

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

In the Matter of:)
)
 TIME WARNER CABLE,)
 Complainant,)
)
 v.)
)
 RCN TELECOM SERVICES)
 OF NEW YORK, INC.,)
 Defendant;)
)
)
 TIME WARNER CABLE,)
 Complainant,)
)
 v.)
)
 RCN-BECOCOM, L.L.C.,)
 Defendant.)
)
)
)
 Application for Review and Petitions for)
 Reconsideration of Orders of the Cable)
 Services Bureau Granting in Part and Denying)
 in Part Open Video System Complaints)

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2000

Released: January 11, 2000

By the Commission:

I. INTRODUCTION

1. By this *Order*, we consolidate the above-captioned proceedings involving Time Warner Cable ("Time Warner"), RCN Telecom Services of New York, Inc. ("RCN-NY"), and RCN-BeCoCom, L.L.C. ("RCN-BeCoCom").¹ In each proceeding, Time Warner filed a complaint with the Cable Services

¹We refer to RCN-NY and RCN-BeCoCom collectively as "RCN."

Bureau (the "Bureau") alleging that RCN, an open video system operator, violated Section 653 of the Communications Act of 1934 and the Commission's regulations by refusing to provide Time Warner with certain information regarding RCN's open video systems as required by Section 76.1503(b)(2) of the Commission's rules.² The Bureau granted in part and denied in part the relief requested by Time Warner.³

2. In *Time Warner-New York* and *Time Warner-Boston*, the Bureau ruled that Time Warner is eligible to obtain carriage on portions of RCN's open video systems in New York and the Boston-area and that it is entitled to the information RCN must provide to eligible programming providers under the Commission's rules.⁴ The Bureau denied Time Warner's requests that RCN provide it with a map of the system facilities involved, the number of potential subscribers in the service areas, and a list of RCN's programming. Time Warner filed an application for review of the Bureau's decision in *Time Warner-New York* in which it contends that the Bureau's failure to require RCN to provide the foregoing information constitutes reversible error.⁵ RCN filed petitions for reconsideration of the *Time Warner-New York* and *Time Warner-Boston* decisions, in which it argues that the Bureau erred in finding that Time Warner is eligible for carriage on portions of RCN's open video systems and entitled to obtain system information pursuant to Section 76.1503(b)(2).⁶

3. Section 1.106 of the Commission's rules provides, in part, that "[p]etitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission."⁷ Because the Commission is required to review Time Warner's related Application for Review and because each petition for reconsideration presents important open video system issues, the Chief, Cable Services Bureau has referred RCN's Petitions for Reconsideration to the Commission. After examining the record, we grant in part and deny in part Time Warner's Application for Review and grant reconsideration in both proceedings to the extent discussed herein.

II. BACKGROUND

4. In the Telecommunications Act of 1996 ("1996 Act"), Congress set forth four means by which common carriers may enter the video programming marketplace: (1) radio-based systems; (2)

²See 47 U.S.C. § 573(b)(1)(A); 47 C.F.R. § 76.1503(a); 47 C.F.R. § 76.1503(b)(2).

³*Time Warner Cable v. RCN Telecom Services of New York, Inc.*, DA 98-2641 (CSB rel. December 30, 1998) ("*Time Warner-New York*"); *Time Warner Cable v. RCN-BeCoCom, L.L.C.*, 13 FCC Rcd. 8613 (CSB 1998) ("*Time Warner-Boston*").

⁴*Time Warner-New York*, DA 98-2641 at ¶ 12; *Time Warner-Boston*, 13 FCC Rcd. at 8618.

⁵RCN-NY filed an opposition to Time Warner's Application for Review to which Time Warner filed a reply.

⁶Time Warner filed oppositions to RCN's Petitions for Reconsideration to which RCN filed replies.

⁷47 C.F.R. § 1.106(a)(1). Section 1.429 of the Commission's rules similarly empowers a designated authority to refer a petition for reconsideration to the Commission. 47 C.F.R. § 1.429(a).

common carriage of video traffic; (3) cable systems; and (4) open video systems.⁸ In rulemakings implementing open video system regulations,⁹ the Commission concluded that Congress did not intend to restrict open video system service to telephone companies alone, and permitted non-local exchange carriers and cable operators to operate open video systems and to obtain carriage on such systems where "consistent with the public interest, convenience, and necessity. . . ."¹⁰ The Commission stated that the open video system model "can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice."¹¹ The United States Court of Appeals for the Fifth Circuit considered consolidated appeals of the Commission's open video system rules -- affirming in part, reversing in part, and remanding in part those rules.¹²

⁸Telecommunications Act of 1996, Pub. L. No. 104-104, § 651, 110 Stat. 118-19 (1996); Communications Act § 651, 47 U.S.C. § 571. An open video system is defined as "[a] facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part." 47 C.F.R. § 76.1500(a).

⁹*Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Report and Order and Notice of Proposed Rulemaking, FCC 96-99, 11 FCC Rcd. 14639 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Second Report and Order, FCC 96-249, 11 FCC Rcd. 18223 (1996) ("Second Report and Order"); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order, FCC 96-256, 11 FCC Rcd. 6776 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, First Order on Reconsideration, FCC 96-312, 11 FCC Rcd. 19081 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Third Report and Order and Second Order on Reconsideration, FCC 96-334, 11 FCC Rcd. 20227 (1996); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Third Order on Reconsideration, FCC 97-129, 12 FCC Rcd. 6258 (1997); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Fourth Report and Order, FCC 97-130, 12 FCC Rcd. 7545 (1997); *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order on Reconsideration, FCC 98-172, 13 FCC Rcd. 14553 (1998).

