

**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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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 GTE 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. 30.

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)).

will offer "sufficient capacity to serve multiple video programmers."³⁰ The Commission has repeatedly stated that the platform will serve as the foundation through which multiple video programmers can provide services to end users, and is therefore critical to achieving the goals of increased competition in the delivery of video services and greater diversity of video programming.³¹ Local telephone companies offering video dialtone service must expand the capacity of their video dialtone platforms to meet increased demand "whenever, and to the extent that, expansion is technically feasible and economically reasonable."³² To determine whether an applicant has met the capacity requirement, we review each application, on a case-by-case basis, taking into consideration: (1) the initial capacity available; (2) the ability to expand this capacity; and (3) the demand for capacity.³³ For applications to provide video dialtone on a trial basis, we also consider the proposed duration of the offering.³⁴

12. We find that BST's proposal meets our capacity and expandability requirements. The initial capacity of the video dialtone platform, according to BST, will be 70 analog channels and approximately 240 digital channels.³⁵ The petitioners have not persuaded us that this capacity will be inadequate to serve multiple video programmers. Indeed, the Commission has approved applications for both commercial and trial deployment of video dialtone facilities offering substantially similar capacity.³⁶ The Commission has found that platforms containing approximately 70 analog channels and about 300 digital channels would provide sufficient capacity to serve multiple video programmers.³⁷ Similarly, we conclude that BST's proposed system capacity is sufficient to serve multiple programmers, particularly in the context of a trial

30 Video Dialtone Reconsideration Order at paras. 30, 33.

31 Id. at para. 31 (citing Video Dialtone Order, 7 FCC Rcd at 5797, para. 29).

32 Video Dialtone Reconsideration Order at para. 38.

33 The Southern New England Tel. Co., 9 FCC Rcd 7715, 7729, para. 23 (1994) (SNET Expanded Trial Order) (citing The Southern New England Tel. Co., 9 FCC Rcd 1019, 1022 n.46. (1993) (SNET Pilot Trial Order)).

34 Id.

35 Amended Application at 3, 6-7. BST explains that the exact number of digital video channels will depend on the digital compression technique and rate used. Id. n.4.

36 See Ameritech Operating Cos., FCC 94-340, at paras. 5, 14 (released Jan. 4, 1995); SNET Expanded Trial Order, 9 FCC Rcd at 7717, para. 5.

37 See, e.g., Ameritech Operating Cos. at para. 14 (platform with 70 analog and 240 digital multicast channels as well as 80 switched digital channels); SNET Expanded Trial Order, 9 FCC Rcd at 7729, para. 24 (platform with 80 analog channels and about 200 digital channels).

limited in duration and scope. We reject CTAG's suggestion that digital equipment will not be available to BST for purposes of this limited trial. BST asserts that it has commitments from vendors for the necessary equipment, and CTAG fails to offer persuasive evidence showing that these commitments will not be met.³⁸ Indeed, BST is not alone in proposing video dialtone platforms with substantial digital capacity. To date, the Commission has approved 17 video dialtone applications; the vast majority of these applications proposed platforms consisting of some digital capacity. Bell Atlantic has been granted authority to offer all-digital video dialtone service in its telephone service area.³⁹ In approving these applications, the Commission has found unconvincing arguments that digital technology will not be available in the near term, and petitioners have offered no new information to persuade us otherwise.

13. We also conclude that BST's representations with regard to expansion of the platform are consistent with our video dialtone rules and policies. BST states: "If demand for any type of channel exceeds supply, BST will consider all reasonable alternatives for addressing such demand."⁴⁰ We believe this commitment is consistent with our requirement that BST expand capacity to the extent technically feasible and economically reasonable, particularly in the context of a video dialtone trial of limited duration.⁴¹ We will require BST to notify the Chief of the Common Carrier Bureau of any anticipated or existing capacity shortfall that arises during the trial and of BST's plans for addressing such shortfall within thirty days of the date BST becomes aware of capacity shortfall or within five days after denying a video programmer access to the platform because of capacity limitations.⁴² BST will be required to expand system capacity to the extent that expansion is technically feasible and economically reasonable within the context of its 18-month trial. To the extent BST concludes that expansion of the platform's capacity during the trial is not technically feasible or economically reasonable, it must, at the

38 In fact, Compression Labs, Inc., a developer and manufacturer of digital equipment, states that "digital compression and transmission equipment will be commercially available in 1995" Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Comments of Compression Labs, Inc., CC Docket No. 87-266 and RM-8221 (filed Dec. 16, 1994).

39 New Jersey Bell Tel. Co., 9 FCC Rcd 3677 (1994) (Bell Atlantic Dover Order) (authorizing construction for commercial-video dialtone service in Dover Township, New Jersey); The Chesapeake & Potomac Tel. Co. of Virginia, 8 FCC Rcd 2313 (1993) (Bell Atlantic Arlington Trial Order) (authorizing technical trial of asymmetric digital subscriber line (ADSL) technology for video dialtone service); The Chesapeake & Potomac Tel. Co. of Virginia, FCC 95-15 (released Jan. 20, 1995) (Bell Atlantic Market Trial Order) (authorizing market trial of ADSL platform in northern Virginia).

