

ORIGINAL

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

In the Matter of

Implementation of Section 302 of the
Telecommunications Act of 1996

Open Video Systems

CS Docket No. 96-46

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: the Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

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August 7, 1996

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Cable Television Association of Georgia ("CTAG") respectfully submits this Petition for Reconsideration and Clarification of the Commission's First Order On Reconsideration in the above captioned proceeding.¹

¹ *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, First Order on Reconsideration, FCC 96-312 (released July 23, 1996) ("*Transition Order*"). CTAG participated in the Reply Comments filed on behalf of itself and other state cable associations, as well as a number of cable MSOs.

INTRODUCTION AND SUMMARY

In the *Transition Order*, the Commission determined that requiring currently authorized video dialtone operators to switch their systems to one of the four video programming delivery options set forth in the Telecommunications Act of 1996 would serve the public interest. Accordingly, the Commission ordered all telcos presently operating video dialtone systems to switch to one of the four options set forth in the 1996 Act by November 8, 1996. The Commission failed, however, to address the procedural steps that telcos must undertake to accomplish this switch and the allocation of the costs the telcos incurred in constructing and operating the soon to be abandoned video dialtone systems.

CTAG is particularly concerned that without further guidance, the Commission's Order could have unintended detrimental effects. For example, all of the existing video dialtone systems were constructed and are operating pursuant to Section 214 authorizations. Many of those authorizations impose record-keeping and cost allocation requirements that were designed to protect consumers, unaffiliated programmers, and competitors from potential anticompetitive actions of the telcos. Yet, the Commission was not clear in the *Transition Order* that telcos must continue to comply with those authorizations and obtain approval pursuant to Section 214 before discontinuing service. Further, the Commission has not concluded its rulemaking to determine the proper allocation of the costs of telco video ventures, much less set forth how LECs are to account for facilities being switched from one transmission option to another. CTAG Petitions the Commission for Reconsideration and Clarification of its Order, therefore, in order that these

critical issues be resolved before the telcos are given the unilateral option to discontinue common carrier services and convert their facilities to their own exclusive use.

One of CTAG's members, Telescripps Cable Company d/b/a Scripps Howard Cable TV Company ("Scripps"), has already experienced the detrimental effects of a LEC's unsupervised decision to abandon a video dialtone trial prematurely. CTAG believes that BellSouth's premature abandonment of its video dialtone trial, and its impact on programmers and telephone consumers demonstrates the problems that will arise in the transition from video dialtone to other options without proper oversight by this Commission.

In 1994, BellSouth filed an application pursuant to Section 214 of the Communications Act seeking authority to construct and operate a 18 month video dialtone trial in the city of Chamblee and DeKalb County, Georgia. At that time, parties petitioning to deny BellSouth's application, including CTAG, questioned the validity of BellSouth's interest in undertaking a legitimate video dialtone "trial." Petitioners suggested to the Commission that BellSouth was using the "trial" label as a way to obtain expedited, superficial review of a commercial service proposal following a last minute amendment to change their hybrid VDT/channel service proposal to pure video dialtone. Now, just months after notifying the Commission that the trial was beginning, BellSouth has chosen to abandon its video dialtone trial and begin providing cable service over the facilities previously constructed under the guise of the trial.

BellSouth's decision to abandon the trial is not without consequences. First, in so doing, BellSouth has ignored the Commission's Order authorizing the trial, which called for the trial to last 18 months. In addition, BellSouth has failed to fully comply with several conditions of its authorization, namely those imposing accounting and reporting requirements designed to prevent cross-subsidization or discrimination. Second, BellSouth has violated Section 214 of the Communications Act. While the Telecommunications Act of 1996 removed the Section 214 requirement for telcos wishing to construct or operate video systems on a going forward basis, the Act stated that previous Section 214 authorizations were not required to be terminated. As one of the systems constructed under the pre-Act authorizations, BellSouth's unique video dialtone system and authorization are still subject to the Section 214 requirement that BellSouth obtain Commission authorization before prematurely discontinuing or reducing service. Third, BellSouth's premature discontinuance of the trial has had, and will have if unremedied, a profound effect on programmer-customers, who have made financial and business plans based on an 18 month trial. Indeed, these customer-programmers have made investments in equipment specifically for use in the trial.

