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Federal Communications Commission
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)
Implementation of Section 302) CS Docket No. 96-46
of the Telecommunications Act)
of 1996)
Open Video Systems)

**OPPOSITION AND COMMENTS OF UNITED STATES TELEPHONE ASSOCIATION
TO CERTAIN PETITIONS FOR RECONSIDERATION**

UNITED STATES TELEPHONE ASSOCIATION

By Its Counsel:

Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend

1401 H Street, N.W.
Suite 600
Washington, DC 20005
(202) 326-7247

July 15, 1996

Mary McDermott
029

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SUMMARY

USTA hereby opposes certain of the petitions for reconsideration, and comments on others, filed regarding open video systems ("OVS"). The Commission in this proceeding has sought to strike a reasonable balance that preserves the incentives needed to make OVS an attractive option for LECs and maintains safeguards to promote competition and protect consumers. The imposition of overly burdensome regulation, as urged in the reconsideration petitions of cable interests, cities and traditional interexchange carriers, would destroy this balance. The result would be that LECs will not choose to provide OVS and will seek alternative means of entering the video marketplace.

Petitions that would resurrect the video dialtone regime through the "back door" of burdensome regulation should be rejected. In particular, the imposition of cost allocation rules and prior review and approval of OVS operators' plans before certification are unnecessarily burdensome. Sufficient safeguards are in place for the Commission to ensure compliance with existing cost allocation rules. Elaborate cost studies and data requirements are also unnecessary and would serve only as a means to delay competition.

USTA supports the application of program access rules to video programming providers on open video systems. Parity of access to programming for OVS will be an important means of encouraging LECs to compete with incumbent cable operators. OVS operators should also be permitted to bundle their service offerings to customers. One-stop shopping is a major convenience and benefit for consumers.

The Commission should deny petitions that LECs be required to create separate subsidiaries for OVS operations. The Commission rightly decide not to impose the costs and burdens of such a requirement because Congress itself chose not to do so.

USTA believes that the Commission wisely chose not to mandate OVS operators to build so-called institutional networks ("INETS"). Local franchising authorities should be permitted to require provision of public, educational and government access ("PEG") channels over INET facilities only if the LEC decides to build an INET. The Commission properly decided that it should refrain from mandating reduced access rates for non-profit programmers. The Commission implemented Congress' intent by granting LECs flexibility in fulfilling their PEG obligations, and should not deviate from it.

In response to petitions regarding channel sharing, USTA believes that OVS operators should be entitled to rely on representations by a video programming provider that the OVS operators may place programming on shared channels. In USTA's view, the appropriate parties in the event of such a dispute are the video programming services and the video provider.

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**OPPOSITION AND COMMENTS OF UNITED STATES TELEPHONE ASSOCIATION
TO CERTAIN PETITIONS FOR RECONSIDERATION**

I. INTRODUCTION

The United States Telephone Association ("USTA"), through its counsel, hereby respectfully submits this Opposition to, and Comments on, certain of the Petitions for Reconsideration filed in the above-captioned proceeding.

USTA applauds the Commission for acting rapidly to implement the open video system ("OVS") provisions of the Telecommunications Act of 1996 (the "Telecom Act") in its Second Report and Order (the "Order").¹ Congress created an ambitious timetable in Section 653(b)(1) for the Commission to establish a new and innovative means of promoting competition in the video market. The Order is a substantial achievement in implementing the statutory framework. As a result, USTA believes that only slight modifications to the *Order*

¹ *Second Report and Order Implementing Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, adopted May 31, 1996 (the "Order").

are necessary to strengthen further its competitive framework,² and that most petitions for reconsideration should be denied.

In the *Order*, the Commission sought to strike a reasonable balance between preserving incentives needed to make open video systems an attractive option for LECs and maintaining safeguards to promote competition and protect consumers. The imposition of overly burdensome regulation, as urged in the reconsideration petitions of cable interests, cities and traditional interexchange carriers, would destroy this balance.³ The result would be to undermine and eliminate the open video system option as a means of promoting video competition. Congress' intent in crafting the statute to create the open video system framework, and thereby speed the arrival of new market entrants, would be thwarted by the excess regulation proposed in many of the petitions. Consumers would be denied choices and new services.