40 Amended Application at 3-4.

41 See Ameritech Operating Cos. at para. 11.

42 Video Dialtone Reconsideration Order at para. 38.

time, explain in detail the basis for its determination.⁴³

2. Nondiscriminatory Access to the Video Dialtone Platform

Comments

14. CTAG asserts that BST's application fails to satisfy the Commission's requirement that telephone companies provide nondiscriminatory access to their basic video dialtone platform. It argues that BST intends to require customer-programmers to access the basic platform through a Level 2 gateway.⁴⁴

Discussion

15. We find no basis in the record for CTAG's assertion that BST will require customer-programmers to use a Level 2 gateway to gain access to the basic platform. Rather, BST states that access to its basic video dialtone platform will be available on nondiscriminatory terms and conditions to all video programmers.⁴⁵

16. We conclude that BST's application meets our nondiscriminatory access requirements, provided that BST complies with certain conditions. We find it necessary to condition BST's authorization in two essential ways to assure us that it will provide nondiscriminatory access. First, BST does not describe the procedures by which video programmers may request channel capacity. For example, BST does not indicate whether there will be an open enrollment period, and if so, the duration of such period, and the steps it will take to notify potential customer-programmers of the opportunity to request capacity on the platform. Nor does BST indicate whether and how customer-programmers may seek channel capacity after the conclusion of any such enrollment period. Second, BST does not specify the maximum amount of capacity that it would allot to any one video programmer.⁴⁶ The absence of information about BST's plans in these regards raises concern whether BST will be able to make capacity available to multiple programmers on nondiscriminatory terms.⁴⁷ For example, if BST were to adopt an unreasonably restrictive enrollment period, some video programmers may be denied the opportunity to request capacity on BST's platform. Similarly, without limits

43 See id.

44 CTAG Petition at 16.

45 Amended Application at 3, 4, 9, Revised Exhibit 2.

46 BST states that it "reserves the right to limit the number of channels made available to any Customer [programmer]" Amended Application, Revised Exhibit 6 (Illustrative Tariff) at 8.

47 See Ameritech Operating Cos. at para. 28.

on the amount of capacity that may be allocated to a single programmer, capacity may be unavailable to multiple programmers.

17. To address these concerns, we condition our approval of BST's Section 214 application on its compliance with the following requirements. First, if BST establishes a limited enrollment period for customer-programmers, that period must be at least thirty days.⁴⁸ If there is capacity available at the end of the enrollment period, BST must either initiate an additional enrollment period or offer this capacity on a first-come, first-served basis.⁴⁹ Second, BST must take reasonable measures to inform potential customer-programmers of any enrollment period, such as by placing an announcement in industry trade journals. Third, BST may not assign more than fifty percent of its analog capacity to a single customer-programmer.⁵⁰ If, however, there is excess analog capacity available, a customer-programmer may exceed the fifty percent capacity limitation, provided that the customer-programmer agrees to relinquish capacity in excess of the fifty percent limitation if necessary to meet future demand.

3. Provision of Video Programming by BST over the Video Dialtone Platform

Comments

18. CTAG argues that by proposing to provide video programming over its broadband facilities, BST is essentially proposing to construct a "cable system" as defined in the Cable Communications Policy Act of 1984.⁵¹ CTAG claims that BST's ownership of both programming content and transport facilities would render it a "cable operator" providing "cable service" over a "cable system."⁵² As such, CTAG contends, BST must obtain a cable franchise

48 Compare U S WEST Communications, Inc., FCC 94-350, n.21 (released Jan. 6, 1995) (in its limited Omaha trial, U S WEST provided interested programmers 24 days in which to file their requests for analog channel capacity; no party claimed that this period was unreasonable or discriminatory).

49 See Bell Atlantic Market Trial Order at para. 32.

50 This is consistent with the Commission's order approving Ameritech's Section 214 applications, wherein the Commission found reasonable a 50 percent capacity limitation. Ameritech Operating Cos. at para. 28; see Bell Atlantic Market Trial Order at para. 31.

51 Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 521, et seq.) (1984 Cable Act).

52 CTAG Comments at 8 (citing Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300, 327 (1991); National Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994)).

prior to filing a Section 214 application to construct video transport facilities.⁵³ Noting that BST has not secured such a franchise, CTAG argues that BST's application is premature.⁵⁴ CTAG also asserts that telephone company provision of video programming over a telephone company-owned broadband network would seriously threaten the public interest because the current video dialtone regulatory construct "was not designed to accommodate" telephone company provision of video programming over a broadband network.⁵⁵

19. BST responds that the issue of whether BST must obtain a cable franchise in order to be one of the programmers on its platform need not be resolved before the Commission can act on its application.⁵⁶ BST notes that the Commission has recently authorized Bell Atlantic, through an affiliate, to provide video programming directly to end users over its video dialtone platform.⁵⁷

Discussion

20. Under the present circumstances, we conclude that BST should be permitted to provide video programming directly to subscribers over its own video dialtone platform during this trial of limited geographic scope and duration. In granting Bell Atlantic-Virginia, Inc.'s application to conduct a market trial in northern Virginia, the Commission recently authorized the provision of video programming by Bell Atlantic's affiliated programming company, Bell Atlantic Video Services, subject to certain safeguards.⁵⁸ Consistent with this decision, we authorize BST to provide video programming directly to subscribers over its video dialtone platform, subject to certain safeguards.

21. Our current video dialtone rules prohibiting provision of video programming by telephone companies were developed in light of the cross-ownership provisions of the 1984 Cable Act. The U.S. District Court for the Northern District of Alabama has enjoined the Commission from applying these provisions of the 1984 Cable Act to BST and its affiliates.⁵⁹

53 CTAG Comments at 11 (relying on 47 U.S.C. § 541(b)).

54 CTAG Comments at 14 (citing Wisconsin Bell, Inc., 4 FCC Rcd 2238, 2240 (1989)).

55 CTAG Comments at 15-17. CTAG argues that, without additional safeguards, telephone companies providing video programming directly to end users could unreasonably discriminate against other video programmers on its network. Id. at 16.

56 Id. at 6-7.

57 Id.; see Bell Atlantic Market Trial Order at para. 21.

58 Bell Atlantic Market Trial Order at para. 21.

59 See supra note 5.

Although we have initiated a rulemaking proceeding to address generally the terms under which local telephone companies may provide video programming subsequent to BellSouth Corp. v. FCC and other similar decisions,⁶⁰ we are acting now to allow BST to provide video programming over its video dialtone platform subject to interim safeguards. This authorization, however, like Bell Atlantic's market trial authorization, will be conditioned on BST's compliance with any rule or policies adopted in rulemaking proceeding. We believe that this is consistent with the district court's decision, and provides necessary protections for the public and other industry participants. In response to CTAG's argument, we acknowledge that BST's provision of video programming over its video dialtone platform is inconsistent with our existing video dialtone rules.⁶¹ Nevertheless, in light of the injunction, as well as the safeguards we adopt here, we waive our video dialtone rules to the extent necessary to permit BST to provide programming over its platform for the duration of the trial consistent with this order.

