

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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JUL 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules,¹ as waived by the Commission for this proceeding, the National Cable Television Association, Inc. ("NCTA") hereby files this opposition to and/or support for certain petitions for reconsideration of the Commission's Second Report and Order in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY.

The Open Video System ("OVS") regulatory model was created by Congress as an alternative to traditional cable regulation. Congress plainly intended OVS as a different set of opportunities and obligations whereby video services may be provided to subscribers. Unfortunately, in certain respects the OVS regulations adopted by the Commission would result in oversight

¹ 47 C.F.R. § 1.429.

² See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46 (released June 3, 1996) ("Report and Order").

of compliance with the statutory obligations that is more apparent than real.

NCTA outlined these areas of concern in its petition for reconsideration. In this opposition, NCTA reiterates its continued support for rules which fairly balance the goals of nondiscriminatory access for programmers and promoting competition in the video distribution business. Specifically, NCTA takes the following positions on reconsideration requests in this proceeding:

- AT&T's request for reconsideration of the Commission's decision to permit incumbent LECs to bundle local telephone service with OVS service should be granted;
- The Commission should deny LEC proposals seeking to eviscerate the obligation to offer nondiscriminatory access to navigation guides and menus;
- The Commission should reject attempts to exclude certain OVS revenues from the calculation of the statutory gross revenue fee; and
- LEC requests for a more readily available presumption of reasonableness for OVS rates should be rejected; indeed, the present presumption should be eliminated and OVS operators required to justify rate discrepancies.

II. THE COMMISSION SHOULD ADOPT AT&T'S PROPOSAL AND RESTRAIN LECs' ABILITY TO BUNDLE OVS WITH TELEPHONY UNLESS AND UNTIL THE LECs HAVE SATISFIED SECTIONS 251 AND 252 AND EFFECTIVE COMPETITION HAS EMERGED.

In the Report and Order, the Commission declined to restrain incumbent LECs from bundling their local telephone service with OVS service. The asserted basis for the Commission's decision is that the "Part 64 cost allocation rules and any amendments thereto will protect adequately regulated telephone ratepayers from a misallocation of costs that could lead to excessive

telephony rates."³ AT&T seeks reconsideration of the Commission's decision to permit bundling of competitive video services with noncompetitive local telephone services.⁴ AT&T correctly observes that until LECs have met the requirements of sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act"),⁵ and as long as incumbent LECs do not face effective competition, allowing bundling will permit LECs to unfairly leverage their monopoly position in local telephony to gain an inefficient advantage in the video market. The plain effect will be to inhibit competition in both local telephony and video. As stated by AT&T, LECs "can thus foreclose their potential competitors from the local markets by locking in customers with bundled offers well before those new entrants have the ability to match those offers with competitive plans of their own."⁶

Thus, while the Part 64 rules (as modified and applied by the Commission prior to the approval of OVS certifications) are a necessary safeguard to protect monopoly ratepayers from bearing the burden of LECs' video distribution ambitions, such safeguards are insufficient to prevent LECs from leveraging their extant market power in local telephony to gain an unwarranted advantage in the video distribution business. Until the above-referenced conditions are met, bundling incumbent local telephone service with competitive video services should be prohibited.

3 Report and Order at ¶ 248.

4 AT&T Petition at 3.

5 47 U.S.C. §§ 251, 252.

6 AT&T Petition at 3.

III. THE COMMISSION MUST ENSURE THAT OVS OPERATORS DO NOT DISCRIMINATE AGAINST UNAFFILIATED PROGRAMMERS WITH REGARD TO THE USE OF NAVIGATIONAL DEVICES AND MENUS AND OTHER MATERIAL PROVIDED TO SUBSCRIBERS.

The 1996 Act specifies that OVS operators must avoid unreasonable discrimination in favor of the operator or its affiliate with regard to material and information provided to subscribers for the selection of programming.⁷ The nondiscrimination obligation includes placement on and presentation on navigation devices and menus.⁸ In the Report and Order, the Commission determined that these obligations run not only to the OVS operator, but to any affiliated programmer as well.⁹ In adopting this requirement, the Commission reasoned that "[t]he open video system operator should not be able to evade its obligation to ensure that other non-affiliated programming providers are represented on a navigational device, guide or menu simply by having the service nominally provided by its affiliate."¹⁰

LECs and LEC-affiliated programmers seek reconsideration of the Commission's decision to apply the nondiscrimination obligations discussed above to LEC affiliates.¹¹ The LECs' complaint with the rule adopted by the Commission boils down to a recognition of the fact that providing nondiscriminatory access

7 47 U.S.C. § 573(b)(1)(E)(i)

8 47 U.S.C. § 573(b)(1)(E)(iv)

9 Report and Order at ¶ 231.

10 Id.

11 Joint Parties Petition at 2-4; Tele-TV Petition at 2-8; US West Petition at 6-7; NYNEX Petition at 10-13.

as envisioned by Congress is the essential, distinguishing characteristic of OVS. OVS offers substantial relief from certain Title VI obligations in exchange for the obligation to offer nondiscriminatory access. If the provision of nondiscriminatory treatment on navigational guides and menus to unaffiliated programmers is inconsistent with the business plan of a LEC-affiliated programmer, the programmer and the LEC are free to enter the video distribution business as a Title VI cable operator.