Finally, BellSouth's unauthorized discontinuance of its video dialtone trial, and its expedient switch of the facilities to provide cable service, raise a serious threat of cross-subsidization and cost misallocation. Given that the Commission has not yet adopted rules governing the allocation of costs for telcos' video systems, BellSouth's construction of a "video dialtone system" and sudden transformation of that system into a cable system raises serious concerns regarding how BellSouth will allocate the costs of constructing the system. Indeed,

certain of BellSouth's promotions, involving free telephone services as an inducement to cable customers, raise questions regarding potential cross-subsidization. Without allocation rules and reporting safeguards, there is a substantial risk that BellSouth has or will over allocate the costs of joint and common facilities utilized for its Chamblee/DeKalb system to regulated telephone accounts. These problems undoubtedly will also arise as other video dialtone systems are switched to other models.

I. BELLSOUTH'S TERMINATION OF ITS VIDEO DIALTONE TRIAL ILLUSTRATES POTENTIAL PROBLEMS

On June 27, 1994 BellSouth filed an application, that it substantially amended on December 21, 1994, pursuant to Section 214 of the Communications Act for authorization to construct facilities and undertake a technical and market trial of video dialtone service in Chamblee, Georgia and surrounding areas of DeKalb County, Georgia.² BellSouth's application sought authority to pass 12,000 homes and provide service for 18 months. In support of the length and scope of its proposed trial, BellSouth provided affidavit evidence that 18 months would be the minimum acceptable period from which to derive useful marketing information.³

² *In the Matter of the Application of BellSouth Telecommunications, Inc.*, W-P-C-6977, Application (filed June 27, 1994); Amended Application (filed Dec. 21, 1994) (CTAG will refer to the Amended version as "Application").

³ *See BellSouth Telecommunications, Inc.*, Order and Authorization, DA 95-181, ___ FCC Rcd. ___, ¶ 33 (Com. Car. Bur. 1995) ("*BellSouth Order*") (citing Initial Application, Exhibit 7, at 4). A copy of the *BellSouth Order* is attached hereto as Exhibit 1.

On February 8, 1995, the Chief, Common Carrier Bureau released an Order granting "pursuant to Section 214 of the Communications Act of 1934, as amended" BellSouth's Application.⁴ The Order states that the system may provide service to "no more than 12,000 homes in the Chamblee and De Kalb County, Georgia service area *for a period of eighteen (18) months* from the date the system is operational and service is available to at least one end-user subscriber."⁵ The Order also placed, among others, the following conditions on BellSouth's authorization:

- BellSouth was required to inform the Secretary of the Commission and the Chief of the Common Carrier Bureau of the official start dates of the technical and market trial phases;⁶
- BellSouth is prohibited from allocating more than fifty percent of the platform's analog channel capacity to any one customer-programmer;⁷
- BellSouth must submit to the Commission copies of all promotional materials and descriptions of all marketing activities directed at encouraging video programmers to use its video dialtone service;⁸
- BellSouth must create two sets of subsidiary accounting records for each part 32 account: one to capture the revenues, investments, and expenses wholly dedicated to the provision of video dialtone, and the other to capture any revenues, investments, and expenses that are shared between video dialtone and the provision of other services;⁹

⁴ *BellSouth Order*, ¶ 51.

⁵ *BellSouth Order*, ¶ 51 (emphasis added).

⁶ *BellSouth Order*, ¶ 51.

⁷ *Id.* ¶ 52(a).

⁸ *Id.* ¶ 52(h).

⁹ *Id.* ¶ 52(i).

