

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

One Financial Center
Boston, Massachusetts 02111
Telephone: 617/542-6000
Fax: 617/542-2241

Donna N. Lampert

Telephone: 202/434-7300
Fax: 202/434-7400
Telex: 753689

Direct Dial Number
202/434-7385

May 22, 1996

EX PARTE

BY HAND

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

RECEIVED

MAY 22 1996

Re: CS Docket No. 96-46 -- Open Video Systems
Implementation of Section 302 of the Telecommunications Act of 1996

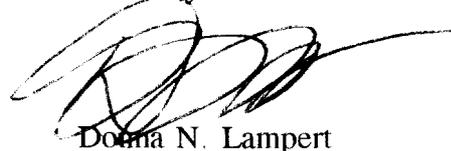
Dear Mr. Caton:

On May 21, 1996, Jeffrey Sinsheimer - Director of Regulatory Affairs, California Cable Television Association, spoke via telephone with Mary McManus, Legal Advisor to Commissioner Susan Ness to discuss issues regarding the potential for discrimination on Open Video Systems and the manner in which nondiscrimination on Open Video Systems can be ensured, and concerns regarding joint marketing by local exchange carriers.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of the written documents discussed are attached for inclusion in the public record in the above-captioned proceedings.

Should you have any questions regarding this matter, please contact me.

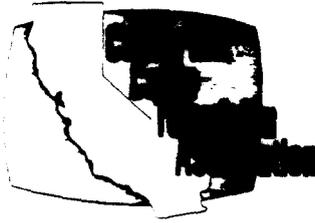
Sincerely,



Donna N. Lampert

Enclosures

cc: Mary McManus (w/encl.)



4341 PIEDMONT AVENUE
P O BOX 11080
OAKLAND CALIFORNIA 94611
510-428-2225
FAX 510-428-0151

May 10, 1996

Meredith Jones, Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Room 918
Washington, D.C. 20554

Re: Cable Services Docket No. 96-46: Open Video Systems:
Elements for An Application for Open Video Systems Certification Form

Dear Ms. Jones:

I am writing this letter in response to your request at our meeting of Tuesday, May 7, 1996 for an outline of the elements that might be included in a form for Open Video System ("OVS") certification.

As you will recall from the Joint Comments filed by the California Cable Television Association ("CCTA") and Cablevision Systems Corporation on April 1, 1996, we highlighted the importance of the certification process to ensure that OVS operators do not engage in anticompetitive and discriminatory behavior that will frustrate competition and undermine congressional intent. To that end, we urged the Commission to require, and strictly enforce, letter-perfect certification filings from all prospective OVS operators.^{1/} "Letter-perfect" filings are the only way the ten day certification process can reasonably achieve the congressionally-mandated goals of non-discrimination, just and reasonable rates and the creation of a service distinct from cable television service, which is eligible for the reduced regulatory burdens envisaged for OVS.

The Commission has previously adopted a "letter perfect" standard for reviewing applications. For example, the Commission adopted the stringent "letter perfect" standard for prescreening applications filed in cellular lotteries, where the Commission faced a deluge of applications that were not uniform, were often bound together haphazardly, and were

^{1/} See Joint Comments at page 3-4.

Meredith Jones, Chief
May 10, 1996
Page - 2 -

frequently so incomplete that they could not be processed.^{2/} As a result, the Commission provided applicants in advance with specific, formalized filing requirements^{3/} whereby applicants certified that their applications were complete and that they contained all of the information required by the Commission's rules.^{4/} Failure to conform to these stringent prescreening requirements constituted grounds for rejection of the application,^{5/} with dismissal occurring no matter when the defect was discovered.^{6/}

We have attached an initial consideration of the type of relevant elements that should be included in any OVS certification form. In addition to these suggestions, I would also

^{2/} Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection Lotteries Instead of Comparative Hearings, Memorandum Opinion and Order on Reconsideration, 101 F.C.C. 2d 577, 603 (1985) ("Cellular Order").

