Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

U S WEST COMMUNICATIONS, INC. File No. W-P-C-6868

For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area.

ORDER AND AUTHORIZATION

Adopted: November 24, 1993; Released: December 22, 1993

By the Commission: Commissioner Duggan concurring and issuing a statement.

I. INTRODUCTION

1. Before the Commission is an application of U S West Communications, Inc. ("U S West") filed pursuant to Section 214 of the Communications Act of 1934, as amended,[1] Section 63.01 of the Commission's rules, and in accordance with Section 63.54 of the Commission's rules, as amended by the Commission's *Second Report and Order*.[2] U S West seeks authority to construct and operate facilities necessary for the provision of a technical trial and a market trial of video dialtone in its Omaha, Nebraska service area.[3]

2. Cox Enterprises, Inc. ("Cox"), Metrovision, Inc. ("Metrovision"), National Cable Television Association, Inc. ("NCTA"), and CompuServe, Inc.("CompuServe") filed petitions to deny U S West's application. U S West filed an opposition to these petitions to deny, and Cox, Metrovision and CompuServe filed responses to the opposition of U S West.

3. In this order, we grant the application of U S West in part, subject to the conditions identified herein.

II. BACKGROUND

4. In the *Second Report and Order*, the Commission determined that, through video dialtone,[4] local telephone companies could participate in the video marketplace, consistent with the statutory restrictions on telephone company-cable television cross ownership.[5] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[6] The Commission has approved three applications for video dialtone trials.[7]

5. U S West seeks authority to conduct a technical trial of video dialtone for a period of four to six months,[8] followed by a market trial of video dialtone lasting up to one year.[9] According to U S West, the purpose of the technical trial is to test the performance and reliability of the video dialtone platform, quantify the operating costs associated with the provision of video dialtone service, and implement operation and maintenance support systems.[10] U S West proposes to pass approximately 10,000 homes during the technical trial.[11] In addition, U S West states that it will not charge video programmers, enhanced gateway providers, or end users during the technical trial.[12] U S West states that an independent, unaffiliated third party will

---

1 47 U.S.C. § 214.

2 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) (*Second Report and Order), pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company et al. v. FCC*, No. 92-1404 *et al.*, (D.C. Cir. Sept. 9, 1992).

3 On May 12, 1993, U S West filed a request for Special Temporary Authority (STA) to begin construction of video dialtone facilities prior to Section 214 authorization. U S West's request for STA was opposed by Cox, Metrovision, and NCTA. The action taken herein renders this issue moot.

4 "Video dialtone" is defined as the provision by a local telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can access any or all programming provided by video dialtone service providers using video dialtone. If a local telephone company provides such a basic platform, it is permitted to provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. *Second Report and Order*, 7 FCC Rcd at 5783.

5 *Second Report and Order*, 7 FCC Rcd at 5783. In a lawsuit brought by subsidiaries of the Bell Atlantic Corporation, the U.S. District Court for the Eastern District of Virginia recently declared unconstitutional the statutory telephone company/cable television cross-ownership restriction codified in 47 U.S.C. § 533(b), and enjoined the Commission from enforcing that provision. *C&P Telephone, et al. v. U.S.*, No. 92-1751-A (E.D. Vir. August 24, 1993). The court later clarified that its injunction is limited to Bell Atlantic and its subsidiaries, and it denied the motion for intervention filed by U S West and other telephone companies. Thus, there is nothing in the District Court's decision to preclude us from taking action herein.

6 *Id.* at 5820. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. A "line" includes any channel of communication established by appropriate equipment. 47 U.S.C. § 214(a).

7 *C&P of Virginia*, 8 FCC Rcd 2313 (released March 25, 1993)("*C&P Telephone*"); *New York Telephone*, 8 FCC Rcd 4325 (released June 29, 1993)("*New York Telephone*"); *Southern New England Telephone Company*, (FCC 93-473, released November 12, 1993)("*Southern New England Telephone*").

8 U S West Application at 2. U S West states that the precise length of the technical trial will be determined by the type, scope, and magnitude of problems encountered during the trial.

9 *Id.* at 5.

10 *Id.* at 2-3.

11 U S West assumes that approximately 15 percent of the homes passed will elect to participate in the trial.

12 U S West states that video programmers and enhanced gateway providers may charge end users for video programming services.

purchase, package, and deliver Time Warner Entertainment, L.P. ("TWE") owned video programming[13] over its video dialtone platform.[14]

6. The market trial, according to U S West, will commence upon completion of the technical trial. U S West states that the number of homes passed will be expanded to 60,000 homes during the market trial. U S West states that a trial of this magnitude is necessary to: 1) provide video programmers with a large enough subscriber base to test "niche" services; 2) attract video programmers; 3) allow participants to gather market research data; 4) determine viewer usage and traffic patterns in a relatively large scale video dialtone operation; and 5) determine the cost of doing business in a relatively large scale video dialtone operation.[15] U S West states that it will file a tariff with the Commission after obtaining Section 214 authorization and before commencing the market trial.[16]

7. U S West states that it will construct a hybrid fiber-to-the-curb, coaxial cable network for video dialtone, voice and data services; however, U S West states that video and telecommunications services will be provided over separate transmission paths, sharing only a limited amount of common investment, *e.g.*, common trenching, common power, common enclosures, and common cable sheath.[17] U S West states that it will have the capacity to provide 77 analog channels and 800 to 1000 digital channels of video programming. According to U S West, analog and digital channels will be assigned on a nondiscriminatory basis in response to market demand. U S West notes that there may be analog capacity limitations in the short run if unexpected demand develops.[18] U S West states that it is evaluating different allocation methods to ensure that analog capacity is available to all video programmers.

