

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

In the Matter of	)	
	)	
TELEPHONE COMPANY-CABLE	)	CC Docket No. 87-266
TELEVISION Cross-Ownership	)	
Rules, Sections 63.54-63.58	)	

**FOURTH REPORT AND ORDER**

Adopted: August 11, 1995

Released: August 14, 1995

By the Commission:

**I. INTRODUCTION**

1. The Communications Act of 1934, as amended (Act), requires a local exchange carrier (LEC) to obtain Commission authorization under Section 214(a) before constructing or acquiring a cable system in its service territory.<sup>1</sup> Although Section 613(b) of the Act generally prohibits LECs from providing video programming directly to subscribers in their service areas,<sup>2</sup> various court decisions have enjoined us from enforcing the telco-cable cross-ownership ban against virtually all LECs. In light of those decisions, in January 1995, comment was sought in this proceeding on broad issues relating to telephone company

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<sup>1</sup> 47 U.S.C. § 214(a); see Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 FCC 2d 307 (1970), aff'd sub nom. General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) (GTE of the Southwest); Comark Cable Fund v. Northwestern Indiana Tel. Co., 100 FCC 2d 1244 (1985) (Comark Cable Fund III), rev'd and remanded on other grounds sub nom. Northwestern Indiana Tel. Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987); Public Notice, Docket No. 87-266, DA 95-722 (released Apr. 3, 1995) (Supplemental Comment Notice); Public Notice, Docket 87-266, DA 95-665 (released Apr. 3, 1995), 60 Fed Reg 17,763 (Apr. 7, 1995) (Blanket 214 Authorization Notice).

<sup>2</sup> 47 U.S.C. § 533(b) ("telco-cable cross-ownership ban or restriction," or "cross-ownership ban or rule").

provision of cable service and video programming directly to subscribers.<sup>3</sup> In addition, in April, supplemental comment was sought on whether we should grant blanket Section 214 authorization to such LECs to construct or acquire cable systems or, alternatively, whether we should streamline the Section 214 process in other ways.<sup>4</sup> While we defer the broader issues raised in that Public Notice, we now find it in the public interest to streamline the Section 214 process with respect to LECs against whom we are not enforcing the cross-ownership ban that seek authorization to construct facilities to provide cable service in their service areas on a stand-alone basis.

## II. BACKGROUND

2. About 25 years ago, the Commission concluded that Section 214 of the Act requires that a LEC obtain Commission authorization before constructing or operating a cable system in its service territory.<sup>5</sup> However, under Commission rules enacted in 1970 and later under Section 613(b) of the Cable Communications Policy Act of 1984, LECs were generally prohibited from providing video programming directly to subscribers in their telephone service areas.<sup>6</sup>

3. After this cross-ownership ban was found to violate the First Amendment and we were enjoined from enforcing it against virtually all LECs,<sup>7</sup> we issued a Fourth Further

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<sup>3</sup> Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, 10 FCC Rcd 4617 (1995) (Fourth Further Notice).

<sup>4</sup> Public Notice, Docket No. 87-266, DA 95-722 (released Apr. 3, 1995); Blanket 214 Authorization Notice.

<sup>5</sup> 47 U.S.C. § 214. See Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order, 21 FCC 2d 307 (1970), aff'd sub nom. GTE of the Southwest.

<sup>6</sup> 47 U.S.C. § 533(b).

<sup>7</sup> See Chesapeake & Potomac Tel. Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994), rehearing denied (January 18, 1995), cert. granted, 63 USLW 3899, 63 USLW 3906 (June 26, 1995) (Nos. 94-1893, 94-1900) (C&P v. U.S.); U S West, Inc. v. United States, 855 F.Supp. 1184 (W.D. Wash. 1994), aff'd, U S West, Inc. v. United States, 48 F.2d 1092 (9th Cir. 1995) (U S West v. U.S.); BellSouth Corp. v. United States, 868 F.Supp. 1335 (N.D. Ala. 1994), appeal pending 11th Cir. No. 94-7036 (BellSouth v. U.S.); Ameritech Corp. v. United States, 867 F.Supp. 721 (N.D. Ill. 1994), appeal pending 11th Cir. No. 94-7036 (Ameritech v. U.S.); NYNEX Corp. v. United States, No. 93-1523 (D. Me. December 8, 1994), appeal pending 1st Cir. No. 95-1183 (NYNEX v. U.S.); GTE