- BellSouth must file copies of summaries of those records for public inspection with the Commission Secretary on a quarterly basis;¹⁰
- BellSouth must file, at six month intervals, a report (1) identifying the capacity allocated to each video programmer-customer and the programmer's identity; (2) including a statement from each video programmer using BellSouth's services stating whether the programmer believes it has been discriminated against by BellSouth; (3) describing the video dialtone technology being used; (4) evaluating the market for video dialtone, including penetration rates on a monthly basis; and (5) including an unpublished commentary regarding the trial.¹¹

On October 2, 1995, BellSouth filed with the Commission a Notification Of Market Trial, indicating that its trial was about to begin.¹² On January 30, 1996, however, BellSouth informed programmer-customers of its video dialtone system that it was considering converting the system to a cable television system.¹³ On February 23, 1996, BellSouth confirmed this plan, stating that it was seeking cable franchises from Chamblee and DeKalb, and that once the franchises were obtained, BellSouth would cease video dialtone operations and no longer lease capacity to independent programmers.¹⁴ Subsequently, on April 16, 1996, BellSouth was granted a cable franchise by the City of Chamblee. On April 26, 1996, BellSouth informed the

¹⁰ *Id.*

¹¹ *Id.* ¶ 52(k).

¹² *In the Matter of the BellSouth's Computer III Market Trial Notification*, CC Docket No. 88-616 (filed Oct. 2, 1995).

¹³ Letter from E.C. (Jim) Whitehead III, Manager Marketing and Sales BellSouth, to Lin Atkinson, General Manager Scripps Howard Cable TV Company (Jan. 30, 1996)(dated 1995). A copy of the letter is attached hereto as Exhibit 2.

¹⁴ Letter from E.O. (Jim) Whitehead, III, Manager Marketing and Sales, BellSouth, to Mark Greenberg, Vanguard Cable Corporation (Feb. 23, 1996). A copy of the letter is attached hereto as Exhibit 3.

Chief of the Common Carrier Bureau that it had received a franchise from the City of Chamblee and would no longer be conducting its video dialtone trial there.¹⁵ Ultimately, on July 5, 1996, BellSouth informed Scripps that as of July 22 it was terminating all opportunity for technical testing in both Chamblee and DeKalb.¹⁶

II. BELLSOUTH AND OTHER VIDEO DIALTONE OPERATORS MUST COMPLY WITH SECTION 214 BEFORE TERMINATING THEIR VIDEO DIALTONE SERVICE

Like BellSouth's, all existing video dialtone systems were constructed and are being operated pursuant to authorizations granted under Section 214 of the Communications Act. Further, like BellSouth's, many of those Section 214 authorizations impose assorted terms and conditions on the operation of the video dialtone systems, including important reporting and record-keeping requirements. Under Section 214, the operators of those video dialtone systems

¹⁵ Letter from Karen Possner, Executive Director Legislative and Regulatory Policy, BellSouth, to Regina Keeney, Chief Common Carrier Bureau (Apr. 26, 1996). A copy of the letter is attached hereto as Exhibit 4. BellSouth's franchise explicitly states that it will use the facilities constructed pursuant to the *BellSouth Order* to provide cable service. "WHEREAS, BellSouth Telecommunications, Inc. ("BST"), an affiliate of BellSouth Interactive Media Services, Inc. ("Company"), has constructed and advanced to fiber/coax network ("network"), for the delivery of video programming and other services in parts of the City of Chamblee, Georgia . . . pursuant to authorization it received from the Federal Communications Commission ("FCC"), as set forth in that certain Order adopted on February 7, 1995 . . . W-P-C 6977 . . . and WHEREAS Company, desires, subject to approval of this Franchise Agreement, to use BST's network and company's headend facilities and equipment to bring new and previously unavailable video services, and the benefits of cable competition, to residents throughout the Trial Area" BellSouth Interactive Media Services, Chamblee, Georgia Franchise Agreement at 1 (attached hereto as Exhibit 5).