The Commission should reaffirm its recognition that a central objective of the Telecom Act is to encourage entry by common carriers into the video marketplace.⁴ As recognized by

² In particular, USTA supports the limited changes in the OVS framework proposed by the petitions for reconsideration of the Joint Parties, NYNEX and US West. The changes recommended in those petitions are consistent with the intent of the Telecom Act and would clarify, while continuing to support, the major policy determinations of the *Order*.

³ USTA notes that the submission of the National League of Cities *et al.* were filed after the requisite deadline for reconsideration petitions. No new arguments are advanced in that filing or its massive appendices, which USTA analyzed with some difficulty because of the time constraints imposed by their tardy submission. Accordingly, the Commission should give no weight to this submission

⁴ See Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 177 (Feb. 1, 1996) ("*Conference Report*").

the *Order*, LECs already possess a number of options in deciding how to enter the video market. Whether the open video system option ever fulfills its potential to jump start competition will be determined by how the Commission addresses the petitions for reconsideration of the *Order*.

II. THE COMMISSION SHOULD DISMISS ATTEMPTS TO FRUSTRATE COMPETITION BY FURTHER BURDENING OVS OPERATORS WITH UNNECESSARY REGULATION

Cable service operators and other opponents of LEC competition advance similar arguments to those previously rejected by the Commission in this proceeding to frustrate Congress' desire to promote competition in the video marketplace.⁵ The Commission in the *Order* properly dismissed such arguments as attempts to recreate the video dialtone regulatory quagmire.⁶ It should do so again here.

A. Imposing Cost Allocation Rules And Prior Review And Approval Of OVS Operators' Plans Before Certification Will Thwart Congress' Intent That Open Video Systems Be A Viable Option To Enter The Video Market

The Commission should again dismiss arguments that prior to commencement of the certification process, it must approve or disapprove a LEC's OVS service plan according to detailed filings incorporating revised cost allocation rules and non-discrimination

See, e.g., Petition of NCTA at pp. 3-4 (seeking to enlist the Commission to delay competition through the imposition of cost allocation rules before LECs may enter the video marketplace).

Order at ¶¶ 28-30.

requirements.⁷ The *Order* properly characterized such tactics as nothing more than seeking to turn the expedited certification process into a "back door" Section 214 requirement -- a vestige of the video dialtone regime.⁸

USTA agrees with the Commission that compliance with the Part 64 cost allocation procedures is not necessary before LECs submit a certification filing.⁹ As the Commission correctly noted, safeguards are in place to ensure compliance with its cost allocation rules. An applicant must certify that it will modify its cost allocation manual in accordance with the Commission's rules. Those rules require, for example, that changes to the cost apportionment table and descriptions of time reporting procedures be filed at least 60 days before the changes are implemented.¹⁰

Claims that the Commission should impose additional, detailed and burdensome filings prior to certification should be treated for what they are: efforts to hobble competition through regulatory manipulation.¹¹ Consistent with Section 653(a)(2), the Commission developed an appropriate mechanism for dispute resolution should LEC compliance be in

⁷ Petition of NCTA at p. 4 (claiming that the Commission otherwise would be making "arbitrary and capricious" decisions).

⁸ *Order* at ¶ 29. Congress specifically repealed the video dialtone regime by directing that open video systems will not be subject to regulation under Title II of the 1934 Act. *Id.* at ¶ 28.

⁹ *Order* at ¶30 n. 92.

¹⁰ *See also Order* at ¶ 33-34 (noting that the manuals must also address procedures to allocate construction costs pursuant to the Commission's rules).

¹¹ Petition of NCTA at p. 4.

doubt. As the *Order* appropriately concludes, should representations in a certification filing prove to be false, the Commission can deny or revoke certification or impose other penalties, including forfeitures.¹²

**B. Requiring Elaborate Cost Studies And Data Requirements
From OVS Operators Serves No Purpose Other Than
To "Game" The Regulatory Process And Cripple Competition**

USTA urges the Commission to reject requests to reconsider its OVS pricing rules based on allegations regarding the alleged potential for discriminatory pricing.¹³ Congress established that OVS is not a common carriage service subject to Title II regulation. The Commission correctly noted that some level of rate differentiation should be permissible, particularly given that market conditions vary considerably among geographic regions, so long as the bases for the differences are not unjust or unreasonable.¹⁴

USTA supports the Commission's commitment to flexibility but believes that the Commission can go further to promote competition. For example, the availability of the strong presumption that carriage rates are just and reasonable should be based on conditions

¹² *Order* at ¶ 36. The Telecom Act requires that the Commission resolve disputes within 180 days after it receives notice. The Commission also has the power to resolve disputes, require carriage or award damages. Congress determined that this mechanism will require open video system providers to adhere to their statutory obligations.

