

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)

Southern New England Telephone)
Company)

Petition for Declaratory Ruling and Order) WC No. 04-30
Preempting the Connecticut Department of)
Public Utility Control's Decision Directing)
the Southern New England Telephone)
Company to Unbundle its Hybrid Fiber)
Coaxial Facilities)

REPLY OF AT&T CORP.

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The comments in the proceeding uniformly demonstrate that the unbundling ordered by the Connecticut Department of Public Utility Control (“DPUC”) is both fully consistent with the Telecommunications Act of 1996 (“the Act”) and the pro-competitive policies underlying the Act. Given that the DPUC’s decision ensures that loop facilities that would otherwise be gathering dust can be used to offer consumers innovative packages of voice and next-generation services, SBC’s preemption request is patently contrary to the Commission’s stated policy of encouraging broadband investment.

Moreover, the DPUC demonstrates that SBC has *waived* any right to the relief it is seeking. When SBC decided to cease using its hybrid fiber-coaxial network, it asked the DPUC both to permit it to relinquish its existing certificate of public convenience and necessity *and* to grant it favorable regulatory treatment of certain costs that it incurred in deploying the network. DPUC at 7. The DPUC granted that request, but on the express condition that SBC’s “hybrid Fiber Coaxial (HFC) infrastructure is available to Connecticut Telephone, and other third parties, under the terms and conditions prescribed by tariffs.” *Id.* (citing orders). To the extent SBC believed that this condition was unlawful, the appropriate course would have been to challenge it when it was imposed. Having instead chosen to accept the benefits of this ruling, SBC cannot now be heard to complain about the very condition the DPUC believed necessary as a precondition to awarding those benefits.

Although the commenters uniformly oppose SBC’s request, AT&T takes issue with Covad’s comments to the extent that Covad suggests that the facilities at issue are currently regulated by Title VI of the Communications Act because they are a “cable system” within the meaning of 602(7) of the Communications Act, 47 U.S.C. § 522(7). *See Covad* at 3-4. The plain language of that definition makes clear that the network at issue is not a cable system.

Section 602(7) excludes from the definition of a cable system “a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Act.” The facilities at issue fall squarely within this exclusion as they are owned by SNET, an SBC affiliate subject to Title II. And while the section 602(7) definition further provides that such facilities “shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers,” 47 U.S.C. § 522(7), SBC has *abandoned* these facilities and the “facilit[ies]” are not “*used* in the transmission of video programming directly to subscribers,” *id.* (emphasis added). Likewise, the Commission has held that an entity operates a “cable system” only when it controls “headend equipment” that is “associated with selection and provision of video programming.” Memorandum Opinion and Order on Reconsideration, *Telephone Company-Cable Television Cross-Ownership* Rules, 7 FCC Rcd. 5069, ¶ 24 (1992). Here, Gemini seeks access only to the “loop” portion of SBC’s plant and the headend and other associated equipment “associated with the selection and provision of video programming” will be owned by Gemini, not SBC.

Section 651 of the Communications Act, 47 U.S.C. § 571, likewise makes clear that network facilities are regulated by Title VI and are outside the ambit of Title II only to the extent they are actually being used to provide video programming services. Section 651(a)(2) provides that “[t]o the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of title II and section 652, but shall not otherwise be subject to the requirements of this title. This paragraph shall not affect the treatment under section 602(7)(C) of a facility of a common carrier as a cable system.” On the other hand, “to the extent that a common carrier is providing video programming to its subscribers [on a non-common carrier basis] . . . such carrier shall be subject to the requirements

[of Title VI.]” 47 U.S.C. § 571(a)(3)(A). Again, Congress made clear that common carriers are regulated under Title VI only “to the extent” that they are actually providing video programming. Indeed, “to the extent” that they are offering “common carriage” of video traffic, they are not subject to Title VI at all (except section 652’s inapplicable “buy out” provisions).

Further, there is no factual basis for Covad’s position that these facilities are exclusively a “cable system.” According to Covad, “there is no indication that SBC Connecticut’s abandoned HFC facilities were ever used for any purpose other than transmission of video programming to multiple subscribers.” Covad at 4. The facilities in question were, in fact, used to provide telecommunications service. DPUC at 6. Thus, whatever the theoretical merits of Covad’s reading of the Communications Act, it is inapplicable to the facts here.

Finally, whether or not a facility is a “cable system” is only a necessary, but not sufficient, condition for application of most of the operative provisions of Title VI. *See generally* 47 U.S.C. §§ 521-549. Rather, the substantive requirements of Title VI generally apply to a “cable operator, which in turn is defined as party “who provides cable service over a cable system.” 47 U.S.C. § 522(5). SBC does *not* “provid[e] cable service” and, therefore, is not a “cable operator.”¹

¹ Nor will SBC be providing a “cable service” to the extent it is transmitting Gemini’s video programming. Only entities that “activ[ely] participat[e] in the selection and distribution of video programming” provide a “cable service.” *NCTA v. FCC*, 33 F.3d 66, 71 (D.C. Cir. 1994). And SBC will not be operating a “cable system” because it will not be providing video programming directly to subscribers. *Id.* at 73-74.

CONCLUSION

Under federal and state law, the DPUC had clear authority to order the unbundling of SBC's abandoned hybrid fiber-coaxial facilities. Far from being subject to preemption, the DPUC's decision is wholly consistent with federal and state law. The Commission should deny SBC's request for an emergency declaratory ruling.

Respectfully submitted,

/s/ David L. Lawson

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2004, I caused true and correct copies of the forgoing Reply of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 15, 2004
Washington, D.C.

/s/ Peter M. Andros

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