¹⁶ Letter to Lin Atkinson, General Manager Scripps Howard Cable TV Co. from E.C. Whitehead, III, Manager Marketing and Sales BellSouth (July 5, 1996) (attached hereto as Exhibit 6).

must obtain authorization from the Commission prior to discontinuing service.¹⁷ In the *Transition Order*, however, the Commission failed to clarify that video dialtone operators must continue to comply with the terms and conditions of their Section 214 authorizations, and go through the proper Section 214 steps before converting their systems to another option.

The Commission must make clear that telcos presently operating video dialtone systems must comply with the explicit terms of their authorizations and follow the proper Section 214 procedures before discontinuing service. Requiring such action will allow the Commission to oversee the transition of systems from video dialtone to their new status. The Commission will be able to collect data regarding the operation of the video dialtone systems, as well as data regarding the allocation of costs and revenues. Moreover, as in the case of BellSouth, the transition from video dialtone may involve a transfer of the property from the LEC to a subsidiary, which the Commission should review to protect against cross-subsidization or cost misallocation.

The consequences of BellSouth's premature and unsupervised transition of its video dialtone trial into a cable system demonstrate why the Commission should oversee the process through the Section 214 process.

¹⁷ 47 U.S.C. § 214. Section 214(a) states that "no carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affect thereby."

A. BellSouth Has Not Complied With Important Conditions Of Its Authorization

At the time of its switch, BellSouth had failed to comply with several explicit conditions on its construction and operation of its Chamblee/DeKalb video dialtone system, as set forth in the BellSouth Order. For example, BellSouth was required to create two sets of subsidiary accounting records for each Part 32 account, and file with the Commission every quarter summaries of those records for public inspection. While BellSouth has filed some of those reports with the Commission, its filings were late and incomplete.¹⁸ On January 16, 1996, BellSouth filed ARMIS reports, Form 43-09A, for the first, second, and third, quarters of 1995. BellSouth has not filed a report for the fourth quarter of 1995 or the first quarter of 1996. Similarly, under the *BellSouth Order*, BellSouth was required to file extensive reports regarding demand for and the operation of its system every 6 months. BellSouth has not filed any such reports.¹⁹ Moreover, BellSouth was required to provide copies of its promotional materials to the Commission, but has not done so.²⁰ BellSouth's failure to comply with the Commission's Order on these matters is not merely a procedural problem with no real consequences. The accounts and reports Ordered by the Commission and ignored by BellSouth were designed to protect BellSouth's monopoly telephone ratepayers as well as independent programmer-customers of BellSouth's system. BellSouth's noncompliance is a serious matter that must be investigated and

¹⁸ Declaration of Michelle Tennant (attached as Exhibit 7).

¹⁹ *Id.*

²⁰ *Id.*

remedied immediately.²¹ Before they are allowed to abandon their video dialtone service, other LECs should be examined to assure that they are not in violation of their authorizing orders. Undertaking such a simple exit-filing procedure will allow the Commission to protect the interests of ratepayers and customer-programmers.

B. The Commission Should Scrutinize Switches From Video Dialtone Service To Cable Service To Protect Programmer-Customers

The premature discontinuance of video dialtone systems will cause significant injury to programmer-customers. For example, the programmer-customers leasing capacity on BellSouth's system, at least one of which, Scripps, is a CTAG member, were led to believe that the trial would last 18 months as BellSouth stated, in order to gain valid marketing data.²² BellSouth's sudden decision to cease the trial to the Chamblee area impacts programmers who have made financial and business decisions based on an expected 18 month period. Had those

²¹ Indeed, BellSouth's AR MIS reports indicate that it has allocated only 25% of the shared costs of constructing its Chamblee/DeKalb system to video dialtone accounts. In its recent rulemaking to determine how such costs should be allocated, the Commission indicated that it would likely require at least a 50% allocation of shared costs to video when LECs provide video. *In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, FCC No. 96-214 ¶ 39 (released May 10, 1996)

²² The *BellSouth Order* explicitly stated that BellSouth's trial was to serve "no more than 12,000 homes . . . for a period of eighteen (18) months. . . ." *BellSouth Order*, ¶ 51. The Order did not allow for the trial to last "up to" 18 months, as BellSouth has asserted in its correspondence. Rather, pursuant to BellSouth's adamantly pressed position, the Commission stated that the trial would last 18 months.