This standard has also been utilized by the Commission in the context of low-power television ("LPTV"), where limited FCC resources and the large number of applications filed for justified the process. See An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Report and Order, 51 RR 2d 476, 502 (1982) ("LPTV Order"). The Commission has since loosened this standard to a "substantially complete" test. Review of the Commission's Rules Governing the Low Power Television Service, First Report and Order, 9 FCC Rcd 2555, 2556 (1994).

^{3/} For example, the Commission determined that applicants must enclose applications in stiff covers, the applicant's name and the market and frequency block applied for must appear on the cover and the first page of the application form, the initial Form 401 must be the first item inside the cover followed by a table of contents, exhibits must be attached to the Form 401 with engineering data, exhibits must have tabs, specific exhibits should not exceed three pages, and maps should be scaled to 1:250,000 indicating the CGSA and 39 dBu contours. Id.

^{4/} Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Memorandum Opinion and Order on Further Reconsideration, 59 RR 2d 407, 410 (1985).

^{5/} Cellular Order, 101 F.C.C. 2d at 604.

^{6/} Central Illinois Cellular Limited Partnership, Order on Reconsideration, 2 FCC Rcd 436, 437 (Com. Car. Bur. 1987).

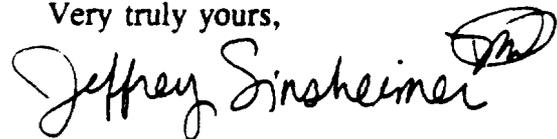
Meredith Jones, Chief
May 10, 1996
Page - 3 -

direct you to the NCTA Comments^{7'} and Reply Comments^{8'} which identify items that should be included in any Application for Certification.

This list is not exhaustive. For example, the certification form should also incorporate the policies and rules that will be developed in the cost-allocation proceeding which is anticipated from the Common Carrier Bureau in the next few weeks. As we discussed, it is essential that the Commission have adequate information regarding the costs of deployment and the relative allocation of costs of any joint and common plant by incumbent local exchange carriers between regulated telephony services and other services, including OVS. Consequently, this information must be obtained and reviewed by the FCC prior to allowing a certification for OVS to become effective.^{9'} To the extent the FCC may have already obtained and reviewed this data outside of the certification application, a question regarding certification as to the provision of full and accurate information in this regard should be included. In the alternative, applicants must be required to provide the FCC the full range of relevant cost data prior to the time they receive certification.

Should you have any further questions, please feel free to contact me.

Very truly yours,



Jeffrey Sinsheimer
Director of Regulatory Affairs

cc: John E. Logan
Gary Laden
Rick Chessen
Meryl Icove

^{7'} Comments of NCTA, CS Docket 96-46, filed April 1, 1996.

^{8'} Reply Comments of NCTA, CS Docket 96-46, filed April 11, 1996.

^{9'} Joint Comments at 25-31.

**Information to be Solicited
By An Application Form for OVS Certification**

- I. Information Concerning the Applicant for Certification.
 - A. Name
 - B. Address
 - C. Phone number
 - D. Statement of Ownership - Describe and Provide Ownership Diagram, including all affiliated entities
 - E. Statement of Eligibility for Certification

- II. Statement of Technical Qualifications.
 - A. Describe plant to be used for OVS system. (Plant diagrams to be attached to OVS certification form.)
 - B. Identify total number of analog channels to be deployed at outset and planned for future.
 - C. Identify total number of digital channels to be deployed at outset and planned for future.
 - D. Describe customer premises equipment to be deployed.
 - E. Identify service area including map of the area that will be served by OVS plant and projected build-out dates.
 - F. Identify the number of homes passed.