22. Pending the resolution of the rulemaking, BST's provision of video programming will be subject to existing safeguards for the provision of enhanced and other non-regulated services.⁶² We agree with CTAG that, to protect the public interest, additional interim

60 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, FCC 95-20 (released Jan. 20, 1995).

61 See supra para. 18.

62 The regional Bell Operating Companies (BOCs) are subject to a comprehensive regulatory framework for the provision of enhanced services designed to protect against discrimination and anticompetitive conduct. During this trial, we will treat the provision of video programming by BST as an enhanced service under Section 64.702(a) of our rules. "Enhanced services" are defined in our rules at 47 C.F.R. § 64.702(a). The safeguards against cross-subsidization include accounting and cost allocation rules to separate enhanced and other non-regulated service costs from regulated service costs. The safeguards against discrimination include: 1) Open Network Architecture (ONA) requirements that ensure that enhanced service providers are able to obtain nondiscriminatory access to basic BOC services; 2) customer proprietary network information (CPNI) requirements that limit access of BOC enhanced services marketing personnel to CPNI if a customer requests, and require that for customers with more than twenty access lines the BOCs must obtain prior customer authorization before gaining access to CPNI; 3) network disclosure rules that ensure enhanced services providers have access to information about network changes that could affect the interconnection of their enhanced services to the network; and 4) nondiscrimination reporting requirements to ensure that BOCs do not discriminate in the quality, installation, and maintenance of basic services provided to certain enhanced service providers. See Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order). We note that the U.S. Court of Appeals for the Ninth Circuit recently remanded in part the BOC Safeguards Order, on the ground that the Commission had not adequately explained how, without full unbundling of BOC networks

safeguards should also be imposed in light of BST's provision of video programming.⁶³ Specifically, to the extent BST provides any marketing, promotional, or sales referral services to a programming affiliate in connection with this trial, BST must offer such services to all other video programmers participating in the trial on the same terms and conditions. BST must also offer transport service, interconnection, and interoperability for unaffiliated video programmers that are equivalent to that provided to an affiliate. Finally, BST shall submit to the Commission copies of all promotional materials and descriptions of all marketing activities directed at encouraging video programmers to use BST's video dialtone service. As a supplement to existing safeguards governing BST's provision of enhanced services, these measures should significantly protect against potential discrimination in favor of BST's programming affiliate, and ensure that BST actively seeks unaffiliated video programmers.⁶⁴

23. We believe that these conditions, coupled with pre-existing requirements applicable to a BOC's provision of enhanced services, and the other measures adopted in this Order, will sufficiently protect consumers and prevent anticompetitive behavior during this trial. When the Commission completes the Fourth Further Notice of Proposed Rulemaking, BST will be required to comply with any requirements imposed pursuant to Titles I, II or VI of the Communications Act the Commission adopts in that proceeding. Our decision today in no way prejudices the issue of what permanent safeguards the Commission should impose upon local telephone companies providing video programming over video dialtone platforms.

24. We do not address, at this time, whether BST will need to obtain a franchise or otherwise comply with Title VI requirements to provide video programming over its video dialtone platform either directly or through an affiliate. Thus, we are not here precluding cities

under ONA, access discrimination could be prevented in the absence of structural safeguards. California v. FCC, 39 F.3d 919 (9th Cir. 1994). The Common Carrier Bureau has issued an interim waiver, effective upon issuance of the Ninth Circuit's mandate, permitting the BOCs to offer integrated enhanced services (including video dialtone-related enhanced services) pursuant to certain conditions, while the Commission conducts remand proceedings. Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, DA 95-36 (Com. Car. Bur., January 11, 1995). Under the terms of the waiver, BOCs must comply with our market trial notification procedures before commencing market trials of new enhanced services, and must receive approval of service-specific Comparably Efficient Interconnection (CEI) plans before offering any new enhanced service on a commercial basis.

63 Section 214 gives the Commission authority to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c).

64 These safeguards are fully consistent with requirements imposed by the Commission on Bell Atlantic-Virginia for its northern Virginia video dialtone market trial. See Bell Atlantic Market Trial Order at paras. 21-24.

from independently evaluating the applicability of Title VI. It will be the responsibility of BST to weigh the risks involved in proceeding without obtaining a cable franchise and to determine how to proceed. In the rulemaking we have initiated, we are requesting comment on whether a local telephone company that seeks to provide video programming services directly or through an affiliate must obtain a cable franchise, or otherwise comply with Title VI requirements.⁶⁵ As noted above, BST will be bound by the outcome of that rulemaking proceeding.

4. Miscellaneous Issues

Comments

25. SHC alleges that, because BST's system will pass only 12,000 homes, compared to the 43,000 homes the incumbent cable operator's system passes, and because of the demographics of the trial service area, BST may be engaging in selective, discriminatory deployment of its video dialtone system.⁶⁶

26. NCTA challenges the minimum service commitment of eighteen months contained in BST's illustrative tariff.⁶⁷ NCTA argues that this provision is unreasonably discriminatory because it creates a distinction between large and small programmers.⁶⁸ According to NCTA, implementation of this requirement will result in part-time programmers being unable to provide their programming on BST's platform.

27. BST does not respond to SHC's claim of selective deployment. With regard to the minimum service requirement, BST responds that the appropriate forum in which to consider such a provision is the tariff review process following grant of an application.⁶⁹ In the tariff review, BST states that it will respond to any concerns regarding the availability of capacity for part-time programmers, and will justify the minimum service period for full-time channels.

65 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, FCC 95-20, at 13, para. 17. Comments on the Fourth Further Notice are due March 6, 1995. Reply comments are due March 27, 1995.

66 SHC Comments at 6 n.7.

67 NCTA Petition (January) at 7.

68 Id.

69 BST Reply at 5. BST states that it does not assume that approval of its application also authorizes its illustrative tariff.

