

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 11 1996

In the Matter of)

Implementation of Section 302 of)
the Telecommunications Act of 1996)

CS Docket No. 96-46

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**REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE
ALLIANCE FOR COMMUNICATIONS DEMOCRACY, CONSUMER PROJECT
ON TECHNOLOGY, PEOPLE FOR THE AMERICAN WAY, THE CONSUMER
FEDERATION OF AMERICA, CENTER FOR MEDIA EDUCATION, AND THE
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST**

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The Alliance for Community Media, the Alliance for Communications Democracy, The Consumer Federation of America, Consumer Project on Technology, People for the American Way, the Center for Media Education, and Office of Communication of the United Church of Christ (“the Coalition”) respectfully submit the following reply comments in response to the Report and Order and Notice of Proposed Rulemaking, FCC 96-99, in the above-captioned proceeding, released March 11, 1996 (“NPRM”). The Coalition is concerned that some commenters’ misinterpretations of the clear meaning of the OVS statute will reduce the availability of information, lower the quality of public discourse, hurt consumers, impede competition, and discourage potential unaffiliated programmers from entering the OVS market.

I. INTRODUCTION

In creating OVS as one of four methods by which telephone companies are permitted to enter the video programming business, Congress mandated an explicit tradeoff. In exchange for reducing the regulatory requirements from the standard set by Title VI of the Communications Act of 1934¹, Congress required operators of “open video systems” to allocate the majority of their channel capacity to programming not of the platform operator’s choosing, allocated on a non-discriminatory basis.² This alternative to cable was intended by Congress to

¹ 47 U.S.C. § 521 et seq.

² Id. § 653(c)(1)(a).

overcome some of the ongoing problems the Commission has experienced with “leased access”³ and video dialtone⁴ in providing for meaningful unaffiliated third-party access.

A substantial number of the parties commenting in this proceeding are in agreement that the Commission must issue meaningful regulations to ensure that access to the OVS platform is offered on a non-discriminatory basis, and that rates, terms and conditions are just and reasonable.⁵ This must include, at minimum: an access rate regulatory structure which allows a wide range of unaffiliated programmers to have access to the platform, including reduced rates for non-profit programmers;⁶ nondiscriminatory channel allocation and channel-sharing (including allocation of analog and digital channels);⁷ and strict cost-allocation and separate-subsidiary requirements.⁸ The Commission should not promulgate regulations which compromise the basic principle of non-discriminatory access to the platform.

Congress did not intend OVS to be a device to allow telephone companies and cable operators to evade the cable regulatory regime instituted by the 1984 Cable Act. Had that been the case, Congress simply could have repealed the Cable Act provisions altogether, instead of amending it, a task on which both Houses of Congress

³ See Leased Access Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Dk. 92-266, CS Dk. 96-60, FCC 96-122 (Released March 29, 1996) at ¶ 7 (“...[T]he highest implicit fee formula is likely to overcompensate cable operators and does not sufficiently promote the goals underlying the leased access provisions.”).

⁴ 47 C.F.R. §§ 63.54-63.58; See also Telephone Company-Cable Television Cross-Ownership Rules, CC Docket No. 87-266, Fourth Further Notice of Proposed Rulemaking, FCC 95-20, released January 20, 1995; See also Comments of Rainbow Programming Holdings, Inc. (“Rainbow”), passim (unaffiliated programming packager denied access by various entities under video dialtone rules).

⁵ 47 U.S.C. §653(b)(1)(A).

⁶ See Comments of the Alliance for Community Media et al. (“Alliance Comments” or “Coalition Comments”) at 20-22; see also, e.g., Comments of Time Warner Cable (“Time Warner”) at 18-19; Comments of American Cable Entertainment, et al. (“ACE”) at 21; Comments and Petition for Reconsideration of the National Cable Television Association, Inc. (“NCTA”) at 17-20; Comments of Home Box Office (“HBO”) at 19-21; Comments of the Motion Picture Association of America, Inc. (“MPAA”) at 8-9; Comments of the National League of Cities, et al. (“NLC”) at 8-9.

⁷ See, e.g., Comments of Continental Cablevision (“Continental”) at 12; Joint Comments of Cablevision Systems Corporation and the California Cable Television Association (“Cablevision”) at 5-17; Time Warner at 18-19; ACE at 8-20; NCTA at 4-17; Comments of Tele-Communications, Inc. (“TCI”) at 7-15; Comments of Group W Satellite Communications (“Group W”), passim; Rainbow at 10-25; MPAA at 4-8; NLC at 13-28.