Notice to consider how current statutory provisions, including Section 214, should apply to a LEC's provision of video programming to subscribers in its service area.<sup>8</sup> Subsequently, to supplement the record on certain particular issues, Commission staff sought additional comment, *inter alia*, on whether the Commission should grant blanket Section 214 authorization to such LECs for construction or acquisition of cable facilities in their service areas.<sup>9</sup> Comment was also sought on whether such blanket Section 214 authorization should apply both when the cable television facility is used also to provide telephone service and when the facility is used to provide only cable television services. Finally, comment was sought on what, if any, other circumstances warrant granting consideration of such blanket Section 214 authorization when a telephone company provides video programming in its service area, on any methods for streamlining the Section 214 application process, and on how the relevant rules should be amended.<sup>10</sup>

### III. COMMENTS

4. Comments were filed both opposing and supporting the use of blanket or streamlined Section 214 authorizations. Many cable companies and at least one state public utility commission (PUC) oppose any use of blanket Section 214 authorizations, contending that LEC provision of cable service in such instances creates the risk that the LEC will construct duplicative, wasteful or inefficient facilities, or misallocate joint costs and thereby cross-subsidize cable service.<sup>11</sup> They maintain that reviewing Section 214 applications enables the Commission to protect against these risks.

5. While most opponents of a blanket authorization express concern over LEC provision of cable and telephone services over the same transmission network, MCI and the California Cable Television Association also challenge the wisdom of granting a blanket authorization for LEC operation of stand-alone cable systems. They argue that LECs could

South, Inc. v. United States, No. 94-1588-A (E.D. Va January 13, 1995) (GTE South v. U.S.); Southwestern Bell Corp. v. United States, Civ. A. No. 3:94-C-0193-D (N.D. Tex. March 27, 1995) (SBC v. U.S.); United States Tel. Ass'n v. United States, No. 1:94CVO1961 (D.D.C. Feb. 14, 1995); and Southern New England Tel. Co. v. United States, No. 3:94-CV-80 (DJS) (D. Conn. April 28, 1995).

<sup>8</sup> Fourth Further Notice, 10 FCC Rcd 4617.

<sup>9</sup> Blanket 214 Authorization Notice, 60 Fed. Reg. 17,763.

<sup>10</sup> Id.

<sup>11</sup> Cal. CTA Reply Comments at 10; Continental, *et al*, Reply Comments at 6-7,9-10; NCTA Comments at 12, Reply Comments at 6-7; PA PUC Reply Comments at 5.

later convert stand-alone cable systems to provide telephone service.<sup>12</sup> NCTA also argues that "[e]ven if the telcos propose to build entirely separate facilities, the Commission must insure against opportunities to cross-subsidize, since at least some commonality outside the transmission plant will occur. The Section 214 process is necessary to determine if the actual degree of separation is sufficient and other safeguards are in place to ensure that telcos do not use their monopoly telephone position anticompetitively."<sup>13</sup>

6. In addition, some cable operators oppose blanket Section 214 authorization because of the risk that LECs will not provide fair pole and conduit access to cable competitors.<sup>14</sup> Capital Cities opposes blanket authorization for LEC acquisitions in their service regions out of concern that such acquisitions would impede competition.<sup>15</sup> Finally, Lenfest West argues that the Commission's decisions limit the use of blanket Section 214 authorization to cases in which the carriers at issue do not have market power, and thus are "non-dominant."<sup>16</sup>

7. LECs respond by asserting that, at least for LEC acquisition or construction of stand-alone cable systems, the Commission does not even have jurisdiction to require LECs to secure Section 214 authorization for such actions.<sup>17</sup> They contend that Southwestern Bell Tel. Co. v. FCC,<sup>18</sup> holds that Section 214 does not apply to LEC provision of non-common carrier services. They also challenge the current validity of statements in GTE of the Southwest<sup>19</sup> and General Telephone of California,<sup>20</sup> that the Commission has authority under Section 214 over LEC construction of facilities, regardless of the type of services to be

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<sup>12</sup> MCI Comments at 5; Cal.CTA Reply Comments at 10.