¹⁰Second Report and Order, 11 FCC Rcd. at 18232-42, 18257-60.

¹¹*Id.* at 18227.

¹²*City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), *reh'g denied*, Nos. 96-60502, 96-60581 and 96-60844 (5th Cir. May 28, 1999) ("*City of Dallas*"). In *City of Dallas*, the Fifth Circuit affirmed the Commission's rules: (i) relating to open video system fees paid to local franchise authorities ("LFAs"); (ii) prohibiting LFAs from requiring institutional networks; and (iii) limiting the ability of non-local exchange carrier cable operators and expired cable franchisees to become open video system operators. 165 F.3d at 360. The Fifth Circuit reversed the Commission's rules: (i) prohibiting LFAs from requiring open video system operators to obtain franchises; (ii) requiring open video system operators to obtain certification prior to constructing new facilities; and (iii) prohibiting local exchange carriers who are also cable operators from providing open video system service in the absence of effective competition. *Id.* The Fifth Circuit remanded to the Commission for further consideration its rules granting discretion to open video system operators to permit competing, in-region cable operators to become open video system programming providers. *Id.* The Commission filed for rehearing before the Fifth Circuit contesting the court's decision on the issue of LFA ability to require that open video systems obtain franchises. The Fifth Circuit denied all rehearing requests. The Commission resolved the reversed and remanded issues in a separate proceeding. See *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order on Remand, FCC 99-341 (rel. November 19, 1999).

5. Although generally enjoying more streamlined regulation than operators of cable systems, open video system operators are subject to clearly defined obligations. At the heart of the open video system concept is the requirement that system operators offer up to two-thirds of their channel capacity to unaffiliated programmers.¹³ In doing so, the operators may not unreasonably nor unjustly discriminate against unaffiliated programming providers, and must provide just and reasonable rates, terms, and conditions for carriage to all eligible programming providers that seek carriage.¹⁴ Open video system operators also are required to provide certain system information to prospective programmers to assist them in deciding whether to seek carriage.¹⁵ The Commission determined that "by requiring open video system

¹³47 U.S.C. § 651; Second Report and Order, 11 FCC Rcd. at 18230-31. An open video system operator is defined as "[a]ny person or group of persons who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, or otherwise controls or is responsible for the management and operation of such an open video system." 47 C.F.R. § 76.1500(b); *see* 47 C.F.R. § 76.5 (ff) (definition of "cable service"); 47 C.F.R. § 76.501 notes (parameters for determining affiliation status); 47 C.F.R. § 76.1500(g) (reference to "affiliate").

¹⁴47 U.S.C. § 573; 47 C.F.R. § 76.1502-04; Second Report and Order, 11 FCC Rcd. at 18230, 18285-93. The Commission's rules provide that:

an operator of an open video system shall not discriminate among video programming providers with regard to carriage on its open video system, and its rates, terms and conditions for carriage shall be just and reasonable and not unjustly or unreasonably discriminatory.

47 C.F.R. § 76.1503(a).

¹⁵An open video system operator must provide the following information to a prospective programming provider:

(i) The projected activation date of the open video system. If a system is to be activated in stages, the operator should describe the respective stages and the projected dates on which each stage will be activated;

(ii) A preliminary carriage rate estimate;

(iii) The information a video programming provider will be required to provide to qualify as a video programming provider, e.g., creditworthiness;

(iv) Technical information that is reasonable necessary for potential video programming providers to assess whether to seek capacity on the open video system, including what type of customer premises equipment subscribers will need to receive service;

(v) Any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system [e.g., scrambling, signal and audio quality, processing or security]; and

(vi) The equipment available to facilitate the carriage of unaffiliated video programming and the electronic form(s) that will be accepted for processing and subsequent transmission through the system.

operators to provide carriage opportunities for video programming providers . . . Congress sought to foster competition by encouraging multiple programming sources on open video systems."¹⁶

III. THE BUREAU'S ORDERS

6. In *Time Warner-Boston*, RCN denied Time Warner's request for open video system information pertaining to RCN's Boston-area system. RCN alleged that Time Warner was not entitled to the information because it qualified as a competing, in-region cable operator by offering cable service to several communities within the certificated area of RCN's open video system.¹⁷ Time Warner responded that it was not a competing, in-region cable operator with respect to the communities for which it sought open video system information because it did not offer cable service to those communities, even though it offered cable service to other communities within the certificated area of RCN's open video system as yet unserved by RCN.¹⁸ The Bureau held that Time Warner was not a competing, in-region cable operator in communities where Time Warner did not offer cable service even if these communities are located within the area in which RCN is certified to operate its open video system.¹⁹

7. In addition to the primary issue of eligibility for carriage, RCN challenged the scope of Time Warner's information request regarding RCN's Boston-area system. Time Warner requested that RCN provide it with: (1) a route map showing the exact location of any current RCN open video system facilities; (2) the number of potential subscribers passed by existing RCN open video system facilities; (3) a route map showing all anticipated construction, with projected dates for activation of each phase of construction; (4) potential subscribers to be passed in each phase of construction; and (5) a list of programming which RCN intended to offer on the channels it reserved for itself.²⁰ The Bureau ruled that Time Warner is entitled to know which areas within a community RCN is serving and is projected to serve, if it is activating its open video system in stages, and when it anticipates offering service to areas that fall under different activation stages.²¹ The Bureau held that a map showing RCN's current and projected fiber paths, specific construction schedules (beyond mere open video system stage activation), and lists of RCN's programming are beyond the scope of Section 76.1503(b)(2).²²

47 C.F.R. § 76.1503(b)(2); *see* Second Report and Order, 11 FCC Rcd. at 18255.

¹⁶Second Report and Order, 11 FCC Rcd. at 18227.