⁸ See, e.g., Continental at 11; Comments of Cox Communications, Inc. (“Cox”) at 5-9; Cablevision at 25-31; Time Warner at 5-16; ACE at 20; NCTA at 20-27; TCI at 3-7, 15-17; Rainbow at 25-27; Comments of Comcast Cable Communications, Inc., et al. (“Comcast”) at 7-9.

spent considerable time and energy. Consequently, the Commission is required to implement Congress' intent that OVS be a distinctly different type of service than cable television, not just "cable-lite."

In regulating this new service, the Commission must ensure that two-thirds of the OVS platform is able to be actively utilized by entities completely unaffiliated with the OVS operator. The "open" of open video systems means "open." The OVS platform must provide meaningful and real access for individuals and organizations not of the OVS operators' choosing or preference, both profit and non-profit, that wish to transmit programming on the platform. A platform that is open in name only is not enough -- the platform must provide and must guarantee nondiscriminatory access to all parties according to rates, terms and conditions that are uniform, just and reasonable -- and the OVS platform operator must be able to demonstrate in the certification process that such is the case. Procedural safeguards and some manner of rate regulation will certainly be necessary to guarantee that access by unaffiliated programmers, particularly educational, public, governmental and non-profit programmers, is available and affordable. The Coalition believes that the draft regulations presented by the National League of Cities, et al. generally take a sensible approach in guaranteeing non-discriminatory use of the OVS platform by unaffiliated programmers.

This proceeding will affect much more than the flow of dollars from OVS subscribers to programming packagers to OVS operators -- it will determine whether or not advanced telecommunications systems permit the free flow of information. It will affect not only choices in the marketplace, but political choices, levels of civic involvement, and participation in society. If the electronic media do not permit a diversity of speakers to share the benefits of expression, would-be speakers will be relegated to other, more primitive means of self-expression -- or no means at all.

II. THE ANTI-DISCRIMINATION PROVISION REQUIRES THE COMMISSION TO ENSURE APPROPRIATE ALLOCATION OF ANALOG AND DIGITAL CAPACITY ON OVS PLATFORMS

The Commission recognizes,⁹ and the Coalition firmly believes, that capacity allocation on an open video system cannot satisfy the principle of non-discrimination unless the OVS operator is required to take into account

⁹ NPRM at ¶¶ 12 and 17.

the distinction between the analog and digital portions of that system when making allocation decisions. Therefore, we disagree with the Bell Atlantic Commenters that the analog/digital allocation decisions can, as a matter of law, be left entirely to the operators.

First, the Commission cannot properly view the available capacity on an open video system in the certification process as on set of “channels” or “bandwidth.” Instead, to ensure that unaffiliated, and particularly public service-oriented programmers have “access” in the true sense of that term, the Commission must view each system as divided between analog channels and digital bandwidth. Therefore, for example, if an OVS operator proposes to establish a system that can accommodate 90 analog channels and 180 Mbps of digital bandwidth, the Commission should ensure that the OVS operator designates no more than 30 analog channels and 60 Mbps of the digital bandwidth to its affiliated programmers.

The purpose of the requirement imposed by Congress on OVS operators to designate a significant portion of their systems to unaffiliated programmers will be rendered meaningless if OVS operators can reserve, for example, all of the analog channel space for affiliated programmers and claim that unaffiliated participants must utilize the digital bandwidth. In the short term, perhaps for the next two decades, the primary mode of video programming delivery and receipt will be in analog format. This is due to the fact that both providers of programming and consumers (i.e. television viewers) do not, and for the foreseeable future will not, have the necessary equipment to provide and receive programming digitally. In the case of start-up commercial programming ventures and PEG programmers, most of which already operate on shoestring budgets, the equipment needed to digitize programming will be out of their reach. And, until a majority of consumers have the capability to receive digital signals, advertiser-supported commercial programmers will choose analog formats as well.

Digital programming certainly seems to be the wave of the future. There probably will come a time when most programmers will prefer digital bandwidth rather than analog channel allocations. However, unless the Commission requires OVS operators to keep the two “areas” separate for allocation purposes in the short term, the purpose of Congress to provide competition in the video marketplace through significantly increased and meaningful access by unaffiliated programmers will never be realized.

III. PEG ACCESS FOR SCHOOLS, UNIVERSITIES, LOCAL GOVERNMENTS, NON-PROFIT GROUPS, AND INDIVIDUALS MUST BE EQUIVALENT TO ACCESS PROVIDED BY CABLE OPERATORS ON CABLE SYSTEMS.