programmers known that BellSouth would immediately abandon the trial, they would not likely have participated.²³

The Commission can protect the invested interests of customer-programmers by scrutinizing any LEC's choice to switch from video dialtone to cable. If a video dialtone system is switched to become an OVS system, then presumably, the interests of programmer-customers who have invested in working with the LEC's video dialtone system will be protected.²⁴ If a video dialtone system is switched to a cable system, however, the investments of the customer-programmers will be lost, as the LEC will not be required to provide them any capacity. In the future, OVS operators would also "pull the plug" and convert to exclusive cable operation as soon as it suits their own needs to the disadvantage of the other programmers who had invested in carriage on the OVS system. The Commission, therefore, should carefully scrutinize the decision of any LEC to switch from video dialtone or any other common platform system to cable.

III. THE COMMISSION MUST IMPOSE REQUIREMENTS TO TRACK THE COSTS OF VIDEO DIALTONE SYSTEMS AS THEY ARE SWITCHED TO CABLE OR OVS

²³ The Commission could require BellSouth to continue its trial the full 18 months under the good cause waiver provision in the *Transition Order*. *Transition Order*, ¶ 9.

²⁴ Of course, the Commission could assure that pre-existing customer-programmers are protected by requiring that video dialtone systems that switch to OVS reserve, at a minimum, the same amount of capacity and channel positions on the new system as existing programmers had on the VDT system.

Substantial investments have been undertaken by LECs to construct existing video dialtone systems. The Commission, however, has never directly addressed how those investments and expenses should be allocated. Indeed, in its Order instituting the LEC-video cost allocation rulemaking, the Commission admitted that its existing cost allocation rules were incapable of controlling the allocation of costs by LECs providing video services.²⁵ The Commission has also recently recognized that as telcos, such as BellSouth, switch from video dialtone to other delivery mediums, a significant accounting question is raised regarding the treatment of facilities that while deployed for video dialtone are no longer classified as video dialtone equipment.²⁶ In that Order, the Commission provided guidance regarding the treatment of ATM equipment initially installed as part of a video dialtone system, but where the video dialtone accounting rules have been repealed. Yet, while the Commission is considering the issue of how to allocate costs when LECs provide video services generally, there is a substantial risk that the costs of existing video dialtone systems are disappearing between the cracks in the Commission's rules and ending up in regulated telephone accounts.

Again, the actions of BellSouth demonstrate the need for the Commission to immediately address the allocation of costs as video dialtone systems are transitioned to cable and OVS. Because BellSouth's video dialtone authorization was for a "trial," it was able to delay the

²⁵ *Allocation of Cost Associated With Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, FCC No. 96-214, ¶ 18 (released May 10, 1996).

²⁶ *Subsidiary Accounting Requirements Concerning Video Dialtone Costs and Revenues for Local Exchange Carriers Offering Video Dialtone Services*, Memorandum Opinion and Order, FCC No. 96-240, ¶ 4 (released May 30, 1996).

filing of a tariff, which would have contained necessary cost data to support proposed rates. Because the tariff was never filed, and the so-called "trial" is now being converted to commercial cable television service, the Commission has not had the opportunity it deemed necessary to review the video dialtone expenses and investments, and determine the extent of appropriate cost allocations and elimination of possible cross-subsidies. In order to protect the rate-paying public, the Commission should undertake a complete investigation and accounting of BellSouth's treatment of the costs of its Chamblee/DeKalb system before allowing the facilities to be abandoned or converted to a cable system.

