

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In the Matter of	)	
Bell Atlantic Telephone Companies	)	Transmittal Nos. 741, 786
	)	
Revisions to Tariff FCC No. 10	)	CC Docket No. 95-145
	)	
Rates, Terms, and Regulations	)	
for Video Dialtone Service in	)	
Dover Township, New Jersey	)	

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OPPOSITION OF  
RAINBOW PROGRAMMING HOLDINGS, INC. TO  
BELL ATLANTIC DIRECT CASE

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**OPPOSITION OF  
RAINBOW PROGRAMMING HOLDINGS, INC. TO  
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Rainbow Programming Holdings, Inc. ("Rainbow"), by its attorneys, hereby submits its Opposition to Bell Atlantic's Direct Case.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

Rainbow, a wholly owned subsidiary of Cablevision Systems Corporation ("Cablevision"),<sup>2</sup> is the managing partner of several partnerships that provide national and regional video programming to distribution systems that serve millions of subscribers.<sup>3</sup> In

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<sup>1</sup> In the Matter of Amendment to The Bell Atlantic Telephone Companies, Tariff FCC No. 10, Transmittal Nos. 741, 786, CC Docket No. 95-145, Bell Atlantic Direct Case (filed Oct. 26, 1995) ("Direct Case"). The Direct Case was filed pursuant to Commission Order. See Order Designating Issues for Investigation, Transmittal Nos. 741, 786, CC Docket No. 95-145 (rel. Sept. 8, 1995) ("Designation Order").

<sup>2</sup> Cablevision, a producer and packager of video programming, is in the business of developing and marketing a diverse array of video programming services.

<sup>3</sup> Today, these programming services include American Movie Classics, Bravo, News 12 Long Island, News 12 Westchester and News 12 Connecticut (regional news channels), MuchMusic, seven regional SportsChannel Services, NewSport, the national backdrop sports service of Prime SportsChannel Networks, The Independent Film Channel, and PRISM, a premium sports and movie service serving the Philadelphia market. In addition, in the near future, Rainbow expects to launch other new programming services.

addition to distributing its programming through cable television and other video delivery systems, Rainbow is unique among video programmers in the magnitude of its commitment to video dialtone. Rainbow has requested and received 192 channels as a video programmer on Bell Atlantic's Dover Township system,<sup>4</sup> and is also in the process of exploring the delivery of its programming on other video dialtone systems.<sup>5</sup> In short, Rainbow has sought to utilize its broad experience to offer its unique mix of national and regional programming to customers. Given its experience as a video programmer and a marketer of video programming to consumers, Rainbow maintains a genuine interest in competing in the multichannel video marketplace so that it can continue to offer consumers high quality diverse video programming.

If consumers have the right and ability to subscribe easily and cost-effectively to the video programmer of their choice and there is a fair opportunity for all video programmers, including Rainbow, to compete on a nondiscriminatory basis, video dialtone will indeed achieve its goals of diversity, innovation and robust competition. If, on the other hand, there is not an equal opportunity for all video programmers to provide a viable multichannel service offering, either because certain programmers are given preferential treatment or the

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<sup>4</sup> See M. Berniker, "Bell Atlantic Wins VDT Tariff for Dover," *Broadcasting & Cable* at 32 (June 19, 1995).

<sup>5</sup> Rainbow has sought to secure capacity as a video programmer on virtually all of the video dialtone service platforms authorized by the Commission to date. See, e.g., Letter from Ms. Andrea Greenberg, Rainbow Senior Vice President, Business Affairs, to Alfred J. Brunetti, Esq., Senior Counsel of The Southern New England Telephone Company ("SNET"), of May 19, 1995 (requesting 40 channels of analog capacity); see also Letter from Ms. Andrea Greenberg to A. Gary Ames, US WEST Communications Group ("US WEST"), of January 23, 1995 (requesting capacity on the US WEST video dialtone trial in Omaha, Nebraska).

terms and conditions of access to the marketplace are skewed, the video dialtone service will not be successful. Moreover, it is not enough for the tariff to be non-discriminatory in name only; it must be so in practical application. Rainbow submits that, as it stands, the terms and conditions of Bell Atlantic's tariff, when viewed in the context of how the service is to be provided in real terms, undermine the goals of video dialtone, and are unfair and discriminatory.

In the course of planning the deployment of its video dialtone program package service offering, Rainbow has encountered several instances of business dealings that reveal a serious potential for anticompetitive behavior. These include the apparent preferential treatment of one particular video information provider ("VIP") -- FutureVision of America Corp. ("FutureVision") -- as well as pricing strategies that appear to be the result of undisclosed and unfair business affiliations between FutureVision and Bell Atlantic. This anticompetitive situation arises not only because there are unreasonable and discriminatory tariff terms, but also as a consequence of a misunderstanding as to the legal duty to act in a nondiscriminatory manner in the provision of certain essential video dialtone functions.