Local governments, public utilities commissions, cable commissions, and public interest groups have filed to protect the rights of schools, local governments, libraries, non-profit organizations and individuals to have meaningful access to advanced telecommunications platforms.¹⁰ This desire to protect the First Amendment rights of the public to engage in civic discourse and artistic expression transcends industry commenters' battles for strategic dominance and special treatment, for preferential elimination of market barriers in some cases and preferential erection of those barriers in others. But the right of the public to speak and to receive information will be hamstrung if OVS platform operators are required only to provide PEG channel capacity, and not also equipment, services and facilities under §653(c)(1)(B) of the Act.

A. The Act Requires OVS Operators to Provide Capacity, Equipment, Services and Facilities Whenever A Cable Operator Does So.

In previous Coalition comments we pointed out that OVS operators are required to provide capacity, equipment, services and facilities pursuant to §653(c)(1)(B) of the 1996 Act.¹¹ Cable industry participants in this proceeding have also acknowledged that equivalent PEG access obligations imposed on OVS platform operators will help achieve regulatory parity between cable and OVS platforms in accordance with §653(c)(1)(B) of the 1996 Act.¹² The Coalition disagrees strongly with Bell Atlantic et al. and Nynex¹³ with regard to how § 611 of the 1984

¹⁰ See Comments of the Division of the Ratepayer Advocate, State of New Jersey at 2 et seq.; NLC, passim; Comments of the Greater Metro Cable Consortium, passim; Comments of the City of Indianapolis Cable Communications Agency, passim; Comments of the New York City Department of Information Technology and Telecommunications at 6-8; Comments of the State of New Jersey Board of Public Utilities' Office of Cable Television at 10-15; Comments of the Below-Named Political Subdivisions of the State of Minnesota (North Suburban Cable Communications Commission et al.) at 5-13; Comments of City of Seattle, passim; Comments of the City and County of Denver, Colorado, passim; Comments of the Pennsylvania Public Utility Commission at 5; Comments of the State of New York Department of Public Service at 9-10; Comments of the City of Arvada (CO), passim; Comments of the City of Mountain View (CA) at 2; Comments of the Cities of Dallas, TX, Denton, TX, Houston TX, et al. at 7-10; and Comments of the City of Olathe, KS at 4-14.

¹¹ Comments of the Alliance for Community Media, et al. at 7-13.

Cable Act applies to OVS platforms. Their interpretation defies the plain language of the statute, as well as Congress' strong desire to create regulatory parity between cable operators and OVS providers with respect to PEG access obligations. Bell Atlantic and Nynex argue that OVS operators are only required to provide PEG capacity (excluding services, equipment and facilities), notwithstanding that §653 specifically requires that the Commission "impose obligations that are no greater or lesser than the obligations contained in the provisions described in [Section 611]."

Contrary to the claims of Bell Atlantic and Nynex, §611(a) authorizes a franchise authority to "establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational or governmental use..." (emphasis added). Thus, §611(a) permits requirements for services, facilities and equipment. Moreover, § 611(c) explicitly permits franchise authorities to enforce terms in a franchise agreement, not only for capacity, but for "services, facilities, and equipment."¹⁴

In an insupportable bootstrap argument, NYNEX argues that Congress' failure to incorporate §624 in §653 supports its view that a franchise authority is prohibited from requiring services facilities or equipment of an OVS operator in any capacity.¹⁵ This purported failure cannot reasonably be construed to eliminate the authorization of §611 with regard to PEG channel equipment, facilities, and services, as it would undermine the maxim of statutory interpretation that statutes are not to be interpreted in such a way as to render its provisions meaningless. The interpretation suggested by the Nynex and Bell Atlantic comments would give franchise authorities the power to enforce provisions of a contract that they had no authority to include in the first place.

In fact §611(c), permitting enforcement of facilities, services and equipment agreements, does not need §624 for its underlying authority; more than adequate authority to impose such obligations is found within §611

¹²See Comments and Petition for Reconsideration of the National Cable Television Association, Inc. at 33-34; Comments of the Cable Telecommunications Association at 3; Comments of Tele-Communications, Inc. at 17-18; Comments of American Cable Entertainment et al. at 25; Comments of Continental Cablevision, Inc. at 6-7; Joint Comments of Cablevision Systems Corporation and the California Cable Television Association at 21-22; Comments of Time-Warner Cable at 25.