8. U S West states that its video dialtone system will be capable of supporting both traditional video programming as well as video-on-demand and other interactive services.[19] According to U S West, it is discussing the use of its video dialtone platform with numerous video programmers. U S West states that it will provide a menu as part of its basic video dialtone platform that will display the name and phone number of video information providers. U S West states that it will also provide an enhanced video gateway. In addition, U S West states that it may offer other enhanced and non-common carrier services, such as video storage and processing, inside wiring, billing and collection and customer premises equipment ("CPE").

9. U S West states that in addition to tracking all investments and expenses that can be directly assigned to its video dialtone trial, it will also capture any common costs associated with the construction of video dialtone facilities.[20] According to U S West, no costs, including common costs, associated with the construction of video dialtone activities will be assigned to any U S West rate base or as a regulated expense without prior authorization from the Commission.

III. Comments

A. Video Dialtone Trial

10. Cox, Metrovision and NCTA raise concerns regarding the unprecedented size and cost of U S West's proposed trial. Metrovision states that based on the size of the proposed trial and the facilities being constructed, U S West is actually proposing a permanent offering of video dialtone.[21] NCTA proposes that there be limits placed on the size and duration of video dialtone experiments.[22]

11. Metrovision states that U S West, as a common carrier, is obligated to charge for its services in a nondiscriminatory manner that allows U S West to recover its investment.[23] NCTA claims that the provision of free video dialtone service is a marketing ploy, rather than a necessary element for the provision of a technical experiment.[24] Cox states that U S West is not proposing any new technology as part of its technical trial that would justify not

[13] U S West states that its parent corporation, U S West, Inc., will acquire a 25.51 percent interest in TWE. TWE owns interests in franchised cable operators and video programmers. The Commission granted U S West a temporary waiver of the cross-ownership rules for 18 months to enable TWE to sell its interests in cable systems within U S West's telephone service area. *See Time Warner Entertainment Company, L.P. And U S West Communications, Inc.*, 8 FCC Rcd. 7106 (released September 14, 1993).

[14] U S West Application at 4, n.7 . According to U S West, this arrangement is consistent with the *Second Report and Order* and the Cable Act prohibition against a local telephone company providing video programming directly to subscribers in its telephone service area. U S West states that under this arrangement, U S West or TWE will not be "providing video programming directly to subscribers."

[15] *Id.* at 5.

[16] *Id.* at 20.

[17] *Id.* at 9. U S West lists the components of the video dialtone system as: 1) a gateway that combines signals from video providers and distributes them; 2) fiber optic cables; 3) video nodes that convert optical signals to electrical signals; 4) a coaxial cable distribution system; and 5) interdiction devices that provide network control and end user access to individual analog channels.

[18] Analog capacity appears to be preferable to digital capacity in terms of end user access and program availability.

[19] End users with cable-ready television sets, according to U S West, will be able to view programming on analog channels without the aid of a set top box.

[20] *Id.* at 13. U S West states that these costs will be assigned in accordance with all relevant Part 32, Part 36, and Part 64 rules or any other requirements that the Commission may adopt. U S West estimates its material and labor costs for the technical trial to be $8,350,000, which includes $2,928,000 of common costs assigned to the trial. U S West estimates the combined total cost for material and labor for the technical and market trial to be $34,649,000, which includes $15,773,000 of common costs assigned to the trial.

[21] Metrovision Petition at 5.

[22] NCTA states: 1) a heavy burden of justification should be placed on applicants proposing trials lasting longer than one year; 2) technical trials should be based upon the lack of technical knowledge or expertise; and 3) rates should be set at compensatory levels. *See* NCTA Petition at 3-5.

[23] Metrovision Petition at 10-11. Metrovision contends that the amount U S West charges customer-programmers must be sufficient to cover the costs incurred by U S West in constructing and operating its video dialtone network and must be unrelated to the charges end users pay, if any, for programming provided over these facilities.