The fact is that if FutureVision has negotiated to bear fully all of its tariffed and non-tariffed costs, as other VIPs must do, it could not possibly recover its costs or investment at its proposed rates. Moreover, the service has been structured to permit FutureVision to have preferential access to interface access software that is necessary for the provision of the service. By labelling the critical interface access function as "enhanced" rather than "basic," Bell Atlantic is undermining the bedrock nondiscrimination principle of video dialtone.

Unless the Commission mandates nondiscriminatory access to all necessary components of video dialtone, it is not a tenable business for independent VIPs.

To ensure that there is the opportunity for genuinely fair video competition, the FCC must act immediately in the context of the instant investigation to make public the nature of any relationships and affiliations between Bell Atlantic and other VIPs. While the core principle of video dialtone is nondiscrimination, the fact is that any financial relationships, including contingent arrangements, between Bell Atlantic and particular VIPs such as FutureVision, affect the incentive and ability of Bell Atlantic to act in a nondiscriminatory manner. Indeed, Bell Atlantic has already attempted repeatedly to advantage FutureVision in the channel reservation process on the grounds it has had a pre-existing relationship with it.<sup>6</sup> Thus, unless the Commission scrutinizes this relationship and ensures that Bell Atlantic does not unduly advantage FutureVision to the detriment of other VIPs, the ability of Rainbow and similarly-situated independent VIPs to utilize video dialtone to compete in the video marketplace will be jeopardized.

Beyond the necessary scrutiny of the nature of the Bell Atlantic/FutureVision relationship, the Commission should also evaluate the manner in which certain essential video dialtone services and functions are provided. When it does so, the Commission will find that not all VIPs have an equal opportunity to secure access to components critical to the provision of video dialtone service. Moreover, under current law, some of these functionalities, such as the required access interface for the provision of video programming should properly be deemed to fall within Title II as "adjunct-to-basic services." As such,

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<sup>6</sup> See Section I, infra.

they should be the subject of an absolute common carrier nondiscrimination obligation. Further, as to other key components, including the necessary digital video dialtone converter units, the FCC should exercise its undisputed jurisdiction to ensure that there is a fair opportunity for all video programmers to compete.

In addition to the serious concerns regarding discrimination by Bell Atlantic in favor of preferred VIPs such as FutureVision, there is also a concern that the explicit terms and conditions of Bell Atlantic's video dialtone tariff have been structured to enable it to discriminate against independent programmers. The term discounts are designed to favor affiliated and favored video programmers and have no sound economic justification. The liability provisions for early termination of this new and untested video dialtone service, along with the threshold level of interruptions required to terminate service without penalty, are unreasonable and unjustified. Indeed, the tariff contains other similar terms and conditions that, taken individually, create the potential for anticompetitive discrimination. Taken as a whole, these tariff provisions function to undermine the ability of truly independent VIPs to make video dialtone a viable competitive business. As Bell Atlantic has failed to meet its burden to show that the terms and conditions of the tariff are reasonable and nondiscriminatory, the Commission should reject the tariff. If it does not do so, Rainbow will not be able to compete in this market and the public will lose the opportunity for genuine video competition.

## ARGUMENT

### I. THE MANNER IN WHICH BELL ATLANTIC IS OFFERING VIDEO DIALTONE SERVICE DISCRIMINATES AGAINST INDEPENDENT VIDEO PROGRAMMERS

#### A. The Commission Should Require Full Disclosure of the Nature of the Relationship Between Bell Atlantic and FutureVision

As conceived, video dialtone is a common carriage service provided by local telephone companies that is premised in the provision of a regulated basic platform of video transmission capacity with the capability to accommodate multiple video program providers and that will expand as demand increases.<sup>7</sup> In adopting video dialtone, the Commission emphasized that it was establishing a video programming distribution mechanism "based for the first time on nondiscriminatory video common carriage made available to and supporting multiple programmers."<sup>8</sup> Bell Atlantic, as an authorized video dialtone provider, must therefore "make available to all service providers the same service offerings and

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<sup>7</sup> Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, First Report and Order, 7 FCC Rcd 300 (1991)("First Report and Order"), recon., 7 FCC Rcd 5069 (1992) ("Memorandum Opinion and Order"), aff'd, National Cable Television Association v. FCC, 33 F.3d 66 (D.C. Cir. 1994) ("NCTA v. FCC"); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5787-5788 (1992) ("Second Report and Order"), aff'd in part and modified in part, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC 244, 258-260 (1994) ("Video Dialtone Reconsideration Order"), appeal pending sub nom., Mankato Citizens Telephone Co., No. 92-1404 (D.C. Cir. filed Sept. 9, 1994).