¹³ Comments of Bell Atlantic et al. ("Bell Atlantic Comments") at 27; Comments of Nynex Corp. ("Nynex Comments") at 17, n. 42.

¹⁴ 47 U.S.C. § 531(c) states: "A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b)."

¹⁵ Nynex Comments at 17, n.42

itself. If Congress had desired to require only capacity from OVS operators, it would have said so. As before, the Coalition joins with most of the cable industry's comments in insisting that OVS operators meet their obligations pursuant to §611 is to match the terms of carriage required of an incumbent cable operator by a local franchise authority.¹⁶

B. The Statute Requires Platform Operators to Serve Each Franchise Area Separately.

1. PEG Access is Driven by Concerns for Localism.

The PEG access provisions of the Cable Act result from Congress' resolve that our nation's telecommunications policy should promote the production and distribution of local programming produced by members of the community for the community's benefit.¹⁷ As the House Commerce Committee stated in its report on the 1984 Cable Act:

Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.¹⁸

PEG access helps fulfill the Commission's long-standing public interest in promoting localism by providing an open forum for local programming.¹⁹

Comments by Bell Atlantic²⁰ and US West²¹ suggesting that a limited number of PEG channels be transmitted throughout a regional OVS platform would consequently be contrary to Congressional intent in applying

¹⁶ See n. 12, supra.

¹⁷ See H.Rep. No. 934, 98th Cong., 2d Sess. at 30-37 (discussing policy and legal rationale for PEG access).

¹⁸ Id. at 30.

¹⁹ See Id.; see also Section 307(b) of the Communications Act of 1934 (47 U.S.C. §307), requiring the Commission to provide fair, efficient and equitable distribution of radio service among "the several states and communities." See also Options Papers Prepared by the Staff for Use by the Subcommittee on Communications, H.Comm.Print 95-13, 95th Cong., 1st Sess. (1977).

²⁰ Bell Atlantic Comments at 27; not unsurprisingly, Bell Atlantic suggests that OVS operators be given "the flexibility based on technical considerations and market conditions" not to comply with a statutory imperative.

²¹ U S West, Inc. Comments on Open Video Systems at 17-19.

§611 to OVS operators. That section explicitly and unambiguously states that PEG channels are to be administered at the franchise authority level for the purposes of promoting local and community communications.²² Contrary to the claims of the telephone industry commenters in this proceeding, nothing in Section 302 of the Act prohibits the Commission from requiring OVS operators to configure their systems to coincide with the geographic boundaries of these authorities, and from requiring that OVS providers negotiate with franchise authorities for the implementation of PEG channel administration. Cable industry commenters indicate that they are already engaged in this type of regional distribution system with regard to systems encompassing multiple ADI's;²³ there is no reason to require any less from an OVS operator.

2. System Configuration Will be Required to Comply with Other Broadcast Exclusivity Rules.

The broadcasting industry shares the Coalition's concern that OVS systems be built to allow certain programs to be delivered to some homes, other programs to other homes in other areas of the OVS platform service region.²⁴ Broadcasting industry commenters have stressed the importance of building and administering systems to ensure that programming complies with syndication and exclusivity rules; they can do no less for PEG access channels. Most importantly, OVS operators should not be allowed to evade configuration requirements with regard to PEG access while being required to comply with similar requirements for the benefit of broadcasters. If the Commission is going to require OVS operators to configure signals for one, it must also compel it for the other.

²² See *Id.*; see also n. 19 *supra* and accompanying text. US West recommends that OVS operators be given the same authority as cable operators to come to individual agreements with local franchise authorities. The Coalition agrees with and supports the NLC "match or negotiate" proposal (NLC at 31-44). We have no objection to negotiations between a franchise authority and an OVS operator for alternative terms of PEG carriage, so long as the Commission preserves the right of the franchise authority to require that the OVS provider accept the terms of the incumbent cable operator's PEG access commitment as a default in case of inconclusive or bad-faith negotiations.

²³ See n. 12 *supra*.

²⁴ See, e.g., Comments of the National Association of Broadcasters ("NAB Comments") at 11, 14; Comments of Capital Cities/ABC, Inc. at 10-12; Comments of the Motion Picture Association of America, Inc. at 12-13; Comments of the Association of Local Television Stations, Inc. at 11-12; Comments of the National Basketball Association et al. at 2; Comments of CBS, Inc. at 4-5; Comments of National Broadcasting Company, Inc. at 15-16.