¹⁷*Time Warner-Boston*, 13 FCC Rcd. at 8617.

¹⁸*Id.*

¹⁹*Id.* at 8618-19.

²⁰Time Warner Complaint (Boston), Exhibit D.

²¹*Time Warner-Boston*, 13 FCC Rcd. at 8621-22.

²²*Id.* at 8622.

8. In *Time Warner-New York*, RCN denied Time Warner's request for information pertaining to RCN's New York open video system on grounds virtually identical to those it relied upon in *Time Warner-Boston*. RCN maintained that Time Warner was not entitled to system information because it must be considered a competing, in-region cable operator due to the fact that it offers cable service in certain communities within the certificated area of RCN's open video system in New York.²³ RCN argued that New York's five boroughs constitute one service area and that Time Warner's operations in the borough of Manhattan rendered it an in-region operator *vis-a-vis* the entire system.²⁴ Time Warner responded that it did not offer cable service in the communities for which it sought open video system information and therefore was not a competing, in-region cable operator with respect to these communities, regardless of whether it offered cable service elsewhere in the certificated area of RCN's open video system.²⁵ Relying upon its decision in *Time Warner-Boston*, the Bureau held that Time Warner was not a competing, in-region cable operator in those communities within RCN's certificated open video system area in which Time Warner did not offer cable service.²⁶ In the New York proceeding, RCN again challenged the scope of Time Warner's information request made pursuant to Section 76.1503(b)(2). Time Warner's request was identical to its request regarding RCN's Boston-area system and the Bureau issued an identical ruling on the scope of information to which Time Warner was entitled.²⁷

IV. DISCUSSION

9. As stated above, RCN argues in its Petitions for Reconsideration that the Bureau erred in finding that Time Warner is eligible for carriage on portions of RCN's open video systems and entitled to obtain system information pursuant to Section 76.1503(b)(2). Because the arguments contained in RCN's Petitions for Reconsideration are essentially the same, we will address them together. In its Application for Review, Time Warner asserts that pursuant to Section 76.1503(b)(2), RCN must provide it with a route map, information regarding the number of potential subscribers in the service areas involved, and a list of RCN's programming. We address these arguments below.

A. Time Warner's Status as a Video Programming Provider Entitled To Obtain System Information Pursuant to Section 76.1503(b)(2)

10. Only those entities entitled to carriage on an open video system may obtain system information pursuant to Section 76.1503(b)(2). In Section 76.1503(c)(2)(v) of its rules, the Commission specifically addressed the eligibility of cable operators to seek carriage on open video systems. This rule provides that "a competing, in-region cable operator or its affiliate(s) that offers cable service to subscribers located in the *service area* of an open video system shall not be entitled to obtain capacity on such open

²³*Time Warner-New York*, DA 98-2641 at ¶ 8.

²⁴*Id.*

²⁵*Id.* at ¶ 9.

²⁶*Id.* at ¶ 12.

²⁷*Id.* at ¶¶ 18-20.

video system. . . ."²⁸ In promulgating Section 76.1503(c)(2)(v), the Commission sought to encourage competing, in-region cable operators to develop and upgrade their own systems, rather than occupy capacity on a competing open video system that could be used by another programming provider, and thereby to promote facilities-based competition.²⁹

11. In its complaints in the proceedings below, Time Warner asserted a right to carriage on portions of RCN's open video systems in New York and the Boston-area and sought to obtain information regarding these systems through Section 76.1503(b)(2). RCN argued that Time Warner is a competing, in-region cable operator with regard to the entirety of both its New York and Boston-area open video systems and that as such it is not eligible for carriage on any part of these systems or to obtain any system information pursuant to Section 76.1503(b)(2).

12. RCN-NY is certified to offer open video system service to the five boroughs of New York City: the Bronx, Brooklyn, Manhattan, Queens, and Staten Island. RCN-NY currently offers open video system service only in Manhattan and portions of the Bronx.³⁰ At the time of the Bureau's ruling in *Time Warner-New York*, RCN stated that it was close to completing negotiations to expand its system to the other boroughs.³¹ In its complaint, Time Warner sought system information only for the Bronx and part of the Brooklyn portions of RCN's proposed New York open video system. Time Warner provides franchised cable service in Manhattan, Queens, Staten Island and a portion of Brooklyn.³² Time Warner is not authorized to provide cable service in the Bronx or the portion of Brooklyn for which it seeks system information.

²⁸47 C.F.R. § 76.1503(c)(2)(v) (emphasis added). Section 76.1503(c)(2)(v) provides two exceptions to the general prohibition regarding carriage of a competing, in-region cable operator's programming:

- (A) Where the operator of an open video system determines that granting access to the competing, in-region cable operator is in its interests; or
- (B) Where a showing is made that facilities-based competition will not be significantly impeded.