<sup>13</sup> NCTA Reply Comments at 13.

<sup>14</sup> Cal.CTA Comments at 10.

<sup>15</sup> Capital Cities Reply Comments at 5-8. Capital Cities remains silent concerning LEC construction of new systems. Id. at 5.

<sup>16</sup> Lenfest Comments at 4-6.

<sup>17</sup> Ameritech Comments at 1-7; Bell Atlantic Comments at 2-3; BellSouth Comments at 3; GTE Comments at 6-7; NTCA Comments at 1-3; NYNEX Comments at 3-4; OPASTCO Comments at 6-7; PacTel Comments at 6; United Comments at 2-3.

<sup>18</sup> 19 F.3d 1475 (D.C. Cir. 1994) (Southwestern Bell).

<sup>19</sup> 449 F.2d 846, 859 (5th Cir. 1971).

<sup>20</sup> 13 FCC 2d 448, 456 (1968), aff'd, General Telephone Co. of California v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied 396 U.S. 888 (1969).

provided over them.<sup>21</sup> They maintain that the holdings in those cases did not concern non-common carrier services, but rather LEC provision of "channel service" to cable operators, which is recognized as a common carrier service.<sup>22</sup> Furthermore, they argue that both of these cases have lost their relevance due to the passage of the 1984 Cable Act and its provision prohibiting the regulation of cable operators as common carriers.<sup>23</sup>

8. Some LECs also contend that, even if the Commission does have jurisdiction over LEC acquisition or construction of stand-alone cable systems, price cap regulation eliminates the dangers raised by such acquisitions and constructions.<sup>24</sup> Opponents of the blanket authorization challenge this assertion, observing that these dangers remain intact, due to the sharing aspect of price caps, the lack of a separate price cap basket for video dialtone service, the impermanence of the price cap productivity factor, and the possibility that initial price cap rates are not accurate.<sup>25</sup> Finally, LECs complain that, at least for stand-alone systems, the Section 214 process is an unnecessary regulatory burden, which unfairly hinders competition.<sup>26</sup>

#### IV. DISCUSSION

9. We begin by finding that Section 214 requires LECs to obtain Commission authorization before acquiring, constructing, or operating a cable system. Section 214(a) requires certification before a carrier undertakes the construction of any line. "Line" means "any channel of communication established by use of appropriate equipment" (emphasis added).<sup>27</sup> Section 214 is not by its terms limited to lines of communication that will be used to provide common carrier services. Accordingly, the facilities used to provide cable television service constitute a "line" within the definition of Section 214. Indeed, "[i]t has

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<sup>21</sup> See, e.g., GTE of the Southwest, 449 F.2d at 859 n.9 ("The construction of CATV channel facilities is the building of a 'line' to be used in interstate communications, and therefore, it is subject to Section 214 certification, even though CATV is not a common carrier service.")

<sup>22</sup> See, e.g., NYNEX Reply Comments at 3.

<sup>23</sup> They cite 47 U.S.C. § 541(c).

<sup>24</sup> See, e.g., Pacific Comments at 10.

<sup>25</sup> Cal.CTA Reply Comments at 10-15; Continental, et al, Reply Comments at 9-10; PA PUC Reply Comments at 9 n.18.

<sup>26</sup> See, e.g., BellSouth Reply Comments at 2-3; Pacific Comments at 2-3; RTCA Comments at 2 n.3.

<sup>27</sup> 47 U.S.C. § 214(a).

long been settled that construction of cable facilities for broadcast television signals by a carrier constitutes construction of part of an interstate channel of communication requiring our prior certification under Section 214.<sup>28</sup>

10. The Commission has consistently held that, even when the public interest would not be served by careful, individual Section 214 reviews, Section 214 requires the Commission to authorize construction of lines, before a common carrier can undertake such construction. For example, in 1984, when the Commission held that it was not in the public interest to review individual Section 214 applications for LECs to construct cable television systems outside their LEC service areas, the Commission recognized that LECs were legally required to obtain authorization before undertaking such construction. Therefore, the Commission granted a blanket Section 214 authorization for out-of-region cable systems.<sup>29</sup> Similarly, when the Commission found it in the public interest to permit LECs to construct cable television systems in rural areas within their local service areas, it recognized that it needed to grant an express Section 214 authorization before such construction could take place.<sup>30</sup>