C. **OVS Operators and Cable Operators Should be Required to Combine Services When Appropriate.**

The Coalition does not believe that the cable operator participants in this filing have made a clear showing of why interconnecting cable PEG with OVS PEG would be contrary to the public interest.²⁵ In most cases, failure to interconnect will lead to wasteful, inefficient and duplicative provision of PEG access programming and services -- particularly with regard to programming provided by governmental access centers, which generally feature public meetings and other official functions. The Coalition sees the possibility of a “win-win” situation for all -- the cable operator, the OVS operator, and the franchise authority -- if the cable operator and the OVS operator would work together to jointly administer the provision of these modest public service requirements. A trilateral agreement could produce lower costs for both the cable operator and the OVS operator, and increase the amount of carriage services, facilities and equipment provided to the franchise authorities’ cable and OVS subscribers.

IV. **THE COMMISSION SHOULD ESTABLISH A MARKET-BASED DISPUTE RESOLUTION MECHANISM THAT PLACES THE BURDEN OF PROOF ON THE OVS OPERATOR.**

In its Comments at pp. 18-19, the Coalition urged the Commission to craft a dispute resolution procedure that is simple enough so that open video systems remain an attractive video programming framework, and at the same time, accessible enough so that complainants can obtain redress. The Coalition believes that the market-based presumption it endorsed in its initial comments appropriately balances the goals of “openness” and “deregulation” and proposes that the same market-based tests be part of the Commission’s dispute resolution mechanism.

None of the dispute resolution proposals made by the local exchange carriers commenting in this proceeding would yield a fair and equitable dispute resolution mechanism.²⁶ Particularly, the Bell Atlantic

²⁵ See n. 12, supra.

²⁶The United States Telephone Association (USTA) argues that the Commission need not promulgate dispute resolution rules, but should resolve any disputes on what we must assume is an ad hoc case-by-case basis. USTA also suggests that the Commission apply a simplified version of its program access adjudication procedures. See Comments of USTA, at 11, 12. The Bell Atlantic commenters and the Nynex Corporation propose that the Commission extend a “presumption of lawfulness” to OVS operators and place both the burden of proceeding and the burden of proof on the complainant. See Bell Atlantic, at 33; Comments of Nynex Corp., at 29.

commenters argue that the burden of proof should be placed on the complainant and that the complainant, as part of establishing a prima facie case, should have to demonstrate that the operator's actions were "commercially unreasonable" and "intentionally discriminatory."²⁷ This proposal would make it almost impossible for the Commission to identify and sanction operators with discriminatory rates and terms. Bell Atlantic would essentially have the Commission stack the deck in the system operator's favor: figuratively dealing 51 cards from the bottom of the deck to the OVS operator and dealing the deuce of spades to the programmer.

Contrary to the fears of some commenters, the Coalition does not urge the Commission to "address every potential controversy or theoretical dispute that could arise."²⁸ However, it would be unwise simply to trust that OVS operators will not discriminate against unaffiliated programmers. Specifically, the Coalition proposes that the Commission (a) establish dispute resolution rules that are in harmony with market-based presumptions, and (b) place the burden of proof on the OVS operator.

The same factors that should be used to gauge the reasonableness of an OVS operators' rates can be used to make an initial determination of whether the OVS operator has discriminated against the complainant. As proposed in our original comments, the presence of unaffiliated programmers on twenty-five percent of the system's capacity coupled with access rates that are within 10 percent of the incremental cost of operating the channel is an appropriate benchmark.²⁹ The Coalition also believes that a meaningful alternative dispute resolution mechanism would be consistent with the intent of Congress so long as it occurred during the 180-day period mandated by statute.³⁰

In addition, the 1996 Act imposes an affirmative obligation on the OVS operator to provide non-discriminatory access; placing the burden of showing discrimination on the aggrieved programmer would turn this affirmative obligation on its head. The burden of showing non-discrimination should always rest on the OVS operator--the party who controls the information that would expose its discriminatory practices or prove its

²⁷Comments of Bell Atlantic, Proposed Open Video System Rules: Burden of proof of discrimination disputes, Appendix, p. 8.

²⁸Comments of USTA, at 11.

²⁹See Coalition Comments, p. 17.

³⁰Another way to expedite and simplify the dispute resolution process would be to require that the complainant post a bond, be granted carriage, and then the Commission resolve the dispute within 180 days. This approach has the advantage of both ensuring third-party access as well as guaranteeing that the OVS operator will be paid.

compliance with the non-discrimination provisions of the Act. Therefore, the Coalition urges the Commission to adopt dispute resolution procedures that will pay more than “lip service” to the non-discrimination, open competition promises of the 1996 Act.