Id. § 76.1503(c)(2)(v)(A)&(B). As discussed in n. 13 *supra*, the Fifth Circuit invalidated the provision granting open video system operators the discretion to carry the programming of an in-region cable operator and remanded this issue to the Commission for further consideration. *City of Dallas*, 165 F.3d at 358. The Commission's rules provide that facilities-based competition would not be impeded where:

- (1) The competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and
- (2) The competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

47 C.F.R. § 76.1503(c)(2)(v)(note).

²⁹Second Report and Order, 11 FCC Rcd. at 18258.

³⁰*Time Warner-New York*, DA 98-2641 at ¶ 7; RCN Answer to Open Video System Complaint (New York) at 8.

³¹*Time Warner-New York*, DA 98-2641 at ¶ 7.

³²Time Warner Complaint (New York) at 2.

13. RCN-BeCoCom was certified by the Commission to offer open video system service in the City of Boston, Massachusetts and forty-six surrounding Massachusetts communities.³³ At the time of the Bureau's ruling in *Time Warner-Boston*, RCN-BeCoCom offered open video system service only within the City of Boston.³⁴ Time Warner offers franchised cable service in twelve of the communities surrounding Boston in which RCN-BeCoCom is certified to offer open video system service.³⁵ Time Warner is not authorized to provide cable service in the remaining outlying communities or the City of Boston. In its request for information regarding RCN's Boston-area system, Time Warner did not request carriage on or information applicable to the twelve communities in RCN's certificated area in which Time Warner offers franchised service.³⁶

14. In its Petitions for Reconsideration, RCN argues that Time Warner is a "competing, in-region cable operator" with regard to the entirety of both RCN's New York and Boston-area open video system service areas and therefore is not eligible for carriage on these systems under Section 76.1503(c)(2)(v) or to obtain system information pursuant to Section 76.1503(b)(2). RCN maintains that "the 'service area' of an OVS should encompass the area for which the OVS operator has been certificated, so long as the certificated entity genuinely and reasonably plans to serve the certificated area."³⁷ RCN asserts that "in determining whether an operator -- franchisee or OVS -- should be construed to be operating in an area, its designated service area should be controlling, not the happenstance of where it is operating when an issue under 47 C.F.R. § 76.1503 arises."³⁸ According to RCN, a cable operator franchised anywhere in the certificated area of an open video system is barred by Section 76.1503(c)(2)(v) from obtaining carriage on the entire system without consideration of the cable operator's operational status in discrete communities within the greater certificated area.³⁹ RCN asserts that Section 76.1503(c)(2)(v) "does not speak of boroughs, areas, precincts or districts; rather the rule speaks only of 'the service area of an open video system.'"⁴⁰

³³RCN initially was certified to operate in Boston, Brookline, Burlington, Dedham, Framingham, Lexington, Norwood, Quincy, Somerville, and Wakefield, Massachusetts but later received cable franchises from these communities and requested withdrawal of its open video system certification for these areas. *Public Notice*, "RCN-BeCoCom, LLC Files Open Video System Certification Modification," 12 FCC Rcd. 22041 (CSB 1997); *Public Notice*, "RCN-BeCoCom, LLC Files Open Video System Certification Modification," 13 FCC Rcd. 10353 (CSB 1998); *Public Notice*, "RCN-BeCoCom, LLC Files A Modification To The Service Area Of Its Open Video System," DA 99-2318 (CSB rel. October 27, 1999).

³⁴*Id.* at 8617.

³⁵The overlapping communities are Ashland, Bellingham, Canton, Chelsea, Dover, Holliston, Medfield, Medway, Norfolk, Sharon, Stoneham, and Walpole, Massachusetts. *Id.* at 8617, n.20.

³⁶*Id.*

³⁷RCN Petition (New York) at 14.

³⁸RCN Petition (Boston) at 11.

³⁹RCN Petition (New York) at 14.

⁴⁰*Id.* at 12.

15. Based upon the foregoing analytical structure, RCN argues that Time Warner is a competing, in-region operator with regard to its entire Boston-area system due to the fact that Time Warner provides service in twelve communities that are part of RCN's certificated area in and around Boston.⁴¹ RCN asserts that Time Warner cannot obtain carriage on any portion of the Boston-area system or obtain information regarding any portion of the system pursuant to Section 76.1503(b)(2). Similarly, RCN argues that the service area of its New York system constitutes the five boroughs of New York City. Because Time Warner provides service in certain of these boroughs, RCN maintains that it is a competing, in-region operator *vis-a-vis* the entire system and cannot obtain carriage on or information regarding any portion of the New York system.⁴² RCN further argues that, in *Time Warner-New York*, the Bureau ignored the fact that Time Warner and RCN compete head-to-head in Manhattan and that this fact further compels a finding that Time Warner is a competing, in-region operator *vis-a-vis* the entire New York-area system.⁴³

16. RCN contends that the Bureau's narrower application of Section 76.1503(c)(2)(v) will "chill OVS entry or development by making it practically certain that existing cable operators will be able to obtain the most commercially sensitive data on their prospective competitors."⁴⁴ RCN asserts that the disclosure to a competitor of the "proprietary and commercially sensitive data" that will result from the Bureau's ruling is contrary to accepted commercial standards.⁴⁵

17. Time Warner argues that the Bureau correctly applied Section 76.1503(c)(2)(v) and rejects RCN's interpretation of what constitutes an open video system service area. Time Warner maintains that the analysis under Section 76.1503(c)(2)(v) must begin with the discrete community served by a franchised operator. Time Warner argues that if a cable operator is serving a community that is located within an OVS operator's certificated service area, and the OVS operator is serving or will soon serve that community, then

⁴¹RCN Petition (Boston) at 8,19.

