Washington, DC 20004

David C. Olson  
Thomas E. Taylor  
Frost and Jacobs  
2500 Central Trust Center  
201 E. Fifth Street  
Cincinnati, OH 45202

Michael A. Morris  
CATA  
P.O. Box 11080  
4341 Piedmont Avenue  
Oakland, CA 94611

Paul K. Taff  
Connecticut Broadcasters  
Association  
101 Tall Timbers Lane  
Glastonbury, CT 06033

Theodore D. Frank  
Arent, Fox, Kintner, Plotkin  
and Kahn  
1050 Connecticut Ave., N.W.  
Washington, DC 20036

Gene Kimmelman  
Consumer Federation of  
America  
1424 16th Street, N.W.  
Washington, DC 20016

Linda T. Muir  
Lawrence P. Keller  
Contel  
245 Perimeter Center Parkway  
P.O. Box 105194  
Atlanta, GA 30348

Angela J. Campbell  
Citizens Communicatins Center  
Georgetown University Law  
600 New Jersey Ave., N.W.  
Washington, DC 20001

Allan D. Cors  
Retail Office Building  
35 West Market Street  
MPRO-31  
Corning, NY 14831

Paul Glist  
Cole, Raywid and Braverman  
1919 Pennsylvania Ave., N.W.  
Suite 200  
Washington, DC 20006

Norman M. Sinel  
Arnold and Porter  
1200 New Hampshire Ave., N.W.  
Washington, DC 20036

Gardner F. Gillespie  
Hogan and Hartson  
555 13th Street, N.W.  
Washington, DC 20004

Howard C. Davenport  
PSC of the District of Columbia  
450 Fifth Street, N.W., 8th Fl.  
Washington, DC 20001

Joseph Van Eaton  
National Federation of Local  
Cable programmers Miami Valley  
Cnsl.-Miller & Holbrooke  
1225 Nineteenth St., N.W.  
Suite 400  
Washington, DC 20036

Brian R. Moir  
Fisher, Wayland, Cooper  
and Leader  
Suite 800  
1255 23rd Street, N.W.  
Washington, DC 20037-1125

Gregory J. Krasovsky  
Florida PSC  
101 East Gaines Street  
Tallahassee, FL 32399-0861

William J. Buckner  
Georgia PSC  
244 Washington Street, S.W.  
Atlanta, GA 30334

Gail L. Polivy  
GTE Telephone Companies  
1850 M Street, N.W.  
Suite 1200  
Washington, DC 20036

Mark A. Jamison  
Susan Allender  
Iowa State Utilities Board  
Lucas State Office Building  
Des Moines, IA 50319

Wayne Kern  
Linda Williams  
Heritage Communications, Inc.  
2195 Ingersoll Avenue  
Des Moines, IA 50312

Nancy Thompson  
Reed, Smith, Shaw & McClay  
1200 18th Street, N.W.  
Washington, DC 20036

Veronica M. Ahern  
Nixon, Hargrave, Devans  
and Doyle  
One Thomas Circle  
Suite 800  
Washington, DC 20005

Clinton Hanson  
Cooperative Telephone Company  
235 1st Avenue East  
P.O. Box 147  
Groton, SD 57445-0147

Robert G. Jones  
City of Lee's Summit  
207 S.W. Market  
Lee's Summit, MO 64063

Nicholas P. Miller  
Joseph Van Eaton  
City of St. Louis, Missouri  
Miller & Holbrooke  
1225 Nineteenth St., N.W. Ste. 400  
Washington, DC 20036

Pasty Judd  
Kentucky Cable TV Association  
P.O. Box 415  
Burkeville, KY 42717

Donald J. Elardo  
MCI Telecommunications  
Corporation  
1801 Pennsylvania Ave., N.W.  
Washington, DC 20006

Keith N. Ware  
Emery County Farmers Union  
Telephone Association, Inc.  
P.O. Box 629  
150 South Main  
Orangeville, UT 84537-0629

Marilyn Moore  
Michigan PSC  
6545 Mercantile Way  
P.O. Box 30221  
Lansing, MI 48909

J. Kent Jerome  
Iowa Telephone Association  
1601 22nd Street  
Suite 209  
West Des Moines, IA 50265

Michael A. Jacobson  
Huntel Systems, Inc. and  
Blair Telephone Company  
P.O. Box 400  
Blair, NE 68008-0400