Discussion

28. SHC provides no evidence to support its assertion of selective deployment. We note, in any case, that the Commission has stated that it believes that a trial authorization affords a carrier the flexibility to decide how and where its limited trial of video dialtone service will be offered.⁷⁰ The Commission has further stated that a trial is intended to enable carriers to experiment and test new technologies and marketing strategies under "real world" conditions.⁷¹ In May 1994, a coalition of five consumer organizations filed two separate petitions asking the Commission to: (1) ensure that video dialtone facilities are deployed in a nondiscriminatory manner and that services are made available universally, and (2) commence a rulemaking to modify the Section 214 application process to ensure equitable introduction of video dialtone and public involvement in the application process.⁷² The issues raised in the petitions deserve serious consideration, and the Commission is committed to a careful review of the record.

29. We agree with BST that issues relating to minimum service requirements are best addressed in the tariff review process. Nevertheless, for guidance in advance of this process, we note our concerns regarding the proposed 18-month minimum programming commitment contained in BST's illustrative tariff.⁷³ In the Ameritech Section 214 order, the Commission noted its view that Ameritech's proposed one-year minimum service requirement appeared to be unreasonable.⁷⁴ The Commission stated that this requirement could restrict the ability of customer-programmers to provide programming on a less than full-time basis or for less than a year, and for this reason, appeared inconsistent with the Commission's goal of increasing the diversity of video programming available to the public. We harbor similar concerns with respect to BST's proposed 18-month commitment. We recognize that a trial of limited duration presents different considerations than a commercial application. At this point, however, BST has not adequately demonstrated that a service requirement of 18 months is necessary to the viability of BST's trial. We will consider the reasonableness of any specific rate proposals or regulations for part-time programmers, such as requiring purchase of minimum time blocks, in the tariff review process.

70 SNET Expanded Trial Order, 9 FCC Rcd at 7739, para. 39.

71 Id.

72 Petition for Rulemaking to Adapt the Section 214 Process to the Construction of Video Dialtone Facilities and Petition for Relief of the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, National Council of La Raza, RM-8491 (Public Notice, DA 94-777, July 14, 1994). Comments on the petitions were due July 12, 1994. Replies were due July 27, 1994.

73 See Ameritech Operating Cos. at para. 30.

74 Ameritech Operating Cos. at para. 30.

B. Section 214 Issues

1. Overview

30. Local telephone companies that wish to offer interstate video dialtone service must obtain approval of a Section 214 application before constructing any new or additional network facilities.⁷⁵ Section 214(a) requires a carrier to obtain certification before constructing or extending a line it will use for interstate communications. It has become clear through the Section 214 process for video dialtone that local telephone companies will use video dialtone systems for interstate communications, including delivering video programming transmitted by means of radio waves. Before the Commission can grant a Section 214 application, it must determine that a grant would serve the "public convenience and necessity."⁷⁶ Traditionally, the focus of the Section 214 review has been "to ensure that carriers prudently invest in equipment so as to avoid waste and unreasonably high rates" for telephone ratepayers.⁷⁷ The courts have given the Commission significant latitude in making its determinations under Section 214 of the Act.⁷⁸

31. In the following sections, we consider the issues of whether BST's application is a bona fide proposal to conduct a video dialtone trial; whether BST has demonstrated that its proposed construction is economically justified; and finally, whether BST's proposed construction will serve the public convenience and necessity as required by Section 214.

2. Classification of BST's Application as a Trial

Comments

32. Petitioners argue that BST's application and amended application should be

75 Video Dialtone Reconsideration Order at paras. 136-137; 47 U.S.C. § 214(a).

76 47 U.S.C. § 214(c).

77 AT&T Request for Authorization to Supplement Existing Lines, File No. W-P-C-5560 (released March 10, 1986).

78 Century Federal, Inc. v. FCC, 846 F.2d 1479 (D.C. Cir. 1988); General Tel. Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). In General Telephone Company of the Southwest, the court noted that "[t]he Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. . . . [B]ut the Commission must at least warrant . . . that competition [resulting from the grant] would serve some beneficial purpose" General Telephone Company of the Southwest, 449 F.2d at 858 (citing FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953)).

considered a request to offer commercial video dialtone service, and that accordingly, BST should provide the Commission with sufficient information about its plans, so the Commission can fully evaluate whether BST's proposed construction is in the public interest.⁷⁹ NCTA alleges that certain carriers, like BST, have resorted to labelling their video dialtone projects "trials" to avoid the more rigorous scrutiny applied to applications to offer commercial video dialtone service.⁸⁰ For several reasons, NCTA asserts, BST's application more closely resembles an application to provide commercial video dialtone service than one to conduct a trial of video dialtone.⁸¹ NCTA contends that the proposed size of BST's project is too large to qualify as a trial and, further, that BST fails to explain the need for this large a trial.⁸² NCTA also asserts that BST fails to explain the relevance to its future plans of the market data it hopes to obtain. In addition, NCTA argues that BST does not explain why it cannot obtain the market and technical information it seeks from available sources.⁸³ Finally, NCTA questions the validity of a trial designed to "test the economic viability" of a service when BST concedes that it does not expect revenues to cover the costs of the trial.⁸⁴ CTAG argues that, because BST states in its amended application that it may yet seek approval of its original combined channel service-video dialtone proposal, BST's amended application is not a bona fide trial proposal.⁸⁵

33. BST maintains that its application for trial authority contains no element that has not been previously reviewed and approved by the Commission.⁸⁶ BST argues that petitioners have presented no persuasive reason to subject the BST application to a heightened level of scrutiny or to approve the application subject to any special conditions.⁸⁷ In response to arguments that there is no genuine need for a trial, BST asserts that it has justified its trial to the same extent that other video dialtone applicants have, and should be treated no differently.⁸⁸ In addition,

79 NCTA Petition (January) at 2-3; CTAG Comments at 4-6.

80 NCTA Petition (January) at 2.

81 Id.

82 Id.

83 Id. at 2-3. According to NCTA, "BellSouth has not identified anything it does not already know about the technical aspects of these [hybrid fiber-coax] systems or that could not be obtained by consulting with its equipment supplier" Id. at 3.