⁴²RCN Petition (New York) at 12-13.

⁴³*Id.* at 13. In its petitions, RCN also argues that Time Warner is an affiliate of Cablevision and MediaOne and that their subscribers must be attributed to Time Warner in performing the Section 76.1503(c)(2)(v) analysis. *Id.* at 20; RCN Petition (Boston) at 12. RCN raises this argument with regard to Cablevision for the first time in its New York petition. Section 1.106 of the Commission's rules provides in part that the Commission will not entertain a petition for reconsideration which relies upon newly-presented facts which existed at the time the underlying action was initiated, unless the petitioner could not have discovered the facts through ordinary diligence or unless the public interest would be served by consideration of the untimely argument. 47 C.F.R. § 1.106(b)(2), (c); see *In re Daniels Cablevision, Inc.*, 12 FCC Rcd. 17410, 17416 (CSB 1997). Because the relevant facts regarding Cablevision's ownership existed at the time RCN responded to Time Warner's complaint, we will not consider RCN's affiliation argument based upon these facts. With regard to MediaOne, RCN simply reiterates in abbreviated form arguments that it raised below which the Bureau deemed insufficiently developed at that time. We therefore will not revisit the MediaOne-Time Warner relationship on the present record. In any event, under Section 76.1503(c)(2)(v), Time Warner could not obtain or continue carriage on any portion of an open video system located within either one of its own franchise areas or within the franchise area of an affiliated entity.

⁴⁴RCN Petition (Boston) at 8; RCN Petition (New York) at 11.

⁴⁵RCN Petition (Boston) at 13-14; RCN Petition (New York) at 21.

the cable operator is a "competing, in-region" operator with regard to that specific community.⁴⁶ Time Warner asserts that a cable operator cannot be considered to be a competing, in-region operator in other portions of the OVS operator's certificated area where the cable operator is not providing service.⁴⁷

18. With regard to RCN's New York system, Time Warner argues that it does not offer cable service to the Bronx or the portions of Brooklyn for which it seeks system information and that it therefore cannot be classified as a competing, in-region cable operator in these communities.⁴⁸ Similarly, Time Warner argues that since it does not offer cable service in Boston or the surrounding communities for which it seeks system information, it cannot be classified as a competing operator in these communities regardless of the fact that it offers service in other discrete communities within RCN's certificated area in and around Boston.⁴⁹

19. In *Time Warner-New York* and *Time Warner-Boston*, the Bureau held that "an incumbent cable operator is a competing, in-region cable operator where there is an actual overlap between a cable operator's franchise area and a specific community served by an open video system operator."⁵⁰ In both cases, Time Warner's franchise areas do not overlap at any point with the portions of RCN's systems on which Time Warner seeks carriage. RCN's proposed open video system in the Bronx and portions of Brooklyn does not overlap with any of Time Warner's franchise areas in Manhattan, Queens, Staten Island or Brooklyn. Similarly, RCN's proposed system in the communities surrounding Boston for which Time Warner sought system information does not overlap with any of Time Warner's franchise areas in the Boston-area. Applying the foregoing standard to these facts, the Bureau ruled that Time Warner is not a competing, in-region cable operator in the communities for which it sought system information and that it therefore is entitled to such information pursuant to the terms of Section 76.1503(b)(2). We disagree with the Bureau's approach in applying Section 76.1503(c)(2)(v) and grant reconsideration to the extent discussed below.

20. At the outset of our discussion, we agree with the Bureau that:

RCN elected to pursue the open video system option and obtained certification from the Commission. Incumbent in RCN's decision are the benefits and responsibilities of open video system operation as determined by Congress and the Commission. . . . As an open video system operator, RCN accepted, and is subject to, the obligation to make available on

⁴⁶Time Warner Opposition (Boston) at 10-11; Time Warner Opposition (New York) at 9.

⁴⁷*Id.*

⁴⁸Time Warner Opposition (New York) at 7-8.

⁴⁹Time Warner Opposition (Boston) at 10-11. In its opposition to RCN's Boston petition, Time Warner requested that the Bureau reconsider its ruling that RCN is not obligated to provide Time Warner with a route map pursuant to Section 76.1503(b)(2). *Id.* at 6. We deny reconsideration and address the merits of this issue in our disposition of Time Warner's Application for Review in which it seeks the same relief.

