

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC

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

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**REPLY COMMENTS OF GTE**

GTE Service Corporation and its affiliated  
domestic telephone operating companies

John F. Raposa, HQE03J27  
GTE Service Corporation  
P.O. Box 152092  
Irving, TX 75015-2092  
(214) 718-6969

Gail L. Polivy  
1850 M Street, N.W.  
Suite 1200  
Washington, DC 20036  
(202) 463-5214

July 28, 1995

Their Attorneys

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## SUMMARY

In these Reply Comments, GTE responds to a number of the issues raised by commenters in this proceeding. Specifically, it is GTE's position that:

- If the Commission's mandate to promote competition in the market for the delivery of video services is to be fulfilled, LECs must be allowed to choose between the development of common carrier VDT networks or Title VI cable systems as the delivery mechanism for their programming offerings without the imposition of burdensome regulation.
- There is no basis in fact or in law to extend the program access rules to LEC-affiliated content providers. Indeed, such extension would merely serve to stifle nascent competition in the video content-creation market.
- The Commission should open an investigation to determine precisely how widespread unlawful and anticompetitive predatory promotional pricing practices by cable are, and take immediate and effective enforcement action against offending cable operators.
- The Commission should expeditiously act upon the petitions for reconsideration submitted by Liberty Cable and NYNEX or open a separate rulemaking as proposed by USTA. Unless the Commission corrects its demarcation point rules for MDUs, the cable industry will continue to be able to deny the benefits of video competition to residents of these buildings.
- The Commission should not advocate modification of the "effective competition" test for cable unless and until the Commission removes anti-competitive

regulatory barriers to VDT market entry and reforms its Part 69 access charge rules.

- Section 621(a) of the Act, which prohibits exclusive cable franchises, should be applied retroactively.
- Channel occupancy rules should not be applied to VDT and should be removed for cable systems. VDT providers should be permitted to design analog channel allocation and sharing plans that accommodate the specific needs of individual markets in which they operate.
- MVPDs should be allowed to bring a complaint against a cable programmer on the basis of price discrimination and the Commission should issue damage awards where appropriate.
- Retail availability of STBs is an appropriate long term goal which GTE fully supports. However, today, signal security issues and the lack of STB industry standards which negatively impact the introduction of new services dictate that the Commission proceed with caution.

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**REPLY COMMENTS OF GTE**

GTE Service Corporation, on behalf of its affiliated domestic telephone companies, hereby submits this reply to comments filed in response to the Commission's Notice of Inquiry in CS Docket No. 95-61, FCC 95-186, released May 24, 1994 (*Notice*). Parties filing comments in this proceeding advance a number of concerns regarding the Commission's regulation of video distribution and programming services and competitive impact of that regulation. GTE provides this reply in response to a number of issues raised by the interested parties.

**I. Video Dialtone.**

In comments submitted in response to the *Notice*, GTE urged the Commission to adopt, as a component of its 1995 annual report to Congress, a commitment to craft changes in regulatory policy which will stimulate true competition in the currently stagnant video distribution market. This market continues to be dominated by entrenched cable interests. In GTE's view, if the Commission is to advance its policy goals with respect to the development of video dialtone (VDT), *i.e.*, infrastructure development, programming diversity, increased competition, and enhanced consumer choice, the Commission must:

- Permit flexibility in the design of channel allocation and sharing plans by LECs that continue to rely on analog channel capacity.
- Increase the "attributable interest" standard in a programmer from 5% to 49% equity ownership or control.
- Eliminate or streamline the Section 214 process so that regulatory delays in the offering of VDT services, and the cable industry's ability to game the process, are eradicated.
- Permit a range of options for LECs proposing to offer video programming services, *e.g.*, Title II common carrier or Title VI cable system, as part of integrated or stand alone networks. Do not overlay Title VI rules on Title II services.
- Allow LEC tariff and pricing policies to respond to market conditions rather than rigid rate structure or cost allocation rules. Specifically, the Commission should treat VDT as a non-dominant offering, subject to streamlined tariff regulation.

Most commenters agree that imprudent regulation presents the greatest single danger to the future of VDT and LECs' ability to emerge as viable competitors in video markets. The Commission's evolving VDT rules have resulted in some LECs abandoning VDT altogether for Title VI cable arrangements. SBC, at 2; BellSouth, at 4. The current Section 214 authorization process, Part 69 waivers, and tariff review affords those whose only interest is to inhibit competition repeated opportunities to force costly delays in VDT implementation. Video Dialtone Association, at 7; Bell Atlantic, at 10. And, alarmingly, inflexible tariff and pricing restrictions have led to at least one major programmer to question whether VDT tariff structures will enable it to deliver programming services to consumers at competitive prices. HBO, at 18.