<sup>8</sup> Second Report and Order, 7 FCC Rcd at 5787.

functionalities on the same terms and conditions" in order to ensure that no programmer obtains preferential treatment on the platform.<sup>9</sup>

To ensure that Bell Atlantic meets this core obligation of holding itself out indifferently to afford all VIPs access to the same basic services on the same terms and conditions, and to resolve the basic question of lawfulness raised in the Designation Order, the Commission should examine additional information necessary to determine whether rejection of the tariff, in whole or in part, is warranted.<sup>10</sup> As a threshold matter, the Commission cannot guarantee that access to Bell Atlantic's platform will be nondiscriminatory unless and until the Commission requires full and open disclosure of the relationship between Bell Atlantic and the VIPs on the platform and ensures that all VIPs are being treated fairly and equally. Otherwise, there cannot be any certainty of the arms-length non-discriminatory dealings that are the bedrock of video dialtone.

FutureVision, established in 1992 after the Commission adopted its video dialtone rules and policy, was a small start-up company that was organized for the purpose of marketing, managing and delivering television programming and video services.<sup>11</sup> Neither deterred by FutureVision's size nor its potential lack of finances,<sup>12</sup> Bell Atlantic announced that it signed with FutureVision a 10-year, 60-channel video dialtone agreement on December

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<sup>9</sup> Id., 7 FCC Rcd at 5810-11.

<sup>10</sup> In the Matter of Annual 1987 Access Tariff Filings, 3 FCC Rcd 749, 751 (1988).

<sup>11</sup> See Bell Atlantic and FutureVision Join Forces to Bring the Information Age to New Jersey," PR Newswire (Dec. 15, 1992) ("Bell Atlantic and FutureVision Join Forces").

<sup>12</sup> During its first year of operations, FutureVision was funded by its founders. See J. Davis, "FutureVision First to Offer Video Dialtone Network," Philadelphia Business Journal at 9 (July 15, 1994).

15, 1992, the same day Bell Atlantic filed its request for Commission authorization to operate the commercial video dialtone service in Dover Township.<sup>13</sup> As originally proposed, the Bell Atlantic/FutureVision agreement committed 94% (60 of 64 channels) of the capacity on the Dover system to FutureVision.<sup>14</sup>

As Bell Atlantic has begun to deploy the Dover video dialtone system, it has already attempted to act in concert with FutureVision to frustrate competition from truly independent VIPs such as Rainbow that have taken or would otherwise consider taking service on the Dover Township platform.<sup>15</sup> For example, in implementing the channel reservation process that was to reserve available video dialtone capacity, Bell Atlantic conferred preferential treatment upon FutureVision by attempting to waive the obligation of FutureVision to provide a Channel Reservation Deposit of \$108,000 (for 60 channels), as required by tariff.<sup>16</sup> While FutureVision ultimately submitted this deposit, it was only after interested

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<sup>13</sup> Compare In the Matter of the Application of New Jersey Bell Telephone Co., File No. W-P-C 6840, Application (filed Dec. 15, 1995) with "Bell Atlantic and FutureVision Join Forces to Bring the Information Age to New Jersey," PR Newswire (Dec. 15, 1992).

<sup>14</sup> In the Matter of New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677, 3680, n.44 (1994) ("Dover 214 Order"). After questions were raised regarding whether FutureVision's presence on the Dover Township system and its apparent right to control 60 of the 64 available channels were consistent with the video dialtone nondiscrimination and platform capacity requirements, Bell Atlantic amended its arrangement with FutureVision to restrict the use of any one programmer to 50% of the initial capacity as well as committed to expanding the platform capacity. Id.

<sup>15</sup> Indeed, as recently as March of 1995, Martin Lafferty, FutureVision's executive vice president, "predict[ed] that only Bell Atlantic Video Services was likely to compete against FutureVision in Dover." See K. Gibbons, "Programming Dover: VIPs Shake Heads at Costs; Bell Atlantic Corp.'s Broadband Network in Dover Township, New Jersey," Multichannel News at 1A (Mar. 20, 1995).