⁵⁰*Time Warner-New York*, DA 98-2641 at ¶ 7 (citing *Time Warner-Boston*); *Time Warner-Boston*, 13 FCC Rcd. at 8618-19.

a nondiscriminatory basis up to two-thirds of its channel capacity to independent programming providers in accordance with the Commission's rules. Affording capacity to independent programmers is a fundamental precept of the open video system option.⁵¹

However, in implementing the open video system rules, the Commission limited the non-discriminatory access requirement as it applied to certain cable operators. Section 76.1503(c)(2)(v) provides that a cable operator offering cable service to subscribers located in the service area of an open video system is barred from carriage on that system. As the Bureau recognized, the Commission enacted Section 76.1503(c)(2)(v) in order to preserve the incentive of such cable operators to upgrade and maintain their franchised systems and to promote facilities-based competition.⁵² If such an operator were permitted to become a programming provider on an open video system serving its franchise areas, it would have less incentive to invest in its own facilities and strengthen its position as a facilities-based competitor in these areas.

21. Reasoning that a competing, in-region cable operator must compete head-to-head with an open video system operator, the Bureau in *Time Warner-New York* and *Time Warner-Boston* required that the area actually served by an open video system operator and the cable operator's franchise area must overlap in order for the carriage prohibition contained in Section 76.1503(c)(2)(v) to apply. In requiring an actual overlap of activated service areas, we believe the Bureau interpreted Section 76.1503(c)(2)(v) too narrowly in the context of these decisions. The technically integrated service area of the open video system is a more appropriate basis for the application of Section 76.1503(c)(2)(v). This approach is consistent with the plain language of Section 76.1503(c)(2)(v) which provides that a competing cable operator may not obtain carriage on an open video system if it provides cable service within the "service area" of the open video system. The scope of an open video system's service area was not expressly defined in the open video system implementing regulations. In the open video system context, we will apply a definition of "service area" similar to the definition adopted by the Commission in the implementation of rate regulation for small cable systems.⁵³ Section 76.901(c) of the Commission's rules provides that the service area of a small cable system "shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend."⁵⁴ We will apply a similar definition in the context of our open video system rules. Accordingly, the term "service area" as used in Section 76.1503(c)(2)(v) shall mean the area that is or will be served by the open video system's principal headend or other originating point of its signal as well as any technically integrated secondary distribution points such as ancillary headends or microwave receive sites.⁵⁵ While an

⁵¹*Time Warner-New York*, DA 98-2641 at ¶ 6 (footnote omitted); *see also Time Warner-Boston*, 13 FCC Rcd. at 8616 (footnote omitted).

⁵²Second Report and Order, 11 FCC Rcd. at 18258.

⁵³*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, FCC 93-177, 8 FCC Rcd. 5631, 5923 (1993).

⁵⁴47 C.F.R. § 76.901(c).

⁵⁵In applying this definition, the boundaries of an open video system's service area shall be determined based upon current equipment and transmission capabilities. A secondary distribution point in an open video system such as an ancillary headend or microwave receive site, will be considered to be technically integrated if 75% or more of the video

open video system operator may be certified to provide service in multiple communities pursuant to a single certification, the operator may have multiple service areas within the single certificated area depending upon the degree of integration of its operations in that area. If a cable operator does not provide cable service to subscribers located within the service area of a specific open video system, it may seek carriage on that system if it is otherwise qualified. A cable operator is not barred from doing so under Section 76.1503(c)(2)(v) if it provides cable service to subscribers located elsewhere in the open video system operator's greater certificated area.

22. In addition, we observe that an open video system operator voluntarily may choose to provide carriage on a less-than-system-wide basis to certain programmers, not including must-carry and PEG channels which the operator must provide on a community-by-community basis as a matter of law.⁵⁶ In such circumstances, the non-discrimination requirement of Section 76.1503(a) would require the operator to make carriage available to all potential programmers on a similar basis. For example, if RCN operates a technically integrated system throughout the five boroughs of New York City, but voluntarily provides carriage to a certain programmer only in Queens (again excluding must-carry and PEG channels), it would be required to offer similar Queens-only carriage to all potential programmers. We note that under this scenario, a strict application of the Section 76.1503(c)(2)(v) carriage prohibition would prevent a cable operator that competes in any of the other boroughs but not in Queens from obtaining Queens-only carriage. However, we would consider permitting carriage of such an operator pursuant to Section 76.1503(c)(2)(v)(B) as an exception to the general carriage prohibition.

23. We cannot determine the proper application of Section 76.1503(c)(2)(v) in these proceedings based upon the Notices of Intent RCN filed for its New York and Boston-area open video systems. Section 76.1503(b)(1) of the rules sets forth the specific information that an open video system operator must include in a Notice of Intent. In the Notices of Intent for its New York and Boston-area open video systems, RCN simply listed the multiple communities comprising the entire certificated areas for these respective systems. RCN did not provide information describing the actual service area or areas within these greater certificated areas according to the parameters discussed above. For example, it is unclear whether RCN provides service in Manhattan and the Bronx from the same headend, multiple integrated headends, or multiple non-integrated headends. We direct RCN within 30 days of the release of this Order to provide a description of the service area or areas of its New York and Boston-area open video systems based upon the foregoing delineation of an open video system's service area.⁵⁷ Only after evaluating this information can the Bureau determine whether the carriage prohibition contained in Section 76.1503(c)(2)(v) applies to Time Warner. In describing its service areas, RCN should include planned expansions of its systems which it reasonably expects to complete. Once RCN provides this information, we direct the Bureau to resolve the petitions for reconsideration consistent with our decision herein.

channels are received from the principal headend or other originating point of the system's signal. *See* 47 C.F.R. § 76.5(kk).

⁵⁶*See* Section 653(c)(1)(B) of the Communications Act of 1934.

