

ANTONY R. PETRILLA
ATTORNEY-AT-LAW

SWIDLER
&
BERLIN
CHARTERED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND-DELIVERY

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

Re: Opposition to Petition for Reconsideration of Fourth Report and Order in CS Docket
No. 96-46

Dear Mr. Caton:

Enclosed please find an original and fourteen copies of the Opposition to Petition for Reconsideration in the above-referenced proceeding. Please date-stamp the extra copy provided and return it with the messenger.

Thank you for your attention to this matter.

Sincerely,



Antony Richard Petrilla

Counsel for RCN Telecom Services, Inc.

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

CS Docket No. 96-46

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Jean L. Kiddoo
Warren Anthony Fitch
Antony Richard Petrilla
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7643 (fax)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
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Implementation of Section 302 of) CS Docket No. 96-46
the Telecommunications Act of 1996)
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Open Video Systems)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

RCN Telecom Services, Inc. ("RCN"), through undersigned counsel and pursuant to 47 C.F.R. § 1.429, respectfully submits this Opposition to the Petition for Reconsideration ("Petition") of Time Warner Cable, a Division of Time Warner Entertainment, L.P. ("Time Warner"), which purportedly seeks review of the Fourth Report and Order in the above-captioned docket.

INTRODUCTION AND SUMMARY OF ARGUMENT

Time Warner's Petition is deficient, and the Commission must reject it, for the following reasons:

- 1) Because Time Warner seeks "backdoor" reconsideration of the Second Report and Order,¹ not reconsideration of the Fourth Report and Order, its Petition is time-

¹ *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, Second Report and Order, FCC 96-249 (rel. June 3, 1996) ("Second Report and Order"); *see also In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, CS Docket No. 96-46, Third Report and Order and Second Order on Reconsideration, FCC 96-334 (rel. August 8, 1996) ("Second Order on Reconsideration"). Elements of the Second Report and Order, as well as the Second Order on Reconsideration, are currently under review in the United States Court of Appeals for the Fifth Circuit. *City of Dallas, Texas, et al. v. FCC and United States*, Nos. 96-60502, et al. (5th Cir.) (decision pending).

barred.

- 2) Even if the Commission deems the Petition to concern the Fourth Report and Order, it cannot grant the substantive relief that Time Warner requests in the strictly procedural context of that decision.

The Commission promulgated the Fourth Report and Order pursuant to Section 553(b)(A) of the Administrative Procedure Act (“APA”). 5 U.S.C. § 553(b)(A); Fourth Report and Order, ¶ 3. That provision generally exempts proceedings on “rules of agency organization, procedure, or practice” from notice and comment requirements. 5 U.S.C. § 553(b)(A). The Commission found that “the changes in the Commission’s OVS procedures proposed in this Fourth Report and Order fit within [Section 553’s] exception because they are *purely ministerial* and *do not alter the rights of interested parties.*” Fourth Report and Order, ¶ 3 (emphasis added). In other words, the new rules arising from the Fourth Report and Order are “procedural,” rather than “substantive,” because they “do not themselves alter the rights or interests of parties, although [they] may *alter the manner* in which the parties present themselves or their viewpoints to the agency.” *JEM Broadcasting Company, Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir 1994) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)) (emphasis added).

Thus, if Time Warner’s Petition seeks reconsideration of the Second Report and Order, it is time-barred. If Time Warner’s Petition relates only to the subjects discussed in the Fourth Report and Order, which the Commission concluded was exempt from notice and comment requirements, the Petition may seek reconsideration only of issues which are procedural in nature. As discussed below, the relief that Time Warner requests in the Petition is not “purely ministerial” and instead would alter the substantive rights of interested parties. Consequently, the Commission cannot grant

Time Warner's Petition for Reconsideration.²¹

The sections below explain how each component of the relief sought in the Petition is either time-barred or impermissible because such relief would affect the substantive interests of RCN and other parties.

ARGUMENT

I. THE PETITION DEMANDS THAT OVS APPLICANTS DOCUMENT THEIR COMMITMENT TO BUILDING "END-TO-END" FACILITIES AND TO CONSTRUCTING AN OVS PLATFORM THROUGHOUT THEIR PROPOSED SERVICE AREA

The Petition advocates requiring OVS applicants to document, in certification applications, their commitment to building "end-to-end" facilities and to providing OVS service throughout their proposed service area. Petition, at 3 - 11.