Recent actions by BellSouth further emphasize the issue of cost allocation and cross-subsidization. In a letter dated June 17, 1996, BellSouth, through its "authorized agent," Vanguard Corporation, offered a subscriber to its americast service a "special offer" whereby it could receive a *free* Caller ID display unit and *free* connection of the unit and Caller ID service.²⁷ The letter asserts that the offer is worth "over \$100 in value." The critical issue raised by this "special offer" is who is absorbing the cost of the \$100 worth of equipment and service being given away.²⁸ Absent proper accounting and cost allocation, local telephone subscribers will be forced to bear the cost of BellSouth's promotion of its cable service. Such a situation is a classic

²⁷ Letter from Ted Williams, General Manager, Vanguard Corporation, authorized agent of BellSouth (June 17, 1996). A copy of the letter is attached as Exhibit 8.

²⁸ The Commission has recognized that joint marketing of telephony and video services raises important cost allocation issues. See *Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, FCC 96-214, ¶ 49 (released May 10, 1996).

example of cross-subsidization of a competitive service with monopoly assets, and must be remedied.

In another example, BellSouth is offering to customers that are willing to commit to subscribing to BellSouth's cable service for one, two, or three years, \$.50 per month discounts off their cable bill for each of these other BellSouth services they purchase: BellSouth local telephone service, BellSouth Enhanced Calling features, and BellSouth "Mobility".²⁹ In addition, BellSouth offers the same subscribers \$.50 off their monthly cable bill if they will commit to purchase/subscribe to BellSouth long distance and internet access services.³⁰ BellSouth, therefore, is attempting to lock-in customers for a service they are not yet authorized to provide.

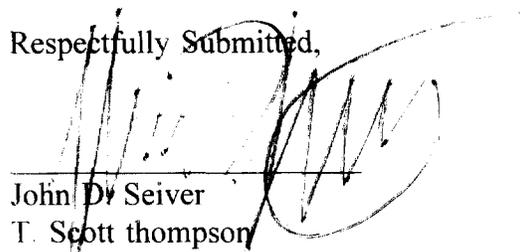
CONCLUSION

Based on the foregoing, the Commission should require video dialtone operators to comply with the terms of their authorizing Orders; the Commission should scrutinize the choice of new technology chosen to protect existing customer-programmers; and the Commission should impose accounting rules regarding the treatment of the costs of video dialtone systems as they are transitioned to other technologies. At a minimum, the Commission should carefully scrutinize the allocation of costs of video dialtone systems to protect against cross-subsidization.

²⁹ BellSouth marketing document: "The BellSouth americast Loyalty Commitment" (attached hereto as Exhibit 9)

³⁰ *Id.*

Respectfully Submitted,



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August 7, 1996

EXHIBIT 1

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

In the Matter of the Application of)	
)	
→ BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
For Authority under Section 214 of the)	File No. W-P-C-6977
Communications Act of 1934, as amended, and)	
Part 63 of the Commission's Rules, to construct)	
and operate integrated network facilities for a trial)	
of video dialtone service in the City of Chamblee,)	
Georgia, and adjacent communities)	
in DeKalb County, Georgia)	

ORDER AND AUTHORIZATION

Adopted: February 7, 1995

Released: February 8, 1995

By the Chief, Common Carrier Bureau:

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Appendix: Record of File No. W-P-C-6977

I. INTRODUCTION

1. Before the Bureau is the application of BellSouth Telecommunications, Inc. (BST) filed pursuant to Section 214 of the Communications Act of 1934, as amended (Communications Act or the Act),¹ for authority to construct, operate, and own integrated network facilities in order to conduct a technical and market trial of video dialtone service. BST originally filed a Section 214 application (Initial Application) seeking trial authority on June 27, 1994. On December 21, 1994, BST submitted an amended Section 214 application (Amended Application) substantially modifying its trial proposal.² Under its amended proposal, BST requests authority to construct and test a broadband hybrid fiber optic-coaxial cable network for provision of video dialtone service and other telecommunications services for a period of 18 months. BST proposes to pass 12,000 homes with its network facilities. The Cable Television Association of Georgia (CTAG), National Cable Television Association, Inc. (NCTA), and Scripps Howard Cable Company (SHC) filed pleadings opposing BST's Initial Application.³ CTAG and NCTA filed pleadings opposing the Amended Application.