⁵⁷To the extent RCN has filed Notices of Intent for other certificated areas that do not comply with the requirements discussed herein, we direct RCN to file supplemental Notices of Intent within 60 days of the release of this Order.

24. Finally, in its Boston complaint Time Warner urged the Bureau to revoke RCN's open video system certification. Time Warner argued that RCN does not intend to build-out the expansive open video system described in its certification application and is simply using its certification as leverage to obtain cable franchises or inhibit competition. The Bureau did not revoke RCN's certification, stating that the record in the proceedings below was not sufficiently developed on this point to enable it to consider revocation.⁵⁸ In their current pleadings regarding the Boston dispute, the parties again raise issues concerning RCN's commitment to the construction of its open video system as certified and the possible revocation of RCN's certification.⁵⁹ The factual development of these issues remains inadequate and we therefore decline to consider revocation of RCN's certification in this context.

B. System Information Requested By Time Warner

25. Section 76.1503(b)(1) requires an open video system operator to include in its Notice of Intent to establish an open video system, information describing the system's projected service area and channel capacity as well as other information required by potential programming providers.⁶⁰ In addition, the Commission recognized that "a prospective video programming provider can reasonably be expected to need additional information concerning the system to assess whether to seek carriage on the system."⁶¹ Therefore, Section 76.1503(b)(2) directs an open video system operator to provide to a prospective programming provider, within five business days of a written request, information relating to the operator's build-out schedule, estimated carriage rates, programming provider qualification requirements, and technical interface specifications, unless already provided in the operator's Notice of Intent.⁶²

26. In its New York complaint, Time Warner requested information regarding RCN's proposed open video system in the Bronx and portions of Brooklyn.⁶³ Time Warner in part sought information regarding RCN's actual and projected service areas and activation dates. The Bureau held that such information is within the scope of Section 76.1503(b)(2), is not commercially sensitive, and is necessary for a programming provider to decide whether to pursue carriage on an open video system.⁶⁴ The Bureau therefore directed RCN to provide this information to Time Warner as required by the Commission's rules.⁶⁵

⁵⁸*Time Warner-Boston*, 13 FCC Rcd. at 8623.

⁵⁹RCN Petition (Boston) at 15-18; Time Warner Opposition (Boston) at 16-22.

⁶⁰47 C.F.R. § 76.1503(b)(1).

⁶¹Second Report and Order, 11 FCC Rcd. at 18255.

⁶²*See supra* n.15, discussing the information an open video system operator must provide directly to prospective programming providers.

⁶³Time Warner made identical information requests in its Boston complaint. However, Time Warner does not challenge the Bureau's decision in *Time Warner-Boston* in its Application for Review.

⁶⁴*Time Warner-New York*, DA 98-2641 at ¶ 18.

⁶⁵The Bureau also ordered that if RCN has provided any information to other prospective programming providers beyond that covered in the order, it also must provide such information to Time Warner. *Id.* at ¶ 20. To the extent that any such information relates solely to portions of RCN's system on which Time Warner is not entitled to carriage, RCN

27. Time Warner also requested that RCN provide: (1) a route map indicating the location of existing and proposed open video system facilities in the covered service areas with specific schedules for future construction; (2) the number of potential subscribers passed by existing RCN open video system facilities; (3) and a list of the programming which RCN intends to offer on its system.⁶⁶ The Bureau held that this information falls outside the parameters of Section 76.1503(b)(2) and that RCN is not obligated to provide this information to Time Warner or any other prospective programming provider.⁶⁷ With regard to the route map, the Bureau noted that the Commission expressly rejected a proposal that open video system operators disclose their construction plans.⁶⁸ The Bureau held that the number of potential subscribers to an open video system is commercially sensitive information and that potential programming providers can generate such data on their own.⁶⁹ In its Application for Review, Time Warner argues that the Bureau's failure to require disclosure of this information constitutes reversible error. Although the issue of Time Warner's eligibility for carriage on RCN's New York system is unresolved, we will consider Time Warner's Application for Review regarding the scope of the disclosure requirements. This will expedite resolution of the case if Time Warner ultimately is deemed eligible for carriage. Having considered Time Warner's arguments regarding the disclosure requirements, we grant in part and deny in part its Application for Review.

28. Time Warner points to the fact that Section 76.1503(b)(2)(i) of the Commission's rules requires an open video system operator to "describe" the stages of activation of its system if it is to be activated in stages, and that Section 76.1503(b)(2)(iv) requires the operator to provide "technical information" reasonably necessary to a prospective programming provider in determining whether to seek carriage. Referencing these provisions, Time Warner argues that a route map is the best way to describe the activation stages as required and that such a map falls within the technical information that is necessary for a programming provider to make a carriage decision.⁷⁰ Time Warner disagrees with the Bureau's position that Time Warner is as capable as RCN of calculating the number of potential subscribers passed by RCN's system. Time Warner argues that a prospective programming provider does not know with specificity which dwellings the open video system will pass, especially if the operator is not required to provide a route map, and therefore cannot generate a reliable figure for the number of potential subscribers.⁷¹ Given the importance of such information in revenue calculations and carriage decisions, Time Warner argues that the

may redact that portion of the data.

⁶⁶*Time Warner-New York*, DA 98-2641 at ¶ 16.

⁶⁷*Id.* at ¶¶ 18, 20.

