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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

CS Docket No. 96-46

In the Matter of)
)
)
Implementation of Section 302 of)
the Telecommunications Act of 1996)
)
Open Video Systems)

To: The Commission

PETITION FOR RECONSIDERATION

TIME WARNER CABLE

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SUMMARY

Time Warner Cable requests reconsideration of the Commission's Fourth Report and Order in which the Commission revised its procedures for processing certification applications involving open video systems ("OVS"). Therein, the Commission recognized that based upon recent experience, and in light of the limited statutory review period, carefully crafted OVS application procedures are critical.

Time Warner Cable believes the Commission's actions do not go far enough to remedy the infirmities in the existing OVS certification process and suggests herein certain additional procedural modifications to more faithfully carry out Congressional intent. By requiring OVS applicants to provide additional information with their applications, interested members of the public, as well as the Commission, will be in a far better position to make meaningful determinations regarding whether the applicant is proposing to construct a bona fide OVS. There are at least two general areas where greater detail is required with an OVS certification application in order to determine whether the application comports with Congressional intent.

First, Congress envisioned OVS as an open platform, allowing both affiliated and unaffiliated programmers to gain access to the network and provide video programming competition. However, it appears that some OVS applicants do not in fact intend to construct a nondiscriminatory platform, but rather, intend to construct a proprietary, closed network, of utility only to the OVS operator's affiliated video programming provider. For example, the Cable Services Bureau recently denied a request by Metropolitan Fiber Systems ("MFS") in New York City and Boston for an extension of time to transition from alleged video dialtone ("VDT") to OVS largely because MFS failed to provide system access to end-user subscribers. Unless the Commission requires up-front documentation of a commitment

to provide facilities running directly to any potential subscriber within the proposed OVS service area, companies such as MFS will attempt to become OVS providers merely to interconnect their own SMATV operations, and thereby evade the statutory cable franchise requirement.

In order to fulfill the statutory OVS nondiscrimination requirement, OVS applicants should also document, as part of their application, that their proposed OVS facility is able to serve the entire area authorized by each affected local governmental authority, not just certain hand-picked buildings. The Commission should further safeguard against abuses of the OVS framework by requiring speedy release of a Notice of Intent once a certification has been granted and by keeping the OVS enrollment period open until construction has been completed. To provide programmers with opportunities and incentives to utilize OVS, the Commission should also require OVS operators to establish new open enrollment periods every 18 months.

Second, while OVS regulations are intended to be streamlined, Congress did not intend to infringe upon local communities' prerogative to manage their rights-of-way in order to protect the public health and safety. It appears that OVS operators are attempting to delay or avoid their obligation to obtain an affirmative grant from local authorities to construct facilities which occupy local streets and rights-of-way. The Commission should clarify that the OVS certification procedures are meant to complement, not preempt, local authorization of OVS facility construction and operation.

The best way for the Commission and other interested parties to confirm that the applicant has obtained local approvals is for OVS applicants to include documentation evidencing such approvals with their FCC OVS application. MFS' efforts to delay its OVS

franchise fee and PEG access negotiations in New York City eviscerate important local authority, give MFS a huge advantage over competitors such as cable companies who are required to obtain a local franchise before receiving Commission authorization to operate, and thwart Congress' goal of vigorous competition. The Commission should require that where OVS operators have not reached an agreement regarding PEG obligations prior to submission of their certification applications, the default PEG requirements should apply. Further, the Commission should clarify that local authorities are free to impose construction schedules and build-out requirements on OVS operators.

Time Warner Cable's suggestions will reduce the administrative burdens on the Commission and all parties. Documentation of the above-described items in advance of the 10-day statutory review period will provide the Commission with enhanced ability to verify the bona fides of OVS applicants, and will likely reduce the number of disputes which may take place post-certification.

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To: The Commission

PETITION FOR RECONSIDERATION

Time Warner Cable, a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits this petition for reconsideration of the Commission's Fourth Report and Order in the above-captioned proceeding.^{1/} In its Fourth Report and Order, the Commission sought to revise its procedures for the processing of certification applications involving open video systems ("OVS"), based on "the experiences of recent open video system certification proceedings."^{2/} The Commission properly recognized that carefully crafted OVS application procedures are particularly critical "given the limited 10-day statutory deadline for deciding certification applications."^{3/}

Time Warner Cable fully agrees with the Commission's goals underlying adoption of the Fourth Report and Order. However, while the revised procedures are a step in the right direction, the Commission's actions do not go far enough to remedy the many infirmities in the existing OVS certification process. Most fundamentally, the 10-day period established by

^{1/}Fourth Report and Order in CS Docket No. 96-46, FCC 97-130 (rel. April 15, 1997). The Fourth Report and Order was published in the Federal Register on May 13, 1997. 62 F.R. 26235. Accordingly, this Petition for Reconsideration is timely filed pursuant to Sections 1.429(d) and 1.4(b)(1) of the Commission's rules.

^{2/}Fourth Report and Order at ¶ 2.

^{3/}Id.

Congress for the Commission to either approve or disapprove any OVS application has simply proven inadequate to provide for anything more than cursory public participation in OVS certification matters. Accordingly, Time Warner Cable is suggesting herein certain additional procedural modifications to more faithfully carry out Congressional intent. By requiring OVS certification applications to provide additional information initially, before the 10-day clock begins to run, interested members of the public, as well as the Commission, will be in a far better position to make meaningful determinations regarding whether the applicant is proposing to construct a bona fide OVS. Reconsideration of the Fourth Report and Order is particularly appropriate in light of the fact that the public was not afforded notice and an opportunity to comment on these matters prior to issuance of the Commission's decision.^{4/}

As set forth below, Time Warner Cable believes that there are at least two general areas where greater detail is required in an OVS certification application in order to determine whether the application comports with Congressional intent. First, it appears that many OVS applicants do not in fact intend to construct a nondiscriminatory platform to allow unaffiliated programmers to market their services throughout a community, but rather intend to construct a proprietary, closed network, of utility only to the OVS operator's affiliated video programming provider. Indeed, it would appear that, in many instances, entities are applying to become OVS providers merely in an effort to utilize facilities occupying public rights-of-way to interconnect their own SMATV operations, and thereby evade the statutory cable franchise requirement. Second, it appears that many OVS operators are attempting to delay or avoid their obligation to obtain an affirmative grant from local authorities to construct facilities which occupy local streets and rights-of-way, thereby usurping "the

^{4/}Id. at ¶ 3.

authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner."^{5/}

I. OVS APPLICATION PROCEDURES SHOULD BE REVISED TO ALLOW VERIFICATION OF THE BONA FIDES OF OVS APPLICANTS.

A. OVS Applicants Should Be Required To Document Their Commitment To Construct End-to-End Facilities Running Directly To Any Potential Subscriber Within The Proposed OVS Service Area.

1. Congress' goals for OVS

As the Commission has recognized, by requiring OVS operators to provide carriage opportunities for unaffiliated video programming providers on terms that are just and reasonable, and not in an unjustly or unreasonably discriminatory manner, "Congress sought to foster competition by encouraging multiple programming sources on open video systems."^{6/} In the Fourth Report and Order, the Commission has established certain procedural modifications to the scope of the OVS certification requirement, in order to further these goals. The Commission had earlier responded to the concern that a short review period would lead to an inadequate review of OVS applications, by stating:

A streamlined certification process does not mean . . . that the Commission may not request and review necessary information. We intend the certification process to provide purposeful representations regarding the responsibilities of the [OVS] operator. We also will require other information, if necessary, to determine compliance with the Commission's rules.^{7/}

Clearly, Congress did not intend for the Commission to merely rubber-stamp OVS applications. Therefore, as explained below, the certification process must be further

^{5/}H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996) ("Conference Report").

^{6/}Second Report and Order, CS Docket No. 96-46, FCC 96-249, 11 FCC Rcd 18223 (1996) ("Second Report and Order") at ¶ 2, citing 47 U.S.C. § 573(b)(1)(A)-(B).

^{7/}Second Report and Order at ¶ 31 (citation omitted).

enhanced to ensure that Congress' goals for OVS are met. Based upon the experiences to date, Time Warner Cable submits that OVS applicants should be required to document that they intend to provide a truly nondiscriminatory OVS platform, with facilities extending from end-to-end to all potential customers within a defined OVS service area. Given the short statutory review period, in the absence of such express certification, certain entities will attempt to use OVS to circumvent the statutory cable franchise requirement.

2. The case of MFS/RCN

The operations of Metropolitan Fiber Systems of New York, Inc., d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc. (jointly referred to as "MFS") in New York City and Boston are illustrative of the reason enhanced certification is necessary. On November 5, 1996, MFS filed applications for certification to operate open video systems in Manhattan and Boston. That same day, MFS filed elections to transition its alleged video dialtone ("VDT") systems^{8/} to OVS and concurrent motions for extensions of time to accomplish such transition. By consolidated order dated November 15, 1996 (the "November 1996 MFS Order"), the Cable Services Bureau (the "Bureau") denied each of MFS' applications for certification.^{9/} The Bureau determined that MFS improperly failed to report the maximum total anticipated channel capacity of its system as required by FCC Form 1275 and noted that significant issues were raised regarding MFS' status as a VDT provider.^{10/} On November 27, 1996 MFS refiled applications for certification to operate an OVS in Manhattan and Boston, which the Bureau granted by consolidated order, dated December 9, 1996 (the "December 1996 MFS Order"), finding that MFS had corrected the

^{8/}The 1996 Act repealed the Commission's VDT rules and policies which had been established to permit telephone companies to offer a common carrier video transmission service for programming provided by others. Second Report and Order at ¶ 4.

^{9/}Consolidated Order, DA 96-1912, 11 FCC Rcd 14980 (1996).

^{10/}Id. at ¶ 15.

deficiency and that other issues were not appropriately addressed as part of the OVS certification process.^{11/}

In February 1997, when it became clear that MFS' masquerade as a bona fide OVS operator entitled to transition treatment from VDT was being exposed as a sham, its affiliate and sole programmer, Residential Communications Network ("RCN"), filed for OVS status to serve the identical overlapping areas as MFS. The Bureau granted RCN's OVS application on February 27, 1997.^{12/} That same day, by order of February 27, 1997 (the "February 1997 MFS Order"), the Bureau denied MFS' request for an extension of time to transition to an OVS, premising its decision on the determination that MFS did not operate a VDT system under the rules established by the Commission.^{13/} The Commission denied MFS' petition for reconsideration of the February 1997 MFS Order by order dated May 16, 1997 (the "MFS Reconsideration Order").^{14/}

A primary issue upon which the Commission based its denial of MFS' request for extension of time to transition from alleged VDT to OVS involved MFS' failure to provide system access to end-user subscribers. Based on Time Warner's experiences in New York City, the Bureau determined, and the Commission affirmed, that MFS never provided a basic VDT platform that enabled all programmers to reach end-user subscribers, and therefore failed to satisfy the de facto characteristics of a VDT provider.^{15/} Moreover, MFS' proposed OVS facility would not have cured these defects. As the Commission found, the MFS facilities are effectively closed to all programmers except for RCN. Other

^{11/}Consolidated Order, DA 96-2075 (rel. Dec. 9, 1996).

^{12/}Memorandum Opinion and Order, DA 97-453, 12 FCC Rcd 2477 (1997).

^{13/}Consolidated Order, DA 97-452, 12 FCC Rcd 3536 (1997).

^{14/}Order on Reconsideration, FCC 97-169 (rel. May 16, 1997).

^{15/}February 1997 MFS Order at ¶¶ 29-30; MFS Reconsideration Order at ¶¶ 23-24.

programmers cannot access subscribers over the facility, since MFS' facilities do not deliver programming to end users, but rather, terminate at the point of presence of certain select multiple dwelling unit ("MDU") buildings.^{16/} RCN has complete control of the facilities that can be used to access actual subscribers, including the risers and home-run coaxial drops. The MFS system thus fails to include the portions of the network which can actually access subscriber residences.^{17/}

The problem with such a closed system is that it contravenes the key characteristic-- "an open facility"-- of OVS. Since RCN has control of the facilities from the curb, or point of presence, to the subscriber premises, and since such facilities are not part of the MFS OVS transport platform, non-affiliated programmers are shut out from any practical use of MFS' system. This means that each OVS programmer except RCN would have to construct its own distribution facilities from the point where MFS' facility terminates, and obtain permission from each landlord to construct such facilities to compete with RCN. Such a requirement is completely at odds with the 1996 Act's mandate that OVS operators may not "discriminat[e] among video programmers with regard to carriage."^{18/}

The Bureau found that MFS admitted there are instances where it does not provide facilities directly to a customer's premises and ruled that MFS had provided no evidence that it made any arrangements to enable potential programmers to utilize RCN's facilities to reach end-user subscribers.^{19/} The Bureau also rejected MFS' reliance on the Commission's decision authorizing the New York Telephone ("NYT") VDT trial because in that proceeding, NYT's use of coaxial cable drops was an acceptable means of complying with

^{16/}See MFS Reconsideration Order at ¶ 23.

^{17/}Id.

^{18/}47 U.S.C. § 573(b)(1)(A).

^{19/}February 1997 MFS Order at ¶ 30.

the VDT rules during a limited one-year trial, and because the cable drop provider "guaranteed that all video programmers would have access to coaxial facilities installed to each apartment at the trial sites at no extra charge."^{20/} The Bureau found that the NYT example "conflicts significantly with MFS's system" which, in some cases, ends at the point of presence of a building and provides no guarantee that unaffiliated customer programmers will be able to reach end-user subscribers and deliver their video programming over MFS' system.^{21/} The Commission affirmed the Bureau's rulings on reconsideration of this issue.^{22/}

OVS is a closely related successor to VDT, and the "open," or non-discrimination, requirement, including access to end users, is virtually identical for both services. The Bureau confirmed this fact in granting MFS' OVS certification, where it stated:

MFS has submitted a verified Form 1275 indicating that it qualifies as an open video system, which by definition includes access to end-user subscribers . . . absent evidence that MFS cannot, or will not, provide video programmers access to end-user subscribers, the open video system certification requires us to rely on MFS's verified application.^{23/}

Moreover, VDT and OVS were designed largely for LECs, whose facilities generally provide access to end users, thus such access was always contemplated by Congress.^{24/} In fact, as the Commission later found, MFS' bare certification regarding end user access to its

^{20/}Id. (emphasis added).

^{21/}Id.

^{22/}MFS Reconsideration Order at ¶¶ 23-24.

^{23/}December 1996 MFS Order at ¶ 17 (emphasis added).

^{24/}See Conference Report at 177; Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, 10 FCC Rcd 244 (1994) at ¶ 1.

proposed OVS facility proved to be inaccurate.^{25/} This demonstrates why such certification needs to be supported by documentation in the first instance.

Obviously, OVS is an extremely attractive option due to its streamlined regulatory status. However, entities are only eligible for such streamlined regulation if their facility is truly non-discriminatory.^{26/} According to the Commission, "Section 653, in addition to promoting diversity of video programming sources, also is designed to reduce the likelihood that open video system operators will discriminate against or otherwise disfavor unaffiliated programming providers."^{27/} As the MFS/RCN situation demonstrates, far from "promoting diversity of video programming sources," some OVS proposals discourage programmers, since no one other than the OVS applicant's hand-picked programmer (in the case of MFS, its affiliate, RCN) can reach end users.^{28/} Such a system design is blatantly discriminatory and contradicts both the letter and spirit of Section 653. Without a better check on the OVS applicant's obligations, the above-described experience with MFS demonstrates that OVS applicants will merely end-run the Communications Act's local cable franchise requirements by constructing a cable system or a private system tailored to an affiliated programmer, claiming it is an OVS, and escaping the necessary scrutiny to determine whether the facility truly meets the OVS requirements. Such a result makes a mockery of Congress' OVS goals.

^{25/}MFS Reconsideration Order at ¶ 23. Again, while this decision specifically applied to MFS' contention that its facilities met the VDT requirements, they are the same existing facilities over which MFS is now certified to provide OVS service, so the Commission's conclusion would appear to apply with equal force to MFS' facilities under the OVS analysis.

^{26/}Second Report and Order at ¶ 1 (footnotes omitted).

^{27/}Third Report and Order and Second Order on Reconsideration, CS Docket No. 96-46, FCC 96-334, 11 FCC Rcd 20227 (1996) ("Third Report and Order") at ¶ 14 (footnote omitted).

^{28/}See Opposition to Certification, filed December 5, 1996 by Time Warner Cable of New York City and Paragon Communications, at 9.

Accordingly, current OVS grantees and future OVS applicants must be required to document the commitment to provide full end-user access to their facilities.

B. OVS Applicants Should Be Required To Document That They Are Committed To Constructing A Nondiscriminatory Platform Throughout The OVS Service Territory.

Especially in light of the brief review period for OVS certifications, applicants should be required to document up front that they will construct a nondiscriminatory platform throughout the OVS service territory. Section 653(b) of the Communications Act prohibits OVS operators from discriminating among video programming providers with regard to carriage,^{29/} and from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information for the purposes of selecting programming or in the way such material or information is presented to subscribers.^{30/} An OVS operator who has certified to the Commission that it complies with these and certain other requirements qualifies for reduced regulatory burdens.^{31/} However, based upon the experiences thus far involving OVS, the required certification regarding nondiscrimination must be more explicit and subject to independent verification.

In order to fulfill the OVS statutory nondiscrimination requirement, OVS applicants should be required to document, as part of their application, that their proposed OVS facility is able to serve the entire area authorized by each affected local governmental authority, not just certain hand-picked buildings. As shown above, where the applicant merely seeks to cherry-pick, *i.e.*, provide service to a relatively small number of buildings (typically those where high-income residents live and/or where the applicant or its affiliate already provides SMATV service) within a larger authorized territory, the proposed facility clearly

^{29/}47 U.S.C. § 573(b)(1)(A).

^{30/}47 U.S.C. § 573(b)(1)(E)(i).

^{31/}47 U.S.C. § 573(a)(1).

discriminates against non-affiliated programmers.^{32/} This was the case with MFS' OVS applications in New York City and Boston. MFS is seeking to use the OVS rules to circumvent the Communications Act's local cable franchise requirement, by using hard wires to connect buildings in which its affiliate provides SMATV service, thereby creating a cable system, and claiming that the proposal meets the OVS requirements simply because other programmers are theoretically entitled to request capacity on the OVS. However, so long as the MFS/RCN OVS facility runs only to those select MDU buildings already served by RCN, any programmer seeking carriage would be at a huge competitive disadvantage, because it will be unable to offer service to any potential subscriber in the OVS service area who does not live in one of the buildings selected for service by RCN.

Similarly, Digital Broadcasting OVS ("DB") was granted OVS certification on October 10, 1996 for contiguous OVS service areas covering all of Los Angeles, Orange, San Diego, Riverside and San Bernardino Counties in California, an area encompassing 36,298 square miles and a population in excess of 16 million people.^{33/} DB has candidly admitted that it has no firm plans to construct OVS facilities to any homes in this massive territory, let alone to construct facilities throughout the area.^{34/} Such obvious sham OVS applications should not be tolerated. While an OVS applicant should be free to propose service territories as large or small as desired, it should bear the obligation to construct OVS facilities capable of serving all the homes in such territory within a reasonable time frame.

^{32/}Similarly, such a facility discriminates against potential OVS customers, contrary to the goals of 47 U.S.C. § 573(b)(1)(E)(i), and raises serious issues relating to economic and racial red-lining.

^{33/}"Commercial Atlas & Marketing Guide," Rand McNally, 1991, 122nd Ed.

^{34/}MultiChannel News, Sept. 2, 1996 at 50.

OVS' streamlined regulatory treatment is premised on the OVS facility's ability to provide increased video programming competition in a given area.^{35/} To do so, the OVS facility must be truly "open" to such programmers. As Commissioner Ness stated in her Separate Statement to the Commission's OVS Second Report and Order,

OVS systems will provide the open platform for programmers that Congress envisioned. . . . Our rules faithfully reflect this balance. They seek to ensure Congress' vision of an open platform, allowing programming providers, both affiliated and unaffiliated with the OVS operator, to gain access to the platform and provide significant new competition in the video programming market.^{36/}

If, however, OVS applicants merely propose closed, private systems linking their existing SMATV operations, competition will not be enhanced.

The simple cure for this problem is to require the OVS applicant to provide nondiscriminatory service throughout a particular territory, not just a few hand-picked buildings where it already provides SMATV service. The scope of territory can be defined by the OVS applicant, so long as the precise boundaries are disclosed clearly on the face of the OVS application submitted to the FCC. Typically, the local OVS authorization grant will cover a clearly delineated geographic area, not just a few buildings, so there should be no local regulatory impediment to meeting this OVS certification requirement. Cable operators typically are required to make their service universally available within their franchise area and, as explained below, regulatory parity and fairness dictate that this requirement be applied to OVS as well. The OVS certification procedures should be revised to require the applicant to submit a detailed construction timetable and facility route map, so that the obligation to construct a nondiscriminatory, open OVS platform can be verified. These requirements should be applied to current OVS grantees as well as future OVS applicants.

^{35/}Second Report and Order at ¶ 8.

^{36/}Second Report and Order, Separate Statement of Commissioner Susan Ness.

C. Additional Safeguards To Ensure The Bona Fides Of OVS Applicants.

As a further safeguard to ensure the bona fides of any OVS applicant, they should be required to file their Notice of Intent ("NOI") to establish an OVS system within ten days after the Commission grants OVS certification. As the Commission is aware from experience garnered to date, preparation of a NOI by an OVS operator is not a complex or burdensome process. If the Commission can be expected to review OVS applications within ten days, OVS operators can surely be expected to submit their NOI within ten days thereafter. Indeed, the ten-day period following grant of OVS certification is likely to be when the matter is most widely publicized and thus most likely to attract the greatest number of potential unaffiliated video programming providers.

The Commission's experience with OVS thus far demonstrates why this safeguard is essential. For example, the Commission approved MFS' OVS applications for New York City and Boston on December 9, 1996, yet MFS has never filed a Notice of Intent to establish its OVS system. Considering that MFS was (and is) providing private service to its affiliate, RCN, this raises the suspicion that MFS has no plans to offer OVS service to unaffiliated entities, and has used its OVS grant merely as a way to connect SMATV systems by hard-wire and escape the Communications Act's cable franchise requirement for such connected facilities. Similarly, Urban Communications Transport ("Urban") received Commission certification for its proposed OVS facilities covering virtually all of New York City and Westchester County, NY on January 27, 1997, yet Urban has not filed a NOI, nearly five months later.

It is the Commission's role to safeguard against such abuses of Congress' OVS framework. This is especially true where, as the Commission cites, "Congress intended the certification process to be streamlined."^{37/} Obviously, Congress intended that OVS

^{37/}Second Report and Order at ¶ 28 (footnote omitted).

facilities be constructed and put to use, not merely certified, as expeditiously as possible.

There is no benefit to having an OVS certification granted if the grantee fails to speedily file a NOI, construct the facility, and begin operations. Indeed, it is highly questionable whether Urban will construct an OVS facility throughout the entire New York City and Westchester County territory, and the fact that Urban has not even filed an NOI only fuels such concern.

Similarly, the OVS operator should be required to reopen the enrollment period for a second ninety-day period no more than one hundred eighty days prior to commencement of OVS operations. If there is a significant lag period between obtaining OVS certification and commencement of OVS operations, potential video programming providers who initially were not interested in obtaining capacity might well have renewed interest when the OVS system has in fact been constructed and is about to begin operations. Again, this is a time frame where the OVS facility is likely to be widely publicized, thus engendering the widest possible exposure to potential unaffiliated video programming providers.

Time Warner Cable also believes that the current requirement for subsequent allocation of open channel capacity, only once every three years,^{38/} is insufficient. Instead, OVS operators should be required to establish a new open enrollment period every 18 months to gauge new demand for capacity, and to allocate such capacity pursuant to the Commission's rules. Three years is too long a time to shut out programmers who either arrive or become interested in carriage after the previous open enrollment period ends.

The need for enhanced OVS certification requirements to prevent discrimination is also demonstrated by recent reports indicating that RCN, which is also a Commission OVS grantee, is seeking to obtain cable television franchises in the areas in and around Boston

^{38/}Second Report and Order at ¶ 38.

where it has already obtained Commission OVS certification.^{39/} There is little logical business sense for RCN to have obtained OVS certification if it now seeks to obtain cable franchises, except to try to use such OVS certification as leverage against the local franchising authorities in negotiations over the franchise provisions. RCN can try to negotiate much less onerous cable franchise provisions than are imposed upon the current cable franchisees if it can threaten that, unless such provisions are severely limited, RCN will walk away from the franchise negotiations and remain an OVS operator. Apparently, RCN is attempting to do just that, reportedly taking the position "that it should have leeway, as a newcomer, to build a franchise area more slowly than the incumbent was required to do."^{40/} Conversely, as noted above, RCN could use its dual OVS/cable regulatory status to whipsaw any unaffiliated programmers on its OVS facility, by shutting down the open platform and stating that the facility is strictly a cable television system on which such programmers are not entitled to carriage.^{41/} Clearly, these outcomes would thwart competition, not promote it as Congress intended.

II. OVS APPLICANTS SHOULD BE REQUIRED TO DOCUMENT THAT THEY POSSESS ALL NECESSARY LOCAL GOVERNMENTAL AUTHORIZATIONS TO CONSTRUCT FACILITIES OCCUPYING PUBLIC RIGHTS-OF-WAY.

A. Documentation Of Local Governmental Authorization Must Be Included With FCC OVS Applications.

Congress made clear in enacting the Cable Communications Policy Act of 1984 that local governmental authorities have a critical interest in protecting their citizens' health and

^{39/}See Kent Gibbons, "RCN's Boston Deal Reveals OVS Pitfalls," Multichannel News, June 9, 1997 at 66.

^{40/}Id.

^{41/}See id.

safety by overseeing construction of cable systems over local rights-of-way,^{42/} and to charge compensation, in the form of franchise fees, for such use.^{43/} Similarly, Congress has made clear that local governmental authorities have a strong interest in authorizing and overseeing the construction of OVS facilities over public rights-of-way, and have the right to be compensated for such use. This concern is demonstrated by Section 653 of the Act, which permits local governmental authorities to impose fees on OVS operators based on gross revenues, "in lieu of the franchise fees permitted under Section 622."^{44/} The legislative history to Section 653 also makes clear that:

The conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner.^{45/}

Accordingly, the Commission properly concluded that, in adopting Section 653, "Congress did not intend to infringe upon local communities' prerogative to manage their rights-of-way in order to protect the public health and safety."^{46/}

OVS operators are exempt only from the local cable television franchise requirement contained in Section 622 of the Communications Act. Clearly, state or local governments can still require OVS operators to obtain authorizations to occupy local streets (other than a Title VI franchise), manage OVS operators' use of public rights-of-way, and be compensated for such use. Section 253(c) of the Communications Act reinforces this policy, by providing

^{42/} See H.R. Rep. No. 934, 98th Cong., 2d Sess. 19, 24 (1984).

^{43/47} U.S.C. § 542(a).

^{44/47} U.S.C. § 573(c)(2)(B).

^{45/} Conference Report at 178.

^{46/} Second Report and Order at ¶ 208.

that, while state and local governments may not prohibit an entity from providing any interstate or intrastate telecommunications service,

[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.^{47/}

While OVS operators are not subject to Title II,^{48/} the language of Section 253(c) mirrors the language of Section 653(c)(2)(B) and its legislative history, evidencing that Congress intended for state and local governments to have the same oversight ability, and authority to receive compensation, for the use of public rights-of-way by OVS operators as by operators of telecommunications facilities governed by Title II.

The Commission's OVS certification procedures should be revised to account for this policy. Some OVS applicants, and others, apparently believe that Commission OVS certification somehow preempts local governmental authority over the construction of OVS facilities, the digging up of streets, stringing of wires over public rights-of-way, and other issues related to safety and public property, even though this argument was expressly rejected by the Commission.^{49/} Accordingly, Time Warner Cable respectfully requests that the Commission unequivocally reaffirm that its OVS certification procedures are meant to complement, not preempt, local authorization of OVS facility construction and operation. The simplest and best way for the Commission and other interested parties to confirm that

^{47/}47 U.S.C. § 253(c).

^{48/}47 U.S.C. § 573(c)(3).

^{49/}Second Report and Order at ¶ 208.

the applicant has obtained such local approvals is for OVS applicants to include documentation evidencing such approvals with their FCC OVS application.

The Commission has expressly recognized that local governmental authorities have an absolute right, consistent with their authority to control and manage the use of public rights-of-way, to impose the following types of requirements on OVS operators: (1) coordination of construction schedules, (2) establishment of standards and procedures of constructing lines across private property, (3) determination of insurance and indemnity requirements, (4) establishment of rules for local building codes, (5) scheduling common trenching and street cuts, (6) repairing and resurfacing construction-damaged streets, (7) ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable, and similar companies, and (8) keeping track of the various systems using the rights-of-way to prevent interference among facilities.^{50/} In order for such requirements to have practical effect, the OVS applicant must be required to obtain all requisite local authority to use the public rights-of-way before it submits an OVS application, and must submit appropriate documentation of such authority as part of its application to the Commission for OVS certification.

For example, MFS' efforts to delay its OVS franchise fee and PEG access support negotiations in New York City, where Time Warner Cable operates a cable system, have been documented before the Commission. In its Opposition to MFS' application for OVS certification in New York City, Time Warner Cable noted that MFS had not even begun negotiations with the City of New York relating to its OVS obligations, including its PEG access support and gross revenue fee payments.^{51/} The Boston Community Access Programming Foundation ("BCAPF") raised similar concerns regarding MFS' failure to pay

^{50/}Id. at ¶ 210.

^{51/}Opposition to Certification, filed November 12, 1996 by Time Warner Cable of New York City and Paragon Communications, at 21.

such fees in Boston.^{52/} In its Reply to such oppositions and comments, MFS merely stated that it was involved in negotiations with the City of Boston regarding PEG access support fees, and that it

currently is working with the City of New York on an arrangement in which MFS would pay a gross receipt fee on video revenues and make PEG contributions and channel capacity available during the transition period between certification and full OVS implementation. MFS does not object in principle to reaching a similar arrangement with the City of Boston.^{53/}

Time Warner understands that, some seven months later, MFS is still "negotiating" with the City of New York and has just reached an agreement with the City of Boston (but apparently not the 47 other communities surrounding Boston) regarding its franchise fee, PEG access and other obligations.^{54/} Such delaying tactics effectively eviscerate these important obligations, and give MFS a huge advantage over its competitors.

For example, cable operators such as Time Warner Cable are required to obtain a local cable franchise before receiving Commission authorization to operate their cable systems through registration of their cable community units with the Commission pursuant to Section 76.12 of the Commission's rules.^{55/} In order to obtain such franchises, Time Warner Cable had to complete negotiations over all issues, including franchise fees and PEG access, and memorialize such agreements in the local franchise agreements. The concrete obligations to pay such franchise fees and PEG access support payments began to accrue

^{52/}BCAPF Comments, filed December 4, 1996, at 3.

^{53/}Reply of Metropolitan Fiber Systems/McCourt, Inc. and Metropolitan Fiber Systems of New York, Inc. d/b/a MFS Telecom of New York to Oppositions and Comments, filed November 25, 1996 at 27, n.29.

^{54/}See "RCN-BETG Venture, Boston Ink 'OVS Agreement,'" TR Daily, June 4, 1997 at 3.

^{55/}47 U.S.C. § 541(b)(1); 47 C.F.R. § 76.12.

upon the effective date of the franchise, well before the commencement of cable television operations. Failure to require MFS and other OVS applicants to meet the same statutory obligations before being granted Commission OVS certification violates Congressional intent by failing to ensure "parity among video providers."^{56/} This problem can be easily cured by requiring OVS applicants to attach their agreements with LFAs, evidencing completion of negotiations over franchise fees, PEG access and other issues, to their OVS applications so that the Commission and other interested parties can verify that the applicant has obtained the necessary local approvals.

As the above-cited example regarding MFS demonstrates, without a requirement for the OVS applicant to document its local authorization, there will be inadequate incentives for the OVS applicant to speedily comply with its local obligations. Every day that MFS has delayed its franchise fee and PEG access obligations by continuing to "negotiate," New York City, Boston (until now) and the many communities surrounding Boston have been denied the fulfillment of obligations and compensation they are entitled to from MFS, as part of "the authority of a local government to manage its public rights-of-way"^{57/} This authority is undermined where, as MFS has attempted to do in New York and Boston, the OVS grantee relies on its Commission OVS certification to construct and operate the OVS facility before receiving appropriate local authorization to do so. Again, the simple solution is to make such local authorization a condition of Commission OVS certification, by requiring the OVS applicant to attach the relevant documentation regarding local authorization to its FCC OVS application.

^{56/}Conference Report at 178.

^{57/}Id.

B. Where OVS Operators Have Not Reached An Agreement With Local Authorities Regarding PEG Obligations Prior To Submission Of Their Certification Applications, The Default PEG Requirements Should Apply.

Time Warner Cable understands the Commission's position that "open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority."^{58/} Given that OVS applicants must complete their negotiations for their authority to use local rights-of-way prior to commencement of OVS construction or operations, there is no logical reason why PEG access negotiations cannot be concluded simultaneously with rights-of-way authorization negotiations. Nevertheless, Time Warner Cable also understands the Commission's decision that "[i]f the open video system operator and the local franchising authority are unable to come to an agreement, we will require the open video system operator to satisfy the same PEG access obligations as the local cable operator."^{59/} Accordingly, the Commission should revise its OVS certification process to clarify that where an OVS applicant has been unable to reach an agreement with the relevant local authorities regarding PEG access obligations prior to submission of its OVS certification request, the default PEG access obligations will automatically apply. Otherwise, as the MFS situation demonstrates, OVS operators will have every incentive to drag out PEG access negotiations indefinitely, while at the same time attempting to avoid the default requirement by arguing that they have not yet been "unable" to come to an agreement.

As explained above, cable operators must reach a binding agreement relating to PEG access obligations with their local franchising authorities before they are allowed to commence construction of cable television facilities or provision of cable service. Congress has expressly mandated the Commission to impose PEG obligations on OVS operators "that

^{58/}Second Report and Order at ¶ 137.

^{59/}Id. at ¶ 141.