- III. Information Regarding OVS Operator Programming.
 - A. Identify OVS operators' affiliate which will provide programming.
 - B. Identify number of channels to be used by OVS affiliate.
 - C. Identify programming contracts by OVS affiliate. (Copies of programming contracts to be attached.)
 - D. Identify other transactions between OVS operator and programming affiliate. (Copies of contracts to be attached.)
 - E. Identify all rates to be charged by OVS operator to its affiliate for the purpose of providing programming and other services.
 - F. Identify all rates to be charged by affiliate to OVS operator.
 - G. Certify that the operator has either established or intends to establish a separate subsidiary that complies with the Commission's regulations.

- IV. Information Regarding Programming by Programmers and Packagers not Affiliated with OVS Operators.
 - A. Describe the non-discriminatory mechanism to be utilized for video programmer access to the OVS system, the award of channels and the determination of channel position.

- B. Describe process that will be used to allocate channel capacity if demand exceeds supply.
 - C. Certify that neither the OVS operator nor the programming affiliate will manage channel allocation process.
 - D. Describe process that will be utilized for shared channel management, including details regarding the selection and authority of the shared channel manager.
 - E. Describe and explain any differences in any of the above processes for analog or digital channels.
 - F. Describe any dispute resolution process.
 - G. Identify all rates to be charged to unaffiliated programmers.
 - H. Certify that all rates to be charged to unaffiliated programmers for use of OVS capacity will not exceed those charged to affiliated programmers.
 - I. Certify that all rates to be charged to unaffiliated programmers will be just, reasonable, and non-discriminatory and will not result in cross-subsidy.
- V. Information Regarding OVS Operator and Programmer Relationship with Subscribers.
- A. Describe how subscribers will have ready and immediate access to shared programming.
 - B. Describe plans of operator or affiliate to negotiate mutually agreeable terms and conditions with over-the-air broadcast stations and other unaffiliated video programming producers to allow consumer access to their signals on any level or screen of any gateway, menu or other programming guide.
 - C. Describe basic gateway or platform and plans regarding whether identification of same will be as service of OVS operator or affiliate.
 - D. Describe channel mapping capabilities.
 - E. Certify that there will be no joint marketing or bundling of OVS and telephone services until such time as there is a facilities-based telephone competitor in the local exchange market offering video services which is jointly marketing or bundling video and telephone services.
 - F. Describe how OVS operator and all affiliates will inform subscribers of alternative service providers.
 - G. Certify that there will be no discrimination in favor of affiliate with regard to material or information, including advertising, provided to subscribers for the purpose of selecting programming on the OVS system.
 - H. Identify all rates that will be charged to subscribers.
 - I. Certify that all rates charged to subscribers will be just, reasonable, and non-discriminatory and will not result in cross-subsidy.
 - J. Describe the customer service standards for the OVS system.

VI. Information Regarding Compliance with Existing Legal Obligations.

- A. Certify and describe plans regarding compliance with the Commissions regulations concerning sports exclusivity (47 C.F.R. 76.67), network non-duplication (47 C.F.R. 76.92 et. seq) and syndicated exclusivity (47 C.F.R. 76.151 et. seq.).**
- B. Certify and describe plans regarding compliance with copyright obligations.**
- C. Certify and describe plans to insure that video programming providers or copyright holders or both are able suitably and uniquely to identify their programming services to subscribers.**
- D. Certify that signal identification will be transmitted without change or alteration.**
- E. Certify that no television broadcast stations or other unaffiliated video programming services carried on such systems will be omitted from any navigational device, guide or menu.**
- F. Certify that the operator is either in compliance with, or intends to comply with, Cable Act provisions relating to must carry, PEG access, program access and other matters.**

VII. Information Regarding Local Fees and Approvals.

- A. Identify all communities to be served by OVS systems. (Copy of service area map to be attached.)**
- B. Identify and attach of all agreements with communities to be served by the OVS operator and all agreements for the payment of fees on the gross revenues of the OVS system in lieu of franchise fees permitted under Section 622, including the rate and amount payable.**
- C. Describe how such fees will be identified on a subscribers bill.**
- D. Identify agreements entered into with local communities for the provision of OVS service, including with respect to use of rights-of-way. (Copies of same to be attached)**

F1/52936.1