

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

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**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION**

Time Warner Cable, a division of Time Warner Entertainment Company, L.P., by its attorneys and pursuant to Section 1.429(g) of the Commission's rules, hereby replies to the Oppositions to Petition for Reconsideration ("Oppositions") filed, respectively, on July 29, 1997 by RCN Telecom Services, Inc. ("RCN") and on July 30, 1997 jointly by Bell Atlantic and NYNEX ("Bell Atlantic/NYNEX"), in response to Time Warner Cable's Petition for Reconsideration ("Petition") in the above-referenced proceeding.¹

Time Warner Cable's Petition agreed with the goals espoused by the Commission in its Fourth Report and Order in the above-captioned proceeding, in which the Commission sought to revise its procedures for processing open video system ("OVS") applications, based on "the experiences of recent open video system certification proceedings."² However, Time Warner Cable contended that the revisions "do not go far enough,"³ and suggested further revisions. Neither Opposition even begins to address the merits of Time Warner

¹RCN, Bell Atlantic and NYNEX are hereafter collectively referred to as the "Parties." This Reply is being timely filed pursuant to 47 C.F.R. § 1.429(g).

²Fourth Report and Order, CS Docket No. 96-46, FCC 97-130 (rel. April 15, 1997) ("Fourth Report and Order") at ¶ 2.

³Petition at 1.

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Cable's proposals to refine the OVS certification process. Instead, both Oppositions make entirely procedural-based arguments that the Commission "cannot grant the substantive relief that Time Warner Cable requests," and that Time Warner Cable's Petition is "time-barred."⁴ As will be demonstrated below, the Parties are in error on both of these counts. Therefore, the Commission should deny both Oppositions and grant Time Warner Cable's Petition, adopting the recommendations contained therein.

I. TIME WARNER CABLE'S PETITION WAS RESPONSIVE TO THE FOURTH REPORT AND ORDER, AND WAS THUS NOT "TIME-BARRLED."

The Parties claim that Time Warner Cable's challenges and suggestions raised in its Petition were responsive not to the Fourth Report and Order, but to the Commission's earlier Second Report and Order⁵ in this proceeding.⁶ As such, according to the Parties, Time Warner Cable's Petition should have been filed within the appropriate time frame after publication of the Second Report and Order, and its failure to do so renders the Petition untimely.⁷ However, the Parties fail to recognize that the issues raised by Time Warner Cable in its Petition were directly related, and thus responsive, to the changes adopted by the Commission in the Fourth Report and Order. The Commission's stated focus in the Fourth Report and Order was

to revise our procedures for both the filing of certification applications and the filing of comments and oppositions to provide the most efficient processing of

⁴RCN Opposition at 1-2; Bell Atlantic/NYNEX Opposition at 1-3.

⁵Second Report and Order, CS Docket No. 96-46, FCC 96-249 (rel. June 3, 1996) ("Second Report and Order").

⁶See, e.g., RCN Opposition at 1, 3-4, 5; Bell Atlantic/NYNEX Opposition at 2.

⁷See, e.g., RCN Opposition at 1-2, 3-4, 8; Bell Atlantic/NYNEX Opposition at 2-3.

applications for certification, given the limited 10-day statutory deadline for deciding certification applications.⁸

As Time Warner Cable indicated in its Petition, however, "[m]ost fundamentally, the 10-day period established by Congress for the Commission to either approve or disapprove any OVS application has simply proven inadequate"⁹ Time Warner Cable then went on to "suggest[] herein certain additional procedural modifications to more faithfully carry out Congressional intent."¹⁰ Thus, Time Warner's Petition was directly responsive to the changes adopted by the Commission in the Fourth Report and Order.

Furthermore, the Commission expressly adopted its rule changes in the Fourth Report and Order "[b]ased on the experiences of recent open video system certification proceedings."¹¹ Time Warner Cable specifically cited this language in its Petition.¹² As the Commission recognized, such "experiences" have shed invaluable real-world knowledge, not previously available, on the Commission's OVS certification process. Specifically, several OVS operators, most notably RCN and its affiliate, Metropolitan Fiber Systems ("MFS"), have gamed the OVS certification process in ways that were unknown during the comment and reconsideration period for the Second Report and Order. Time Warner Cable cited some of these problems in its Petition.¹³ For example, according to the OVS application filed by MFS for New York City, which was granted by the Commission, MFS

⁸Fourth Report and Order at ¶ 2.

⁹Petition at 1-2.

¹⁰Id. at 2.

¹¹Fourth Report and Order at ¶ 2.

¹²Petition at 1.

¹³See id. at 4-9.

failed to provide end-user access by programmers to subscribers, except for its programming affiliate RCN.¹⁴ Additionally, RCN has refused to provide even the most cursory information to Cablevision and Time Warner Cable regarding the possibility of carriage on RCN's own Boston OVS, giving rise to a Petition for Expedited Determination by Cablevision, asking the Commission to require RCN to carry Cablevision,¹⁵ and a letter from Time Warner Cable notifying RCN that RCN is in violation of Section 76.1503(b)(2) of the Commission's rules.¹⁶ Thus, it is no wonder that RCN has filed its Opposition to Time Warner Cable's suggestions for improving the OVS certification process, which currently provides no meaningful information to the Commission, prospective OVS programmers, and the public on which they could evaluate OVS proposals.

Contrary to RCN's assertions, therefore, neither Time Warner Cable, the Commission, nor other interested parties had the benefit of knowledge of such recent developments during the comment and reconsideration filing periods for the Second Report and Order, precisely because they were, as the Commission concedes, "recent." Otherwise, the Commission would also have been able to analyze such developments at the time of the Second Report and Order as well, and there would have been no need for the Fourth Report and Order. Indeed, at the time of adoption of the Second Report and Order, the Commission had not processed a single OVS certification request, and thus it would have been impossible for Time Warner Cable or any other interested party to seek reconsideration of the Second

¹⁴Petition at 5-6.

¹⁵Petition for Expedited Determination, DA 97-1051, filed May 15, 1997 by Cablevision of Boston, Inc.; A-R Cable Services; A-R Cable Partners; and Cablevision of Framingham.

¹⁶Letter dated May 30, 1997 from Arthur H. Harding, attorney for Time Warner Cable, to Scott Burnside, RCN-BETG, LLC.

Report and Order in light of actual experience with OVS certification processing procedures. In the Fourth Report and Order, however, the Commission expressly sought to refine its OVS certification procedures in light of "the experiences of recent open video system certification proceedings"¹⁷ -- experiences which were obviously unknown to the Commission or anyone else at the time of the Second Report and Order. Accordingly, Time Warner Cable had standing to file its Petition at the time it was filed, particularly given that Time Warner's Petition seeks to stem abuses by entities such as RCN which have only come to light subsequent to the adoption of the Second Report and Order.

In sum, since Time Warner Cable's Petition was submitted in furtherance of the Commission's stated goals to refine its OVS certification procedures in light of recent experiences in OVS certification proceedings -- which would have been impossible at the time Petitions for Reconsideration of the Second Report and Order were due -- Time Warner's Petition is not time-barred.

II. THE FOURTH REPORT AND ORDER IS SUBJECT TO A PETITION FOR RECONSIDERATION.

The Parties argue in their Oppositions that Time Warner Cable's Petition was inappropriate because the Fourth Report and Order adopted purely procedural changes not subject to notice and comment.¹⁸ The Parties are wrong in that conclusion. Although administrative agencies can forego usual notice and comment requirements in rulemakings when amending rules of "agency organization, procedure, or practice,"¹⁹ the Administrative

¹⁷Fourth Report and Order at ¶ 2.

¹⁸RCN Opposition at 1-3; Bell Atlantic/NYNEX Opposition at 1.

¹⁹5 U.S.C. § 553(b)(3)(A); see also Fourth Report and Order at ¶ 3.

Procedure Act ("APA"), the Communications Act and the Commission's Rules allow petitions for reconsideration of such rulemakings.

A. The Administrative Procedure Act.

The procedural requirements for agency rulemakings are set forth in Section 553 of the APA.²⁰ Under subsection 553(b), general notice of proposed rulemaking must be published in the Federal Register, but "this subsection does not apply -- (A) to . . . rules of agency organization, procedure, or practice."²¹ However, under subsection 553(e), "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."²² As there are no exemptions from subsection 553(e), the APA thus requires agencies to consider petitions for reconsideration of all rulemakings, even if notice and comment were not required. Time Warner Cable is an interested person adversely affected by the mandates of the Fourth Report and Order because, as set forth in its Petition, the current OVS certification procedures permit companies to unfairly compete with Time Warner Cable's cable operations.²³ Time Warner Cable was therefore justified in filing its Petition.

B. The Communications Act.

Section 405(a) of the Communications Act of 1934, as amended, provides another basis for Time Warner Cable's Petition: "After an order, decision, report or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other

²⁰5 U.S.C. § 553.

²¹5 U.S.C. § 553(b)(3)(A).

²²5 U.S.C. § 553(e) (emphasis added).

²³Petition at ii, 2.

person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration."²⁴ This statute draws no distinction between orders pursuant to rulemaking proceedings where notice and comment was afforded, and where notice and comment was exempted.