Ellen S. Deutsch  
Citizen Utilities Company  
of California  
1035 Placer Street  
Redding, CA 96001

Kathleen Sheran  
Mankato/NMCCAB  
202 East Jackson  
Box 3368  
Mankato, MN 56001

Herman W. Land  
12071 Caminito Corriente  
San Diego, CA 92128

Gary L. Lieber  
Schmeltzer, Aptaker and Shepard  
2600 Virginia Ave., N.W.  
Suite 1000  
Washington, DC 20036

Allan E. Anderson  
Marshall Cable TV Commission  
P.O. Box 310  
Marshall, MN 56258

Martha S. Hogerty  
Missouri PSC  
Truman State Office Bldg.  
P.O. Box 360  
Jefferson City, MO 65102

Jonathan D. Blake  
Covington and Burling  
1201 Pennsylvania Ave., N.W.  
P.O. Box 7566  
Washington, DC 20044

Larry W. DORITY  
Missouri Telephone Association  
P.O. Box 785  
Jefferson City, MO 65102

John Hesselman  
Mondovi Telephone Company  
217 South Eau Claire Street  
Mondovi, WI 54755

Patrick A. Lee  
NYNEX Telephone Companies  
120 Bloomingdale Road  
White Plains, NY 10605

Paula W. Gold  
Massachusetts Executive Office  
of Consumer Affairs  
One Ashburton Place  
Suite 1411  
Boston, MA 02108

David Cosson  
National Telephone  
Cooperative Association  
2626 Pennsylvania Ave., N.W.  
Washington, DC 20037

Rosalind A Niles  
Massachusetts Community  
Antenna Television Commission  
100 Cambridge Street  
Suite 2003  
Boston, MA 02202

H. Bartow Farr, III  
Richard G. Taranto  
Klein, Farr, Smith & Taranto  
National Cable Television Ass.  
2445 M St., N.W., Ste. 225  
Washington, DC 20037

Gigi B. Sohn  
Andrew J. Schwartzman  
Media Access Project  
2000 M Street, N.W.  
Washington, DC 20036

Norman A. Osland  
Nebraska Telephone Association  
635 South 14th  
Suite 300  
Lincoln, NE 68508

Penny Rubin  
New York State  
Department of PS  
Three Empire State Plaza  
Albany, NY 12223

Paul Cianelli  
Thomas K. Steel  
New England Cable Television  
Association  
100 Grandview Road, Suite 201  
Braintree, MA 02184

Cara Woodson  
National League of Cities  
1301 Pennsylvania Ave., N.W.  
Washington, DC 20004

Margaret M. Foti  
New Jersey Board of  
Public Utilities  
Two Gateway Center  
Newark, NJ 07102

John W. Cowrin  
Mary Hilgeman  
Bureau of Consumer Frauds  
and Protection  
Energy and Utilities Section  
New York, NY 10271

Martha Malkin Zornow  
National Association of  
Public Television  
1350 Connecticut Ave., N.W.  
Suite 200  
Washington, DC 20036

Nicholas P. Miller  
Miller, Young and Holbrooke  
1225 19th Street, N.W.  
Washington, DC 20036

Paul Rodgers  
Charles D. Gray  
NARUC  
1102 ICC Building  
P.O. Box 684  
Washington, DC 20044

John L. Grow  
New York State Commission  
on Cable Television  
Three Empire State Plaza  
Tower Bldg.  
21st Floor  
Albany, NY 12223

Wade H. Hargrove  
Randall M. Roden  
Tharrington, Smith and  
Hartgrove  
209 Fayetteville Street Mall  
P.O. Box 1151  
Raleigh, NC 27602

Henry L. Baumann  
National Association  
of Broadcasters  
1771 N. Street, N.W.  
Washington, DC 20036

Maxine R. Davison  
Ogden Telephone Company  
21 West Avenue  
Spencerport, NY 14559

John R. O'Hanlon  
O'Hanlon Law Offices  
1569 Washington  
P.O. Box 428  
Blair, NE 68008

Anthony J. Celebreeze, Jr.  
PUC of Ohio  
120 East Broad Street  
Columbus, OH 43266-0573

