

franchise if that LEC also engages in the provision of video programming carried on its platform.

*B. Regulatory Safeguards Governing a Local Exchange Carrier's Provision of Video Programming on its Video Dialtone Platform*

1. Introduction and Scope

8. In this section we consider what changes, if any, need to be made to our video dialtone regulatory framework if a telephone company, pursuant to an applicable court decision, decides to become a video programmer on its own video dialtone platform in its telephone service area. In addressing the issues identified below, parties should address whether we should apply different safeguards for technical and market trials than for commercial offerings of video dialtone.

2. Ownership Affiliation Standards

9. Under our current rules, LECs are prohibited from providing video programming directly to subscribers, and from having a cognizable (*i.e.*, 5 percent or more) financial interest in, or exercising direct or indirect control over, any entity that is deemed to provide video programming in its telephone service area. We propose to retain these ownership affiliation standards to identify those video dialtone programmers that we will consider to be affiliated with LECs providing the underlying common carriage. Under this proposal, if the Commission determines that LEC ownership of video programming requires additional safeguards, those safeguards would apply if the LEC owned five percent or more of a video programmer. We seek comment on this proposal.

3. Safeguards Against Anticompetitive Conduct

a. Sufficient Capacity To Serve Multiple Service Providers

10. Under the video dialtone regulatory framework, a LEC is required to provide sufficient capacity to serve multiple service providers on a nondiscriminatory basis. In the Video Dialtone Reconsideration Order, 59 FR 63909-01 (December 12, 1994), we rejected use of an "anchor programmer," that is, allocation of all or substantially all of the analog capacity of the video dialtone platform to a single programmer. We seek comment on whether there are other across-the-board rules that we should adopt to ensure that video dialtone retains its essential Title II character when a LEC becomes a video programmer on its platform.

11. We seek comment, for instance, on whether we should limit the percentage of its own video dialtone platform capacity that a LEC, or its affiliate, may use. Such a limit could help ensure other programmers access, but may create a risk that some capacity might go unused. We seek comment on what an appropriate limit would be; whether any percentage limit should vary with the platform's capacity; and whether different rules should apply to analog and digital channels. Video dialtone capacity constraints appear likely to be most severe in the short-term, with respect to analog channels, and may be of less concern on future all-digital systems. Commenters should address whether LEC use of video dialtone capacity raises short-term or long-term concerns, and how the probable duration of the problem should affect our regulatory approach. Alternatively, we seek comment on whether LECs that deny capacity to independent programmers should be subject to procedural requirements more detailed than those imposed in the Video Dialtone Reconsideration Order.

12. In the Third Further Notice of Proposed Rulemaking, 59 FR 63971-01 (December 12, 1994), the Commission sought comment and information regarding channel sharing mechanisms that LECs have proposed as means of making analog capacity available to more customer-programmers than might otherwise be accommodated. Parties addressing limits on LEC use of the video dialtone platforms should comment in this proceeding on the relationship between such channel sharing mechanisms and any proposal to limit LEC use of analog channels. The Third Further Notice of Proposed Rulemaking also sought comment on two other signal carriage issues: (1) Whether the Commission should mandate preferential video dialtone access or rates for commercial broadcasters, public, educational and governmental ("PEG") channels, or other not-for-profit programmers; and (2) whether the Commission should permit LECs to offer preferential treatment to certain programmers on a voluntary ("will carry") basis. Parties should comment in this proceeding on the relationships among mandatory preferential treatment, "will carry," and any proposed limits on a LEC's use of its video dialtone capacity to provide programming directly to subscribers.

13. Another example of potentially anticompetitive conduct that has been cited in the context of cable television service under Title VI involves channel positioning. Programmers assert that cable operators can and do deliberately

assign unaffiliated program services to undesirable channel locations. Under Title II, such discriminatory conduct is prohibited. We seek comment on whether LECs that are also video program providers have an increased incentive to use their control over the video dialtone platform to engage in such activities and what, if any, specific safeguards we should implement to prevent such conduct. In particular, we seek comment on whether the channel positioning rules that apply to cable operators in the context of the "must-carry" requirement of Title VI should also apply to video dialtone platform operators providing programming directly to subscribers in their local exchange service areas.

b. Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers

14. In the Video Dialtone Reconsideration Order, the Commission affirmed, with certain modifications, its decision to permit LECs to enter into non-ownership relationships with video programmers that exceed a carrier-user relationship. We propose at a minimum, to retain these restrictions as safeguards against LEC anticompetitive conduct and to promote further LEC deployment of broadband services. We believe that the restrictions on non-ownership affiliations between LECs and cable operators are important to the Commission's goal of promoting competition in the video services marketplace, and are not overbroad infringements on LEC First Amendment rights. Parties should comment on the proposal to retain these safeguards and should describe any specific additional measures they believe necessary to safeguard against anticompetitive conduct by LECs that offer programming on their own video dialtone system.

c. Acquisition of Cable Facilities

15. In the Video Dialtone Reconsideration Order, the Commission substantially affirmed its decision to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone. We continue to believe that this ban will benefit the public interest by promoting greater competition in the delivery of video services, increasing the diversity of video programming available to consumers, and advancing the deployment of the national communications infrastructure. We tentatively conclude that the ban on LEC acquisition of cable facilities for the provision of video dialtone does not impermissibly restrict LEC speech