2. For the reasons set forth below, we grant BST's Section 214 application, subject to certain conditions and requirements, which are designed to protect the interests of video programmers, video dialtone subscribers, and telephone ratepayers.

1 47 U.S.C. § 214.

2 BST's amended application was placed on public notice on December 23, 1994. Public Notice, "Pleading Cycle Established for Comments on BellSouth's Amendment to its Section 214 Application," DA 94-1571 (Dec. 23, 1994). Comments were filed on January 10, 1995. Reply comments were filed on January 20, 1995.

3 A complete list of pleadings filed in connection with this application is provided in the attached Appendix

II. BACKGROUND

3. In the Video Dialtone Order,⁴ the Commission adopted a regulatory framework whereby local telephone companies could participate in the video marketplace, without violating the statutory telephone company-cable television cross-ownership restrictions.⁵ We defined "video dialtone" as the provision of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis.⁶ The Commission also determined that carriers must file a Section 214 application before constructing video dialtone facilities.⁷

-
- 4 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Video Dialtone Order), aff'd & modified on recon., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994) (Video Dialtone Reconsideration Order), appeals pending sub nom. Mankato Citizens Tel. Co., et al. v. FCC, No. 92-1404, et al. (D.C. Cir. Sept. 9, 1992).
- 5 Two U.S. Courts of Appeals have declared the statutory telephone company-cable television cross-ownership restriction, codified at 47 U.S.C. § 533(b), unconstitutional as a violation of the First Amendment. Chesapeake & Potomac Tel. Co. v. United States, No. 93-2340 (4th Cir. Nov. 21, 1994), aff'g, 830 F. Supp. 909 (E.D. Va. 1993); U S WEST, Inc. v. United States, No. 94-35775 (9th Cir. Jan. 3, 1995), aff'g, 855 F. Supp. 1184 (W.D. Wash. 1994). Federal district courts in four other circuits have also found the statutory cross-ownership restriction unconstitutional. See United States Tel. Ass'n v. United States, No. 1:94CV01961 (Kessler, J.) (D.D.C.) (on Jan. 27, 1995, Judge Kessler issued a bench ruling deciding in favor of USTA; the published order has not yet been released); NYNEX Corp. v. United States, No. 93-323-P-C (Me. Dec. 8, 1994); Ameritech Corp. v. United States, No. 93 C 6642 (N.D. Ill. Oct. 27, 1994); BellSouth Corp. v. United States, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); see also CTE South, Inc. v. United States, No. 94-1588-A (E.D. Va. Jan. 13, 1995).
- 6 A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can gain access to any or all video programming carried on that platform. If a local telephone company provides such a basic platform, it may also provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. Video Dialtone Order, 7 FCC Rcd at 5783, para. 2.
- 7 Id. at 5820, para. 72. Generally, Section 214 requires Commission authorization before a carrier extends a new line of interstate communication. 47 U.S.C. § 214(a).

The Application

4. Originally, BST requested Section 214 authority to construct, own, and operate integrated network facilities to conduct a technical and market trial of analog channel service, digital video dialtone service, and telephone service for 18 months. BST subsequently modified its plans, and now requests authority to construct facilities and conduct a technical and market trial of only video dialtone service and telephony.⁸ BST states that the purpose of the trial is to assess the technical, market, and economic viability of video dialtone service and other telecommunications services provided on an integrated network.⁹

5. Under its revised proposal, BST will construct a broadband hybrid fiber optic-coaxial cable network that will pass 12,000 homes, initially offering each subscriber-end user 70 analog video channels and approximately 240 digital video channels.¹⁰ According to BST, its video dialtone platform will be capable of delivering "traditional television programming, enhanced pay-per-view, video on demand, interactive services (such as educational services, home shopping, games, and health care services), and other programming services."¹¹ BST states that it may provide video programming directly to subscribers during the trial over its video dialtone platform.¹² In addition to basic video dialtone services, BST states that BST or a non-regulated affiliate may offer end users a video gateway with an enhanced menu and navigational aids.¹³

6. BST will offer video information providers ("VIPs") three types of video transport

8 Apparently, BST intends to use the proposed facilities to offer end users telephone service. Amended Application at 6, 7, Revised Exhibits 1 & 2 ("BST's broadband telecommunications network architecture for the VDT [video dialtone] Trial is designed to be an intelligent platform for a full range of switched voice, data, and video services." (emphasis added) .