¹³ *See, e.g.*, Petition of MCI at pp. 2-6.

¹⁴ *Order* at ¶ 130.

that permit and encourage the introduction of new technologies.¹⁵ As important, the Commission should dismiss the blatant efforts of MCI to increase LEC regulatory burdens by urging that video carriage rates must be delivered in excess of incremental cost.¹⁶

Moreover, competition would be disserved by requiring LECs to file with the Commission incremental and stand-alone telephone and video cost studies along with subscriber and usage data as part of their OVS applications, as MCI requests. The only result of such requirements would be to hamper LEC market entry, delay competition and increase costs for LECs. MCI attempts to buttress this obstructionist approach by requesting that the Commission adopt an unnecessarily expansive definition of standing to include non-programmers.¹⁷ The point of such arguments is to lay the groundwork for use of regulatory fora to thwart the advent of open and direct competition.

C. Extension Of The Program Access Rules To OVS Will Promote Competition

USTA supports the Commission's decision to apply program access rules to video programming providers on open video systems.¹⁸ Open video systems will fulfill their

¹⁵ See *Petition of Joint Parties at 4-8*. For example, the requirement that one-third of the capacity of a system be utilized by unaffiliated providers can be onerous given the enormous potential capacity of switched digital systems. USTA supports the view that the Commission should focus on the presence of unaffiliated programmers rather than an arbitrary percentage of capacity utilized before allowing LECs the safe-harbor of the presumption of reasonable and just rates.

¹⁶ Petition of MCI at 6

¹⁷ *Id.*

¹⁸ *Order at ¶ 175.*

potential only if LECs obtain parity of access to video programming. Despite claims by cable incumbents,¹⁹ parity of access is an essential pre-condition for LECs' to provide meaningful competition to incumbent cable operators, due to the concentration of control over vast portions of existing and newly produced commercial programming among a handful of vertically integrated cable operators. Lacking such parity, LECs' efforts to compete with open video systems will be hindered. Congress' goals will not be achieved and consumers will also suffer through higher prices, fewer services and less innovation. The Commission should modify its rules to ensure that provisions regarding parity of access to programming explicitly include open video systems.²⁰

Arguments that the Commission's application of the program access rules to OVS programming providers will harm competition should be dismissed.²¹ When Congress crafted the unique OVS framework, the intent was to support and promote competition against incumbent cable operators. Congress elected to use competition as the tool to introduce lower prices and innovation. Despite arguments to the contrary, Congress did not seek to create discrete programming niche markets, one for traditional cable services, and another for OVS.²² Rather, the successful deployment of OVS depends on the ability of OVS operators to attract

¹⁹ *See, e.g.*, Petition of NCTA at p. 12-13 (arguing that vertically integrated programming would help competition).

²⁰ USTA incorporates by reference its comments regarding program access reform tendered in the Cable Reform proceeding, CS Docket No. 96-85, at pp. 3-6.

²¹ Petition of Rainbow Programming Holdings at 2-18.

²² *Id.* at p. 4.

consumers through the provision of programming that meets market demand. The Commission correctly determined that video programming providers on open video systems should be classified as multichannel video programming distributors. This classification is the best means of promoting Congress' intent to speed the introduction of real competition in the video market.

D. The Provision Of "Bundled" Services Will Promote Competition And Does Not Increase The Risk Of Cross-Subsidization

USTA supports the Commission's conclusion that bundling of telephone and video services is not necessarily anticompetitive.²³ AT&T's attempt to claim that LECs derive an unfair advantage by marketing to their customers and "locking them in" with competitive offerings ignores the Commission's (and Congress') oft-stated admonition that the Telecom Act protects competition, not competitors.²⁴ The one-stop shopping attacked by AT&T in the OVS context is of major convenience and benefit to customers, as interexchange carriers themselves increasingly recognize in competing in local telephony markets. As AT&T's Chairman Robert E. Allen stated, AT&T intends to 'take a basic \$25-a-month long-distance customer and convert him or her into a \$100-a-month customer for a broader bundle of services' including "AT&T's planned satellite-television service, a joint marketing venture

²³ *Order* at ¶ 248.

