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1995

BEFORE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	CS Docket No. 95-61

TO THE COMMISSION:

INITIAL COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC") files these *Initial Comments* in response to the *Notice of Inquiry ("NOI")* issued May 24, 1995 by the Federal Communications Commission ("FCC" or "Commission"). The Commission's *NOI* was prompted by the 1992 Cable Act, which requires the FCC to submit annually a report to Congress on the status of competition in the market for the delivery of multichannel video programming.

SBC has maintained a consistent but low-profile interest in the development of competition in the video marketplace. As the FCC is well aware, SBC welcomed the opportunity for telephone company affiliates to enter the video business, but we have vigorously opposed most of the restrictions the Commission (and Congress) have attempted to place on it. Through litigation telephone companies have now won the right to participate in that business.[1] Therefore, the FCC's 1995 Report

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[1]The *NOI* at paragraphs 48 and 49 notes that a number of courts have held Section 613(b) of the Communications Act (47 U.S.C. § 533(b)), which forbids telephone companies from providing video services in their telephone service area, unconstitutional as a violation of free speech. One decision not cited by the Commission is the one affecting SBC's rights, *SBC v. United States*, Civil Action No. 3:94-CV-0193-D, decided on

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to Congress may hold special importance as Congress deliberates on the structure of video competition.

I. UPDATE ON VIDEO DIALTONE

SBC has made no secret of its views of video dialtone ("VDT"). While the Company applauded the Commission's desire to encourage competition with the incumbent wired cable systems, the FCC's evolving rules are simply inadequate to support a realistic business case for SBC.[2] It seems that other RBOCs have come to the same conclusion.[3] Those companies which have entered into VDT deployments have found the open enrollment process poses a serious impediment to their offer of a viable video alternative to the incumbent cable system.[4]

March 27, 1995 (copy attached). On June 26, the United States Supreme Court granted certiorari in one of the cited cases, *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994)(Section 533(b) held unconstitutional as applied to Bell Atlantic within its service areas). The probability of telephone company entry, therefore, is great and its impact should be considered in the Commission's report to Congress. SBC has argued in response to the Commission's *Fourth Further Notice of Proposed Rulemaking* in CC Docket No. 87-266 that this result means that telephone companies and their affiliates may choose either to be cable companies, regulated under Title VI of the Communications Act, or video information providers on their telephone company-provided video dialtone networks.

[2]Neither SBC nor any of its subsidiaries has filed a Section 214 application for VDT service.

[3]Bell Atlantic and U S West have withdrawn all of their pending Section 214 applications for VDT. Letter of Edward D. Young, Bell Atlantic Network Services, Inc. to William E. Caton, dated May 24, 1995, letter of Larry Sarjeant, U S West to Kathleen Wallman, dated June 15, 1995.

[4]Four companies (U S West, BellSouth, SNET, and Sprint) have initiated "open enrollment" for video information providers

II. COMPETITIVE IMPLICATIONS OF SBC'S JOINT VENTURE WITH DISNEY CORPORATION, AMERITECH AND BELLSOUTH.

As part of its analysis of VDT, the Commission seeks comment on the "competitive implications" of the joint venture formed by SBC, Ameritech, BellSouth and the Disney Corporation to develop and package video programming and interactive services.[5] The venture's success depends upon the deployment of a broadband infrastructure by the three Regional Bell Operating Company partners. Ventures such as this one will create a wealth of new, high quality video programming which in turn will generate more vigorous competition for large, vertically-integrated cable operators. Without additional delivery systems, however, these additional choices will not create competition for incumbent cable systems. Incentives for deployment of alterative broadband facilities, therefore, is critical to development of meaningful video competition. If the FCC, Congress and the courts do not provide the right regulatory and legal environment for SBC to act as a Title VI cable company, such ventures as the Disney

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("VIPs")to indicate their interest in securing analog channel capacity on their VDT networks. In each case, the incumbent cable system and each of the other potential VIPs sought more capacity than the VDT arrangement could provide. *See U S West*, WPC-6868; *BellSouth*, WPC-6977; *Sprint*, WPC-6858; *Caroline Telephone*, WPC-6999. In one instance, the VDT provider (BellSouth) was forced to allocate only six or seven channels to each VIP, making it impossible for **any** to provide a service comparable to the cable incumbent. Obviously, the analog channel limitations and the process of allocating channel capacity constitute "...technological impediments...[to] the deployment of VDT platforms as competitive alternatives to cable systems." *NOI*, ¶ 53(b).

[5]*NOI*, ¶ 55.

arrangement will not provide the competitive spur to cable companies.

