are no greater or lesser than the obligations" imposed on cable operators.[60] If OVS providers are allowed to commence construction of OVS facilities, or commence OVS operation for even a single day, without being subject to PEG access obligations equivalent to those imposed on the local cable operator, the Congressional mandate will be violated. Accordingly, if OVS applicants are unable to reach an agreement prior to submission of their OVS certification requests, the Commission should clarify that the default PEG access obligations automatically attach.

C. The Commission Should Clarify That Local Authorities Are Free To Impose Construction Schedules And Build-Out Requirements On OVS Operators.

In its Second Report and Order, the Commission cites the following examples of Title VI "franchise-like" requirements which local authorities may not impose on OVS operators: "constructing institutional networks, donating money to local educational or charitable institutions, or specifying the amount or type of capacity that the system must possess."[61] Conversely, the Commission recited a litany of issues which "fall squarely within [local authorities'] legitimate management function."[62] These issues, which Time Warner Cable has set forth in full above, include such items as coordination of construction schedules, scheduling of common trenching and street cuts, and keeping track of the various systems using the rights-of-way to prevent interference among facilities. Incongruously, the Second Report and Order later implies that the imposition of a build-out requirement by local authorities on OVS operators is "unrelated to management of the rights-of-way."[63] The Commission should remedy this ambiguity and squarely confirm that the imposition of a

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[60] 47 U.S.C. § 573(c)(2)(A).

[61] Second Report and Order at ¶ 211.

[62] Id. at ¶ 210.

[63] Id. at ¶ 215.

nondiscriminatory and competitively neutral build-out requirement by local authorities on OVS operators is not only permissible, but is mandatory.

As explained above, a requirement for OVS operators to construct facilities capable of serving every potential subscriber within the OVS service area is fundamental to the ban on discrimination against OVS video programming providers set forth in Section 653(b)(1)(A) of the Act. By the same token, the establishment of reasonable, nondiscriminatory construction timetables and build-out requirements falls squarely within the well-established power of local authorities to manage public rights-of-way. Local governmental authorities have a vital interest in ensuring that OVS facilities are constructed safely and speedily. Most of Time Warner Cable's cable franchises contain strict construction timetables, and Time Warner Cable understands that this is standard practice throughout the industry. Such timetables often require the cable operator to construct the cable plant throughout the community within one to three years of the date of grant of the franchise. Obviously, the same local authorities have an equally compelling concern in imposing similar construction timetables for OVS applicants.

The imposition of a construction timetable to insure that all citizens enjoy equal access to the proposed facilities, and to avoid protracted disruption to public streets, lies at the heart of a local government's ability to manage its local rights-of-way. Again, however, unless such terms are agreed upon before the OVS applicant submits its application to the Commission, there is little incentive for the applicant to expeditiously complete its negotiations with the local governmental authority over this issue, and start the clock running on a required construction timetable. The result would be that the local government would not be able to "manage its public rights-of-way in a nondiscriminatory and competitively neutral manner," as intended by Congress.[64] Proper management of public rights-of-way

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[64] See Conference Report at 178.

dictates that such construction schedules be strictly applied to, and enforceable against, OVS applicants, just as they are imposed upon cable operators.

D. Time Warner Cable's Suggestions Will Reduce Administrative Burdens.

While Time Warner Cable is sensitive to the statutory requirement that the Commission act on OVS applications in only 10 days, the alterations suggested herein would reduce, rather than increase, the administrative burdens on the Commission and all parties. First, OVS applicants would simply be required to attach appropriate documentation, i.e., a copy of their agreement with the local governmental authority evidencing local OVS authorization, including agreement on franchise fee and PEG access obligations, as well as a route map and construction timetable, along with their FCC OVS application. Such documentation will be readily available to the OVS applicant and easy to verify on its face. If such documentation is at odds with the local authority's understanding of the facts, such authority will be in a position to bring this discrepancy to the Commission's attention within the applicable five day time frame.

This suggested procedure is also likely to significantly reduce the number of disputes which may take place post-certification, and which Congress has directed the Commission to resolve within 180 days.[65] Currently, the FCC OVS application only requires the applicant to certify that it will, in the future, comply with PEG, must-carry and other FCC requirements.[66] However, many requirements, such as the obligation to pay PEG access support fees, can be resolved before OVS operation commences, upon finalizing the agreement with the governmental authority granting local authorization for the OVS system. Indeed, as explained above, this is the procedure which Time Warner Cable and most cable operators must follow before they are allowed to commence operations.

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[65] 47 U.S.C. § 573(a)(2).

[66] FCC Form 1275, section C.1.

Delaying such obligations to some unspecified future time invites disputes after grant of the application, over whether the OVS grantee has complied with such obligations. If, however, the applicant is required to demonstrate compliance with such obligations at the time of submission of its application to the Commission, many such disputes would likely be eliminated. Furthermore, if disputes arise based on the documentation provided by the applicant, they can potentially be resolved during the certification period, since interested parties will have the necessary information to raise objections during such period.

In short, permitting OVS applicants to obtain OVS certification from the Commission before completing negotiations and coming to a final agreement with the relevant local governmental authorities undermines local governmental management of public rights-of-way. OVS applicants will likely attempt to rely on their Commission OVS grantee status as sufficient to begin constructing and operating their facilities. This invites disputes which the Commission is likely to be called upon to resolve. Since, as Congress has clearly confirmed, local authorities have a critical role to play in overseeing use of public rights-of-way, the best way to ensure that this role is maintained, and to avoid disputes, is to require OVS applicants to first obtain, then document, their full local authorization as part of the FCC OVS application process.

WHEREFORE, Time Warner Cable petitions the Commission to reconsider its Fourth Report and Order adopting procedures for Open Video System applications, and amend its rules to include the changes suggested herein.

Respectfully submitted,

TIME WARNER CABLE

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Dated: June 12, 1997

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DECLARATION *

I, Edward J. Weiss, do hereby declare and state under penalty of perjury as follows:

1. I am the Assistant General Counsel of Time Warner Cable; and

2. I have read the foregoing "Petition for Reconsideration" ("Petition"). With respect to statements made in this Petition, other than those of which official notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge, information, and belief.

*Facsimile copy. Original to be filed upon receipt.

June 12, 1997
DATE

EDWARD J. WEISS

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