V. THE COMMISSION SHOULD ADOPT REGULATIONS THAT PROHIBIT THE BUNDLING OF NON-COMPETITIVE SERVICES WITH COMPETITIVE SERVICES.

Several commenters contend that the market for telephone and video services should determine what will best serve consumer needs and that the Commission should forbear from establishing regulations regarding bundled services.³¹ They also argue that the Commission should give LECs the flexibility to offer services “in the manner they conclude will best secure customers.”³² Bell Atlantic, at p. 29; see also NYNEX, at p. 28. As the Commission well knows, LECs have an enormous incentive to use their monopoly market power in local exchange services and to tie competitive and non-competitive services in an attempt to monopolize the video market.³³ Such a tie-in would frustrate the goal of free and open competition. Therefore, the Commission should prohibit the bundling of services that are not subject to a competitive market. In addition, the Commission should establish inbound telemarketing rules that require LECs to disclose all available competitive choices for video programming when customer request telephone service.

The benefits produced by the bundling of services in a competitive market should not overshadow the reality that a competitive market does not yet exist and that LECs can easily use such packages in an anti-competitive manner. For example, bundling non-competitive services increases the likelihood that LECs will subsidize the lower price of the bundled service package with their telephone rates.³⁴ LECs could even use

³¹See Comments of Bell Atlantic et al. (“Bell Atlantic Commenters” or “Bell Atlantic”), at 29; see also Comments of NYNEX Corporation (“NYNEX”), at 28.

³²See NYNEX at 28.

³³See Comments of Alliance for Community Media et al. (“Coalition Comments”), at 1.A. Accord Comments of AT&T Corp (“AT&T”), at p. 3; Comments of Time Warner Cable (“Time Warner”), p. 17; Comments of Comcast Cable Communications (“Comcast”), p. 9; Comments of National Cable Television Association (“NCTA”), p. 24.

³⁴For example, AT&T used the Commission’s Computer Inquiry proceeding to demonstrate a dominant operator’s incentive to cross-subsidize when bundling, as an anti-competitive marketing strategy. See AT&T, at 3.

interconnection negotiations to frustrate the market entry of a competing service provider.³⁵ Therefore, requiring all bundled services to be subject to a competitive market will prevent LECs from using their local exchange monopoly to undercut the competitive market for video services.³⁶

The Bell Atlantic commenters and NYNEX corporation further argue that the 1996 Act's silence on the issue of joint marketing means that the Commission should not interfere with the market.³⁷ However, Congress did not intend for the Commission to forbear from establishing rules where LECs are likely to engage in discriminatory inbound marketing and to frustrate its ultimate goals.³⁸ Because of the LECs dominant position in their service area, the Coalition urges the Commission to require them to disclose all competing video programming providers when marketing their own video programming package.³⁹

³⁵Both Comcast and Cox Communications expressed the concern that they could be precluded by LECs from offering a telephone and video services package if the LECs withheld interconnection. See Comcast, at 9; see also Cox Communications, at 9.

³⁶One cable company, Cox Communications, also suggested that LECs should be required to meet the competitive market requirements of sections 251 and 252 before being permitted to jointly market OVS with local exchange service. See Comments of Cox Communications, at p. 9.

³⁷See Comments of Bell Atlantic et al. ("Bell Atlantic"), p. 30; see also NYNEX, at 29 (stating that the Commission should only take action if the need arises).

³⁸The Coalition believes that the Commission should define "inbound marketing" as "...when a company receives a consumer contact with regard to one service, and then uses that contact to market other services." See Time Warner, at 17.

³⁹NCTA also recognized the need for the Commission to establish and maintain in-bound telemarketing rules until local telephone service is subject to competition. See NCTA, p. 25.

VI. CONCLUSION

For the above stated reasons, the Commission should regulate OVS in such a way as to serve the public interest.

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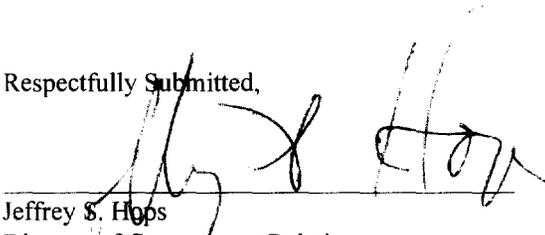
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