The Fourth Report and Order does not discuss this issue or even touch on the possibility that OVS application requirements may be heightened.²² The Fourth Report and Order contains no ruling in regard to which Time Warner could seek reconsideration and appropriately advance its two proposed certification requirements. Time Warner could have raised its concerns during the

²¹ The Commission cannot rely on the reconsideration procedure to provide interested parties notice and an opportunity to comment. *Reeder v. FCC*, 865 F.2d 1298, 1304 (D.C. Cir. 1989) ("when the FCC explicitly adopted the [rule at issue], it did so in the First Reconsideration Order, which was just that — an order, not a proposal seeking comment. Again, the FCC received complaints in response, but the agency's mind was already made up when the rules were first announced.").

²² On this topic, the order merely states that OVS applicants must: (1) file applications in hard copy and on 3.5" diskette (in WordPerfect 5.1 or Excel 4.0 format); (2) provide a cover sheet bearing the words "Open Video System Certification Application" and "Attention: Cable Services Bureau"; (3) use a new mailing address; and (4) write the words "open video systems" on their mailing envelopes. Fourth Report and Order, ¶ 4. These rules are purely procedural and ministerial in any sense of those terms.

reconsideration period for the Second Report and Order. It is time-barred from doing so now.^{4/}

Even if, *arguendo*, it were postulated that these issues somehow relate to the Fourth Report and Order, Time Warner's proposed changes are substantive, not procedural. The Commission would violate Section 553(b)(A) of the APA if it adopted Time Warner's proposed rules. By exacting a much more detailed showing from applicants regarding the technical structure and physical location of planned networks, Time Warner transparently seeks to elevate the standards for OVS applications, not merely to alter the manner in which the existing standards are met. The Commission cannot adopt such new substantive rules when reconsidering a "purely ministerial" order which has not been subject to notice and comment.^{5/} Fourth Report and Order, ¶ 3.

II. THE PETITION IMPROPERLY CALLS FOR A REQUIREMENT THAT OVS APPLICANTS FILE A NOTICE OF INTENT WITHIN TEN DAYS AFTER THE COMMISSION GRANTS CERTIFICATION

Time Warner's Petition calls for placing a new, ten-day time limit (from the date of certification) for OVS operators to file a Notice of Intent with the Commission. Petition, at 12.

This proposal is directly contrary to the Commission's decision in the Second Report and Order that the "Notice of Intent may be filed at any time." Second Report and Order, ¶ 45. The

^{4/} In calling for OVS applicants to document their commitment to building "end-to-end" facilities and a "nondiscriminatory platform," Time Warner appears to seek the disclosure of construction plans. The Commission already denied a similar request in the Second Report and Order (at ¶ 48 n. 130). Time Warner cannot challenge that ruling here.

^{5/} Furthermore, even the original Notice of Proposed Rulemaking in this docket did not discuss establishing technical parameters for OVS networks. *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46; *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58*, CC Docket No. 87-266 (Terminated), Report and Order and Notice of Proposed Rulemaking, FCC 96-99 (rel. March 11, 1996).

Fourth Report and Order does not disturb this ruling in the slightest.⁶ Time Warner's proper — and only — vehicle for reversing the ruling would have been a timely petition for reconsideration of the Second Report and Order. There is nothing in the Fourth Report and Order to reconsider on this point. Even if there were, Time Warner's suggested new time limit would be a substantive amendment to the Commission's OVS rules, requiring proper notice and comment. A ten-day time limit would unduly increase the burden on OVS operators to assemble the contents of their Notices of Intent in advance.⁷ The Commission cannot alter its ruling on this matter without observing notice and comment procedures.