[24] NCTA Petition at 2-3. According to NCTA, without the regulatory sanction U S West asks the Commission to provide, these predatory anticompetitive rates would violate antitrust laws. *Id.* at 5.

charging trial participants.[25] According to Metrovision, the trial proposed by U S West will result in direct competition between U S West and existing cable providers in the Omaha area, and if U S West is not required to charge video service providers, these service providers will have an unfair competitive advantage over incumbent cable operators such as Metrovision.[26] Cox states that U S West fails to address the impact of providing free video dialtone service on its estimated 15% participation rate, and the likely change in participation once U S West begins charging for transport during the marketing phase of its trial.[27]

12. According to Metrovision, U S West's application does not contain sufficient information to prove that its video dialtone service is economically justified.[28] In addition, Metrovision states that U S West should be required to file a tariff for the services offered during the technical trial. According to Metrovision, without a tariff on file, potential service providers will have no knowledge of what services are available to them.[29]

13. In its opposition, U S West states that although it plans to deploy a video dialtone service if the Omaha trial is successful, it is unwilling to introduce a general video dialtone service until it has tested both the technology and market for video dialtone service.[30] A full-size market trial is a critical prerequisite to a permanent service offering, according to U S West, because it will allow U S West to: 1) measure willingness of end users and programmer-customers to pay for both basic and enhanced services; 2) validate U S West's assumptions on video dialtone participation rates;[31] 3) derive information on demand by time of day; and 4) gain information on market acceptance of interdiction devices as an alternative to the use of set-top boxes for analog channels. Furthermore, U S West states that its market trial must be of sufficient size to attract video programmers and enhanced gateway providers.

14. Contrary to assertions that a technical trial is not necessary, U S West states that numerous aspects and components of the network remain untested in a commercial environment, such as large scale interdiction devices, digital video transmission and compression, and upstream signaling for video-on-demand services.[32] U S West states that its decision not to charge programmer-customers for access during its four to six month technical trial is not an anticompetitive move, but is based on its limited experience with an untested video dialtone network architecture.[33]

B. Capacity To Serve Multiple Video Programmers

15. Cox contends that U S West will be providing only 45 analog channels on a common carrier basis and therefore, U S West does not meet the video dialtone requirement of providing a common carrier platform with sufficient capacity to serve multiple video programmers.[34] Cox states that any method employed by U S West to allocate capacity is not an acceptable substitute for adequate capacity.[35]

16. In its opposition, U S West states that it will have sufficient digital capacity to satisfy all potential customers.[36] U S West states that its analog capacity will be allocated in a manner that fully complies with the requirements of the *Second Report and Order* and that ensures a diverse group of programmers has an opportunity to test their services.[37] According to U S West, it will provide 77 analog channels, access to 54 of which will be restricted, through interdict/scrambling, on a secured-dedicated basis to end users subscribing to special programming, such as enhanced services.[38] The remaining 23 channels will be allocated as follows: three for small programmers, wishing to offer free or advertiser-supported programming, on a secured-dedicated basis; eight channels on a secured-shared basis, for parties willing to share channel capacity; and 12 channels on an unsecured-shared basis. The 12 unsecured-shared channels will be "available to all end users subscribing to U S West's basic VDT service or to any programmers's service during the trial,"[39] and will be further suballocated into the following: nine shared-general channels;[40] two

[25] Cox Petition at 10.

[26] *Id.* at 12. Metrovision states that a substantial reduction in the breadth of the U S West trial would lessen, but not eliminate, the anticompetitive effects of it not charging video service providers.

[27] Cox Petition at 8-9; *see also* Metrovision Petition at 6.

[28] Metrovision Petition at 12-14; *see also* NCTA Petition at 2-3. NCTA states that U S West's application should be denied because, by pricing its service at zero, U S West has not provided economic justification for the trial, or otherwise satisfied public interest requirements.

[29] Metrovision states that if U S West is required to file a tariff with rates based on the cost estimates included in its application, it would be easier to determine whether U S West will be able to offer video dialtone service in a manner that covers all its costs and does not shift these costs to ratepayers.

[30] U S West Opposition at 4-5. U S West states that it is willing to take the risk that it may never recover its trial costs in order to determine whether video dialtone service is a financially viable service offering.

[31] U S West states that it adopted a 15 percent penetration rate based upon its experience in joint cable-telephone ventures in the United Kingdom and proprietary market research conducted in the United States.

[32] *Id.* U S West states that one of the key elements of its trial is to determine whether its network and support systems actually function in a commercially sized operation ("scalability").

[33] *Id.* at 9. In addition, U S West states that it has no control over how much video programmers charge for their service offerings during the trial.

[34] *Id.* at 12.

[35] *Id.* at 13. Furthermore, Cox states that U S West's failure to specify a non-discriminatory channel allocation scheme violates its common carrier obligation.

[36] U S West Opposition at 13-14. U S West states that it will allocate digital channels on a first-come, first-served basis.

[37] *Id.* at 16.

[38] Twenty-seven of the 54 channels would be for U S West's own enhanced video dialtone service. The remaining 27 channels would be reserved for other enhanced video gateway providers, "or video programmers on a first-come, first-served basis." *Id.* at 14.

[39] *Id.* at 14.