⁶⁸Second Report and Order at 18255, n.130 ("We believe this [disclosure of construction plans] could unnecessarily risk the disclosure of confidential business plans and that the projected activation date should be sufficient for the purposes of video programming providers.").

⁶⁹*Time Warner-New York*, DA 98-2641 at ¶ 20.

⁷⁰Time Warner Application for Review at 5.

⁷¹*Id.* at 7.

OVS operator must provide the number of potential subscribers to prospective programmers.⁷² Finally, Time Warner maintains that information regarding RCN's programming line-up is "reasonably necessary" for it to make a carriage decision. Time Warner reasons that a prospective programmer must know the extent of program duplication and whether channels will be shared.⁷³

29. RCN responds that a route map is not referenced in Section 76.1503(b)(2) and that a detailed map of this nature could be used for anti-competitive purposes.⁷⁴ With regard to its programming line-up, RCN again argues that this information is not referenced in the Commission's rules.⁷⁵ RCN further maintains that Section 76.1503(b)(2)(iv) is directed at strictly "technical information" that is reasonably necessary for carriage decisions and that information regarding an operator's programming is not of a technical nature.⁷⁶ Finally, RCN argues that potential subscribership figures are commercially sensitive and again not of a technical nature as would be covered by Section 76.1503(b)(2)(iv).⁷⁷

30. As stated above, the Bureau held that route maps, potential subscribership figures, and programming lists are beyond the scope of an open video system operator's disclosure obligations under the Commission's rules. With regard to route maps and programming lists, we believe the Bureau's ruling is consistent with Section 76.1503(b) and strikes an appropriate balance between an open video system operator's need to protect arguably proprietary information and a prospective programming provider's need to obtain information necessary to make a carriage request. We clarify that a prospective video programming provider is entitled to information providing the precise boundaries of an open video system operator's existing and planned service areas, which must be provided in the Notice of Intent.⁷⁸ In this regard, prospective video programming providers also are entitled to realistic dates upon which open video system stages will be activated.⁷⁹ This information is essential to a prospective video programming provider's decision whether to seek carriage. A route map designating the location of an open video system's facilities is proprietary and not essential to this decision. Similarly, an open video system operator's prospective programming line-up is clearly proprietary information and is not subject to Section 76.1503(b)(2) of the Commission's rules. The Commission's rules make provision for the sharing of channels offered by more than one video programming provider.⁸⁰ Time Warner's request for RCN's programming line-up is no more appropriate than would be a demand by RCN that prospective video

⁷²*Id.* at 8.

⁷³*Id.* at 8-9.

⁷⁴RCN Opposition at 18, 20.

⁷⁵*Id.* at 21.

⁷⁶*Id.* at 22.

⁷⁷*Id.* at 23.

⁷⁸47 C.F.R. § 76.1503(b)(1)(iii).

⁷⁹47 C.F.R. § 76.1503(b)(2)(i).

⁸⁰47 C.F.R. § 76.1503(c)(2)(iii).

programming providers submit their proposed programming line-ups as part of a request for carriage.

31. Although the number of potential subscribers to an open video system is not specifically enumerated in Section 76.1503(b)(2), we find merit in Time Warner's arguments regarding the difficulty in calculating such data given that operators often only build-out selected portions of their designated service area or target only certain types of properties such as multiple dwelling units. As discussed above, an open video system operator must provide the precise boundaries of its existing and planned service area in its Notice of Intent. If the operator intends to construct a system that will serve the general population within the designated service area or activation stage thereof and so states in its Notice of Intent, we agree with the Bureau's reasoning and find that the operator is not obligated to provide the number of potential subscribers to the system as part of its system description under Section 76.1503(b)(1)(iii). Supplied with the precise boundaries of the service area and possessing the knowledge that the system will serve the general population within that area, a prospective video programming provider has an equal ability to estimate the system's potential subscribership. However, if the open video system operator intends to construct a system that will serve significantly less than the general population in the service area, we find that it must include in its Notice of Intent a reasonable estimate of the number of potential subscribers to the system as part of its system description, although it need not specify which subsegments of the population its system will reach. This information is necessary to enable a prospective video programming provider to make an informed decision regarding whether or not to seek carriage on the open video system. If Time Warner ultimately is found eligible for carriage, we direct the Bureau to require RCN to amend the Notice of Intent for its New York system to comply with this Order. We therefore grant in part and deny in part Time Warner's Application for Review.

V. ORDERING CLAUSES

32. Accordingly, **IT IS ORDERED** that Time Warner Cable's Application for Review of the Cable Services Bureau's *Time Warner-New York Order* granting in part and denying in part the relief requested by Time Warner Cable in its Open Video System Complaint against RCN Telecom Services of New York, Inc. **IS GRANTED IN PART AND DENIED IN PART.**

33. **IT IS FURTHER ORDERED** that RCN Telecom Services of New York, Inc. and RCN-BeCoCom, L.L.C.'s Petitions for Reconsideration of the Cable Services Bureau's *Time Warner-New York* and *Time Warner-Boston Orders* granting in part and denying in part the relief requested by Time Warner Cable in its Open Video System Complaints against RCN Telecom Services of New York, Inc. and RCN-BeCoCom, L.L.C. **ARE GRANTED TO THE EXTENT DISCUSSED HEREIN.**

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary