

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
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Implementation of Section 302 of)
The Telecommunications Act of 1996)

OPEN VIDEO SYSTEMS)
)
_____)

CS Docket No. 96-46

**OPPOSITION OF MFS COMMUNICATIONS
COMPANY, INC. TO PETITIONS FOR RECONSIDERATION**

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SUMMARY

The Commission's regulation of Open Video Systems ("OVS") should not be changed in any of the ways suggested by the various parties that petitioned for reconsideration of the Commission's Order. Specifically, MFS urges the Commission to reject the arguments relating to the following issues.

- **Proposed additional pre-certification requirements should be rejected.** Section 653 of the Telecommunications Act of 1996 clearly states that OVS operators need only provide essential information and certify their compliance with Commission regulations in order to be certified by the Commission. Nonetheless, some petitioners encourage the Commission to adopt pre-certification requirements similar to those contained in Title II from which OVS operators were exempted. The Commission should uphold its rejection of these arguments.
- **Local franchising authorities should not be granted additional control over OVS operators.** Congress expressly exempted OVS operators from most of the franchising requirements contained in Title IV. The Commission should not accept the arguments made by certain petitioners to grant more control to these local authorities giving them the opportunity to seriously delay the entry of competitors into the multichannel video distribution market.
- **OVS operators should not be required to grant competing cable operators and their programming affiliates access to competing OVS systems.** OVS operators and programmers cannot lease capacity on traditional cable systems as leased access is very limited and usually cost prohibitive. Therefore, to allow cable operators to lease capacity on an OVS system would put OVS operators at a significant competitive disadvantage and would permit incumbent cable operators and their programming affiliates who are

direct competitors of programmers on the OVS system to use up available OVS capacity and have access to important competitive information.

- **OVS operators should not be sanctioned for violations of sports exclusivity provisions by its programmers.** The Commission designated OVS operators as the proper recipients of notice from sports organizations wishing to take advantage of the sports exclusivity rules, but exempted operators from sanctions if their programmers violate these rules, appropriately recognizing that it is the programmers, and not the operator which will control the programming and that, to require operators to control programming by all programmers would require 24 hour per day monitoring to properly prevent abuses. The Commission wisely chose not to burden operators in this way, and it should not alter its decision now.

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MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits its opposition to the petitions, filed by various parties, for reconsideration of the Commission's Second Report and Order¹ in the above captioned. The Commission's OVS rules are consistent with the 1996 Act^{2/} and should not be altered. The Commission should again reject arguments that it should impose unnecessary regulation, or regulation which envisions a preconceived structure for how OVS systems will develop in the marketplace, because such regulation would affirmatively stifle the development of new and innovative means of delivering video programming to the public in accordance with Congress' goal of bringing additional competition to this segment of the communications market.

¹ Second Report and Order, CS Docket No. 96-46, FCC 96-249 (rel. June 3, 1996) ("OVS Order").

² The Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, *approved* February 8, 1996 ("1996 Act").

As Congress,^{3/} and the Commission^{4/} have both noted, OVS operators will be new entrants in the multichannel video distribution market which, aside from isolated instances of wireless delivery systems, has been almost entirely the province of a single provider in every market. As a result, OVS providers will be entering a new market dominated by an incumbent cable television provider. Just as the Commission has wisely subjected the new telephone ventures of incumbent cable operators to streamlined regulation as non-dominant carriers despite their existing cable monopoly, so too should it refrain from yielding to the arguments raised by the cable industry that such streamlined regulation is inappropriate for new entrants (and therefore new competitors) into the video marketplace.

I. THE 1996 ACT CLEARLY PRECLUDES THE EXTENSIVE REGULATION PROPOSED BY SOME PETITIONERS

Most of the petitions for reconsideration merely reiterate arguments that the Commission should provide for more stringent regulation of OVS operators by the Commission or through local authorities. This would directly contradict Congress' approach to OVS. By exempting OVS operators and programmers from Title II regulation, Congress indicated its appreciation of the fact that OVS operators are new entrants in the established video programming market and its mandate that, as such, the marketplace will appropriately dictate the standards of service and the rates they must meet. As the Commission has long-recognized with respect to the non-dominant

³ Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 (Feb. 1, 1996) ("Conference Report").

⁴ OVS Order at 9; *NPRM* at ¶ 29 ("Open video operators generally will be 'new entrants' in established video programming distribution markets, lacking market power vis-a-vis video programming end users.").

new entrants in the long distance and local telephone market, and in other telecommunications markets where competition exists, Title II-type rate and entry regulation is (1) not necessary to protect consumers or to assure just and reasonable rates and (2) likely to impair the ability of OVS operators to compete effectively in the market by “stifl[ing] price competition and service and marketing innovation.”^{5/} In order to facilitate competition in the OVS market, the Commission must reject the arguments to over-regulate new entrants.