²⁴ Petition of AT&T at pp. 2-5.

with General Motors Corp's Hughes Communications subsidiary."²⁵ Accordingly, the Commission should not be detained by AT&T's arguments in this context.

The Commission's Part 64 cost allocation rules will protect regulated ratepayers from cost misallocations that could lead to excessive telephony rates. Likewise, incumbent LECs ("ILECs") may not require that a subscriber purchase its video services in order to receive local service. The requirement that when offering discounts to consumers, the ILEC must impute the unbundled tariff rate for the regulated service will likewise protect consumers.

E. Separate Subsidiaries Are Not Required For LEC Use of OVS

The renewed request on reconsideration for the Commission to require LECs to implement a separate subsidiary prior to entry into the OVS market is without basis in the Telecom Act.²⁶ The Commission correctly notes that Congress refrained from imposing such a requirement when crafting its OVS provision.²⁷ It would be inappropriate to step outside the legislative framework to impose a requirement that Congress did not itself adopt.

In addition, as a matter of policy, a separate subsidiary requirement could decisively affect the Commission's balance between a LEC's incentives to provide open video services

²⁵ See John J. Keller, *AT&T Challenges the Bell Companies*, Wall St. J., June 12, 1996, at A3. The joint marketing of video programming between AT&T and Hughes involves AT&T's investment in the Hughes subsidiary DirecTV. See also AT&T Advertisement, "Yes Virginia, there really will be a choice," Thursday, July 11, 1996 at Va. Supp. p. 8 ("[o]ne company to serve all of your communications needs").

²⁶ Petition of Alliance for Community Media at pp. 2-3.

²⁷ Order at ¶ 249.

and its expected regulatory burdens. Should LECs be required to establish a separate subsidiary, the Commission can expect that LECs may elect not to become OVS operators.

F. Allowing Local Franchise Authorities To Require OVS Operators To Build Institutional Networks Will Destroy Incentives For LECs To Enter The Video Market With OVS Services

USTA supports the Commission's view that Section 611 of the Telecom Act does not authorize local franchising authorities to require LECs offering open video services to provide an institutional network ("INET") to local governments.²⁸ Only if LECs elect to build an INET, for example, should local franchising authorities be permitted to require the provision of educational and governmental access channels through an INET facility.²⁹

Cable operators may well be resisting efforts by franchising authorities to impose mandatory obligations to build INETs.³⁰ Such legal challenges can not serve as a viable basis to misconstrue Sections 611 and 653(c)(2)(a) of the Telecom Act. Such a tortured reading of the statute would only serve to destroy incentives for LECs to enter the OVS market at all.³¹

USTA likewise opposes petitions that the Commission mandate reduced access rates for non-profit programmers.³² Such discounts should be the subject of negotiation between OVS

²⁸ *Order* at ¶ 143.

²⁹ *Id.*

³⁰ *Id.*

³¹ Petition of Michigan, Illinois and Texas Communities at pp. 10-21; Petition of the Alliance for Community Media at pp. 7.

³² *Order* at ¶ 130 n. 300,

providers and those programmers. Reconsideration of this issue is unnecessary and would constitute the antithesis of Congress' clear intent to quickly introduce video competition.³³ Certainly, there is no support for such claims in the Telecom Act or its legislative history. USTA believes the Commission has acted appropriately in light of this Congressional silence.

As contemplated in the Telecom Act, OVS is a new and different service option, distinct from cable and common carriage. Should the Commission's balance between incentives for LEC market entry and safeguards for consumers be disturbed -- as would be the case with a sweeping requirement to build-out INETs or mandated public interest discounts -- LECs' incentives to offer open video services will decrease. The public interest would suffer through diminished competition and fewer choices for the consumer.

G. The Commission Should Permit OVS Operators Flexibility
In Implementing PEG Obligations

The Commission correctly determined that the OVS operator should have discretion in the manner in which it would fulfill its PEG obligations.³⁴ In keeping with the basic pro-competitive thrust of the Telecom Act and the OVS provisions specifically, the Commission also wisely elected to promote efficient use of facilities and resources by allowing OVS operators to interconnect with a cable operator's PEG feeds.³⁵ Despite arguments that this decision is inconsistent with the statute because interconnection can only be required of a

³³ Petition of Alliance for Community Media at pp. 9-11.