Anthony L. Pharr  
Office of Communications  
United Church of Christ  
2000 M Street, N.W.  
Suite 400  
Washington, DC 20036

R.C. Brown, III  
Peebles Telephone Company  
Perco Telephone Company  
and Sugarland Telephone  
Company  
P.O. Box 650  
Sugarland, TX 77487

E. G. Fitzgerald, Jr.  
People Mutual Telephone  
Company, Inc.  
P.O. Box 367  
Gretna, VA 24557

Rex Bryan  
Pinnacles Telephone Co.  
340 Live Oak Road  
Paicines, CA 95043

Paul Klein  
419 Park Avenue South  
New York, NY 10016

James P. Tuthill  
Pacific/Nevada Bell  
140 New Montgomery Street  
Room 1523  
San Francisco, CA 94105

Robert B. McKenna  
Lawrence E. Sarjent  
U S West, Inc.  
1020 19th Street, N.W., Suite 700  
Washington, DC 20036

Stanley J. Moore  
Pacific/Nevada Bell  
1275 Pennsylvania Ave., N.W.  
Washington, DC 20004

Josephine S. Trubekf  
Rochester Telephone Center  
180 South Clinton Avenue  
Rochester, NY 14646-0700

Marvin A. Sirbu  
Baker Hall 128 B  
Carnegie Mellon University  
Pittsburgh, PA 15213

Robert J. Butler  
Wiley, Rein and Fielding  
1776 K Street, N.W.  
Washington, DC 20006

Philip L. Verveer  
Willkie, Farr and Gallagher  
Three Lafayette Centre  
1155 21st Street, N.W.  
Suite 600  
Washington, DC 20036-3302

Jay C. Keithley  
United Telecommunications, Inc.  
1850 M Street, N.W.  
11th Floor  
Washington, DC 20006

Margot Smiley Humphrey  
Charles R. Naftalin  
Koteen and Naftalin  
1150 Connecticut Ave., N.W.  
Washington, DC 20036

Robert A. Beizer  
Schnader, Harris, Segal  
and Lewis  
111 19th Street, N.W., Ste. 1000  
Washington, DC 20036

Robert C. Atkinson  
Teleport I  
One Teleport Drive  
Staten Island, NY 10311

James C. Rice  
VectorTech, Inc.  
1504 Edgehill  
Madison, WI 53705

Jerome Graff  
Valley Teleco Cooperative  
P.O. Box 7  
Herreid, SD 57632

Don Grigg  
Western Iowa Telephone  
Association  
P.O. Box 38  
Lawton, IA 51030

Mr. Thompson T. Rawls  
BellSouth Telecommunications, Inc.  
4300 Southern Bell Center  
675 West Peachtree St., N.E.  
Atlanta, GA 30375

Daniel L. Brenner  
Neal M. Goldberg  
David L. Nicoll  
National Cable Television  
Association, Inc.  
1724 Massachusetts Ave., N.W.  
Washington, DC 200036

Peter Arth, Jr.  
Edward W. O'Neill  
Mark Fogelman  
The People of the State of  
California and The PUC  
505 Van Ness Avenue  
San Francisco, CA 94102

Michael E. Glover  
Besty L. Anderson  
Bell Atlantic Telephone Companies  
1320 N. Court House Road  
Arlington, VA 22201

Office of the General Counsel  
Federal Communications Commission  
1919 M Street, N.W. Rm. 614  
Washington, DC 20554

Robert B. Nicholson  
Robert J. Wiggers  
Appellate Section  
Antitrust Division  
U.S. Department of Justice  
10th St. & Constitution Ave., N.W.  
Room 3224  
Washington, DC 20530

John Gibson Mullan  
Kirkland & Ellis  
Mankato Citizens Telephone Company, Yelm  
Telephone Company, Huntel Systems, United  
States Telephone Association  
655 Fifteenth Street, N.W., Ste. 1200  
Washington, DC 20005

David Rolka  
Maureen A. Scott  
Veronica A. Smith  
John F. Povilaitis  
The Pennsylvania Public Commission  
Room 104  
POB 3265  
Harrisburg, PA 17105

Janet Reno  
U.S. Department of Justice  
10th St. & Constitution Ave., N.W.  
Room 511  
Washington, DC 20530