A. No Additional Pre-Certification Requirements Should Be Adopted

Some parties have asked the Commission to reconsider its approach to certification of OVS operators and to adopt more stringent pre-certification requirements.^{6/} These parties have not raised any arguments that were not considered by the Commission prior to issuing its order. The NCTA argues again that certification should be withheld until an OVS operator

⁵ Policy and Rules Concerning Rates of Competitive Common Carrier Services and Facilities Authorizations Therefore (CC Docket No. 79-252) (“Competitive Carrier Proceedings”), *Second Report and Order*, 91 FCC 2d 59 (1982) (“Second Report”), *recon.*, 93 F.C.C.2d 54 (1983) (“Recon Order”); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) (“Fourth Report”), *vacated*, *AT&T v. F.C.C.*, 978 F.2d 727 (D.C. Cir 1992), *rehearing en banc denied*, January 21, 1993; *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984), *recon.*, 59 Rad. Reg. 2d (P&F)543 (1985); *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *rev’d*, *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186 (D.C. Cir. 1985).

⁶ See *Petition for Reconsideration and Clarification the Alliance for Community Media, the Alliance for Communications Democracy, the center for Media Education, People for the American Way, and the Media Access Project* (“Coalition Petition”) at 15-18; *Petition for Reconsideration of the National Cable Television Association, Inc.*, (“NCTA Petition”) at 2-6; *Petition for reconsideration of Metropolitan Dade County* (“Dade County Petition”) at 4; *Petition for Reconsideration of the City of Indianapolis* (“Indianapolis Petition”) at 2.

affirmatively demonstrates its compliance with the Commission's regulations.^{7/} It insists that OVS operators should have to demonstrate compliance with cost allocation rules prior to certification and that the "the short review period does not justify the mere acceptance of an officer's or director's statement 'to the best of his or her information or belief' of compliance with the Commission's rules."^{8/} Others suggest that OVS operators should be required to document compliance with PEG access and local right-of-way requirements prior to certification.^{9/}

Each of these arguments was already considered and properly rejected by the Commission in its order. As the Commission noted, "[i]n addition to the potential for delay, some of the pre-certification requirements suggested by petitioners are beyond the scope of the certification process."^{10/} The statute itself limits the certification process to having the operator attest that it "complies with the commissions regulations under subsection(b)."^{11/} Congress made it clear that certification of compliance is all that should be required prior to certification, not documentary proof of compliance. The NCTA and the others offer no reason for the Commission to reconsider its interpretation here other than vague references that "more control" of operators is needed.

⁷ NCTA Petition at 2-3.

⁸ *Id.* at 3-4.

⁹ NCTA Petition at 3-5; Dade County Petition at 4; Coalition Petition at 17.

¹⁰ OVS Order at ¶ 30.

¹¹ *Id.* (quoting Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1)).

Petitioners also argue that the Commission should adopt additional notice requirements -- such as directly notifying the affected municipalities or publishing notice in local newspapers. These additional notification requirements would only lead to unnecessary delay. OVS systems cannot be constructed in secret. As the Commission noted in the order, for example, right-of-way permits must be obtained prior to construction of systems. OVS operators are also required to negotiate with local franchising authorities to attempt to reach an agreement as to how to meet the PEG requirements. There can be no question that local authorities will be aware of any proposed OVS system well in advance of its commencement of operations. Therefore, imposition of any additional notice requirement would be an unnecessary barrier to entry.

B. The Commission Struck a Proper Balance in Adopting its OVS PEG Access Rules

MFS strongly urges the Commission to uphold its rules applying the PEG access requirements to OVS operators. They strike the proper balance between ease of entry in order to encourage competition and the public interest in access to this information. Some petitioners have objected to the Commission's rule requiring incumbent cable operators to interconnect with OVS systems in order for OVS operators to comply with the PEG requirements.^{12/} They seek reconsideration of the Commission's requirement that, in the absence of a voluntary agreement with the franchising authorities, OVS operators will be allowed to satisfy their PEG obligations by connection to the cable access channel feeds of the local cable operator.^{13/}

¹² See Coalition Petition at 7; Petition for Reconsideration of Michigan, Illinois and Texas Municipalities ("MIT Municipalities Petition") at 8-20;

¹³ Id.

The NCTA and the Coalition argue that this interconnection requirement imposes greater PEG burdens on cable operators than OVS operators. However, the Commission requires that OVS operators will be required to share all of the cost of any system with which it interconnects, including unrecovered capital costs.^{14/} This cost sharing will result in apportioning the burdens on both OVS and cable operators, and will be far more efficient than requiring duplicate facilities to be built to transmit virtually identical information to the consumer.

