

programming directly to subscribers within its telephone service area and over facilities used to provide both voice and video services. We now seek comment on these issues and on the analysis we offer below.

1. Application of Title II to LEC Video Programming Offerings

2. We first tentatively conclude that telephone companies should be permitted to provide video programming over Title II video dialtone platforms. We recently reaffirmed our conclusion that the construction of video dialtone systems would serve the public interest goals of facilitating competition in the provision of video programming services, encouraging efficient investment in our national information infrastructure, and fostering the availability to the American public of new and diverse sources of video programming. Two U.S. Courts of Appeals have now held unconstitutional the specific statutory basis for prohibiting a telephone company from providing, directly or indirectly, programming over its own video dialtone platform. In light of the public interest benefits of a video dialtone platform, which provides multiple video programmers with common carrier-based access to end users, we tentatively conclude, in the absence of Section 533(b), that we should not ban telephone companies from providing their own video programming over their video dialtone platforms. We note that we allow telephone companies to use their networks to provide their own enhanced services today, subject to safeguards. Thus, in the absence of a demonstration of a significant governmental interest to the contrary, we propose to allow telephone companies to provide video programming over their own video dialtone platforms, subject to appropriate safeguards. We seek comment on this proposal, and on whether any such significant governmental interest to support a ban exists and, if it does, whether a ban would be a narrowly tailored restriction on the telephone companies' First Amendment rights.

3. A second Title II issue is whether we can, and should, require telephone companies to provide video programming only over video dialtone platforms. Even before the recent court decisions invalidating the telco-cable cross-ownership ban, there were three circumstances in which LECs could provide video programming directly to subscribers. In these circumstances, however, LECs have not been authorized to use their local exchange

facilities to provide cable service, but, rather, to construct or purchase interests in separate cable facilities. Indeed, as noted by the court in *NCTA v. FCC (1994)*, it was not until after the 1984 Cable Act that technological advances have made it practical to deliver video signals over the same common carrier networks that are used to provide telephone service. Previously, as the court noted, "[a] telephone company that wanted to provide cable service would have had to construct a coaxial cable distribution system parallel to its telephone system."

4. We seek comment on whether we have authority under Section 214 to require LECs that seek to provide video programming directly to subscribers in their telephone service areas to do so on a video dialtone common carrier platform and not on a non-common carrier cable television facility. We seek comment on what circumstance would warrant such a requirement, and specifically on whether we should require use of a video dialtone platform whenever a LEC provides video services over facilities that are also used in the provision of telephone services. We seek comment on our authority generally to require LECs seeking Section 214 authority to acquire or construct video facilities to comply with our video dialtone framework.

2. Application of Title VI to LEC Provision of Video Programming

5. We now seek comment on the circumstances, if any, in which a LEC that, by court decision, is not subject to the 1984 Cable Act telco-cable cross-ownership ban may offer a cable service subject to Title VI in lieu of a Title II video dialtone offering. We also seek comment on the extent to which Title VI should apply to video programming provided by LECs on a Title II video dialtone system. We have previously held that LEC provision of a common carrier video dialtone platform is not subject to Title VI of the Act. In particular, we found that such LECs are not offering "cable service," and are not operating a "cable system" within the meaning of Title VI. We reasoned that LECs did not actively participate in the selection and distribution of video programming because they were precluded from providing video programming directly to subscribers in their telephone service areas. We also concluded that video dialtone facilities are not cable systems because they are common carrier facilities subject to title II of the Act which, under Commission rules, could not be used for LEC provision of video programming directly to subscribers in the LEC's telephone

service area. We now seek comment on whether, if a LEC, or its affiliate, does provide video programming over its video dialtone system and actively engages in the selection and distribution of such programming, that LEC, or its affiliate, is subject to Title VI. We seek comment on the Commission's legal authority to determine whether some, but not all, provisions of Title VI relating to cable operators would apply to a LEC that provides video programming over its video dialtone platform. We also seek comment on whether the application of some or all provisions of Title VI would result in a regulatory framework that is duplicative of, or inconsistent with, federal or state regulation of communications common carriage. For example, the goals of the leased access provision of Title VI could be met through obligations Title II imposes on a LEC as the provider of the video dialtone platform whether or not the LEC as a video service provider provides its own leased access channels. We seek comment on the potential impact of our determinations in this proceeding on existing grants by state and local authorities of public rights-of-way. We also invite parties to discuss both the legal and practical implications of requiring, or not requiring, telephone companies providing video programming over their own video dialtone systems to comply with each of the various provisions of Title VI. In the event that Title VI cable rate regulation rules apply, we seek comment on how such rules would apply to a LEC providing video programming directly to subscribers over its own video dialtone platform.

6. In addition, we seek comment on whether, if Title VI does not apply to telephone companies' provision of video programming on video dialtone facilities, the Commission should adopt, under Title II, provisions that are analogous to certain aspects of Title VI. For example, we seek comment on whether we should adopt rules governing program access by competing distributors, carriage agreements between video service providers and unaffiliated programmers, and vertical ownership restrictions.

7. Finally, we note that the court's opinion in *NCTA v. FCC (1994)* is consistent with the Commission's reasoning in the First Report and Order, 56 FR 65464-01 (December 17, 1991), that a LEC providing video dialtone service does not require a local franchise because the LEC does not provide the video programming. We seek comment on whether this view would require a LEC offering video dialtone service to secure a local