If the Commission's objective to promote competition in the market for video programming delivery is to be realized, regulatory policies must be adopted which stimulate the competitive market by encouraging LECs to invest in either Title II or Title VI video endeavors. Adoption of sensible policy directives would provide incentives for LECs to construct and operate open common carrier networks in those markets where

VDT services make economic sense. Likewise, LECs will take advantage of Title VI options in those markets in which the operation of a competitive cable system is economically appropriate. It is the marketplace -- not regulation -- which will ultimately provide competitive alternatives for the American video consumer. Therefore, the Commission's role should be to unshackle potential competitors to vie in the video marketplace.

GTE strongly agrees with the comments of the National Telephone Cooperative Association (at 5) that Section 214 of the Act should not be interpreted to require prior authorization when a LEC construct, acquires, or operates a cable system. As GTE pointed out in comments previously submitted,<sup>1</sup> as a result of recent court decisions, telephone companies have the constitutional right to speak over their own networks, irrespective of whether those networks are closed cable systems or common carrier VDT platforms. Further, the Commission may not lawfully regulate non-common carrier services, *i.e.*, Title VI cable operations, provided by telephone companies. *See United States Telephone Association v. F.C.C.*, No. 95-533-A (E.D.Va., Amended Complaint filed June 22, 1995). The Commission has previously found that the granting of blanket Section 214 authority in the case of LEC provision of cable services outside its local franchised telephone operating areas is in the public interest. The Commission should reach the same conclusion with respect to LEC in-region cable operations and, at a

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<sup>1</sup> See Supplemental Comments of GTE in response to the Commission's Public Notice, DA 95-665, released April 3, 1995. In the Public Notice, the Commission sought comment upon its intended application of the Section 214 application process to the construction or acquisition of in-franchise cable systems by local exchange carriers. *See also* Public Notice ("Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems"), DA 95-520, released March 17, 1995, as amended, DA 95-722, released April 3, 1995 (*Enforcement Policy*).

minimum, grant blanket section 214 authority to telephone companies which desire to construct or acquire in-franchise cable systems.

*In Summary:* If the Commission's mandate to promote competition in the market for the delivery of video services is to be fulfilled, LECs must be allowed to choose between the development of common carrier VDT networks or Title VI cable systems as the delivery mechanism for their programming offerings without the imposition of burdensome regulation.

## **II. Extension of Section 628 Program Access Rules.**

In the *Notice*, the Commission asks whether its program access rules promulgated under Section 628 of the Act<sup>2</sup> should be applied to video programming vendors (VPVs) and multichannel video programming distributors (MVPDs) whether or not a cable operator has an attributable interest in the content provider. The Commission also more specifically asks whether its program access rules should be applied to LEC video dialtone providers and their affiliated program providers. *Notice*, at ¶¶ 88-91.

In enacting Section 628, Congress intended to constrain the abusive practices of cable operators which sought to impede the development of competing multichannel video programming providers by withholding or restricting access to programming services that they controlled. However, even with the enactment of Section 628, many video industry participants continue to face formidable discrimination and anti-competitive practices from cable operators which are either willfully refusing to comply

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<sup>2</sup> Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 548.

with the program access rules (see CAI Wireless Systems, at 2-3) or which are executing exclusive arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable (see National Rural Telecommunications Cooperative, at 9-10).<sup>3</sup> In GTE's view, the cable industry's abusive practices have continued notwithstanding Congressional action and the Commission's promulgation of implementing regulations. Therefore, GTE urges the Commission to aggressively enforce its existing program access rules so that emerging alternative programming distributors have access to programming sources unencumbered by the anti-competitive restraints which monopoly cable systems continue to impose.

While Section 628 was enacted to constrain cable industry abuses, it was not designed to impose general restrictions on the programming industry or to regulate programming *per se*. *E.g.*, Viacom, at 3-4. Thus, the Commission's rules should encourage the development of diverse and alternative programming services by non-cable entities, such as LECs, DBS and others. No legitimate purpose would be served by attempting to extend the requirements of Section 628 to non-cable affiliates. Indeed, such extension would exceed the Commission's lawful jurisdiction.