[40] U S West states that it will allow the purchasers of the nine shared channels to select the programming for these channels, and if the purchasers of these analog channels cannot agree on the programming to appear on these channels, then these channels will be allocated among channel purchasers for program selection. U S West states that the most likely candidates for program selection are "off-the-air" programming channels without local ad insertion. *Id.* at 15-16.

shared-small-programmer channels offering free or advertising-supported service; and one channel for the basic video dialtone menu of program providers.[41]

C. Basic/Enhanced Offering

17. CompuServe states that U S West does not clearly define its "limited menuing capability."[42] In its opposition, U S West states that a basic video dialtone menu screen was included as part of its basic video dialtone platform to address concerns of the Commission that end users be aware of the programmers providing services over a video dialtone platform. U S West states that its menu should be classified as an "adjunct to basic" service, and that it has no intention of including any functionality or information in its menu which would classify its menu as "enhanced."[43] According to U S West, it will list service providers, along with their telephone numbers, in alphabetical order with no other information provided as to the content of a service provider's offering.[44] In its reply, CompuServe states that based on the representations contained in U S West's opposition, and assuming that any decision by the Commission is consistent with these representations, it does not object to the Commission's grant of U S West's application.[45]

D. Cost Allocation

18. According to Cox, U S West provides no details on the method it intends to use to identify and track costs and investments, and as a result, the Commission is left to accept on faith that U S West has fully identified, assigned and separated all relevant video dialtone costs and investments.[46] Cox also contends that the joint use of U S West's broadband network for video dialtone and telephone service raises issues concerning the proper accounting of common costs between telephone and video services, interstate and intrastate jurisdictions.[47] Cox also claims that U S West can not make a reasonable profit on its proposed video dialtone network.[48]

19. In its opposition, U S West states that it will not assign to any regulated rate base any costs incurred during its video dialtone trial without prior Commission approval. To identify the cost of direct and common plant associated with the construction of video dialtone facilities, U S West states that it will establish methods and procedures for time reporting practices and accounting to ensure that all employee and material costs associated with the planning and construction of the video dialtone facilities are accurately reported and captured.[49] U S West also states that Cox misunderstands or misconstrues its cost data related to real estate, feeder fiber, and interdiction units.[50]

20. In its reply, Cox states that the cost information provided by U S West is so highly aggregated that it is impossible to determine whether relevant cost allocations are missing.[51] Cox 3 also states that U S West provides no information on its methodology for allocating common costs. Cox states that the Commission cannot accept U S West's assurances at face value since the Commission specifically designated Section 214 applications as the vehicle for imposing additional competitive and accounting safeguards for video dialtone based upon obvious local exchange carrier incentives to cross-subsidize their video dialtone investments.[52]

III. DISCUSSION

21. We conclude that the public interest, convenience and necessity is served by granting Section 214 authority to U S West for the provision of a video dialtone technical and market trial in its Omaha, Nebraska service area, subject to certain conditions. By permitting local telephone companies to participate in the video marketplace through the provision of video dialtone service, we sought to further the local telephone companies' investment in an advanced, cost-effective telecommunications infrastructure. Further, we sought to stimulate competition in the provision of video services, and provide additional opportunities for consumer choice through a diversity of video services.[53] U S West proposes to construct an advanced fiber-to-the-curb/coaxial cable network[54] that will enable video pro-

---

41 *Id.* at 14-15.
42 CompuServe Petition at 7.
43 U S West Opposition at 16-17.
44 *Id.* at 17.
45 CompuServe Reply at 3-4.
46 Cox Petition at 15; *see also* MetroVision. Cox states that U S West provides insufficient detail to verify its proposed costs. For example, according to Cox, U S West estimates that feeder fiber can be installed for about $1,500 per kilometer which is substantially less than any known construction technique. Furthermore, Cox states that U S West lists fewer interdiction units than estimated subscribers. In addition, Cox contends that U S West's estimated video dialtone costs of less than $600 per home passed are much lower than comparable offerings.
47 *Id.* at 20. Cox states that it appears that U S West is using an incremental cost methodology to identify and develop its video dialtone costs, such methodology being at odds with a fully loaded, fully distributed cost basis U S West would use to recover interstate interconnection and collocation charges.
48 Cox states that a rough analysis reveals that U S West will realize less than a 3% rate of return on its investment, or a 42-year payback on its investment.
49 U S West Opposition, Affidavit of Philip E. Grate.
50 Specifically, U S West states that, contrary to claims by Cox that real estate costs are entirely missing from its Section 214 application, real estate costs are included in its costs listed under "Level 1 Video Gateway." In addition, U S West states that it never stated that it could install feeder fiber for $1,500 per kilometer, but that its cost support data filed with its application indicates a cost of $4,464 per kilometer for the technical trial and $4,094 per kilometer for the market trial. As to claims by Cox that U S West lists fewer interdiction units than estimated subscribers, U S West states that there will be 1,358 residential subscribers during the technical trial and 7,805 residential subscribers during the market trial, which correspond to the number of interdiction units listed in its accounting of costs in its Section 214 application.
51 Cox Reply at 2. Cox points to U S West's inclusion of real estate costs in its "Level One Video Gateway" account. In addition, Cox states that U S West's estimate of $4,000 per kilometer for feeder fiber is misleading because it is bundling its feeder fiber material costs with its installation costs.
52 *Id.* at 5; *see also* Metrovision Reply at 8. Metrovision states that accepting U S West's statement that it is developing proper cost accounting standards denies the Commission the opportunity to determine whether ratepayers will be protected.
53 *Second Report and Order*, 7 FCC Rcd at 5787, 5836.
54 In the *Second Report and Order*, we found that an advanced