<sup>16</sup> See Tariff, Section 2.10(A).

parties complained to the Commission objecting to Bell Atlantic's improper behavior.<sup>17</sup>

Likewise, in instituting the channel capacity open enrollment process, Bell Atlantic claimed that channels would be allocated on a full and fair basis, yet it attempted to pre-allocate 60 channels for FutureVision on the grounds it had a pre-existing contract with it.<sup>18</sup>

Moreover, this "pre-existing contract" theory would also have permitted FutureVision to secure the most desirable block of channels on Bell Atlantic's video platform.<sup>19</sup> Here too, Bell Atlantic's attempt to confer special treatment upon its favored VIP, FutureVision, was averted only after Commission intervention.

Rainbow's experience leads it to believe that a continuing preferential arrangement between Bell Atlantic and FutureVision is enabling FutureVision to provide service rates at announced levels that no other competitor can legitimately match in a commercially viable business. Thus, FutureVision recently announced that it will offer 77 basic channels for \$19.95 per month over Bell Atlantic's video dialtone network in Dover Township.<sup>20</sup> As Bell Atlantic noted in its Direct Case, in order to price at this level, FutureVision must cover

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<sup>17</sup> See Ex Parte letter from Donna N. Lampert to Ms. Kathleen M.H. Wallman, Chief, Common Carrier Bureau of April 20, 1995 at 1-2 (FutureVision initially was allowed to reserve 60 channels of capacity without providing Bell Atlantic with the required channel reservation deposit) ("April 20 Ex Parte Letter").

<sup>18</sup> See Ex Parte Letter from Donna N. Lampert to William F. Caton, FCC Secretary, of April 6, 1995, Exhibit 1 ("Bell Atlantic Video Dialtone Channel Capacity Enrollment Process") at 7-8, 10.

<sup>19</sup> Id., Exhibit 1 at 7, 13 (Bell Atlantic indicated that a lottery process would be used to assign channel positions for those participating in the allocation process).

<sup>20</sup> See Affidavit of Frank P. DeJoy, attached hereto as Appendix 1, at ¶ 6 ("DeJoy Affidavit"); see also E. Rosenthal, "FutureVision Plans to Beat Competition on Price, Innovations," Information & Interactive Services Report (Oct. 20, 1995).

not only the tariff price it pays Bell Atlantic, but its other costs, including, but not limited to, equipment, programming and marketing.<sup>21</sup> Yet, if FutureVision has negotiated to bear fully all non-tariff-based costs, as all truly independent VIPs must do, the fact is that FutureVision could not recover its costs, let alone its investment, at this rate level.

Under Bell Atlantic's tariff, the rates that Bell Atlantic charges for video dialtone channels are based on the number of potential, not actual, subscribers in the Dover Township area.<sup>22</sup> Thus, since FutureVision has purchased 96 channels, it is obligated to pay at least \$136,800 per month for video dialtone broadcast service under the tariff, assuming 38,000 potential subscribers.<sup>23</sup> While FutureVision's per-month total cost of providing video dialtone service is thus fixed under this formula, its cost varies on a per-subscriber basis depending upon the number of subscribers it has. Assuming various levels of penetration, Futurevision's video dialtone costs under the tariff would be as follows:

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<sup>21</sup> See Direct Case, Declaration of Robert J. Rider at ¶ 7.

<sup>22</sup> Tariff, Section 6.

<sup>23</sup> This sum is calculated as follows: 4 (number of 24-channel blocks reserved) x \$0.90 (cost per home passed per channel block using for illustrative purposes here only the term discount rate) x 38,000 (total homes passed) = \$136,800.

## VIDEO DIALTONE TARIFFED COSTS<sup>24</sup>

Penetration	No. of Subscribers	VDT Tariff Cost Per Subscriber
10%	3800	\$36.00
20%	7600	18.00
25%	9500	14.40
30%	11400	12.00
35%	13300	10.29
40%	15200	9.00
50%	19000	7.20

Using the general rule of thumb that the total costs of providing programming services are typically two and a half to three times the cost of transport for traditional cable service,<sup>25</sup> FutureVision would need to generate a market penetration of approximately 50% to cover its total costs. Given a market penetration of 25 percent, FutureVision would be operating at a significant loss if it expended total cost levels which approximated the amounts typically incurred by VIPs in the industry. Thus, in order to provide multichannel video programming services at these rates on a sustained basis while staying in business, FutureVision must either be grossly mistaken in its evaluation of the video business, must be engaging in anticompetitive pricing strategies, or must be cutting the costs of its non-tariffed expenses by a considerable margin. Based upon the information that Rainbow has obtained,

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<sup>24</sup> These calculations do not include other optional tariffed charges such as direct access links, messaging ports and additional channel charges, so that the total monthly cost to FutureVision would actually be higher.