³⁴ Order at ¶ 153-156.

³⁵ Id. at ¶ 145.

common carrier,³⁶ USTA believes that the Commission's rule is entirely within Congress' directive to speed the introduction of competition for the cable incumbents. To require a separate build-out of facilities would be inefficient and burdensome, greatly reducing the attractiveness of OVS as an option for LECs.

H. The Commission Should Maintain Simplicity And Flexibility When Determining Proper Channel Sharing

USTA supports the Commission's determination that Section 653(b)(1)(C) permits an OVS operator to place on a single channel a service that is offered by more than one video programming operator. Some parties apparently argue that the Commission should require an OVS operator to determine whether the video program providers have negotiated and obtained the specific approval of a video service for carriage of the programming on a shared channel.³⁷ In essence, the video programming service or vendor would have the right of prior approval on how an OVS operator will deploy shared services.

USTA believes that such a framework is infeasible in theory and unworkable in practice. Certainly a video programming service or vendor should have the protections provided for in law. An OVS operator, however, is not the appropriate party to become enmeshed in any potential dispute. The OVS operator should be entitled to rely on representations by the video program provider that it may place the programming on a shared channel. Should the programming service or vendor dispute this, its proper recourse should

³⁶ See, e.g., Petition of NCTA at p. 16.

³⁷ Petition of ESPN at p 3; Request for Clarification or in the Alternative, Petition for Reconsideration of the Office of the Commissioner of Baseball *et al.* at pp. 2-4.

be to the program provider. USTA respectfully requests that the Commission clarify the issue to facilitate development of shared channels while protecting interests of programming services and vendors.

III. CONCLUSION

USTA respectfully urges the Commission to ensure that open video system operators have a high degree of flexibility in designing and operating open video systems. Despite the claims of those who seek to handcuff competition from open video system providers, the Commission should retain highly streamlined regulations governing open video systems, consistent with the Order and USTA's views expressed herein.

Respectfully submitted,

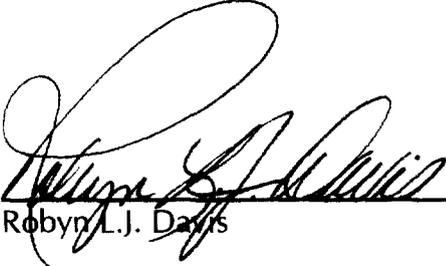
UNITED STATES TELEPHONE ASSOCIATION

BY: Keith Townsend / *HRB*
Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
1401 H Street, N.W.
Suite 600
Washington, DC 20005
(202) 326-7247

July 15, 1996

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on July 15, 1996 opposition and comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.


Robyn L.J. Davis

Nicholas P. Miller
Tillman L. Lay
Frederick E. Ellrod III
Miller, Canfield, Paddock and Stone
1225 19th Street, NW - Suite 400
Washington, DC 20036

Rick Maultra
City of Indianapolis - Cable Comms. Agency
200 East Washington Street
City-County Building - Room G-19
Indianapolis, IN 46204

Robert Lemle
Charles Forma
Marti Green
Cablevision Systems Corp.
One Media Crossways
Woodbury, NY 11797

Peter Arth, Jr.
Edward W. O'Neill
Mary Mack Adu
People of the State of Calif. & the PUC of Calif.
505 Van Ness Avenue
San Francisco, CA 94102

Thomas W. Cohen
Davison, Cohen & Co.
1701 K Street, NW
Suite 800
Washington, DC 20006

Howard J. Symons
James J. Valentino
Fernando R. Laguarda
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Michael J. Ettner
GSA
Office of General Counsel
Washington, DC 20405

Mayor Robert G. Frie
City of Arvada
P.O. Box 8101
8101 Ralston Road
Arvada, CO 80001

Donna E. Lampert
James J. Valentino
Charon H. Harris
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Alan J. Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
California Cable Television Assn.
4341 Piedmont Avenue
Oakland, CA 94611

David Cosson
L. Marie Guillory
National Telephone Cooperative Assn.
2626 Pennsylvania Avenue, NW
Washington, DC 20037

William B. Barfield
Michael J. Schwarz
BellSouth
1155 Peachtree Street, NE
Suite 1800
Washington, DC 30309

Mary Gardiner Jones
Henry Geller
Alliance for Public Technology
901 15th Street, NW
Suite 230
Washington, DC 20005