III. THE PETITION WOULD HAVE OVS OPERATORS RE-ALLOCATE OPEN CHANNEL CAPACITY EVERY 18 MONTHS

Time Warner's Petition asks the Commission to increase the frequency with which OVS operators allocate open channel capacity, after the initial allocation, to every 18 months. Petition, at 13. Time Warner "believes that the current requirement" established in paragraph 92 of the Second Report and Order "for subsequent allocation of open channel capacity, only once every three years, is insufficient." *Id.* In Time Warner's own words, it disagrees with the Second Report and

⁶ The Fourth Report and Order merely amends 47 C.F.R. § 76.1503(b)(1) to require OVS operators filing Notices of Intent: (1) "to attach a cover sheet to the filing indicating that the submission is an Open Video System Notice of Intent"; (2) to use the wording "Open Video System Notice of Intent" and "Attention: Cable Services Bureau," in half-inch type, on their cover sheets; (3) to "include the words "open video systems" on their mailing envelopes"; and (4) to submit all such documents simultaneously to the Office of the Secretary and the Bureau Chief, Cables Services Bureau. Fourth Report and Order, ¶ 9.

⁷ The Commission implicitly recognized the burden of filing a Notice of Intent, when it allowed OVS operators to file Notices at any time, "so long as the operator can provide the information detailed below to unaffiliated video programming providers." Second Report and Order, ¶ 45.

Order's decision to set the interval between allocation periods at three years. *See* 47 C.F.R. § 76.1503(c)(2)(ii). Obviously, Time Warner should have sought reconsideration of the Second Report and Order on this issue. The Fourth Report and Order does not address allocation procedures in any respect and thus cannot conceivably be the proper proceeding for Time Warner's desire to revisit re-allocation issues.

In addition to the Petition's untimeliness, the proposed alteration to the rule on frequency of allocations would entail substantive, rather than procedural, action on the part of the Commission. Requiring existing OVS operators who entered the market since the release of the Second Report and Order, relying upon the three-year allocation rule, to restructure their operations to provide for more frequent channel allocations is inherently substantive action. Because of the acknowledged lack of notice and comment for the wholly procedural rulings of the Fourth Report and Order, the Commission cannot not adopt substantive rules in this reconsideration proceeding.

IV. THE PETITION IMPROPERLY CALLS FOR OVS APPLICANTS TO DOCUMENT THAT THEY POSSESS MUNICIPAL AUTHORIZATIONS TO USE PUBLIC RIGHTS-OF-WAYS

Time Warner's Petition proposes a new OVS certification rule under which OVS applicants would be required to submit, with their applications, confirmation that they have obtained all necessary local authorizations to use public rights-of-way. Petition, at 14 - 17.³

³ The Petition states:

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.

The Fourth Report and Order does not address any topic even tangentially related to rights-of-way issues. Moreover, in the Second Report and Order, the Commission addressed, and rejected, the proposition that OVS applicants should obtain municipal authorization to use public rights-of-way:

We disagree with National League of Cities, et al. that Congress merely intended to exempt open video system operators from the federal requirement for a local cable franchise, and that this exemption “has no effect whatsoever on any state or local requirement for right-of-way authorization.” The reading of National League of Cities, et al. would render meaningless Congress’ exemption of open video system operators from local franchising requirements under Section 621 [of the Communications Act].

Second Report and Order, ¶ 215. In the Second Order on Reconsideration, the Commission stated that certificated OVS operators “have been granted enforceable rights to use the public rights-of-way.” Second Order on Reconsideration, ¶ 34.

Time Warner’s proposal flies in the face of the Commission’s ruling that OVS operators are exempt from such requirements in the first place. Time Warner’s disagreement with this conclusion should have been voiced in the form of a petition for reconsideration of the Second Report and Order. It is untimely and otherwise inappropriate to do so here, especially given that this ruling is one of the issues currently being reviewed by the United States Court of Appeals for the Fifth Circuit.

There can also be no question that Time Warner is again asking the Commission to overturn a substantive ruling. Access to rights-of-way does not affect merely a party’s right to express an interest, as strictly procedural matters do, but rather controls the nature of that interest. Access to

Petition, at 17 (emphasis in original).

rights-of-way dictates the terms on which an OVS operator may carry out its business. If Time Warner's Petition really seeks reconsideration of the Fourth Report and Order, its proposal on rights-of-way authorization suffers from a lack of notice and comment which, due to its substantive nature, does not qualify for the exception in Section 553(b)(A) of the APA.