GTE believes that imposition of government regulation on commercial activities must evolve from a finding that a problem of public dimension exists and that some form of governmental regulation can and will eliminate that problem. *E.g.*, Group W Satellite Communications, at 3. However, the *Notice* proffers no reason to imprudently extend the program access rules to non-vertically integrated programmers and LEC

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<sup>3</sup> See also Part III (Predatory Promotional Pricing By Cable), *infra*.

affiliated programmers nor has any commenter provided a demonstration that these nascent LEC competitors have engaged, or are likely to engage, in the unfair or deceptive acts that are the staple of the cable industry. The few content providers with affiliation with putative VDT providers or programmers -- unlike cable-affiliated content providers -- have absolutely no market power and possess no incentive to limit programming distribution.<sup>4</sup> *E.g.*, Group W, at 4. Indeed, applying the program access requirements -- designed by Congress and the Commission to resist the well-documented monopolistic practices of entrenched cable operators and their content affiliates -- to emerging LEC-affiliated providers would only have the effect of stifling investment in production, distribution and carriage of new programming content. *E.g.*, Viacom, at 5. As GTE has pointed out in Comments in the generic video dialtone proceeding,<sup>5</sup> the Commission has properly exempted content providers subject to the program access rules for these very reasons. *E.g.*, *In re New England Cable News*, 9 FCC Rcd 3231 (1994). Correspondingly, it makes no sense to single out LEC video dialtone providers by applying the cable program access rules to newly emerging video programming entities.

*In Summary:* There is no basis in fact or in law to extend the program access rules to LEC-affiliated content providers. Indeed, such extension would merely serve to stifle nascent competition in the video content-creation market.

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<sup>4</sup> As video dialtone is only in the incipient stage, there exist extremely few content providers with any affiliation with putative VDT providers or programmers, and those which do exist are embryonic in nature.

<sup>5</sup> See GTE Comments submitted in response to the Fourth Notice of Proposed Rulemaking, FCC 95-20 (released Jan. 20, 1995), CC Docket No. 87-266, at 30-31.

### III. **Predatory Promotional Pricing By Cable.**

In an response to the introduction of competition from wireless cable, it appears that cable operators have adopted predatory pricing practices in violation of the uniform rate structure provisions of the Act.<sup>6</sup> Comments of Heartland Wireless Communications, Inc., at 1-2. In contrast to these anticompetitive actions, as a common carrier, VDT providers are precluded from charging price levels that are below cost in order to retain market share. In fact, the Commission has specifically identified a number of cost elements that it believes must be reflected in VDT price levels in order to prevent the establishment of predatory rates. *VDT Reconsideration Order*, 10 FCC Rcd 244, 343-46 (¶¶ 214-220) (1994).

GTE believes that in a competitive environment, all market players must be able to design rates which adequately permit them to compete for customers. However, this does not mean that entrenched cable operators should be permitted to target discounted, below cost promotional offers to customers in response to emerging competition. To the contrary, the emergence of competition dictates that cable operators should be restrained from such anticompetitive conduct in violation of the Act.

*In Summary:* The Commission should open an investigation to determine precisely how widespread unlawful and anticompetitive predatory promotional pricing practices by cable are, and take immediate and effective enforcement action against offending cable operators.

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<sup>6</sup> 47 U.S.C. § 543(d).

#### **IV. Cable Inside Wire.**

GTE agrees with the comments of Wireless Cable Association, Inc. (at 21-24) and Optel, Inc. (at 2) that residents in multiunit dwellings (MDUs) be afforded effective control over the cable wiring in their residence. Currently, cable operator control over inside wiring amounts to a bottleneck prevention of competition which denies the benefits of alternative programming sources to MDU denizens. Therefore, GTE supports Liberty Cable's Petition for Reconsideration with respect to moving the demarcation point for MDUs and NYNEX's Petition for Reconsideration which requests that subscribers assume control of inside wiring immediately upon installation of service rather than upon termination of service.<sup>7</sup> At a minimum, consumer access should encompass the ability to remove, replace, rearrange or maintain cable home wiring. If competition to entrenched monopoly wireline providers is to develop, the Commission must take steps to remove remaining barriers to such competition. The Commission can begin by acting on these petitions for reconsideration or establish a new rulemaking proceeding as proposed by USTA. *See, Joint Petition for Rulemaking filed by Media Access Project, United States Telephone Association, and Citizens for a Sound Economy, July 27, 1993.*

*In Summary:* The Commission should expeditiously act upon the petitions for reconsideration submitted by Liberty Cable and NYNEX or open a separate rulemaking as proposed by USTA. Unless the Commission corrects the demarcation point rules for

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<sup>7</sup> Petition of Liberty Cable Co. for Reconsideration and Clarification, MM Docket No. 92-260, April 1, 1993 and Petition for Reconsideration of the NYNEX Telephone Companies, MM Docket No. 92-260, April 1, 1993. *See* GTE Comments, May 18, 1993.