<sup>25</sup> See Application of New Jersey Bell Telephone Company For Authority Pursuant to Section 214 of the Communications Act, File No. W-P-C 6840, Reply of Adelphia Communications Corp. at 22 (filed Feb. 17, 1993). While it is not possible to determine specific programming costs, as these vary depending upon the particular programming, it is not disputed that these costs are generally substantial.

it believes that FutureVision has preferential and discriminatory access to certain critical video dialtone functions and services which are not freely available in the competitive marketplace and appears to have a unique arrangement with Bell Atlantic that allows it to gain an unfair competitive advantage in the marketplace.<sup>26</sup>

If the Commission is serious about promoting a video dialtone platform that is consistent with the principles of common carriage, it should investigate for the existence of any interest, affiliation, contingent interest, or other agreement by Bell Atlantic with any particular VIP, including, but not limited to, the right to acquire such VIP or to utilize their channels, which may give these VIPs a distinct and unlawful advantage over truly independent VIPs.<sup>27</sup> Indeed, in rejecting arguments that Bell Atlantic had struck a discriminatory deal with FutureVision prior to the filing of its public tariff, the Commission found that any unreasonable discrimination issues should be raised at the tariff level of review.<sup>28</sup> When the Commission does require such disclosure, Rainbow believes that the Commission will find that the relationship between Bell Atlantic and FutureVision is the antithesis of the kind of arms-length, non-discriminatory relationship that was envisioned for video dialtone.<sup>29</sup>

In addition, the Commission should investigate whether any part or all of FutureVision's costs are being borne improperly and unfairly by Bell Atlantic. Thus, the

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<sup>26</sup> See DeJoy Affidavit at ¶¶ 7-27.

<sup>27</sup> Dover 214 Order, 9 FCC Rcd at 3681.

<sup>28</sup> Id.

<sup>29</sup> See NCTA v. FCC, 33 F.3d at 71.

Commission should examine whether, and to what extent, Bell Atlantic is financing, or potentially reimbursing, FutureVision's start-up costs. As Rainbow has found, the costs for starting up service on Bell Atlantic's system are considerable. For example, while FutureVision purchased 96 digital encoders at \$100,000 each,<sup>30</sup> the financing arrangement that enabled this sale is unknown. If there is an arrangement with Bell Atlantic in this regard, there is an inherent incentive for Bell Atlantic to act so as to advantage FutureVision over other VIPs.

Indeed, it appears that, but for the presence of Rainbow on the Dover Township system, FutureVision would have succeeded in leveraging its preferred position to gain unfairly market share, as it is now the channel packager for all other capacity on Bell Atlantic's network.<sup>31</sup> To prevail when competition is fair is acceptable, but to do so as the result of unfair advantage must not be tolerated. The fact is that if there is a relationship between Bell Atlantic and FutureVision, including even a contingent arrangement such as a contingent purchase option, it affects directly the incentive of Bell Atlantic to act in a nondiscriminatory manner. In order to safeguard against future anticompetitive abuses as well as to uncover the potential for such discrimination, it is thus crucial that the nature of the Bell Atlantic-FutureVision relationship be made public and for the Commission to impose any additional needed safeguards.

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<sup>30</sup> See "Bell Atlantic Allocates VDT Channels," *Broadcasting & Cable* at 9 (July 3, 1995).

<sup>31</sup> See E. Rosenthal, "FutureVision Plans to Beat Competition on Price, Innovations," *Information & Interactive Services Report* (Oct. 20, 1995) ("FutureVision formed an alliance with the five remaining video information providers so that it will be marketing 112 channels.").

**B. Services Essential to the Provision of Video Dialtone Must Be Available on Non-Discriminatory Terms to Independent Video Programmers**

While this proceeding is designed in part to investigate whether some of the video dialtone tariff terms and conditions are reasonable, Rainbow is concerned about the prospects for fair competition if the FCC fails to insist upon the core nondiscrimination obligations for access to all essential aspects of video dialtone. As the Commission has consistently stated, "enabling multiple video programmers to obtain access on nondiscriminatory terms to LEC video delivery capabilities" is fundamental to achieving the Commission's public interest goals of "fostering new and diverse video programming sources" and bringing the benefits of competition to consumers.<sup>32</sup> Yet, experience to date demonstrates that rather than being afforded equal and fair access to critical functions, independent VIPs have no such opportunities.

Since requesting and receiving 192 channels as a video programmer on Bell Atlantic's Dover Township system, Rainbow has become concerned that under current terms and conditions, it is virtually impossible for a VIP to compete successfully in the multichannel video dialtone business unless it has a special relationship with Bell Atlantic. While FutureVision apparently has such a preferential relationship, Rainbow does not. As the trade press has reported, utilization of and access to Bell Atlantic's system requires a potential VIP to absorb significant additional costs outside of the tariff transport costs.<sup>33</sup> These costs are

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<sup>32</sup> See Video Dialtone Reconsideration Order, 10 FCC Rcd at 259.