84 Id. (quoting Amended Application at 10).

85 CTAG Comments at 4.

86 BST Reply at 2.

87 Id.

88 Id. at 3.

BST provides an affidavit from the president of a marketing research and consulting firm who states that, for the purposes of this trial, 18 months would be the minimum acceptable period from which to derive useful marketing information and 24 months would be optimal.⁸⁹

Discussion

34. We conclude that BST's application is a bona fide proposal for a technical and market trial of video dialtone facilities. The Communications Act requires the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide" wire and radio communications service.⁹⁰ The Commission also has a mandate under the Act to encourage technological innovation in communications, and to expedite the introduction of new technology subject to other public interest considerations.⁹¹ In the Video Dialtone Order, the Commission found that it is in the public interest to encourage trials of video dialtone technology in order to fulfill its goal of promoting efficient investment in the national telecommunications infrastructure.⁹² The Commission has repeatedly declined to set fixed numbers regarding the size or duration of video dialtone trials, but rather has found that a case-by-case review better serves the public interest.⁹³ Moreover, the Commission has stated its preference not to interfere with carriers' decisions regarding technologies or services. Rather, it has stated that "through the trial process, carriers can be given a certain amount of flexibility to explore the commercial and technical viability of video dialtone."⁹⁴

35. We find that it is reasonable for BST to pass 12,000 homes with its network facilities for the purposes of its proposed trial.⁹⁵ While opponents of BST's trial assert that it is too large, they fail to present any compelling arguments to support these assertions. We do, however, impose certain conditions on BST's authorization intended to protect telephone ratepayers and trial participants. First, consistent with the Commission's U S WEST Omaha

89 Initial Application, Exhibit 7, at 4.

90 47 U.S.C. § 151.

91 47 U.S.C. §§ 151, 157, 218.

92 7 FCC Rcd at 5836, para. 105; see Video Dialtone Reconsideration Order at para. 3.

93 See, e.g., SNET Expanded Trial Order, 9 FCC Rcd at 7722, para. 12; U S WEST Communications, Inc., 9 FCC Rcd 184, 188, para. 22 (1993).

94 SNET Expanded Trial Order, 9 FCC Rcd at 7738, para. 38.

95 See SNET Expanded Trial Order, 9 FCC Rcd at 7724, para. 15 (approving construction of video dialtone facilities that will pass 150,000 homes); U S WEST Communications, Inc., 9 FCC Rcd at 188, paras. 24-25 (approving a technical trial of 2,500 homes and a market trial of 60,000 homes).

trial authorization, if BST's technical trial passes more than 2,500 homes, BST must charge trial participants at tariffed rates after no more than thirty days of free trial service.⁹⁶ Second, we limit this authorization to 18 months. Thus, both the technical and market trials should be completed during that time period. Third, BST must inform customer-programmers and end user-subscribers that it is conducting a trial of video dialtone services, that the trial is limited to 18 months, and that BST, if it wishes to continue to offer video dialtone service on a commercial basis, must seek Commission approval.⁹⁷

36. We find unconvincing NCTA's argument that BST cannot conduct a valid market trial because BST expects that revenues will not cover the trial's costs. Market trials test consumer acceptance of new products and services. The Commission has concluded that, because applications to conduct video dialtone trials are limited in scope and duration, a lesser degree of scrutiny can be applied to the economic justification provided in support of the application.⁹⁸ We find CTAG's contention that BST's application cannot be considered genuine because it may ultimately seek approval of a different capacity structure irrelevant to the consideration of this application. Petitioners have not shown that the data BST will derive from its market trial will not be reasonably related to future video dialtone plans.

3. Economic Justification

Comments

37. SHC and CTAG assert that BST presented no economic justification for its proposed trial. CTAG states that BST failed to identify the cost allocator it used, revenue and cost estimates, cash flow information, and accounting information, and to demonstrate that the proposed system will not be cross-subsidized by telephone subscribers.⁹⁹ CTAG alleges that BST cannot provide an economic justification for its proposal because the system will not break even in a reasonable period of time.¹⁰⁰ In addition, CTAG maintains that, since the initial

96 See U S WEST Communications, Inc., 9 FCC Rcd at 188, 190, paras. 24, 35(c).

97 This is consistent with conditions imposed in previous video dialtone authorizations. See, e.g., SNET Expanded Trial Order, 9 FCC Rcd at 7723, para. 13. The technical phase of BST's trial will begin when service is available to at least one end user-subscriber. See infra para. 51.

98 See infra para. 41.

99 CTAG Petition at 17-20 (citing Letter to Edward D. Young, III, 8 FCC Rcd 5183 (1993)); CTAG Reply at 11-12; CTAG Comments at 28-29. CTAG asserts that even after amending its application, BST has still not provided the Commission with adequate cost and revenue information. CTAG Comments at 29.

100 CTAG Petition at 21.

application was filed, the cost of BST's proposed trial has increased 40 percent, from \$6.25 million to \$8.75 million.¹⁰¹ CTAG states that BST did not explain the reason for this increase.