grammers and other service providers to provide, and consumers to receive, diverse video and other services.[55] We find that U S West's proposal to construct, operate and maintain facilities to test the provision of video dialtone service, as conditioned herein, will further the Commission's public interest objectives associated with the provision of video dialtone service.

A. Video Dialtone Trial

22. As a preliminary matter, we do not agree with NCTA that fixed standards should be adopted regarding the size and duration of video dialtone proposals to determine whether they constitute trials or commercial offerings. The development of a service should not be hampered by artificial constraints on the offering of a trial. We believe that a case-by-case review of video dialtone proposals better serves the public interest and will allow video dialtone to develop according to market forces. Video dialtone trials can give the Commission, local telephone companies and video programmers valuable information prior to the implementation of a commercial offering. At the same time, we recognize that trials limited in length, size and cost might not raise the same concerns as large-scale offerings.[56] U S West's trial is significantly larger than previous video dialtone trials, and the petitioners argue that U S West's trial is anticompetitive.[57]

23. First, as to the technical trial, the petitioners argue that a technical trial serving 10,000 potential households, at no charge to video programmers, amounts to unfair pricing. The petitioners dispute U S West's estimate that only 1,500 households will participate in the technical trial. Petitioners provide no analysis, however, as to what the level of participation will be, or what impact the trial will have on their own services.[58]

24. On the other hand, U S West has not supported its estimate that the trial must pass 10,000 households to attract 1,500 subscribers. It seems that the number of households participating in the trial will be a function of many variables, some of which will be within U S West's control. For example, while U S West cannot control whether programmers charge end users, the amount that they charge, or the extent to which they promote their programming, it can control the extent to which it promotes video dialtone generally, which could affect the level of participation in the trial. Furthermore, U S West has not demonstrated why "scalability" - a key element to be tested in the technical trial -cannot be satisfied if fewer than 1,500 households participate in the trial. We believe that U S West should be permitted to proceed with its technical trial. However, we find that U S West has not adequately justified the size of its technical trial in light of the concerns raised by the petitioners regarding anticompetitive pricing. Therefore, we will allow U S West to elect one of the following options:

a) offer the trial as proposed but charge participants at tariffed rates after 30 days. (It is unlikely that 30 days of free service would significantly disadvantage competitors.)

b) offer the trial as proposed but pass no more than 2,500 households. (A test of this level is consistent with previously approved trials.)[59]

U S West must notify the Commission that it has selected Option A or Option B within 30 days of the release of this order.

25. Second, a market trial serving 60,000 potential households also exceeds the scope of prior trials. However, if the market trial is offered at lawful rates and is otherwise consistent with our video dialtone standards, then it raises fewer public policy concerns. U S West agrees to absorb all costs associated with the trial as a shareholder expense if these costs are not later recovered in a general service offering. It is unlikely that even if U S West had to absorb the entire cost of the project, estimated to be less than $35 million, it would jeopardize the interests of telephone customers, considering the fact that U S West's net assets exceed $19 billion and net income exceeds $954 million.[60]

B. Capacity To Serve Multiple Video Programmers

26. The framework developed in the *Second Report and Order* and our subsequent decisions regarding the provision of video dialtone requires, as a prerequisite to a local telephone company's participation in the video marketplace, the provision of a basic, common carrier platform containing sufficient capacity to serve multiple

---

telecommunications infrastructure capable of transporting voice, data and video services is in the public interest. *Second Report and Order,* 7 FCC Rcd at 5795.

[55] We found that the provision of a basic platform will permit video programmers to compete for consumers' attention, likely bringing those consumers more choice in content, more responsive customer service and lower prices for video programming and video programming services. *Second Report and Order,* 7 FCC Rcd at 5795-96.

[56] We disagree with Cox and Metrovision that U S West, as a common carrier, is necessarily obligated to charge for its services during a technical trial. U S West's technical trial is not a general offering to the public, but a limited offering to trial participants. We previously have found that the offering of limited technical trials by common carriers are in the public interest, *see e.g., C&P Telephone, New York Telephone, Southern New England Telephone* (*see also* 47 U.S.C. Section 7) and held that the uncertainties of a trial posed by untested network components does not necessarily lend itself to charging for trial services. Under any video dialtone service, however, U S West is obligated to provide nondiscriminatory access to the platform.

[57] We emphasize that our standards for the provision of video dialtone service are the same, whether the application is for a trial or actual service offering. *Second Report and Order,* 7 FCC Rcd at 5827. We do recognize, however, that trials may not lend themselves to the same level of specificity as actual service offerings. *New York Telephone,* at ¶26.