Jeffrey L. Sheldon
Sean A. Stokes
UTC
1140 Connecticut Avenue, NW
Suite 1140
Washington, DC 20036

John A. Levin
John F. Povilaitis
Pennsylvania PUC
G-31 North Office Building
Commonwealth and North Streets - P.O. Box 3265
Harrisburg, PA 17105

Thomas J. Ostertag
Office of the Commissioner of Baseball
350 Park Avenue
17th Avenue
New York, NY 10022

Philip R. Hochberg
Verner, Liipfert, Bernhard, McPherson & Hand,
Chartered
901 15th Street, NW - Suite 700
Washington, DC 20005

Blossom A. Peretz
New Jersey Department of the Treasury
Division of the Ratepayer Advocate
31 Clinton Street - 11th Floor
P.O. Box 46005
Newark, NJ 07101

Gigi B. Sohn
Andrew Jay Schwartzman
Media Access Project
2000 M Street NW
Washington, DC 20036

John Podesta
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Walter S. de la Cruz
Gary S. Lutzker
Department of Information Technology and
Telecommunications
11 Metrotech Center - Third Floor
Brooklyn, NY 11201

Robert Alan Garrett
Jonathan M. Frenkel
Arnold & Porter
555 12th Street, NW
Washington, DC 20004

Maureen O. Helmer
John L. Grow
NYDPS
Three Empire State Plaza
Albany, NY 12223

Matthew Lampe
City of Seattle Department of Administrative
Services
618 Second Avenue
12th Floor Alaska Building
Seattle, WA 92104

James J. Popham
Association of Local Television Stations, Inc.
1320 19th Street, NW
Suite 300
Washington, DC 20036

Jeffrey Hops
Alliance of Community Media
666 11th Street, NW
Suite 806
Washington, DC 20001

James N. Horwood
Spiegel & McDiarmid
1340 New York Avenue, NW
Washington, DC 20005

Janis D. Everhart
Scott Carlson
City of Dallas
1500 Marilla - Room 7/D/N
Dallas, TX 75201

Quincy Rodgers
General Instrument Corporation
Two Lafayette Centre
1133 21st Street, NW - Suite 405
Washington, DC 20036

James E. Meyers
1555 Connecticut Avenue, NW
Suite 500
Washington, DC 20036

Hiawatha Davis, Jr.
City and County of Denver
City and County Building
Denver, CO 80202

Samuel A. Simon
Access 2000
901 15th Street, NW
Suite 230
Washington, DC 20005

Peter Tannenwald
Elizabeth A. Sims
Irwin, Campbell & Tannenwald, PC
1730 Rhode Island Avenue, NW
Suite 200
Washington, DC 20036

Michael H. Hammer
Francis M. Buono
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW - Suite 600
Washington, DC 20036

Mark C. Rosenblum
Ava B. Kleinman
Seth S. Gross
AT&T
295 North Maple Avenue - Room 3245F3
Basking Ridge, NJ 07920

Thomas D. Creighton, #1980X
Robert V. Vose, #251872
Bernick and Lifson, PA
Suite 1200 The Colonnade
5500 Wayzata Boulevard
Minneapolis, MN 55416

Robert B. Jacobi
Stanley S. Neustadt
Cohn and Marks
(Golden Orange Broadcasting Co., Inc.)
1333 New Hampshire Avenue, NW - Suite 600
Washington, DC 20036

Stephen A. Hildebrandt
Group W. Satellite Communications
1025 Connecticut Avenue, NW
Suite 506
Washington, DC 20036

Harvey Kahn
Access 2000
2656 29th Street
Santa Monica, CA 90405

Andrew D. Lipman
Jean L. Kiddoo
Karen M. Eisenhauer
Swidler & Berlin, Chtd.
3000 K Street, NW - Suite 300
Washington, DC 20007

Lawrence Fenster
MCI
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Sondra J. Tomlinson
U S WEST
1020 19th Street, NW
Suite 700
Washington, DC 20036

Donald C. Rowe
Robert Lewis
NYNEX
1111 Westchester Avenue
White Plains, NY 10604

Herschel L. Abbott, Jr.
Michael A. Tanner
BellSouth
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins (Lincoln Tel.)
1455 Pennsylvania Avenue, NW
Washington, DC 20004

James D. Ellis
Robert M. Lynch
David F. Brown
SBC
175 E. Houston - Room 1254
San Antonio, TX 78205

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
NCTA
1724 Massachusetts Avenue, NW
Washington, DC 20036

Howard J. Symons
Fernando R. Laguarda
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Frank W. Lloyd
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC
701 Pennsylvania Avenue, NW - Suite 900
Washington, DC 20004

Leslie A. Vial
Bell Atlantic
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

John F. Raposa, HQE03J27
GTE
P.O. Box 152092
Irving, TX 75015

Lucille M. Mates
Christopher L. Rasmussen
Sara Rubenstein
Pacific Bell
140 New Montgomery Street - Room 1522A
San Francisco, CA 94105

Mary W. Marks
SBC
One Bell Center
Room 3558
St. Louis, MO 63101

Michael Hammer
Michael G. Jones
Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre - 1155 21st Street, NW
Washington, DC 20036

Robert J. Sachs
Margaret A. Sofio
Continental Cablevision, Inc.
Lewis Sharf, Pilot House
Boston, MA 02110

Brenda L. Fox
Continental Cablevision, Inc.
1320 19th Street, NW
Suite 201
Washington, DC 20036

Peter H. Feinberg
Laura H. Philips
Steven F. Morris
Dow, Lohnes & Albertson (Cox Comm.)
1200 New Hampshire Avenue, NW - Suite 800
Washington, DC 20036

John D. Seiver
T. Scott Thompson
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Stephen A. Hildebrandt
CBS, Inc.
1025 Connecticut Avenue, NW
Washington, DC 20036

Michael S. Schooler
Steven F. Morris
Dow, Lohnes & Albertson (Comcast, Adelphi, etc.)
1200 New Hampshire Avenue, NW - Suite 800
Washington, DC 20036

Paul Rodgers
Charles D. Gray
James Bradford Ramsay
NARUC
1102 ICC Building - P.O. Box 684
Washington, DC 20044

Fritz E. Attaway
Motion Picture Association of America, Inc.
1600 Eye Street, NW
Washington, DC 20006

Gary Shapiro
Consumer Electronics Manufacturers Assn.
2500 Wilson Boulevard
Arlington, VA 22201

Sam Antar
Roger C. Goodspeed
Capital Cities/ABC, Inc.
77 West 66th Street
New York, NY 10023

Mark W. Johnson
CBS, Inc.
1634 Eye Street, NW
Suite 1000
Washington, DC 20006

Marilyn Mohrman-Gillis
Lonna M. Thompson
Association of America's Public Television Stations
1350 Connecticut Avenue, NW
Washington, DC 20036

Jot D. Carpenter, Jr.
Telecommunications Industry Assn.
1201 Pennsylvania Avenue, NW
Suite 315
Washington, DC 20044

Henry L. Baumann
Jack N. Goodman
Terry L. Etter
NAB
1771 N Street, NW
Washington, DC 20036

Charles S. Walsh
Seth A. Davidson
Fleischman and Walsh, LLP
1400 16th Street, NW
Suite 600
Washington, DC 20036

John V. Roach
Ronald L. Parrish
Tandy Corp.
1800 One Tandy Center
Fort Worth, TX 76102

John W. Pettit
Richard J. Arsenault
Drinker Biddle & Reath
901 15th Street, NW
Suite 900
Washington, DC 20005

Joseph P. Markoski
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, NW
P.O. Box 407
Washington, DC 20044

Stephen R. Effros
James H. Ewalt
Cable Telecommunications Assn.
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030

Mayor Peter J. Angstadt
Office of the Mayor
911 North 7th Avenue
P.O. Box 4169
Pocatello, ID 83205

ITS
2100 M Street, NW
Suite 140
Washington, DC 20036

Richard L. Sharp
W. Stephen Cannon
Circuit City Stores, Inc.
9950 Maryland Drive
Richmond, VA 23233

Dennis L. Myers
Ameritech Mobile Services, Inc.
2000 West Ameritech Center Drive
Location 3H78
Hoffman Estates, IL 60195

Lawrence W. Secrest, III
Peter D. Ross
Rosemary C. Harold
Wiley, Riley & Fielding
1776 K Street, NW
Washington, DC 20006

Mario E. Goderich
Metropolitan Dade County
140 West Flagler Street - Room 901
Miami, FL 33130

Stephen W. McCullough
City of Irving
P.O. Box 152288
Irving, TX 75060