MDUs, the cable industry will continue to be able to deny the benefits of video competition to residents of these buildings.

**V. Definition of Effective Competition.**

As the 1994 Competition Report properly concluded, entrenched cable operators continue to control substantial market power in local markets. Competitive rivalry in most markets is "largely, often totally, insufficient to constrain the market power of incumbent cable systems." *1994 Competition Report*, 9 FCC Rcd at 7556 (¶ 246). The Commission did observe, however, that the entry of new competitors in the coming years will likely exert a favorable effect on market conduct and performance. *Id.* GTE believes that the emerging convergence of cable and telephony businesses, and the corresponding increase in competition in both video and telephony markets, must logically result in the relaxation of regulation of both industries if the full benefits of competition are to be afforded to the American consumer.

In this proceeding, NCTA (at 39) urges the Commission to recommend to Congress that the effective competition test for cable rate regulation be relaxed.<sup>8</sup> In support of its position, NCTA alleges that as much as 15% of an operator's business may be lost before it is able to escape rate regulation. However, this situation is not unlike the predicament that LECs find themselves in today. Under current Part 69 restrictions on pricing and existing price cap rules, LECs are effectively precluded from responding to access competition in a timely manner. LECs must price on an averaged cost basis, are precluded from offering discounted pricing options for certain competitive switched access functions (except for certain limited exceptions) and

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<sup>8</sup> "Effective competition" is defined at 47 U.S.C. § 543(l).

cannot introduce new innovative services or pricing structures without having to endure long, protracted regulatory proceedings (*i.e.*, waiver of Part 69 rules).

Because LEC development of alternative video distribution systems is only in its infancy stages, GTE believes relaxation of the effective competition test, as proposed by NCTA is premature at this time. However, relaxation of the effective competition test would be appropriate if coupled with the streamlining and relaxation of competitive telephony and VDT rules. As GTE has advocated, the Commission must streamline or eliminate the Section 214 process, remove the necessity to file Part 69 waivers and other impediments to the ability of a LEC to competitively price video services, and make VDT subject to streamlined tariff regulation. Further, in light of the increasingly competitive nature of local access markets, the Commission should undertake the reform of the Part 69 access charge rules by adopting the USTA Access Charge Reform proposal.<sup>9</sup>

*In Summary:* The Commission should not advocate modification of the "effective competition" test for cable unless and until the Commission removes anti-competitive regulatory barriers to VDT market entry and reforms its Part 69 access charge rules.

## **VI. Exclusivity of Preexisting Franchises.**

James Cable Partners (at 2) asserts that Section 621(a) of the Act,<sup>10</sup> which prohibits the granting of exclusive cable franchises, should not be amended in order to

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<sup>9</sup> See USTA Petition for Rulemaking, Reform of Access Charge Rules, RM 8356, September 17, 1993.

apply retroactively to exclusive franchises granted prior to the enactment of the 1992 Cable Act. GTE disagrees.

In order to encourage competition in the video distribution market, new market entrants must be able to effectively negotiate local franchise authority, if required, from local franchising authorities. Jones Cable Partners position is premised on the assertion that there are few exclusive franchises remaining. Even assuming *arguendo* that this is the case, exclusive franchises are nevertheless direct impediments to making a diversity of video programming available to the American public. Indeed, exclusive franchises, irrespective of when they were granted, are potentially uneconomic in effect and disserve the public interest by preventing what may be a more efficient and lower-cost provider from competing with the established cable operator. Therefore, the Commission should recommend to Congress that Section 621(a) be applied retroactively to abrogate any exclusivity of franchises predating the 1992 Cable Act.

*In Summary:* Section 621(a) of the Act, which prohibits exclusive cable franchises, should be applied retroactively.

## **VII. Cable Channel Occupancy Rules.**

In the Commission's generic VDT rulemaking proceedings, as well as in defense of its own Section 214 Applications, GTE has repeatedly advocated a flexible regulatory approach to ensuring that sufficient capacity is made available to multiple programmers on VDT networks. GTE believes that LECs should be allowed to design analog channel allocation and sharing plans that accommodate the specific needs of individual markets in which they operate. Unfortunately, the Commission has adopted policies that arbitrarily establish limits on the number of analog channels that any one

programmer is able to lease on a VDT system. In the same vein as these imprudent policies, cable channel occupancy rules limit the number of channels that a vertically integrated cable system may devote to video programmers in which the operator has an attributable interest. 47 U.S.C. § 533(f)(1)(B); 47 C.F.R. § 76.504.