[58] The number of households participating in the trial may well be a function of the vigor with which the test is promoted, which, in turn, is largely up to U S West and the programmers who subscribe to its services.

[59] U S West estimates the costs of the technical trial to be $8,350,000. The size and cost of previous video dialtone technical trials were: C&P of Virginia, 400 end user-subscribers at a cost of less than $5,000,000; New York Telephone, 2,500 potential end user-subscribers at a cost of less than $3,000,000; Southern New England Telephone, 1,600 potential end user-subscribers at a cost of less than $3,000,000. The size of the market trial applied for by C&P of Virginia (filed November 9, 1993) is as high as 2000 households, at an estimated facilities and equipment cost of over $11,000,000. Of course, many of the "scalability" issues U S West proposes to test also can be tested during the marketing phase of its trial.

[60] Statistics of Common Carriers, 1991-92.

programmers.[61] The basic common carrier platform must give multiple video programmers nondiscriminatory access to a common carrier transmission service that will enable them to deliver, and consumers to receive, video programming and other information services.[62]

27. Our policy is to review each application on a case-by-case basis, taking into consideration the initial capacity available, the ability to expand this capacity, the demand for capacity, and, in the case of video dialtone trials, the proposed duration of the offering, before making any decision on whether the applicant meets the requirement of providing a basic common carrier platform with sufficient capacity to serve multiple programmers.[63] Based on the foregoing, we find that U S West is offering sufficient capacity to serve multiple programmers. The offering of 800 to 1000 channels of digital capacity and 77 channels of analog capacity appears to be sufficient[64] given the limited duration of the trial (18 months) and the absence of any commitment by video providers to use U S West's video dialtone platform in the record before us. Cox and Metrovision do not contest the adequacy of U S West's digital channel capacity, but claim that U S West is not providing sufficient analog capacity to serve multiple video programmers. In an attempt to ensure that a diverse group of analog programmers has access to the video dialtone platform, U S West has proposed a method for allocating its limited analog capacity.[65]

28. Because we expect U S West will expand analog capacity if demand warrants, we need not rule on its proposed allocation scheme for other users. However, the allocation of 27 analog channels for programmers using U S West's enhanced video dialtone gateway is problematical. U S West states that it has a *bona fide* interest in testing an enhanced video dialtone gateway and would be unable to do so without analog capacity. As an enhanced service provider, U S West may not select which programming services have access to the basic platform.[66] By reserving a significant amount of the available analog capacity for programmers using its enhanced video dialtone gateway, U S West is placing itself in a favorable position vis-a-vis other enhanced service providers. We do not find any compelling justification related to the testing of the video dialtone platform that would warrant U S West's allocating 27 analog channels to itself as an enhanced service provider. The customers of U S West's gateway may use analog channels, but only if those channels are made available in a non-discriminatory manner that would allow the customers of all enhanced service providers equal access to analog channel capacity. For example, the customers of U S West's gateway may share, on nondiscriminatory terms, the analog channel capacity of the basic platform.[67]

29. With respect to U S West's carriage of TWE-owned video programming, a matter that has not been challenged, we agree with U S West that it should be prohibited from carrying TWE programming except through an independent third party. We will require, however, that U S West provide quarterly reports on all services provided to this third party programmer. Further, we will require any independent party to verify its ownership structure and its "arm's length" dealings.

C. Basic/Enhanced Offering

30. We find that the basic menu provided by U S West is consistent with the definition of a basic platform: "a common carrier transmission service coupled with the means by which consumers can access any or all video program providers making use of the platform.[68] Furthermore, we find the limited information provided by U S West in its menu, *e.g.,* a list of service providers, along with their telephone numbers in alphabetical order, is not discriminatory. We further find that U S West's provision of non-common carrier and enhanced services, *e.g.,* billing and collection, storage and other processing, inside wiring, customer premise equipment etc., is consistent with requirements for the provision of these services as provided for in Section 63.54(d)(2) of our rules, 47 C.F.R. § 63.54(d)(2).[69]

D. Cost Allocation

31. U S West states that it will track all investments and expenses that can be directly assigned to its video dialtone trial and will establish accounting methods and procedures to capture any common costs associated with the construc-

---

61 47 C.F.R. § 63.54(d)(2); *Second Report and Order,* 7 FCC Rcd at 5789. By providing this basic common carrier platform, local telephone companies are permitted to exceed the "carrier-user relationship" with video programmers that are customers of, interconnect with, or share the construction or operation of, the basic common carrier platform. A local telephone company may not, however, determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering or the price, terms, and conditions of video programming offered to consumers, or otherwise have a cognizable financial interest in, or exercise editorial control over, video programming provided directly to subscribers within its telephone service area.