V. THE PETITION WOULD APPLY DEFAULT PEG OBLIGATIONS AUTOMATICALLY UPON CERTIFICATION TO OVS OPERATORS THAT ARE STILL IN THE PROCESS OF NEGOTIATING PEG OBLIGATIONS WITH LOCALITIES

Time Warner's Petition urges the Commission to redesign its rules on Public, Educational and Governmental ("PEG") programming to limit the amount of negotiations between OVS operators and municipalities:

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.

Petition, at 20.

As Time Warner admits, its proposal would "clarify" the Commission's ruling in the Second Report and Order — not the Fourth Report and Order (which does not address PEG requirements)

— 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.

Id. (quoting Second Report and Order, ¶ 141). Of course, the only way to clarify a ruling of the Second Report and Order was to have filed for reconsideration of that decision. Time Warner is time-barred from having its Petition in regard to the Second Report and Order heard now.

Even if Time Warner had more credibly attempted to direct its Petition at the Fourth Report and Order, its proposed revision to the PEG rules does not fall within the procedural rubric of that order. In setting the rule for default PEG obligations, the Commission struck a delicate balance between the need for expediency and its belief that “negotiation is the best way to establish appropriate PEG access obligations.” Second Report and Order, ¶ 141. To tilt that balance further toward expediency would involve substantive amendment to the Commission’s rules. Such action would be impermissible in the context of reconsidering an order that must contain entirely procedural rulings to qualify for the exemption from APA notice and comment requirements.

VI. THE PETITION IMPROPERLY SEEKS TO ALLOW LOCAL AUTHORITIES TO IMPOSE BUILD-OUT REQUIREMENTS AND CONSTRUCTION SCHEDULES UPON OVS OPERATORS

Time Warner’s Petition asks the Commission to clarify that municipalities may impose build-out requirements and construction schedules upon OVS operators, as part of managing public rights-of-way in a nondiscriminatory and competitively neutral manner. Petition, at 21 - 23.

No part of the Fourth Report and Order even remotely deals with the right of municipalities to manage public rights-of-way. In seeking reconsideration, Time Warner cites rulings of the Second Report and Order. First, Time Warner requests that the Commission “remedy [the] ambiguity” created by the Commission’s ruling in the Second Report and Order that build-out requirements are “unrelated to management of the rights-of-way.” Petition, at 21 (citing Second Report and Order, ¶ 215). Second, Time Warner asks that the Commission expand its “litany of issues,” set forth in the Second Report and Order, “which ‘fall squarely within [local authorities]’ legitimate management function” to include the right to impose construction schedules on OVS operators. *Id.* (citing Second Report and Order, ¶ 210). Plainly, Time Warner complains of

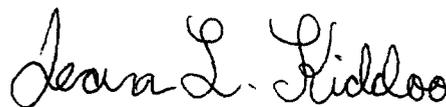
Commission action taken in the Second Report and Order and does not object to any ruling in the Fourth Report and Order. Time Warner's Petition is thus time-barred.

In any event, the Commission nonetheless may not grant Time Warner's requested relief without violating the APA's notice and comment requirements. Establishing heretofore unrecognized rights for municipalities to impose build-out requirements and construction schedules on OVS operators would involve undeniably substantive rulemaking. The Commission cannot take such steps under the purely procedural guise of the Fourth Report and Order, which was not subject to notice and comment procedures. The exemption of Section 553(b)(A) of the APA would not sanction the resulting rules.

CONCLUSION

For the foregoing reasons, the Commission should deny Time Warner's Petition for Reconsideration.

Respectfully submitted,



Jean L. Kiddoo
Warren Anthony Fitch
Antony Richard Petrilla
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (tel)
(202) 424-7643 (fax)



Dated: July 29, 1997

CERTIFICATE OF SERVICE

I, Sheila M. Beattie, hereby certify on this 29th day of July, 1997, that a copy of the foregoing Opposition to Petition for Reconsideration, CS Docket No. 96-46, was served upon the following parties via hand-delivery.

Arthur H. Harding, Esq.
Matthew D. Emmer, Esq.
Stephen E. Holsten, Esq.
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Sheila M. Beattie
Sheila M. Beattie