GTE agrees with the comments of HBO (at 25) that restrictions such as these are of little use to ensure diversity in programming and could very well have the deleterious effect of impeding the use of technologies (such as multiplexing) which benefit consumers. As new competitors enter the video markets, GTE believes that consumers will have access to a broad array of programming sources. Quite properly, customer choice will dictate what types of programming are made available in the marketplace. However, arbitrary limits on the amount of services that any one programming entity can provide will stifle the growth and diversity of competitive programming and further limit the choices available to subscribers. The Commission should properly recommend to Congress that the channel occupancy rules be removed and, correspondingly, allow LECs to select the channel allocation and sharing plans they believe are appropriate for their individual markets.

*In Summary:* Channel occupancy rules should not be applied to VDT and should be removed for cable systems. VDT providers should be permitted to design analog channel allocation and sharing plans that accommodate the specific needs of individual markets in which they operate.

#### **VIII. Damage Awards Under Section 616.**

GTE supports the comments of Satellite Receivers which argue (at 2) that MVPDs should be allowed to bring a complaint against a cable programmer on the basis of price discrimination. While GTE believes that some differences in carriage

terms may be legitimate and appropriate under specific circumstances, if a complainant can demonstrate that the price charged by a vertically-integrated cable programming provider appears excessive, the program provider should be required to demonstrate to the Commission that the price charged is cost-based or reasonable given other circumstances.

GTE is hopeful that this type of price discrimination by cable-affiliated content providers will be a short term problem. GTE believes that as competition develops in the market for video programming delivery, demand for alternative programming sources will be enhanced. Program providers that have historically sought to limit access to programming sources they control may find that their past practices actually work to reduce the popularity and acceptance of their programs as the video programming markets becomes increasingly competitive.

*In Summary:* MVPDs should be allowed to bring a complaint against a cable programmer on the basis of price discrimination and the Commission should issue damage awards where appropriate.

#### **IX. Retail Availability of Decoders (STBs).**

NCTA (at 23-24) asserts that the Commission should not require retail availability of decoders (STBs). This issue must be given careful consideration by the Commission. GTE agrees with NCTA that security over video networks today is largely controlled by the functionalities of the set top box and that immediate retail availability of such boxes could seriously restrict a provider's ability to deter theft. Indeed, since signal security is largely achieved via the functionality of the STB, the problem is even more acute with respect to open (VDT) networks than closed cable systems.

The Commission should remain cognizant that many services enabled by interactive technologies are expensive to provide and enhance when the necessary hardware to run the applications is resident in the STB. For example, the navigator/program guides which will enable subscribers to make sense of expanding programming sources available will require a hardware component. These types of services may be provided via adjunct boxes or "sidecars", but this solution is far less convenient from a subscriber's point of view (particularly when more than one service is purchased and multiple "sidecars" are required), more expensive for the provider to provision (and hence more expensive for the subscriber) and a separate remote control is usually required.

Nonetheless, as a long term goal, GTE fully supports the retail availability of STBs. However, if retail availability of STBs is to be the policy, then there must be accompanying standards so that signal security may be maintained by the network provider or system operator. Additionally, caution is required until the STB market standardizes to permit new services to be provided via software and/or modular additions (plug-ins to the back of the STBs), in part because service providers are less likely to risk investment required to launch new services if not assured access to a sizable customer base. As industry standards emerge, this risk will diminish and retail availability of STBs may become a reality.

*In Summary:* Retail availability of STBs is an appropriate long term goal which GTE fully supports. However, today, signal security issues and the lack of STB industry standards which would negatively impact the introduction of new services dictate that the Commission proceed with caution.

**X. Conclusion.**

GTE believes that imprudent regulation is the single greatest impediment to the introduction of true competition in the market for the delivery of video services to the American people. If entrenched cable operators are to be dislodged from their bottleneck monopoly positions and consumers are to reap the benefits of competition, then the Commission must act expeditiously to streamline its processes and allow potential competitors to compete on a nondominant basis with cable.

Respectfully submitted,

GTE Service Corporation and its affiliated  
domestic telephone operating companies

John F. Raposa, HQE03J27  
GTE Service Corporation  
P.O. Box 152092  
Irving, TX 75015-2092  
(214) 718-6969

By  \_\_\_\_\_  
Gail L. Polivy  
1850 M Street, N.W.  
Suite 1200  
Washington, DC 20036  
(202) 463-5214

July 28, 1995

Their Attorneys

## Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments of GTE" have been mailed by first class United States mail, postage prepaid, on the 28th day of July, 1995 to all parties of record.

  
Ann D. Berkowitz