11. This long-held interpretation of Section 214 has been affirmed by the courts. The LECs' argument to the contrary ignores the clear statement by the Fifth Circuit in GTE of the Southwest that Section 214 applies to the construction of any line of communication, whether used for common carrier or non-common carrier purposes. A party in that case specifically argued that the Commission could not regulate a common carrier's entry into a non-common carrier business. In response, the court stated that:

the reach of Section 214 is not confined to certification of common carrier facilities. The section provides that "no carrier" shall construct a "new line without prior certification, "line" being defined as "any channel of communication established by the use of appropriate equipment." The construction of CATV channel facilities is the building of a "line" to be used in interstate communications, and therefore, it is subject to Section 214 certification, even though CATV is not a common carrier service.<sup>31</sup>

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<sup>28</sup> Comark Cable Fund III, 100 FCC 2d at 1256.

<sup>29</sup> Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and other Non-Common Carrier Services Outside its Telephone Service Area, CC Docket No. 84-28, Report and Order, 98 FCC 2d 354 (1984) (1984 Blanket 214 Order).

<sup>30</sup> Elimination of the Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.56, for Rural Areas, 88 FCC 2d 564 (1981), aff'd 91 FCC 2d 622 (1985), aff'd NCTA v. FCC, 747 F.2d 1503 (D.C. Cir. 1984).

<sup>31</sup> GTE of the Southwest, 449 F.2d at 859, n.9.

12. Some LECs argue that GTE of the Southwest is not relevant because it addressed only common carrier channel service. This argument, however, ignores the fact that in that case, a LEC proposed to provide -- and the Commission had regulated -- not only channel service but CATV as well. We find that that holding remains good law. Moreover, we note that, prior to 1984, the Commission's cross-ownership rules required Section 214 authorization for LEC construction or acquisition of a cable system. In enacting Section 613(b) in 1984, Congress did nothing to indicate that the Commission had exceeded its authority by requiring prior Section 214 authorization.

13. Nor is there merit to the LECs' contention that enactment of the 1984 Cable Act supersedes GTE of the Southwest. As an initial matter, contrary to the LECs' assertions, by requiring LECs to obtain Section 214 authorization we are not regulating cable television as a common carrier service. We are merely ensuring at this initial stage that the LECs' telephone ratepayers will not be burdened, inter alia, with this investment. In addition, the provision in the 1984 Cable Act that the LECs cite is inapplicable to them. That provision, Section 621(c),<sup>32</sup> states that a "cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable services." But Section 602(7),<sup>33</sup> which defines "cable system," provides that "a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of this Act... shall be considered a cable system (other than for purposes of Section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers" (emphasis added). Thus, Section 621(c) does not preclude application of Section 214 to LEC construction of a cable system.

14. The D.C. Circuit's decision in Southwestern Bell does not compel the conclusion that LECs do not need authorization under Section 214 to construct a cable system. That case did not involve a cable system or present the issue of whether a LEC needed to obtain authorization under Section 214 before constructing a line of communication. Rather, in that case the Commission had "prescribed rates for so-called 'dark fiber' communications services, directed petitioners to provide these services as a general offering, and, finally, denied permission to withdraw dark fiber service."<sup>34</sup> Most importantly, the court added, "[p]etitioners became entangled in the FCC's web of common carrier regulation solely by virtue of filing . . . contracts" describing the service.<sup>35</sup> The court held: "Without expressing any opinion on whether the Commission may have a different and adequate reason for regulating dark fiber, we are not satisfied with the logic under the orders as they stand

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<sup>32</sup> 47 U.S.C. § 541(c).

<sup>33</sup> 47 U.S.C. § 521(7).

<sup>34</sup> 19 F.3d at 1477.