<sup>33</sup> See K. Gibbons, "Programming Dover: VIPs Shake Heads at Costs; Bell Atlantic Corp.'s Broadband Network in Dover Township, New Jersey," Multichannel News at 1A (Mar. 20, 1995) (Several programmers were "surprised at what they considered were hidden costs of the service . . . . Even some programmers who have been working with telcos for

for such essential requirements as network application software, digital encoding, the lease of set-top decoders, and other functions and services such as installation of in-home wiring.<sup>34</sup>

While all of these services may be competitive in theory, the reality is that only VIPs with a special relationship with Bell Atlantic have apparently been able to obtain the most critical functions at reasonable, cost-effective prices.

**1. Bell Atlantic Must Offer Access to Interface Software as a Regulated Service Under the Tariff**

As an initial matter, the Commission should require Bell Atlantic to offer the essential interface access function under tariff, as it should be properly classified a "basic" or an "adjunct-to-basic" service. Not only does this functionality possess all the attributes of a basic service within the Commission's previous holdings, it is an essential component of the video dialtone service offering. Accordingly, core common carriage tariffing and nondiscrimination requirements apply fully.

In order for VIPs to provide video programming to their end-user subscribers over Bell Atlantic's platform in Dover Township, they must have access to the network application software that facilitates the connection between the VIP and the end-user. In fact, although no other software can provide this essential function, Rainbow was only informed of the absolute necessity of using this specific software in late October, 1995.<sup>35</sup> Rainbow has been informed that it can have access to this specific software on a non-tariffed,

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months on video dialtone . . . said the Bell Atlantic charges were far more than they expected.").

<sup>34</sup> Id.

<sup>35</sup> See DeJoy Affidavit at ¶¶ 19-21.

"negotiated" contract basis.<sup>36</sup> Thus, while Bell Atlantic apparently considers this critical software interface an enhanced service within Section 64.702(a) of the Commission's rules,<sup>37</sup> its function is basic to the provision of video dialtone service and should be regulated as such.

Under Commission precedent, notwithstanding the three-prong test that is used to determine whether a service is "enhanced,"<sup>38</sup> the Commission has held that a service that might fall within a literal reading of the definition of enhanced services might be considered "adjunct-to-basic" if the service is intended to "facilitate the provision of basic services without altering the fundamental character" of that service.<sup>39</sup> Under this analysis, the

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<sup>36</sup> See DeJoy Affidavit at ¶ 25. As noted below, while Bell Atlantic has offered to license Rainbow so that it can use this software, the parent company of the software developer and owner, FutureVision, has threatened to restrict Rainbow's access to the software unless Rainbow gives FutureVision a license for Rainbow's video programming. See *infra* at pp. 18-19; DeJoy Affidavit at ¶ 23.

<sup>37</sup> 47 C.F.R. § 64.702(a).

<sup>38</sup> The regulatory treatment of data communications services is governed by the basic-enhanced service framework established in the Commission's Computer II proceeding. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 (1980) ("Computer II") modified on recon., 84 FCC 2d 50 (1980), further modified, 88 FCC 2d 512 (1981), aff'd sub nom., Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) ("CCIA"), cert. denied, 461 U.S. 938 (1983). Basic communications services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. In contrast, section 64.702(a) of the Commission's rules defines an enhanced service as an unregulated service that employs computer processing applications that: (1) act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; or (2) provide the subscriber additional, different, or restructured information; or (3) involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

<sup>39</sup> See First Report and Order, 7 FCC Rcd at 314-317, n.47 (citing North American Telecommunications Assoc., Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer

Commission has consistently concluded that features may be offered as tariffed "adjunct-to-basic" services even though an end-user subscriber can access additional, different or restructured information.<sup>40</sup> Examples of such "adjunct-to-basic" services include speed dialing or electronic white pages, as their fundamental purpose is to facilitate establishment of the transmission path.<sup>41</sup>

Indeed, in the video dialtone context, the Commission was highly cognizant of the potential for discrimination that existed when a carrier sought to deploy the basic video dialtone platform.<sup>42</sup> It was for that reason that the Commission was careful to stress that "basic routing functions" and "computer processing applications directly related to the facilitation of the connection between the subscriber and service provider"<sup>43</sup> should be

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Premises Equipment, 101 FCC 2d 349, 356-361 (1985) ("NATA/Centrex Order"), modified on recon., 3 FCC Rcd 4385 (1986).

<sup>40</sup> See NATA/Centrex Order, 101 FCC 2d at 356, 361; see Computer II, 77 FCC 2d at 421 (speed calling); Southwestern Bell Telephone Co. Petition for Waiver of Section 69.4(b) of the Commission's Rules, 5 FCC Rcd 3792 (1990) (electronic directory assistance).

<sup>41</sup> See supra n.40; see also First Report and Order, 7 FCC Rcd at 316-317, n.47; Second Report and Order, 7 FCC Rcd at 5812, n.150; In the Matter of Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3084 (1990) (the Commission found that certain Operations Support System capabilities such as service order entry, service order status, trouble reporting and status services, diagnostics, monitoring, testing, and reconfiguration were to be considered basic or adjunct to basic as they were directly related to the management of basic telephone service, did not alter the fundamental character of the service, and merely maintained the ability to continue to receive network services).

<sup>42</sup> See First Report and Order, 7 FCC Rcd at 316-317.

<sup>43</sup> Id.

available on a nondiscriminatory basis.<sup>44</sup> Moreover, the Commission found that the regulatory status of particular non-carrier services is best determined in the context of a specific video dialtone proposal.<sup>45</sup>

On Bell Atlantic's platform, the Enhanced Provisioning Interactive Communication ("EPIC")(TM) software performs precisely this type of routing and service facilitation function. Indeed, the EPIC software is the necessary interface which provides the only means for VIPs to access the end-user subscriber.<sup>46</sup> Accordingly, the Commission should conclude that the EPIC software -- an essential component in providing service on the Dover Township platform -- is an "adjunct-to-basic" service subject to regulation under Title II of the Communications Act and that, as required by Section 203 of the Act, Bell Atlantic must offer this service under tariff.

In so holding, the Commission should also note that FutureVision, through its affiliate Broadband Applications Development Co. ("BADCO"), is the developer and licensor of the proprietary EPIC network application software.<sup>47</sup> In 1994, FutureVision agreed to license the proprietary EPIC software to Bell Atlantic for use on the Dover Township network.<sup>48</sup> According to FutureVision's own statements, EPIC provides an essential foundation for

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<sup>44</sup> Id.

<sup>45</sup> Second Report and Order, 7 FCC Rcd at 5812.

<sup>46</sup> See DeJoy Affidavit at ¶¶ 19, 21.

<sup>47</sup> See E. Hollreiser, "FutureVision Looks to the Future as It Alters Corporate Structure," Philadelphia Business Journal at 10 (Sept. 15, 1995).

<sup>48</sup> See "Bell Atlantic Makes Video-Info Software Deal," Broadcasting & Cable, at 10 (Jan. 3, 1994).

handling video and information services over the video dialtone network.<sup>49</sup> Yet, it appears, that only Bell Atlantic and FutureVision have the right to market the software to third parties.<sup>50</sup> Without this proprietary software, access to the Dover Township network is impossible.<sup>51</sup> Again, if Bell Atlantic is permitted to act in concert with FutureVision to discriminate in such fashion, video dialtone will not be a viable business for independent entities like Rainbow. Most significantly, although Rainbow intends to deploy service in the near future, neither Bell Atlantic nor FutureVision has yet to provide Rainbow with the proposed rates and terms for access to this software.<sup>52</sup>

Incredibly, recognizing that its proprietary software empowers it with the ability to disadvantage other VIPs on the Dover Township network, FutureVision has threatened to withhold from Rainbow any access to the EPIC software, and thereby deny Rainbow access to Bell Atlantic's system, until Rainbow first licenses FutureVision to carry Rainbow's video programming.<sup>53</sup> FutureVision's blatant attempt to withhold the essential proprietary network software represents another example of how the access to critical video dialtone functions is anything but "equal." While Bell Atlantic did indicate that it would provide

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<sup>49</sup> Id.

<sup>50</sup> See DeJoy Affidavit at ¶ 27. Id. While FutureVision's deal with Bell Atlantic enables the Telephone Company to use and market EPIC to third parties, the arrangement may include restrictions which prevent the Telephone Company from providing the software at rates which would enable Rainbow to compete effectively for service with FutureVision in Dover Township. Accordingly, the Commission should require Bell Atlantic to produce this contract for investigation.

<sup>51</sup> Id. at ¶¶ 19, 21.

<sup>52</sup> Id. at ¶¶ 23, 26.

<sup>53</sup> Id. at ¶ 23.

Rainbow with the EPIC software subject to "negotiable" rates, terms and conditions, it is clear that the leverage is wholly one-sided.<sup>54</sup> This anticompetitive behavior further underscores the need for Commission regulation under Title II common carriage nondiscrimination principles.