38. In support of its motion to dismiss, NCTA argues that BST's proposal violates the Video Dialtone Reconsideration Order's cost information requirements.¹⁰² First, NCTA states that BST failed to allocate costs between the state and federal jurisdictions.¹⁰³ Second, NCTA argues that BST failed to provide a fully detailed economic justification, which should include detailed cost and revenue estimates, an explanation of assumptions underlying the estimates, and a reasonable cost allocator.¹⁰⁴

39. BST concedes that the revenues from the trial will not cover costs, but argues that it does not attempt to justify the trial on that basis.¹⁰⁵ Instead, BST argues that the trial is justified by the economic benefits of the information the trial will produce.¹⁰⁶ BST also argues that a trial does not require the detailed economic justification sought by NCTA.¹⁰⁷ BST states that it will separately account for its video dialtone costs, and will not actually assign any costs to any jurisdiction until authorized by the appropriate regulator.¹⁰⁸ BST also asserts that the tariff review process and the Commission's accounting safeguards are adequate to ensure that video dialtone rates are reasonable and that telephone ratepayers' interests will be protected.¹⁰⁹

40. In response to arguments regarding the increased cost of its video dialtone project, BST contends that it is reasonable to expect cost estimates to change "as planning for deployment of new technology progresses to greater levels of detail and as assumptions are

101 CTAG Comments at 30. In its initial petition to deny, NCTA argued that BST costs for the trial would exceed its estimates because it had ignored operational costs associated with video dialtone, including marketing and sales, service and maintenance, and other general and administrative expenses. NCTA Petition (August) at 16.

102 In support of its motion, NCTA also argued that BST's proposal is discriminatory. These arguments are addressed in paragraphs 15-16, supra.

103 NCTA Motion at 6.

104 NCTA Motion at 6-11; see NCTA Petition (January) at 3.

105 Amended Application at 10; BST Reply at 3.

106 Amended Application at 10; see BST Opposition at 20.

107 BST Opposition to Motion to Dismiss at 3.

108 Id. at 2-3.

109 BST Reply at 4.

refined by new information."¹¹⁰ BST argues further that evolving cost estimates do not, in any case, provide a basis for rejecting its application or for subjecting it to a higher level of scrutiny than other applications for video dialtone trials.¹¹¹

Discussion

41. We reject contentions that BST has not demonstrated sufficient economic justification for its proposed trial. Those arguing to the contrary ask the Commission to hold the application to a level of scrutiny and examination normally reserved for applications for commercial deployment of video dialtone service. BST proposes to conduct a trial involving only 12,000 homes for 18 months. Because of the experimental, limited nature of BST's proposal, we find that it is in the public interest to subject the economic support accompanying this trial application to a less exacting level of scrutiny than would apply to an application for permanent, commercial video dialtone service.¹¹² Nevertheless, consistent with the Commission's treatment of other trial applications, any shortfall between revenues recouped and costs expended for the trial must ultimately be borne by the BST's shareholders.¹¹³ The record indicates that BST will be in a position to absorb those costs if necessary, without jeopardizing the interests of its telephone customers.¹¹⁴

42. We note that as of year-end 1993, BST had a net income of \$887 million on \$12.9 billion of total operating revenues.¹¹⁵ It also had net assets of \$23.1 billion on \$26.72 billion of total assets.¹¹⁶ BST represents its total costs for the trial to be approximately \$9 million. We find that the estimated cost of the trial does not justify denial of the application. We thus find the information provided by BST to be a sufficient showing of economic justification for this trial.

43. To ensure that video dialtone costs are not borne by ratepayers of other regulated

110 BST Reply at 8.

111 Id.

112 See Puerto Rico Telephone Company, DA 94-1384 at para. 39 (released Dec. 5, 1994); SNET Expanded Trial Order at paras. 37, 39; U S WEST Communications, Inc. at 188 n.57; see also Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988).

113 See SNET Expanded Trial Order, 9 FCC Rcd at 7738-39, para. 39.

114 See U S WEST Communications, Inc., 9 FCC Rcd at 188, para. 25.

115 Statistics of Communications Common Carriers, Federal Communications Commission, at 74-75 (1993/1994 ed.).

116 Id. at 70.

interstate services, we will require BST to segregate all costs incurred in providing trial video dialtone service, including development costs and expenses, into subsidiary accounting records for each Part 32 account and to assign these costs to the video dialtone trial. These costs must include both the direct and shared costs of any facilities, including inter-office fiber, used for the provision of video dialtone service. As we have required for every other video dialtone trial authorization, we require that if these costs, including all incremental costs of video dialtone, are not recovered from future video dialtone services, they must be borne by BST, rather than the ratepayers of other regulated services.¹¹⁷ We will also require BST to create two sets of subsidiary accounting records: one to capture the revenues, investments, and expenses wholly dedicated to the provision of video dialtone service, and the other to capture any revenues, investments, and expenses that are shared between video dialtone service and the provision of other services. BST must file a summary of those records with the Commission on a quarterly basis.¹¹⁸ BST is further required to keep subsidiary accounting records to identify, by each Part 32 account, the amount of plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers. We take no position here concerning BST's proposed method for allocating its common costs -- this allocation will be evaluated during the tariff review process. Finally, in the event BST wishes to offer local exchange and exchange access telephone services over its broadband facilities during the trial, it must first submit and obtain approval of an accounting and cost allocation plan that is consistent with the rules then in effect.¹¹⁹

44. The costs of non-common carrier and enhanced services, as well as video customer premises equipment (CPE) offered during the trial must be accounted for in accordance with Part 32 and Part 64 of the rules.¹²⁰ We require that, to the extent the accounting treatment of non-regulated components of the video dialtone trial is not already covered by BST's cost allocation manual (CAM), BST must revise its manual to cover them. All revisions must be filed within

117 Puerto Rico Tel. Co. at para. 41; SNET Expanded Trial Order at para. 29; New York Tel. Co., 8 FCC Rcd 4325, 4329 at para. 23 (1993); Bell Atlantic Arlington Trial Order, 8 FCC Rcd at 2316, para. 13.

118 Video Dialtone Reconsideration Order at para. 173. Copies of accounting records should be sent to the Chief, Accounting and Audits Division, Common Carrier Bureau. We note that these requirements are consistent with those imposed in other video dialtone trial authorizations. See, e.g., Puerto Rico Tel. Co. at para. 41; SNET Expanded Trial Order at para. 29.

119 See SNET Expanded Trial Order, 9 FCC Rcd at 7732, para. 29; U S WEST Communications, Inc., 9 FCC Rcd at 190, para. 31.