C. The Commission's Rules.

The Commission's Rules further support the filing of Time Warner Cable's Petition. Part 1, Subpart C of the Commission's Rules addresses rulemaking proceedings conducted under 5 U.S.C. § 553.²⁵ Section 1.429(a) of the Rules directs that "[a]ny interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart."²⁶ The Commission has expressly recognized that Time Warner Cable's Petition was filed pursuant to Section 1.429.²⁷ Additionally, Section 1.429(a) cites to Section 1.407, which states that final orders may be issued by the Commission, even "[in] those cases where notice and public procedure thereon are not required."²⁸ The Commission has thereby acknowledged that final agency actions may be rendered in non-notice and comment rulemakings and are subject to Section 1.429 petitions for reconsideration. This was the case

²⁴47 U.S.C. § 405(a) (emphasis added).

²⁵47 C.F.R. §§ 1.399 - 1.430. The rulemaking at issue herein is a proceeding under 5 U.S.C. § 553, as no statute required the Commission to conduct a "formal" rulemaking under 5 U.S.C. §§ 556 and 557, and the Commission did not in fact do so.

²⁶47 C.F.R. § 1.429(a).

²⁷FCC Public Notice, Report No. 2210 (July 10, 1997); published in Federal Register, 62 Fed. Reg. 37911 (July 15, 1997).

²⁸47 C.F.R. § 1.407.

in the instant proceeding.²⁹ Therefore, Time Warner Cable had standing to file its Petition for Reconsideration of the Commission's Fourth Report and Order.

D. Due Process Has Been Afforded To All Interested Parties.

RCN repeatedly argues that the Commission is powerless to reconsider its Fourth Report and Order because that decision was not subject to notice and comment. But just because the rules initially adopted pursuant to the Fourth Report and Order were exempt from the notice and comment requirements pursuant to Section 553(b) of the APA, this does not deprive the Commission of its discretion to adopt the proposals advanced by Time Warner Cable. Indeed, the Commission issued a public notice announcing Time Warner Cable's Petition for Reconsideration on July 10, 1997.³⁰ Notice of Time Warner Cable's Petition was published in the Federal Register on July 15, 1997.³¹ Thus, RCN, Bell Atlantic/NYNEX, and all other interested parties have been provided with due process and have been afforded ample notice and opportunity for comment on the issues raised in Time Warner Cable's Petition. The fact that RCN and others have chosen to attack the Petition purely on procedural grounds is testament to the fact that they have no persuasive substantive grounds on which to challenge the proposals advanced in Time Warner Cable's Petition.

CONCLUSION

The contentions raised by Time Warner Cable in its Petition stemmed directly from the Commission's rule changes adopted in its Fourth Report and Order. Indeed, the Commission cited "the experiences of recent open video system certification proceedings" as

²⁹The Fourth Report and Order became a final order when it was placed on public notice by publication in the Federal Register. 47 C.F.R. § 1.103(b).

³⁰FCC Public Notice, Report No. 2210 (July 10, 1997).

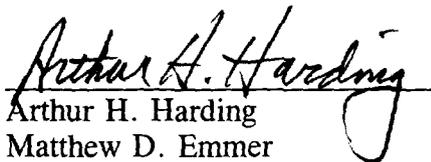
³¹62 Fed. Reg. 37911 (July 15, 1995).

the impetus behind the Fourth Report and Order. Those same "recent" developments, having arisen after the comment and reconsideration period for the Commission's Second Report and Order, are therefore logically important enough to give rise to Petitions for Reconsideration of the Fourth Report and Order. Second, contrary to the protestations of RCN, Bell Atlantic and NYNEX, Time Warner Cable has demonstrated herein that the Commission's rule changes adopted in its Fourth Report and Order are indeed subject to petitions for reconsideration. Accordingly, Time Warner Cable had standing to file its Petition. Wherefore, the Commission should deny both Oppositions and grant Time Warner Cable's Petition, adopting the recommendations contained therein.

Respectfully submitted,

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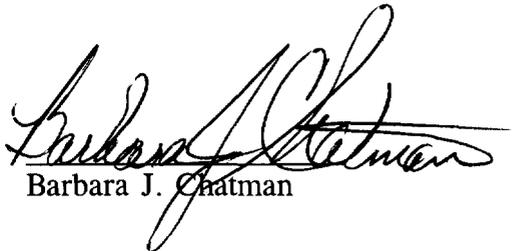
CERTIFICATE OF SERVICE

I, Barbara J. Chatman, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that a copy of the foregoing "Reply To Opposition To Petition For Reconsideration" was served this 11th day of August 1997, via first class mail, postage pre-paid, upon the following:

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