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March 19, 1996

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-46

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, I submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On March 19, 1996, the undersigned, Jim Horwood and Jeff Hops, on behalf of the Alliance for Community Media ("ACM"), met with Jackie Chorney of the Chairman's office. The meeting dealt with the the imposition of public, educational and governmental access requirements on open video system operators, including matters set forth in the attached memorandum and declaration, which were handed out at the meeting.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By
Tillman L. Lay

Enclosures

cc: Jackie Chorney, Esq.
Jim Horwood, Esq.
Jeff Hops, Esq.

MEMORANDUM

To: Cable Services Bureau, Federal Communications Commission

From: Jeffrey Hops, Director of Government Relations, Alliance for Community Media

Date: 2/16/96

Re: Regulation of "Open Video Systems"

On February 9, 1996, President Clinton signed the Telecommunications Act of 1996 ("1996 Act ") into law. While there are a number of provisions that may affect Alliance members, there is certainly none more important for the future survival of public access to video platforms than the new "open video systems" ("OVS") paradigm.

Since OVS was in neither the House nor the Senate bill, this new approach represents a significant departure from the proposed "video dialtone" provisions of both S. 652 and H.R. 1555. The OVS construct was created without hearings, agency and public comment, or the initial ratification of either house of Congress. Consequently, the legislative history which normally acts as a guide to administrative agencies is absent.

Interpretation of § 302 of the 1996 Act is fraught with difficulties. The term "Open video system" is not defined in the 1996 Act, except by implication.[1] Because of the potential confusion caused by this lack of clear definition, it may be helpful to look at the definition of "cable system" in § 602(7); conceiving of OVS as a cable system open to third-party programmers hints at resolving some of the conceptual and legislative ambiguities created by the absence of a statutory definition. However, it should be emphasized that this is not a legal conclusion, nor is this device supported by statutory interpretation. In fact, in contradistinction to cable systems, ambiguities and/or oversights in the drafting of § 651 leave open the possibility that common carriers offering video service via radio signals may argue that the section does not require that an OVS platform even be a wire system. 1996 Act, § 651(a)(3) (stating that common carriers providing video services via radio signals may elect to provide video programming via "open video systems"). In short, the failure to distinctly define the nature of OVS in the 1996 Act seems to suggest that an OVS may refer to the existence of some kind of facility capable of providing "cable service" (as defined in § 602(6) of the 1984 Cable Act), relatively "open" to third party programmers, rather than a type of programming technology.

The provisions permit "common carriers" [47 U.S.C. § 153(h)] to provide video services through :

- radio-based systems (e.g., wireless cable and direct broadcast satellite);
- on a common carrier basis, governed by Title II (this may indicate their current switched telephone lines which currently carry telephone and data services);
- as a cable operator governed by Title VI of the 1934 Communications Act ; or
- on an "open video system." 1996 Act § 651(a) (1996).

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[1] This is in contrast to the Cable Act's definition of "cable system" [47 U.S.C. § 522(7)], which is well in excess of 150 words and contains four subsections.

Any common carrier providing video services through any of a number of methods may elect to have that method regulated as an "open video system." Section 651(b) of the 1996 Act states that a local exchange carrier (as opposed to a "common carrier") operating a cable or open video system cannot be required by Title II to provide access pursuant to that title. Instead, it can limit access to itself pursuant to Title VI, or it can provide limited open access pursuant to § 653.

Section 653 of the 1996 Act describes the regulatory requirements that OVS operators (as distinct from entities transmitting via an OVS) must meet in order to receive certification as such from the Commission. An OVS operator many not discriminate among video programming providers with regard to carriage on its system, and can impose terms, rates and conditions of carriage that are "not unjustly or unreasonably discriminatory." 1996 Act § 653(b)(1)(A). The OVS operator may not program more than one third of its system if demand exceeds the capacity of the system. Id. at § 653(b)(1)(B). FCC rules on network nonduplication and sports exclusivity are extended to open video systems, Id. at § 653(b)(1)(D) and OVS operators must comply with various guidelines regulating how consumers can access various services. Id. at § 653(b)(1)(E). Nonetheless, the OVS operator generally has significant leeway to negotiate with programmers on "mutually agreeable terms and conditions . . . to allow consumer access to [those programmers'] signals on any level or screen of any gateway, menu, or other program guide..." Id. at 653(b)(2). OVS systems generally are not required to comply with the terms of Title VI governing cable operators (including the federal requirement to obtain a cable franchise), but must carry public, educational, and governmental ("PEG") access signals, public television and broadcast stations under terms and conditions similar to those under which PEG centers on cable operate. OVS operators may be required to pay franchise authorities "fees in lieu of ... franchise fees." Id. at § 653(c).

The Alliance for Community Media and associated groups are interested in assuring that OVS be implemented in a way that is protective of the public interest, particularly with regard to protecting the interests of individuals, charities and non-profit organizations that hope to continue to participate in PEG access programming on OVS systems.

Our concerns are:

1. **The Commission cannot allow cable operators to transform themselves into OVS platform operators**, although their programming can be carried on OVS operators' systems. While the cable industry may argue that the law gives them this option, the conference report makes clear that the privilege is to be extended only to local exchange carriers. To allow otherwise is inconsistent with the conference committee report and the fundamental assumptions underlying §§ 302 and 303. If cable operators were to abandon their local franchises, they would lose all authority to be in the public rights-of-way. Moreover, cable operators cannot circumvent the public interest requirements that currently protect subscribers to cable systems by a simple change of nomenclature.

2. **§ 653(c)(2) mandates that the FCC must regulate PEG on OVS so that it as nearly as possible replicates the PEG requirements imposed on each cable operator in each franchising jurisdiction where OVS operates, and subject to the same conditions under which PEG operates on cable systems.**

a. PEG is the result of a negotiated agreement between a cable operator and a city, which is often based on a "needs assessment" study conducted by a city or other franchise authority, either as an initial matter or at renewal. How are negotiated outcomes to be converted to a regulatory paradigm effectively so as to take account a city's good faith assessment of its telecommunications needs?

We submit that the only way is to require the OVS operator to match the PEG obligation of each cable operator in the franchise areas where the OVS operator provides service. The Commission must allow local communities to play a substantial role in determining the circumstances in which an OVS operator will be required to provide PEG access.

b. Can or should OVS and cable systems "share" a PEG center signal? In cases where the center is under the management and control of the cable operator, how can these centers be turned into independent entities, or can other cost-sharing arrangements be devised that will create an equitable burden between the cable and OVS platforms? In cases where the cable system manages the PEG channel, will the PEG and OVS platform now jointly manage the PEG access center?

When a cable operator and an OVS operator "share" a PEG center, both must contribute equitably to its upkeep, management, and expansion.

c. In cases where there is no cable PEG, can OVS PEG be mandated/requested/ otherwise acquired? What would be a franchise authority's role in such a process?

Commission regulation must permit communities to open new PEG access centers on OVS systems when communities determine that such access is necessary.

d. If an OVS platform serves areas outside the geographic limit of one franchise area, can the Commission mandate that PEG signals be targeted within a franchise zone?

We submit that the answer is Yes.

In areas where a jurisdiction with PEG is contiguous to a jurisdiction without PEG, can the Commission mandate that the PEG access signal is to serve the unserved region as well?

Again, we submit that the answer is Yes. The Commission must ensure that PEG access remain distinctly local access. PEG access centers should be available to all subscribers within a franchising authority's jurisdiction. The provision of PEG access signals to neighboring jurisdictions without PEG access should not preclude those jurisdictions from having their own PEG access centers, subject to the determination of local needs.

g. In OVS platforms serving more than one region, should the platform provider or the Commission be empowered to only provide access to a limited number of PEG access centers?

We submit that the answer is no. Platform providers are technologically capable of configuring signals to match franchise authority boundaries, and should be required to configure a PEG access feed to those boundaries. To offer access any less than the cable operator does is inconsistent with the spirit and the letter of the statute.

3. At what level/place/menu/navigation point will PEG be carried?

The Commission must ensure that directions and access to PEG center signals are not hidden in a sub-sub-menu where no-one knows of its existence. Ideally, PEG should be in the "shared channel" basic package of all OVS subscribers.

We look forward to working with the Commission on these important issues as they continue to be considered by the Commissioners and staff.