9 Amended Application at 10; see Initial Application at 1-2.

10 Amended Application at 3.

11 Id. at 4. BST states that by "other programming services" it means services such as one-way videotext, including news services and stock market information, one-way transmission of video games and computer software, and on-line airline guides. Initial Application at 5 n.4.

12 Amended Application at 5 n.2. BST states that it will notify the Commission before providing video programming directly to subscribers over its video dialtone platform. Id.

13 Amended Application at 4-5.

channels: analog multicast, digital multicast, and digital switched.¹⁴ According to BST, multicast channels will provide VIPs the ability to deliver the same signal to multiple subscriber locations at the same time.¹⁵ BST states that digital switched channels will provide VIPs the ability to deliver signals to individual subscriber locations on demand.¹⁶ If demand for any type of channel exceeds supply, BST states that it will consider all reasonable alternatives for addressing such demand.¹⁷ BST states that it would consider such options as imposing a limit on the number of channels assigned to a single VIP or realigning capacity among channel types.¹⁸ Prior to beginning the market trial, BST states that it will file a tariff with the Commission.¹⁹

III. DISCUSSION

7. Applications to construct video dialtone facilities and offer video dialtone services must satisfy both the Commission's video dialtone requirements and Section 214 of the Communications Act.

A. Video Dialtone Issues

8. Local telephone companies wishing to offer video dialtone service must make available a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. The platform must provide "sufficient capacity to serve multiple video programmers."²⁰ In addition, carriers are required to expand the capacity of the platform to accommodate additional demand to the extent technically feasible and economically reasonable.²¹

14 Id. at 4.

15 Id.

16 Id.

17 Id. at 3-4.

18 Id. at 4.

19 Id. at 9, 11.

20 Video Dialtone Order, 7 FCC Rcd at 5797, para. 29; Video Dialtone Reconsideration Order at para. 20.

21 Video Dialtone Reconsideration Order at para. 38.

1. Sufficient System Capacity

Comments

9. CTAG asserts that BST's video dialtone platform will not provide sufficient capacity to serve multiple video programmers because the digital network equipment and video customer premises equipment (CPE) needed for the provision of the digital capacity of the video dialtone platform are not yet commercially available.²² According to CTAG, the remaining analog capacity would not provide sufficient capacity to serve multiple VIPs.²³ CTAG further claims that BST will not expand capacity of its platform to meet additional demand, and that BST's suggested means for complying with the Commission's expandability requirement is deficient because BST maintains too much discretion in determining when and how to expand.²⁴

10. In response, BST maintains that its video dialtone platform will provide sufficient capacity to serve multiple video programmers.²⁵ BST argues that petitioners' arguments regarding the availability of digital equipment are misguided because it need only procure enough digital equipment to conduct the trial.²⁶ BST states that it has commitments from vendors for the digital network equipment necessary for the trial, and expects these equipment suppliers and vendors to meet their commitments by delivering a sufficient quantity of equipment in order for BST to conduct the trial.²⁷ BST asserts that CTAG has mischaracterized BST's statements regarding expansion of the platform's capacity.²⁸ According to BST, it is committed to considering "all reasonable alternatives" for addressing additional, unanticipated demand.²⁹

Discussion

11. As stated above, a local telephone company seeking Section 214 authority to offer video dialtone service must demonstrate, among other things, that its proposed basic platform

22 CTAG Petition at 14.

23 CTAG Petition at 15-16.

24 CTAG Comments at 26 (citing Amended Application at 3-4), 27.

25 Amended Application at 3, 8.

26 BST Opposition at 10.

27 Id.

28 BST Reply at 7

29 Id. at 8 (citing Amended Application at 3-4 (emphasis in original)).