62 *Second Report and Order,* 7 FCC Rcd at 5789. We determined that pursuant to Section 201(a) of the Communications Act, 47 U.S.C. § 201(a), a local telephone company offering a video dialtone platform must furnish capacity to video programmers upon reasonable request, and that pursuant to Section 202(a), 47 U.S.C. § 202(a), such capacity must be provided without unreasonable discrimination. *Id.* at 5798, note 69.

63 *Southern New England Telephone,* FCC 93-473, released November 12, 1993.

64 U S West states that it will expand the capacity of its video dialtone system to meet additional demand if a shortage develops. However, it does not explain how, and under what circumstances, it would expand capacity. We will require U S West to report to the Chief, Domestic Services Branch, Common Carrier Bureau, within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, on the steps taken to expand the capacity of the platform to accommodate demand.

65 U S West states that analog capacity will cease to be a constraint when the price of analog-to-digital conversion declines significantly and more programming is digitally encoded.

66 *Second Report and Order,* 7 FCC Rcd at 5818, n.180. U S West states that it will not be involved in any decisions related to the pricing and packaging of video programming.

67 A non-discriminatory approach to the use of analog channel capacity would allow all enhanced service providers and video programmers access to channel capacity under the same terms and conditions.

68 *Second Report and Order,* 7 FCC Rcd at 5783, n.3.

69 Local telephone companies may exceed the carrier-user relationship only with video programmers that are customers of, interconnect with, or share the construction or operation of the basic platform. *Second Report and Order,* 7 FCC Rcd at 5798.

tion of video dialtone facilities.[70] Cox states that the Commission cannot accept U S West's assurances at face value, especially since U S West provides no information on the methodology for allocating common costs. Consistent with the approach taken in previous video dialtone orders, we find that U S West's assignment of costs related to the provision of the basic platform in accordance with Part 32 is appropriate. However, to ensure that these costs are not borne by ratepayers of other regulated services, we require U S West to segregate all costs incurred in providing the basic platform into subsidiary accounting records and to assign these costs to the video dialtone trial.[71] In addition, we will require U S West to account for all common costs associated with the construction, operation and maintenance of facilities that are jointly used for video dialtone and telecommunications facilities. Prior to assigning any of these costs to the rate base of any regulated service, U S West must justify, and the Commission must approve, the methodology used by U S West to allocate these costs between regulated services. Our decision here does not finally establish the method for tracking and assigning costs to video dialtone. In the event these costs are not recovered from future video dialtone services, they must be borne by shareholders rather than the ratepayers of other regulated services.

32. U S West states that it will account for the costs of providing enhanced and non-common carrier services in accordance with Part 64 of the Commission's rules. We find that, to the extent the nonregulated components of the video dialtone trial are not already covered by U S West's cost allocation manual (CAM), U S West must revise its manual to show the procedures it intends to use to allocate the costs between regulated and nonregulated activities for the duration of the trial.[72] At a minimum, we require U S West to revise the nonregulated activities section of its CAM to include a description of the video dialtone trial and the nonregulated services that will be offered during the trial. U S West must also update the nonregulated activities matrix to identify those accounts that are used in the provision of nonregulated video dialtone services. Until these revisions are filed with the Commission, U S West cannot offer enhanced and non-common carrier services. These temporary revisions will be subject to public comment and Commission scrutiny. U S West will have to file permanent revisions if and when it decides, and is authorized, to offer video dialtone services generally. We emphasize that our decision on any temporary revision to U S West's CAM will not finally resolve any accounting issue related to video dialtone services.

33. In the context of U S West's trial, we believe that our existing safeguards, coupled with the conditions we impose, including a requirement that U S West offer non-discriminatory access to the basic platform, should adequately protect against anticompetitive conduct by U S West. Among these safeguards are the cost allocation rules and cost accounting safeguards designed to separate nonregulated services from regulated service costs,[73] our ONA policy, which is designed to ensure that independent enhanced service providers can obtain non-discriminatory access to basic services,[74] and our non-discrimination reporting requirements, and network disclosure rules.[75] We are not persuaded, and the commenters have not shown, that these safeguards are inadequate to protect against cross-subsidization and discrimination by U S West for purposes of this trial.

IV. ORDERING CLAUSE

34. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of U S West Communications, Inc. (File No. WPC-6868) IS GRANTED, and the applicant is authorized to provide a video dialtone trial in its Omaha, Nebraska service area commencing within one year of the release of this order.

35. IT IS FURTHER ORDERED, that grant of this application IS SUBJECT TO the following conditions:

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any U S West rate base or as a regulated expense without prior authorization from this Commission.

b) That U S West shall file any necessary revisions to its Cost Allocation Manual (CAM) prior to providing any enhanced and non-common carrier services.

c) That the technical phase of the trial be limited to a period of up to six months, and (i) the number of homes passed during the technical trial be limited to 2,500 potential households, or (ii) the number of homes passed be limited to 10,000 potential households provided that U S West charges trial participants at tariffed rates after no more than 30 days of free trial service.

d) That the marketing phase of the trial be limited to a period of up to one year after the completion of the technical phase of the trial.

e) That U S West must not allocate 27 analog channels to programmers using its enhanced gateway service. U S West must allocate channels on the basic platform in a nondiscriminatory manner.