DECLARATION OF DALE N. HATFIELD

1. I, Dale N. Hatfield, declare as follows:

2. My name is Dale N. Hatfield. I am over the age of twenty-one and fully competent to make this Declaration. The statements contained in this Declaration are within my personal knowledge or opinion, and each is true and correct.

3. I am the chief executive officer of Hatfield Associates, Inc., a consulting firm specializing in engineering and economic studies, market research, policy and regulation, and strategic planning in telecommunications. I have been involved in the telecommunications industry in the United States for more than thirty years. My experience and training range from acting as an advisor in the Executive Office of the President of the United States to serving as Chief of the Office of Plans and Policy of the Federal Communications Commission ("FCC") to serving as Acting Assistant Secretary of Commerce for Communications and Information. I have also been involved in the development of advanced education programs and courses in the telecommunications field in conjunction with major universities, including the University College at the University of Denver, the University of Colorado at Boulder, and Pace University in White Plains, N.Y. I am also a Senior Fellow of Northwestern University's Annenberg Washington Program in Telecommunications Policy Studies in Washington, D.C. I have testified before Congress and state regulatory agencies on a number of occasions, and have participated in a large number of FCC and state regulatory proceedings. I have an undergraduate degree in electrical engineering from Case Institute of Technology and a master's degree in industrial management from Purdue University.

4. Through my education, training, and experience, I have gained an appreciation and understanding of the telecommunications industry in the United States, and in the evolution and development of advanced forms of local networks being deployed by the local exchange carriers and cable television companies for the delivery of video services to the home. More specifically, I am familiar with the broadband networks that are being considered or deployed for the provision of Video Dialtone ("VDT") services. I am also familiar with the VDT "214 applications" and the relevant tariff filings that have been submitted to the FCC by various RBOCs for the provision of VDT services.

5. On May 26, 1995, I received a letter from Jeffrey Hops, Director of Government Relations of the Alliance for Community Media ("Alliance"). In the letter, Mr. Hops stated that the Alliance had been informed that lobbyists from one or more of the Regional Bell Operating Companies ("RBOCs") had asked for a change in the language of S. 652, the "Telecommunications Competition and Deregulation Act of 1995," as it emerged from the Senate Commerce Committee markup. The letter went on to state that the RBOC representatives had asked the Senate to consider an amendment to the Committee Report, to mandate that so-called "incremental-cost based rates" be offered to only a small fraction of the public, educational, and governmental ("PEG") access centers in a VDT operator's region, and to feed these centers' programming to all their service area customers.

6. Mr. Hops' letter noted that the RBOCs in question have stated that it is technologically unfeasible and/or financially prohibitive for them to set up a VDT service region on any smaller scale than a state-wide or region-wide basis, potentially encompassing hundreds of franchise areas. According to the letter, these RBOCs argue that since they will be delivering hundreds of channels simultaneously to each home, the requirement to provide incremental-cost based access to each PEG center in the service area will mean that PEG channels could potentially occupy most of their capacity. The letter went on to state that, when the Alliance noted that the PEG centers were only seeking access in a geographic region identical to the franchise area (rather than the whole system), the RBOCs restated their technological and pecuniary objections to delivering signals to customers on anything less than a state-by-state or regional basis.

7. Mr. Hops' letter on behalf of the Alliance stated that, while they believed the objections of the RBOCs to be without merit, they lacked the technological expertise to adequately assess the validity of the claims. The letter closed by asking me to prepare an analysis of the claims on their behalf. This declaration presents the results of my analysis. It was prepared on a pro bono basis, i.e., without compensation -- direct or indirect.

8. In assessing the RBOC claims, I would first note that 214/tariff applications that have been filed with the FCC for VDT services encompass service areas significantly less than one state and typically involve a suburb or portion of a metropolitan area. Thus I would conclude that the distribution of PEG channels on less than a state-wide basis is clearly feasible from a technical standpoint.