<sup>35</sup> Id. at 1480.

now."<sup>36</sup> As the court explained, "it does not make sense that the filing of the terms of any contract -- no matter how customer tailored -- with the FCC, without more, reflects a conscious decision to offer the service to all takers on a common carrier basis."<sup>37</sup>

15. In this case, unlike the dark fiber case, we are not concluding that LECs must obtain an authorization under Section 214 merely because they filed contracts describing their cable service. Rather, we conclude that they must obtain authorization because they intend to construct a line of communication, so that under the plain language of the statute (and as affirmed by the Fifth Circuit) Section 214 authorization is required. Moreover, as explained more fully in the remainder of this order, we are not prescribing rates for stand-alone cable systems, directing LECs to provide cable service as a general offering, or denying permission to withdraw cable service. Instead, we are providing an extremely streamlined process under which LECs will obtain Section 214 authorization by certifying that their system is not a common carrier system, that they will comply with the rules we have promulgated to protect telephone ratepayers, and that they have secured a franchise to provide cable service pursuant to Title VI of the Communications Act.

16. Thus, although we defer consideration of blanket or streamlined Section 214 authorizations in other contexts to a future order in this proceeding, we find that the public interest would be served by providing for streamlined Section 214 authorization to LECs against whom we are not enforcing the cable television/telephone company cross-ownership ban, who propose to construct a stand-alone cable system in their service area. In 1984, we found that it was in the public interest to grant a blanket Section 214 authorization to LECs seeking to operate cable systems outside of their LEC service areas.<sup>38</sup> Similarly, in 1985 we provided for streamlined Section 214 authorization to LECs seeking to operate cable systems in rural areas inside their LEC service areas. 47 C.F.R. § 63.09. More specifically, we concluded that LECs would be granted Section 214 authorization to provide cable service in rural areas if they certified that the area is "rural" under the Commission's regulations and that the applicant had obtained a franchise.<sup>39</sup> We now conclude that, in light of the injunctions barring enforcement of Section 613(b) of the 1984 Cable Act, the public interest will also be served by granting streamlined Section 214 authorization to LECs against whom we are not enforcing the cross-ownership ban that construct a cable system in their service areas on a stand-alone basis.

17. We conclude that a streamlined process is warranted in this instance. While we generally require a LEC to provide detailed data when applying for a Section 214

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<sup>36</sup> Id. at 1480-81 (emphasis by the court).

<sup>37</sup> Id. at 1481.

<sup>38</sup> 1984 Blanket 214 Order.

<sup>39</sup> 47 C.F.R. § 63.09.

authorization, we believe that it is in the public interest to adopt a streamlined process where a LEC is willing to certify to the following three facts: First, it must certify that its cable system is a stand-alone system, i.e., it does not share central office assets (USOA Accounts 2210 through 2232) or cable and wire facilities (USOA Accounts 2410 through 2441) with the carrier's regulated telephone business<sup>40</sup> and that it will not be used for common carrier service unless and until it has secured the prior approvals necessary under our Part 64 rules and other regulations designed to ensure that the LECs' telephone ratepayers do not subsidize the provision of cable service. Second, it must certify that it will comply with our accounting, cost allocation, and affiliate transactions rules applicable to nonregulated activities. Third, it must certify that it has secured a franchise to provide cable service pursuant to Title VI of the Communications Act. We believe that if these conditions are met, individual scrutiny of Section 214 applications would not be in the public interest. Nevertheless, at this point in time, we believe that these certification requirements are necessary for in-region cable systems because of the potential for in-region cable facilities to be used to provide common carrier services.

18. In light of the injunctions barring enforcement of Section 613(b) of the Cable Act, a primary concern about LEC construction of stand-alone cable systems is that telephone ratepayers not bear the burden of the investment in those systems. Pending our review of structural separation requirements,<sup>41</sup> we find that our current regulatory safeguards against cross-subsidy are sufficient to protect telephone ratepayers when a telephone company provides cable service over such a stand-alone cable system.<sup>42</sup> For LECs subject to price cap regulation, our price cap rules prevent those LECs from raising interstate telephone service rates to recover nonregulated cable television investments. If the cable operation is conducted by the telephone operating company, the Part 64 joint cost rules will require investment in a stand-alone cable system to be directly assigned to the nonregulated cable operation.<sup>43</sup> Once that investment is assigned to the nonregulated activity, it cannot be reassigned to the interstate and intrastate regulated telephone ratebases without prior

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<sup>40</sup> 47 C.F.R. §§ 32.2210-32.2232, 32.2410-32.2441. We do not mean to preclude LECs' stand-alone cable systems from using pole attachments subject to our pole attachment rules. 47 C.F.R. § 63.57.

<sup>41</sup> Fourth Further Notice, 10 FCC Rcd at 4639-40.

<sup>42</sup> See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 322 (1994) (Video Dialtone Reconsideration Order).

<sup>43</sup> 47 C.F.R. § 64.901(b)(2). Cable television activities of LECs are treated as "nonregulated" activities for purposes of Title II accounting and cost allocation rules, even though cable systems are regulated under Title VI of the Communications Act.

permission from this Commission.<sup>44</sup> If a LEC uses a separate affiliate to construct a cable system, the investment in that system will be recorded on the books of account of that affiliate. Any transfer of assets between the cable affiliate and the telephone operating company will be governed by the affiliate transactions rules.<sup>45</sup> Given these safeguards, we believe that a streamlined Section 214 process is adequate to protect ratepayers.

19. We recognize that permitting LECs to construct competing cable systems may permit them to make investments in duplicate facilities, but we do not regard this as a danger to ratepayers. Our concern is not with such duplicative investments *per se*, but rather that telephone ratepayers not bear the risk if such investments fail. We find that the risk to telephone ratepayers from investments in in-region stand-alone cable systems is not materially greater than the risk created by LEC investments in systems outside of their service areas as long as the LEC properly separates the costs for its non-common carrier lines of communication from the costs for its common carrier services, and it certifies that its facilities will not be used for common carrier services unless and until it has secured the prior approvals necessary under our Part 64 rules and other regulations designed to ensure that the LECs' telephone ratepayers do not subsidize the provision of cable service.<sup>46</sup>

20. We reject MCI's contention that a full Section 214 review is necessary for LEC provision of cable service because the systems might, in the future, be used to provide telephone service. The primary rationale for the Section 214 application process is to ensure against duplicative and wasteful investments by LECs that could harm telephone ratepayers. We have just found that these risks are not sufficiently great in the case of a stand-alone system to warrant individualized review under Section 214, with our certification requirements. If, at some point in the future, the LEC seeks to use the facilities to provide telephone service and seeks to recover a part of its investment in those facilities from telephone ratepayers, we would require it to secure the prior approvals necessary under our

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<sup>44</sup> See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, 1320 para. 169 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990). Waivers of our Joint Cost rules, e.g., 47 C.F.R. §§ 32.23, 32.27, 64.901, 64.902, are granted by the Commission only upon a showing that: (1) the carrier's regulated activities require the use of plant capacity allocated to nonregulated activities; and (2) the carrier cannot obtain the needed capacity elsewhere at lower cost. If a waiver is granted, the investment must be transferred at the lower of the plant's depreciated cost or its fair market value. *Joint Cost Order*, 2 FCC Rcd at 1320, para. 169 & 1353, n.284, *recon.*, 2 FCC Rcd at 6291, para. 66, *further recon.*, 3 FCC Rcd at 6705, para. 29; See also Pacific Bell Reallocation of Nonregulated Investment, 9 FCC Rcd 492 (1994); *Video Dialtone Reconsideration Order*, 10 FCC Rcd at 330-31.

<sup>45</sup> 47 C.F.R. § 32.27; see also 47 C.F.R. § 64.903.

<sup>46</sup> See para. 16, *supra*.

Part 64 rules and other regulations designed to ensure that the LECs' telephone ratepayers do not subsidize the provision of cable service. Moreover, our authority to impose conditions on the use of facilities under Section 214(c) gives us an important tool to ensure that carriers do not later shift the usage of cable facilities between cable and common carriage without prior approval.<sup>47</sup>

21. While we are continuing our review of our current pole attachment rules in light of comments submitted in response to our Third and Fourth Further Notices,<sup>48</sup> our initial review of the record does not reveal any reason for us to believe that potential pole attachment problems should prevent us from streamlining the Section 214 process in the circumstances described here. Our recent decision in TCA Management Co. v. Southwestern Public Service Company<sup>49</sup> to assign additional resources to the resolution of pole attachment complaints reflects our commitment to promoting full and fair competition between LECs and cable operators through the rapid resolution of pole attachment complaints.

22. Accordingly, we provide for streamlined Section 214 authorization for LECs constructing lines of communication in their service areas to construct and operate stand-alone cable systems. A LEC constructing such a line of communication must submit a streamlined Section 214 application certifying, first, that it will be constructing a stand-alone cable system and the lines constructed will not be used to provide common carrier service unless and until it has secured the prior approvals necessary under our Part 64 rules and other regulations designed to ensure that the LECs' telephone ratepayers do not subsidize the provision of cable service. Second, the LEC must certify that it will comply with our accounting, cost allocation, and affiliate transactions rules applicable to nonregulated activities. That is critical to ensure that telephone ratepayers do not subsidize the cost of construction or operation of the cable system. Finally, the LEC must certify that it has secured a franchise to provide cable service pursuant to Title VI of the Communications Act.

23. Upon receipt of this streamlined Section 214 application, we will issue a public notice listing the application as accepted for filing. Unless the Bureau notifies the applicant within 14 days of the issuance of the public notice, the Section 214 authorization will be deemed granted, and the LEC may begin construction on the fifteenth day. This certification will be confirmed in a separate public notice, to be issued monthly pursuant to this rule. Where the Bureau has notified the applicant within 14 days, action by the full Commission will be taken within 180 days. We expressly refuse to grandfather any existing cable

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<sup>47</sup> Cf. MCI Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978).

<sup>48</sup> See Video Dialtone Reconsideration Order, 10 FCC Rcd at 375, para. 285; Fourth Further Notice, 10 FCC Rcd at 4640-41, paras. 40-41.

<sup>49</sup> Hearing Designation Order, FCC 95-221 (released June 15, 1995).

systems that LECs may have constructed without Section 214 authorization in clear disregard of our rules.<sup>50</sup> Our rural application process, however, remains in place.<sup>51</sup>

24. Unlike construction of a cable system, acquisition of an existing cable system may impede competition. Given the additional concerns we have about the effects of LEC acquisition of existing cable systems on potential competition in LEC service areas, we defer the issue of LEC acquisitions of cable systems in their service areas to a later order in this proceeding. We also conclude that we have authority to grant streamlined Section 214 authorization wherever we find that a more detailed Section 214 review would not, on balance, serve the public interest. There is no requirement that we limit streamlined Section 214 authorization to nondominant carriers.

25. Finally, although we conclude that streamlined Section 214 authorization is appropriate with respect to LECs that have obtained injunctions barring enforcement of the cable-telco cross-ownership ban (and other LECs against whom we are not enforcing the ban), LECs considering building stand-alone cable systems in their telephone service areas should keep in mind that the injunctions may be dissolved. The Supreme Court recently granted the government's petition for a writ of certiorari seeking review of the Fourth Circuit's decision enjoining enforcement of Section 613(b).<sup>52</sup> If the Court also accepts the government's position on the merits in that case, the injunctions barring enforcement of Section 613(b) will be dissolved and LECs that construct stand-alone cable systems may have to dispose of them. If the government prevails in the Supreme Court, we will have to conduct further proceedings to determine how best to bring the parties into compliance with the Court's judgment. LECs should also keep in mind that we have yet to resolve the question raised in the Fourth Further Notice regarding whether we can, and should, require telephone companies to provide video programming only over video dialtone platforms. If we decide to impose any such requirement, we will modify the authorization process established here accordingly.

## V. ORDERING CLAUSE

26. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 214, Part 63 of the Commission's rules, 47 C.F.R. Part 63 IS AMENDED as set forth in Appendix A. This

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<sup>50</sup> The April 3, 1995 Supplemental Comment Notice expressly stated that "[a] telephone company must . . . obtain from the Commission a certificate of public convenience and necessity under Section 214 of the Communications Act before constructing or acquiring a cable television system within its local service area."

<sup>51</sup> See 47 C.F.R. § 63.09.

<sup>52</sup> United States v. Chesapeake and Potomac Telephone Co., Sup. Ct. No. 94-1893, 63 USLW 3899, 63 USLW 3906 (June 26, 1995).

amendment will be effective upon publication in the Federal Register because this amendment relieves a restriction, pursuant to 5 U.S.C. § 553(d).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

Appendix A: Amendment to CFR

**AMENDMENT TO THE CODE OF  
FEDERAL REGULATIONS**

Title 47 of the CFR, Part 63 is amended as follows:

**PART 63 - EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION,  
OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND  
GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS**

1. New section 63.16 is added to read as follows:

**§ 63.16 Construction of stand-alone cable system by a carrier in its exchange telephone service area.**

(a) Applications of telephone common carriers proposing to construct and operate stand-alone cable systems within their telephone service areas, either directly or indirectly through affiliates, need include only the following information in lieu of that required by §63.01:

(1) Applicant's name, address and telephone number. This information shall also be submitted for Applicant's affiliate, if applicable;

(2) Location of the proposed system (city, town or village, county, and state);

(3) Certification that the lines constructed by the Applicant constitute a stand-alone cable system that will not be used to provide common carrier service unless and until it has secured any prior approvals necessary under the Commission's Part 64 rules and any other requirements designed to ensure that the local exchange carriers' telephone ratepayers do not subsidize the provision of cable service;

(4) Certification that the Applicant will comply with 47 C.F.R. §§ 32.23, 32.27, 64.901-64.904;

(5) Certification that the Applicant is franchised to provide cable service pursuant to Title VI of the Communications Act, and date of franchise; and

(b) As used in this subsection, a stand-alone cable system is one that does not share central office assets (USOA Accounts 2210 through 2232, 47 C.F.R. §§ 32.2210-32.2232) or cable and wire facilities (USOA Accounts 2410 through 2441, 47 C.F.R. §§ 32.2410-32.2441) with the carrier's regulated telephone business.

(c) An original and two copies of the application shall be furnished to the Secretary, Federal Communications Commission, Washington, DC 20554. Applicant shall furnish a copy to the Governor of the state in which the line is to be constructed, and also to the Secretary of Defense, Attn. Special Assistant for Telecommunications, Pentagon, Washington, DC 20301.

(d) Unless the Bureau notifies the applicant otherwise within 14 days of the issuance of the

public notice listing the application as accepted for filing, the 47 U.S.C. § 214 authorization will be deemed granted, and the LEC may begin construction on the 15th day. The Bureau will confirm such authorizations in public notices issued monthly. Where the Bureau has notified the applicant, action by the full Commission on the 47 U.S.C. § 214 application will be taken within 180 days from the date of the Bureau notification.

## Appendix B: Commenters

### Comments

Ameritech

Apollo Cablevision

Bell Atlantic

BellSouth

California Cable Television Assoc. (Cal. CTA)

Continental Cablevision, Western Communications, Benchmark Communications, Columbia Associates, Helicon, Atlantic Cable Coalition, Cable Television Assoc. of Georgia, Great Lakes Cable Coalition, Minnesota Cable Television Assoc., Oregon Cable Television Assoc., Tennessee Cable Television Assoc., and Texas Cable TV Assoc. (Continental, et al)

Entertainment Made Convenient (EMC)

GTE Service Corp. (GTE)

Hargray Telephone

Lenfest West, Lencomm, and Suburban Cable TV (Lenfest)

MCI Telecommunications (MCI)

METS Fans United/Virginia Consumers for Cable Choice, Fairfax County Citizens for Cable Competition, and United Homeowners Assoc.

National Association of Broadcasters

National Cable Television Assoc. (NCTA)

National Telephone Cooperative Assoc. (NTCA)

New York Department of Public Service

NYNEX

Organization for the Protection and Advancement of Small Telephone Companies (OPATSCO)

Pacific Telesis Group (Pacific)

Peoria, AZ, City of

Roseville Telephone (Roseville)

Rural Telephone Company Assembly (RTCA)

Tekstar Cablevision

United States Telephone Association (USTA)

United and Central Telephone (United)

US West Communications (US West)

Video Dialtone Trade Assoc.

### Reply Comments

Ameritech

BellSouth

Cal. CTA

Capital Cities/ABC (Capital Cities)

Continental, et al

Comcast Cable Communications & Jones Intercable

GTE

NCTA  
NTCA  
NYNEX  
Pacific  
Pennsylvania Public Utilities Commission (PA PUC)  
Roseville  
SBC Communications (SBC)  
USTA