---

[70] U S West provides cost estimates consistent with the requirements of Section 63.01(L) of our rules, 47 C.F.R. Section 63.01(L). These cost estimates include the quantities of major materials and labor costs associated with the installation of these materials.

[71] U S West must account for all costs associated with the trial, including development costs and expenses, in accordance with Part 32 and Part 64 of the Commission's rules.

[72] *See* 47 C.F.R. § 64.903.

[73] Separation of Costs of Regulated Telephone Service Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd 1298 (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).

[74] Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991), *(BOC Safeguards Order), pets. for recon. pending, pets. for rev. pending, California v. FCC*, (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with *MCI v. FCC* (No. 92-70186), *New York v. FCC* (No. 92-70217), *ANPA v. FCC* (No. 92-70261); *California v. FCC*, (9th Cir. Feb. 21, 1992) (No. 92-70105), consolidated on June 2, 1992 with *NYPSC v. FCC* (No. 92-70281).

[75] *BOC Safeguards Order*, 6 FCC Rcd at 7601-14.

f) That U S West not carry TWE-owned programming on the U S West video dialtone basic platform, except through an independent third-party programer. U S West must provide quarterly reports on all services provided to the third-party programmer, and the third-party programmer must independently verify its ownership structure and its arms'-length dealings with U S West.

g) That U S West must not involve itself in decisions concerning the presentation of video programming to end users absent prior Commission approval, and specifically, must allow video programmers participating in the trial to decide whether they will charge for video programming offered to end users. U S West must not discriminate against video programmers based upon their decision to charge or not to charge for programming offered during the trial.

h) That U S West shall report to the Chief, Domestic Services Branch, Common Carrier Bureau, within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, on the steps taken to expand the capacity of the platform to accommodate demand.

i) That U S West submit to the Chief, Domestic Services Branch, Common Carrier Bureau, after completion of the technical trial and at the end of the marketing trial, a written report. The report shall, among other things,

1) include a statement from each video programmer or other service provider using U S West's services stating whether that programmer/service provider believes it has been discriminated against by U S West in any manner. In addition, U S West shall provide a statement from each programmer/service provider, or from U S West, identifying each programmer/service provider that inquired about obtaining access to U S West's platform, and did not obtain access, and why it did not;

2) identify the capacity allocated to each video programmer-customer and the identity of the programmer-customer;

3) describe the video dialtone technology used during the trial. U S West shall include information on the video switch and other components of the video dialtone system, the operation of video-on-demand, the methods of accessing the platform, and the digital technology incorporated into the network and its impact on capacity and on the operation of a video dialtone service;

4) to the extent known, evaluate the market for video dialtone service, including consumer interest in on-demand video services and consumer willingness to pay for service;

5) detail the costs U S West has allocated to the trial, direct and common costs, broken down into subsidiary accounting records;

6) include any published commentary of which U S West is aware regarding the trial.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Application of US WEST COMMUNICATIONS, INC. For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service areas, File No. W-P-C-6868

I support our decision to grant US West's Section 214 application for authority to conduct a video dialtone trial in Omaha. It is encouraging to see telephone companies like US West testing the video dialtone model. Trials like this one should yield useful information about the demand for video dialtone services, from the point of view of both programmers and viewers.

My decision to concur has to do with certain misgivings about the way in which US West proposes to handle Time Warner Entertainment programming--- programming in which US West has a 25 percent ownership share. I am satisfied that the statutory cross-ownership prohibition is not violated so long as an independent third party programmer is responsible for choosing whether to place Time Warner programming on the basic US West platform. US West is a common carrier with respect to its offerings of such basic transmission services, and thus is not in a position to favor its own programming in determining how to allocate that basic capacity. Today's order makes that clear.

I do have concerns, however, about our ability to ensure the independence of the third party programmer if US West is allowed to provide enhanced gateway services to programmers carrying Time Warner programming. I therefore would have preferred adding a further safeguard: a prohibition on US West's provision of unregulated "level 2" gateway services to any programmer carrying Time Warner programming. Because level 2 programming is not subject to the common carrier nondiscrimination safeguards, I have some concerns about US West's ability to favor its own programming on level 2.[1] Given that this is a trial, however, and that we are imposing reporting requirements that will allow us to monitor the US West offerings, I am prepared to concur.

# # # #

[1] I dissented in part from the original video dialtone decision because I was concerned about allowing telephone companies to have up to a 5 percent financial interest in a video programmer. I was concerned that, so long as the carrier had a financial interest in programming, the carrier would be tempted to favor its own programming. On the basic common carrier platform, such incentives are thwarted by the carrier's inability to discriminate. But on the enhanced gateway, such common carrier protections--- such as nondiscrimination and tariffing requirements--- do not exist. See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, 7 FCC Rcd 5781, 5885 (1992), pets. for recon. pending, pets. for review pending, Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir., filed September 9, 1992) ("Video Dialtone Order").