Grant of the LEC petitions would render the nondiscrimination obligation of section 653(b)(1)(E) a nullity. The LEC petitions on this point are a thinly veiled attempt to create a substantially deregulated cable system and "have the best of both worlds." The LECs' request to limit the application of section 653(b)(1)(E) should be rejected.

IV. THE "FEE IN LIEU OF FRANCHISE FEE" SHOULD BE BASED ON ALL OVS OPERATOR REVENUES, WHETHER RECEIVED FROM SUBSCRIBERS OR PROGRAMMERS.

In the Report and Order, the Commission correctly chose to "apply the [OVS gross revenue] fee to all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers."¹² However, the Joint Parties argue that LEC programming affiliate revenues should be excluded from the revenue base upon which the gross revenue fee is calculated,¹³ and that only OVS operator

¹² Report and Order at ¶ 220.

¹³ Joint Parties Petition at 4-5.

revenues derived from providing video service to end-user subscribers should be included as revenues subject to the gross revenue fee.¹⁴ On the other hand, NYNEX argues that the Commission should stipulate that the only revenues subject to the gross revenue fee are those revenues derived from providing carriage to video programming providers, whether affiliated or unaffiliated.¹⁵

Both proposals are flawed and contrary to the Congressional intent to assess a gross revenue fee on OVS in "another effort to ensure parity among video providers. . . ." ¹⁶ The Joint Parties' proposal is simply beyond the pale, as it would allow LECs to avoid paying any gross revenue fee by the simple expedient of providing "cable" service through an affiliate (under the Joint Parties proposal, "carriage" revenues paid by any programmer would be excluded from the calculation of gross revenues as not derived from the provision of "cable service"). Such a result is exactly the opposite of parity.

Conversely, including only those revenues derived from carriage (as proposed by NYNEX) in the calculation of gross revenues would understate the revenues derived from OVS service. This formula would exclude revenues earned by the LEC through its programmer affiliate, and account only for revenues paid by the affiliate to the LEC-OVS operator. Adoption of such a rule would confer an additional, unwarranted benefit on OVS operators not

14 Id. at 5.

15 NYNEX Petition at 8-9.

16 S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178.

contemplated by the statute. Thus, at a minimum, the Commission must retain its present calculation.

V. THE AVAILABILITY OF A PRESUMPTION OF REASONABLENESS FOR LEC OVS RATES SHOULD NOT BE RELAXED; RATHER, THE PRESUMPTION SHOULD BE ELIMINATED.

The Report and Order establishes a presumption that rates charged by an OVS operator to unaffiliated programmers are just and reasonable and nondiscriminatory if two conditions are met: (1) at least one unaffiliated programmer, or unaffiliated programmers as a group, "occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates," and (2) "the rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator."¹⁷ If these conditions are met, an unaffiliated programmer will bear the burden of demonstrating that the charge in question is unjust, unreasonable or unjustly or unreasonably discriminatory.

As demonstrated in NCTA's petition for reconsideration, this standard is insufficient to protect unaffiliated programmers from discrimination and should be changed. However, on reconsideration the Joint Parties seek to move the Commission's OVS rate rules in the other direction. The Joint Parties suggest that the presumption of reasonableness applies "if two unaffiliated programmers purchase carriage on the OVS, without specifying any particular level of capacity they must buy."¹⁸

¹⁷ Report and Order at ¶ 114.

¹⁸ Joint Parties Petition at 7-8.

Adoption of the Joint Parties' proposal would provide ample room for LECs to game the rules by providing access to two small, unaffiliated programmers at one rate, while offering access to other unaffiliated programmers (particularly packagers) only at significantly higher rates.

Fortunately, such discrimination could be avoided by requiring that each programmer be charged the same carriage fee. In any event, an OVS operator should always bear the burden of demonstrating that any difference in rates charged to different programmers is justified by the circumstances.

The presumption threshold advocated by the Joint Parties promises not only discrimination, but unreasonable rate levels as well. One opportunity available to the OVS operator to foreclose access to competing programmers and packagers is to charge unreasonably high rates, so long as a few programmers with different elasticities of demand are willing to pay these rates. Certain types of programmers, e.g., home shopping, pay-per-view, or pay channels, may be willing to purchase capacity on OVS systems, even where the rate assessed is inefficiently high for advertiser-supported programmers. Unlike programmers supported by advertising or packagers of such programming channels, these other programmers are supported by a separate revenue stream, possibly allowing them to pay inefficient access rates. Thus, two pay channel or home shopping programmers could purchase access for as few as two channels, at a rate which effectively renders the OVS system inaccessible to packagers or other types of programmers. The OVS operator would thereby escape

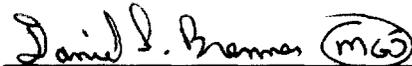
substantive rate regulation and preserve control over all but two channels of its capacity. Such a result plainly is contrary to the 1996 Act and should be rejected.

VI. CONCLUSION.

NCTA respectfully requests that the Commission take the actions suggested above with regard to the petitions for reconsideration filed in this proceeding.

Respectfully, submitted,

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15 July 1996

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