120 47 C.F.R. §§ 32.101 et seq., 64.901 et seq.

thirty days after release of this Order, and sixty days before providing non-regulated services related to video dialtone.¹²¹ At a minimum, in its submission, we require BST to list all accounts affected by its provision of non-regulated services associated with its video dialtone trial, and also describe those services. All temporary CAM revisions related to the trial will be subject to public comment and Commission scrutiny. BST must file permanent revisions if and when it decides, and is authorized, to offer commercial video dialtone services. We emphasize that our decision here, and the conditions we attach to it, are without prejudice to and in no way constrain any action that the Commission may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

4. Public Interest Issues

Comments

45. Petitioners also contend that the Commission should not grant BST's application because BST's proposed construction of video dialtone facilities will not serve the public convenience and necessity, as required by Section 214 of the Communications Act. NCTA argues that, if the Commission concludes that the public interest will be served by BST's proposed video dialtone construction and grants its application, the Commission should not consider any subsequent BST video dialtone application until this trial has ended and the results evaluated.¹²² NCTA asserts that, because BST has claimed that it needs to conduct this video dialtone trial to determine whether video dialtone is economically viable and technically feasible, it would be reasonable for the Commission not to consider any BST application for video dialtone until this trial is complete.¹²³ NCTA also argues that the Commission should condition any authorization granted to BST on BST's endorsement of local exchange competition.¹²⁴

46. CTAG contends that BST's application should be rejected because BST has engaged in anticompetitive conduct. According to CTAG, shortly after the pleading cycle closed on BST's Initial Application, BST notified Georgia's cable operators that it was increasing the rates charged for pole attachments from \$3.68 to \$4.40 per pole.¹²⁵ CTAG alleges that this pole attachment rate increase is "a deliberate attempt to inflict competitive harm on cable operators," and thus requires that BST's application be denied.

121 See 47 C.F.R. § 64.903(b).

122 NCTA Petition (January) at 4.

123 Id. at 5.

124 Id.

125 CTAG Comments at 17 (citing Cable Television Ass'n of Georgia v. BellSouth Telecommunications, Inc., P.A. No. 95-___ (filed Dec. 30, 1994)).

47. BST responds that NCTA's request that the Commission not consider any subsequent BST video dialtone application until the instant trial is complete would be a condition that has not previously been imposed on a video dialtone trial authorization. BST argues that such a condition would only delay telephone company entry into the video marketplace and, thus, would be inappropriate and contrary to stated Commission goals.¹²⁶ BST notes that the Commission authorized Bell Atlantic to deploy commercial video dialtone facilities before its trial was complete. BST contends that the trial process is a continuing learning experience, both before and during a trial, and can contribute to planning for and implementation of commercial deployments, even if they overlap the trial period.¹²⁷ In response to NCTA's argument that BST should be required to support local exchange competition as a condition for a grant of its application, BST asserts that imposition of such a requirement would subject it to a condition not imposed on any other video dialtone applicant, and that would be an unlawful intrusion into the prerogative of the State of Georgia.¹²⁸

48. BST argues that there is no basis for the Commission to deny its application because of CTAG's pole attachment complaint. According to BST, the complaint is "limited to a disagreement about the application of the Commission's formula for calculating pole attachments rates."¹²⁹ Moreover, BST contends that any delay in consideration of its application would encourage opponents of video dialtone to file similar complaints to delay the deployment of competitive video technologies such as video dialtone.¹³⁰

Discussion

49. We find that BST's proposed construction of facilities for the provision of video dialtone service will serve the public convenience and necessity. BST has demonstrated that a limited trial of video dialtone technology and services is supported by the Commission's video dialtone orders and prior authorizations for trial video dialtone service. NCTA's argument that the Commission should not consider any subsequent BST video dialtone application while this trial is operational is premature. To date, BST has not filed another Section 214 application to offer video dialtone service, and until such time, consideration of any issues raised by another application would be premature. We reject NCTA's argument that BST should be compelled to support local exchange competition as a condition of this authorization. Although the Commission has stated that it strongly supports the removal of artificial regulatory barriers to competition in local exchange service, we believe that it would not serve the public interest to

126 BST Reply at 4.

127 Id.

128 Id. at 5.

129 Id. at 7.

130 Id.

delay the introduction of competitive video services presented by video dialtone until competition in the provision of local telephone service is authorized.¹³¹ We note that, although the provision of local exchange service is not yet fully competitive in Georgia, the Public Service Commission allows competition in both intrastate interLATA service and intraLATA toll service.¹³² In addition, CTAG's pending pole attachment complaint does not require that we suspend consideration of BST's application or outright rejection of the application. The Commission is currently considering the merits of CTAG's complaint, and even if the Commission finds the new pole attachment rates to be unreasonable, this would not warrant denying BST's subscribers the benefits of video dialtone.

IV. CONCLUSION

50. Based on our review of the record, we grant BST's application to conduct an 18-month trial of video dialtone service in portions of Chamblee and DeKalb County, Georgia, subject to the conditions imposed above. We find that BST's proposal meets the requirements of the Video Dialtone Order, Video Dialtone Reconsideration Order, and Section 214 of the Communications Act. Our approval of this application is subject to any rules resulting from any applicable rulemaking and to any determination regarding CTAG's pole attachment complaint.

V. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED, that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and authority delegated to the Chief of the Common Carrier Bureau by Section 0.291(a) of the Commission's rules, 47 C.F.R. § 0.291(a), the application of BellSouth Telecommunications, Inc. (File No. W-P-C-6977) IS GRANTED, and the applicant is authorized to construct and operate facilities and equipment to provide a video dialtone trial to no more than 12,000 homes in the Chamblee and DeKalb 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. We instruct BST to inform the Secretary of the Commission and the Chief of the Common Carrier Bureau, of the official start date of the technical phase and also of the official start date of the market trial phase of the trial.

131 See Video Dialtone Reconsideration Order at n.66, paras. 142, 267.

132 NARUC Report on the Status of Competition in Intrastate Telecommunications, Nat'l Ass'n of Regulatory Utilities Commissioners, at 36-37 (Sept. 1994). The NARUC report indicates that 19 facilities-based carriers and nearly 300 resellers provide intrastate interLATA service. Id. at 36.