In sum, Rainbow entered into an Agreement with Bell Atlantic to take 192 channels of video dialtone service on the Dover Township network with the understanding that Bell Atlantic would comply with its obligation to "provide service indifferently to all comers"<sup>55</sup> and with the understanding that it would have access to all essential basic video dialtone functions on a tariffed, nondiscriminatory basis. By attempting to label one of these functionalities as enhanced rather than basic, Bell Atlantic is able to undermine the fundamental tenet of video dialtone. Rainbow stresses that it genuinely seeks to provide service using its reserved capacity. Yet, if Bell Atlantic is permitted to provide this basic function on a discriminatory basis, it will be able to consolidate the unlawful preferential treatment of one selected VIP, FutureVision. Unless and until the Commission rectifies these discriminatory practices, Rainbow will be unable to compete and the public will lose the opportunity to have another video competitor in the market.

**2. The Commission Should Regulate the Provision of the Video Dialtone Digital Converters Pursuant to Its Title I Jurisdiction**

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<sup>54</sup> *Id.* at ¶¶ 19-27. Moreover, as noted above, Rainbow has not yet been provided any proposed rates or terms for such access. *Id.* at ¶ 26.

<sup>55</sup> *NCTA v. FCC*, 33 F.3d at 75; *see also NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve").

In addition to requiring Bell Atlantic to provide an essential component of the basic video dialtone service under tariff, the Commission should also exercise its Title I jurisdiction over certain non-basic services to promote the public interest goals of video dialtone. If independent VIPs do not have fair access to the components that are critical to the provision of video dialtone, they will not be able to offer a competitive video service at this time. In the instant case, the overwhelming evidence is such that unless the FCC exercises its ancillary jurisdiction and requires that all VIPs be given access to the essential digital converters on a nondiscriminatory basis, video dialtone cannot serve its stated public interest goals.

Under the Commission's current policies, the Commission does not generally subject customer-premises equipment ("CPE") such as digital converters to its jurisdiction under Title II of the Communications Act.<sup>56</sup> While the Commission determined that it would not regulate CPE under its Title II jurisdiction, however, it made clear that it retained its ancillary jurisdiction under Title I of the Act.<sup>57</sup> According to relevant legal precedent, this jurisdiction extends to services "reasonably ancillary to the effective performance of the

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<sup>56</sup> See 47 U.S.C. § 201 *et. seq.* The Commission established in its Computer II decision that it would not treat CPE as a service, term and condition, or practice governed by Title II. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384 (1980) ("Computer II").

<sup>57</sup> See 47 U.S.C. §§ 152, 153; Computer II, 77 FCC 2d at 454. Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), authorizes the Commission to exercise jurisdiction over "all persons engaged within the United States in such [interstate or foreign] communication" and Section 3(a), 47 U.S.C. § 153(a), defines "communications by wire" subject to the Commission's jurisdiction to include "services...incidental to such transmission."

Commission's various responsibilities."<sup>58</sup> The scope of this jurisdiction is derived from the statutory purposes enumerated in the Act.<sup>59</sup> Central to these statutory purposes is the overarching goal to promote a "rapid, efficient, Nation-wide and world-wide wire and radio communication service...at reasonable charges."<sup>60</sup> Indeed, this goal was cited by the Commission as a crucial goal specific to video dialtone.<sup>61</sup>

Significantly, in Computer II, the Commission specifically noted that it can be necessary to exercise ancillary jurisdiction over both enhanced services and CPE in order to assure wire communications at reasonable rates.<sup>62</sup> Since Computer II, the Commission has interpreted the public interest to require it to evaluate the competitive implications of a

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<sup>58</sup> See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

<sup>59</sup> See id. at 173; Computer II, 77 FCC Rcd at 433; Detariffing of Billing and Collection Services, Report and Order, 102 FCC 2d 1150, 1169-70 (1985) ("Detariffing Order").

<sup>60</sup> 47 U.S.C. § 151.

<sup>61</sup> See e.g., Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300, 304-305 (1992); Application of BellSouth Telecommunications, Inc. for Authority Under Section 214 of the Communications Act of 1934, As Amended, and Part 63 of the Commission's Rules, to Construct and Operate Integrated Network Facilities for a Trial of Video Dialtone Service in the City of Chamblee, Georgia and Adjacent Communities in Dekalb County, Georgia, Order and Authorization, 77 R.R. 2d 472, 480 (1995).

<sup>62</sup> Computer II, 77 FCC Rcd at 441, 444-46; see also CCIA, 693 F.2d at 213. In upholding the Commission's decision, the D.C. Circuit held that the Commission's assertion of ancillary jurisdiction was a lawful expression of its "broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data processing." Id. at 213-14.