III. RECOMMENDATIONS FOR PROMOTING COMPETITION IN THE VIDEO MARKETPLACE.

SBC's views on what is needed to provide meaningful competition for cable systems can be summarized as follows.[6]

The Commission should not impose any restriction upon video information providers affiliated with telephone companies which differs in any way from the requirements imposed on cable companies. Any such additional requirements will represent more costs and administrative hurdles for the company before it can justify the multi-billion dollar investment which broadband infrastructure will require. Telephone company affiliates should be able to choose to operate as a Title VI cable company,[7] using its telephone delivery system as the backbone, without being required to provide capacity to unaffiliated providers. Regulatory parity should always be the Commission's goal.

V. CONCLUSION

This report could not be more timely, following United States Senate approval of legislation that could eliminate most of the barriers (legal and economic) to telephone company provision of video services. The Commission should reiterate to

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[6]For a more complete explication of SBC's views of how the FCC could improve the probability of competitive cable offerings, please see the *Initial Comments of SBC Communications* filed in CC Docket No. 87-266 on March 21, 1995 and its *Reply Comments* filed there on April 12, 1995.

[7]With all the requirements imposed on a cable company.

Congress that telephone companies must have the choice of whether to be in the video business, and that if they exercise that choice they may do so under a Title II or a Title VI model, at their option. Only then will competition in video services be fair, vigorous, and productive of real consumer benefit.

Respectfully submitted,

SBC Communications Inc.

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June 30, 1995

ATTACHMENT

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR 27 1995
NANCY DOHERTY, CLERK
BY _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SOUTHWESTERN BELL CORPORATION, et al.,	§	
Plaintiffs,	§	Civil Action No. 3:94-CV-0193-D
VS.	§	
UNITED STATES OF AMERICA, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

Plaintiffs Southwestern Bell Corporation, Southwestern Bell Video Services, Inc., and Southwestern Bell Telephone Company bring this action seeking a judgment declaring 47 U.S.C. § 533(b), a provision of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, unconstitutional, and requesting an injunction permanently enjoining its enforcement. Plaintiffs contend § 533(b), both on its face and as applied, violates the First Amendment, and that it abridges the equal protection principles found in the Fifth Amendment. Defendants are the United States of America, the Federal Communications Commission ("FCC"), and Janet Reno, in her official capacity as Attorney General of the United States.

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_____ PURSUANT
TO F. R. C. P. RULES
58 AND 79a

Plaintiffs have filed a motion for summary judgment. Defendants have filed a motion for judgment on the pleadings or in the alternative for summary judgment.[1] Since the time this lawsuit was initiated, several courts have applied intermediate scrutiny to hold § 533(b) unconstitutional on First Amendment grounds. See US West, Inc. v. United States, ___ F.3d ___, 1994 WL 760379 (9th Cir. Dec. 30, 1994), aff'g 855 F.Supp. 1184 (W.D. Wash.); Pacific Telesis Group v. United States, ___ F.3d ___, 1994 WL 719063 (9th Cir. Dec. 30, 1994) (reaching same decision based on US West); Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), aff'g 830 F.Supp. 909 (E.D. Va. 1993); Ameritech Corp. v. United States, 867 F.Supp. 721 (N.D. Ill. 1994); and BellSouth Corp. v. United States, 868 F.Supp. 1335 (N.D. Ala. 1994). The evidentiary record before this court is not materially different from those described in the opinions that have declared § 533(b) unconstitutional. It would add little for this court to undertake an exegesis in reaching the same result. Utilizing intermediate scrutiny, the court holds that § 533(b) abridges plaintiffs' First Amendment right to free speech because it is not narrowly tailored to serve the goals to which it is dedicated. See Chesapeake and Potomac Tel. Co., 42 F.3d at 202; US West, ___ F.3d at ___, 1994 WL 760379, at *9.

Accordingly, the court grants plaintiffs' motion for summary judgment and denies defendants' motion for judgment on the pleadings or in the alternative for summary

[1]Plaintiffs have also filed objections to exhibits offered by defendants. The court need not resolve these objections, and they are therefore denied as moot.

judgment. By judgment filed today, the court declares § 533(b) unconstitutional and permanently enjoins defendants from enforcing it against plaintiffs.[2]

SO ORDERED.

March 27, 1995.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

[2]The Federal Communications Commission announced on March 17, 1995 that it will not enforce § 533(b)'s cable television/telephone company cross-ownership restriction against any telephone companies that are parties to cases in which the FCC has been enjoined from enforcing § 533(b), and any telephone companies operating in the Fourth and Ninth Circuits, regardless whether a party to any suit.