52. IT IS FURTHER ORDERED, that grant of the application for the trial proposed herein IS SUBJECT TO the following CONDITIONS:

- a) That BST make available a basic common carrier platform offering sufficient capacity to serve multiple video programmers under the same terms and conditions and, as demand increases, undertake all reasonable steps to expand capacity to the extent technically feasible and economically reasonable within the context of this trial. BST may not allocate more than fifty percent of the platform's analog channel capacity to any one customer-programmer.
- b) That BST notify the Chief, Common Carrier Bureau (with copies to the Chiefs of the Policy and Program Planning Division and the Domestic Facilities Division) within thirty (30) days of becoming aware of a capacity shortfall and of BST's plans for addressing a deficiency, or within five (5) days after denying a video programmer access to the video dialtone platform because of capacity limitations, whichever occurs first. If BST concludes that expansion of the platform's capacity for the trial is not technically feasible or economically reasonable, it must, at that time, explain in detail the basis for its determination.
- c) That if BST's technical trial passes in excess of 2,500 homes, BST charge trial participants at tariffed rates after no more than thirty (30) days of free trial service.
- d) That BST inform participants in the trial, including both programmer-customers and end user-subscribers, that BST is conducting a trial of video dialtone services, that the trial is limited to 18 months, and that BST may or may not offer video dialtone on a commercial basis after the conclusion of the trial.
- e) That if BST establishes a limited enrollment period for customer-programmers, such period must be at least thirty (30) days in length. If there is platform capacity available at the end of the enrollment period, BST must initiate an additional enrollment period or offer this capacity on a first-come, first-served basis.
- f) That BST take reasonable measures to inform potential customer-programmers of any enrollment period, such as by placing an announcement in industry trade journals.
- g) That BST comply with any rules or policies adopted in the rulemaking proceeding commenced by the Commission's Fourth Further Notice of Proposed Rulemaking, CC Docket 87-266, released January 20, 1995.
- h) That to the extent BST provides any marketing, promotional, or sales referral services to a video programming affiliate in connection with this trial, BST offer such services to all other video programmers participating in the trial on the same terms and conditions. BST must also offer transport service, interconnection, and interoperability for unaffiliated video programmers that are equivalent to that provided to an affiliated video programmer. BST must submit to the Commission copies of all promotional materials and descriptions of all marketing activities directed at encouraging video programmers to use BST's video dialtone service.

i) That BST 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. BST must file three (3) copies of summaries of those records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Two (2) copies of the summaries must also be served on the Chief, Accounting and Audits Division, Common Carrier Bureau. BST is further required to keep subsidiary accounting records to identify, by each Part 32 account, the amount of plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers. In the event BST wishes to offer local exchange and exchange access telephone service over the broadband network during the trial, it must first submit and obtain approval of an accounting and cost allocation plan.

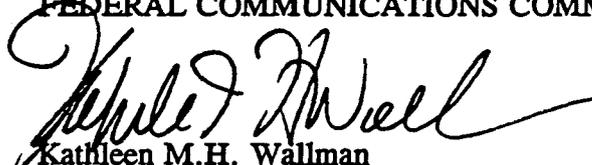
j) That BST file all revisions to its Cost Allocation Manual (CAM) within thirty (30) days after release of this Order, and sixty (60) days before providing non-regulated products or services related to video dialtone. BST must also list all accounts affected by its provision of non-regulated services associated with the video dialtone service, and must describe those services.

k) That BST submit to the Chief, Common Carrier Bureau, at six month intervals during the trial, and within sixty (60) days of the end of the trial, a written report. The report must, among other things:

- 1) identify the capacity allocated to each video programmer-customer and the identity of the programmer-customer;
- 2) include a statement from each video programmer or other service provider using BST's services stating whether that programmer/service provider believes it has been discriminated against by BST in any manner;
- 3) describe the video dialtone technology used during the trial. BST must include information on the components of its video dialtone system, including the methods of accessing the platform available to customer-programmers and subscribers and the digital technology incorporated into the network and its impact on capacity;
- 4) to the extent known, evaluate the market for video dialtone service, providing penetration rates on a monthly basis, and describing consumer interest in on-demand video services and consumer willingness to pay for video dialtone service;
- 5) include any published commentary of which BST is aware regarding the trial.

53. IT IS FURTHER ORDERED, that pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), the grant of BST's application to provide video dialtone service is subject, from the date of release of this grant, to the conditions contained herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, and pricing issues. Failure of the BellSouth Telecommunications, Inc. to decline this authorization as conditioned within thirty-one (31) days from its release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau

APPENDIX: RECORD OF FILE NO. W-P-C-6977

Application, BellSouth Telecommunications, Inc., June 27, 1994 (Application)

Petitions to Deny:

National Cable Television Association, Inc., August 8, 1994 (NCTA Petition (August))

Georgia Cable Television Association, August 8, 1994 (CTAG Petition)

Comments, Scripps Howard Cable Company, August 8, 1994 (SHC Comments)

Opposition to Petitions to Deny, BellSouth Telecommunications, Inc., August 23, 1994 (BST Opposition)

Replies to Opposition to Petitions to Deny:

National Cable Television Association, September 2, 1994 (NCTA Reply)

Georgia Cable Television Association, September 2, 1994 (CTAG Reply)

Scripps Howard Cable Company, September 2, 1994 (SHC Reply)

Motion to Dismiss, National Cable Television Association, Inc., (NCTA Motion)

Opposition to Motion to Dismiss, BellSouth Telecommunications, Inc. (BST Opposition to Motion to Dismiss)

Amended Application, BellSouth Telecommunications, Inc., December 21, 1994 (Amended Application)

Comments:

National Cable Television Association, Inc., January 10, 1995 (NCTA Petition (January))

Cable Television Association of Georgia, January 10, 1995 (CTAG Comments)

Reply, BellSouth Telecommunications, Inc., January 20, 1995 (BST Reply)