II. OVS Operators Must be Able to Exclude Competing Cable Operators From Their Systems

Section 76.1503(c)(2)(iv)(C) of the Commission's regulations provides that

An open video system may . . . [r]efuse carriage on its open video system to a competing, in-region cable operator or its affiliates that offers cable service to subscribers located in the service area of the open video system, except where the allocation of open video system capacity to a competing cable operator is consistent with the public interest, convenience, and necessity.^{15/}

Granting this discretion to OVS operators is well within the authority of the Commission and is not an impermissible delegation of that authority as certain parties have argued.^{16/} Congress specifically authorized the Commission to limit cable operators' use of OVS systems to instances that are "consistent with the public interest, convenience and necessity."^{17/}

¹⁴ OVS Order at ¶ 146; 47 CFR § 76.1505(d)(4).

¹⁵ 47 CFR § 76.1503(c)(2)(iv)(C).

¹⁶ See Cox Petition at 6; NCTA petition at 6-10.

¹⁷ Communications Act at § 653; 47 U.S.C. § 573.

Until new entrants are allowed to establish meaningful competition for cable operators, it would not be in the public interest to require these start-up entities to provide access to their competitors. Permitting the cable television operator or its programming affiliates to distribute programming over a competing OVS platform would permit a cable operator, which has its own franchise to construct facilities, to instead tie up capacity on a competitor's network, either directly or through a programming affiliate, without any reciprocal ability on the OVS operator's or its programmer customers' parts to use the cable operator's capacity. Moreover, the ability to take programming capacity on a competitor's system would be susceptible to substantial competitive abuse if capacity in an OVS network is limited, since the cable operator, in addition to avoiding its own construction costs, could at the same time effectively limit its competitor's programming and thereby limit competition in the marketplace. It would also give the cable operator (either directly or through its programming affiliates) access to confidential business plans and information. And, as the Commission learned in its VDT proceedings, it would provide a vehicle for the cable operator to tie up the OVS operator in regulatory arenas with frivolous challenges and proceedings.

Clearly, given the fact that the in-region incumbent cable operators have franchises to construct their own facilities and have a significant head-start in the market, there is no need for the Commission to provide for an opportunity for a cable operator to avoid developing its own alternative infrastructure, or to risk the competitive harm which would result from requiring an OVS operator to permit access to transmission facilities by the incumbent cable provider. As MFS noted in its original comments, the Commission's approach to this issue is consistent with its precedent in the area of cellular licensing, where the Commission held that a facilities-based

carrier of these services should be allowed to deny resale to other fully-operational facilities-based carriers.^{18/} This exception to non-discrimination rules has been deemed valuable by the Commission because it promotes competition “by encouraging each licensee to build out its network.”^{19/} The Commission properly exercised its discretion with respect to cable operators’ entrance into OVS to promote the same goal of encouraging competitive infrastructure. These rules should not be altered.

III. OVS Operators Should Not Be Sanctioned for the Failure of a Programming Provider to Comply with the Sports Non-duplication Rules

The petition of the Professional Sports Organizations^{20/} urges the Commission to alter § 76.1506 of its new regulations to provide for the imposition of sanctions against OVS operators in the event that OVS programming providers fail to comply with sports exclusivity rules. Such a plan would impose an enormous and unnecessary burden on OVS operators. The Sports Organizations petition states that “[s]ports deletions, notwithstanding their importance, are few in number, can happen sporadically, any day of the week.”^{21/} In order to ensure that they would be free from sanctions, an OVS operator would have to monitor the programming of every provider

¹⁸ See *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Notice of Proposed Rulemaking, CC Docket No. 94-54, FCC 95-149, at ¶ 62 (1995) (“CMRS Order”); *In the Matter of Petitions for Rule Making Concerning Proposed Changes to the Commission’s Cellular Resale Policies*, Notice of Proposed Rule Making and Order, CC Docket No. 91-33, 6 FCC Rcd 1719, 1724 (1991).

¹⁹ CMRS Order at ¶ 62.

²⁰ Request for Clarification or, in the Alternative Petition for Reconsideration of Office of the Commissioner of Baseball, National Basketball Association, National Football League and National Hockey League (“Sports Organizations Petition”).

²¹ *Id.* at 3.

on its system 24 hours per day, seven days a week. The Commission placed responsibility for these rules on the operator in order to make it easier for the sports organizations to fulfill their notification requirement. However, it appropriately limited the duty of the OVS operator to communicating that notice to its programmers because it recognized that the operator will not be able to prevent violations. This balance should be maintained -- the Commission's regulation should not be altered.

IV. CONCLUSION

For the forgoing reasons, MFS strongly urges the Commission to deny the petitions for reconsideration of its Second Report and Order in the above captioned proceeding. The Commission's regulations strike the proper balance between encouraging the development of

OVS systems and protection of consumers by requiring compliance with the various obligations imposed on OVS participants by Congress. None of the arguments made by the various petitioners justify altering this balance.

Respectfully submitted,



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