9. More fundamentally, I would note that the Hybrid Fiber/Coax ("HFC"), fiber-to-the-curb ("FTTC"), and fiber-to-the-home ("FTTH") systems that are being evaluated and/or deployed by the RBOCs involve the use of high capacity fiber optic lines from a hub to a node located near or at the customer's premises. Depending upon the aggressiveness of the systems in terms of fiber deployment, each of the nodes may serve from several hundred homes, to a handful of subscribers (in the case of FTTC), to a single customer in the case of FTTH. The hub itself may be located at a telephone company Central Office or in a Controlled Environment Vault (CEV) located nearer the customer. The point is that these nodes (which contain the electronic circuitry to, among other things, change the optical signal on the fiber to an electrical signal on coax/copper facilities) serve geographic areas which are much smaller than existing franchise areas and the areas served by a single telephone company Central Office or wire center -- i.e., to areas encompassing a few hundred homes or less. Thus, it is a straight-forward process to insert local PEG channels onto only those hub-to-node fiber links that, in the aggregate, approximate the existing coverage area of the PEG access center(s). Thus an individual PEG channel need not consume capacity outside the franchise area.

10. I should note that the local exchange carriers and cable television companies are taking advantage of these architectures to deliver (or proposing to deliver) different programming and advertising content to different areas within a franchise area or region. Because each small area (or even an individual apartment complex) is served by a single node with separate connections to the hub, the collection of channels delivered can be varied. For example, the collection of channels

delivered to a node serving a singles complex can be different that those delivered to a retirement complex. This permits the delivery of not only more tailored programming, but more tailored advertising as well. It permits, say, a local hardware store, pizza parlor or car dealership to purchase ads that are inserted in programs going to only those residential areas containing potential customers. This hybrid fiber-coax network architecture is illustrated in Attachment 1 which is drawn from a recent Bell Atlantic filing at the FCC. It clearly shows how signals from different sources (including local off-the-air signals) are picked up at the broadband network interface (or hub as I have called it) and distributed to remote optical nodes (or simply nodes) which serve a group of houses. Clearly, one of the signals that could be distributed locally (and only locally) would be the area's PEG channels.

11. Further evidence that the distribution of programs to individual franchise or even smaller areas is produced by Bell Atlantic's well publicized Video Dialtone Service proposed for Dover Township, New Jersey. It is employing the FTTC architecture and is capable of delivering 384 channels of video capacity. In its tariff filing dated January 27, 1994, Bell Atlantic proposes to provide both "Broadcast Service Channels" and "Narrowcast Service Channels" in the Dover Township service area. In the tariff filing (page 1-4), Bell Atlantic states that the service area is segmented into cells, each of which serves approximately 290 end-user subscribers. The broadcast service channel provides for the transport of one or more video signal to all end-user subscribers in all cells within the service area. Narrowcast service allows the programmer-customer (the vendor providing the video programming) to only serve those cells that he or she selects.

12. Two conclusions are immediately apparent from the descriptions of the RBOC network architectures/services described in paragraphs 8 through 11 above. First, the overall service areas being proposed (and implemented) are much less than state-wide. In the case of Bell Atlantic's service in New Jersey, its tariff encompasses a few Central Office areas within a single township. Second, the architecture being proposed and deployed allows different signals to be selectively delivered to areas (or cells as Bell Atlantic calls them) encompassing only a few hundred homes. In the case of Bell Atlantic, the areas encompass under 300 homes. Thus, if the PEG franchise area encompassed a larger area, say Dover Township, it could be carried just in that area, not the whole state. On the other hand, if it covered less than the entire service area (i.e., the Dover Township) it could be carried in just those cells that approximate the franchise area.

13. Finally, I would note that the ultimate vision of the telecommunications platform of the future is a switched, interactive, broadband network. In such an environment, individual end-user customers will be able to, in effect, "dial up" channels on an on-demand basis and only the channels currently being viewed would have to be delivered to the individual residence. In such a world, capacity becomes virtually unlimited and the ability to carry PEG channels becomes a non-issue. In fact, in such a world, with the Intelligent Network features and functions that are being built into the system today, the network could, based upon the location of the caller, automatically route the call to the local PEG channel.

14. Based upon the above, I conclude that any RBOC objections to delivering PEG (or other signals) to customers on anything less than a state-by-state basis is without merit.

I declare under penalty of perjury that the above is true and correct. Signed the 2nd day of June, 1995, in Boulder, Colorado.

Dale N. Hatfield