

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

In the Matter of:)
)
TDS Metrocom, LLC)
)
Certification to Operate an)
Open Video System)
)

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 2004

Released: August 5, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On July 26, 2004, TDS Metrocom ("TDS") filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934 ("Communications Act") and the Commission's rules.¹ TDS seeks to operate an open video system for Fitchburg, Wisconsin (the "Service Area"). In accordance with our procedures,² the Commission published notice of receipt of the TDS application³ and posted the application on the Internet.⁴ The City of Fitchburg ("Fitchburg") filed comments.

2. Pursuant to Section 653(a)(1) of the Communications Act, any entity meeting the requirements may obtain certification to operate an open video system.⁵ In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended there to be a streamlined certification process.⁶ Open video system operators may apply for certification at any point prior to the commencement of service. Open video system operators must obtain certification

¹ 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

² See *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18223, 18247 (1996) ("Second Report and Order").

³ See *Public Notice*, "TDS Metrocom LLC Files An Application For Open Video System Certification," DA 04-2348 (MB, rel. July 28 2004).

⁴ The TDS application is available via the Internet at <http://www.fcc.gov/mb/ovs/csovscer.html>.

⁵ See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1501. An operator of a cable system however, generally may not obtain such certification within its service area unless it is subject to "effective competition" as defined in Section 623(1)(l) of the Communications Act, 47 U.S.C. § 543(1)(l). The effective competition requirement does not apply to a local exchange carrier that is also a cable operator that seeks open video system certification within its cable service area.

⁶ *Second Report and Order*, 11 FCC Rcd at 18243.

prior to the commencement of service, allowing sufficient time to comply with the Commission's requirements regarding notifications that applicants must provide to potential programming providers.⁷

3. As part of the certification process, the applicant must acknowledge and accept the obligations associated with operation of an open video system and must provide certain information regarding its proposed system.⁸ To obtain certification, an applicant must file FCC Form 1275, which requires, among other things: (a) a statement of ownership, including a list of all affiliated entities;⁹ (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;¹⁰ (c) a list of the names of the communities the applicant intends to serve; (d) a statement of the anticipated type and amount of capacity that the system will provide; and (e) a statement as to whether the applicant is a cable operator applying for certification within its cable franchise area.

II. COMMENTS

4. Fitchburg states that it supports robust competition in the provision of video programming, welcomes TDS' bid to enter the video carriage market and looks forward to working with TDS to make the arrangements necessary to bring the benefits of video competition to the area.¹¹ It asserts that it is responsible for protecting and promoting the health, safety, and welfare of its residents and that part of this responsibility is to manage the use of certain public rights-of-way within the boundaries and control of the City of Fitchburg.¹² Fitchburg indicates that it has a legitimate interest in regulating the impact that construction and operation of an OVS may have on the rights-of-way and it therefore urges the Commission to make clear that the City retains discretion and oversight to determine the use of its public rights-of-way.¹³ Moreover, Fitchburg asserts that TDS must obtain all necessary authorizations and permits governing the use of public rights-of-way before using such public property for OVS purposes, including taking the steps necessary to acquire a franchise.¹⁴

⁷ *Id.* at 18247; 47 C.F.R. § 76.1502(a); *see also Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19705 (1999) (deleting the pre-construction certification requirement from Section 76.1502(a) of our rules).

⁸ *Second Report and Order*, 11 FCC Rcd at 18245-46.

⁹ For purposes of determining whether a party is an affiliate, we have adopted the definitions contained in the notes to Section 76.501 of our rules, 47 C.F.R. § 76.501, with certain modifications. 47 C.F.R. § 76.1500(g). Generally, we will consider an entity to be an open video system operator's "affiliate" if the open video system operator holds 5% or more of the entity's stock, whether voting or non-voting. *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 20227, 20235 (1996) ("*Third Report and Order*"); 47 C.F.R. § 76.1500(g).

¹⁰ 47 U.S.C. § 573(b). This provision sets forth the Commission's requirements regarding non-discriminatory carriage; just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may distribute programming when demand for carriage exceeds system capacity; channel sharing; sports exclusivity, network non-duplication and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers. *See also* 47 C.F.R. § 76.1502(a).

¹¹ Fitchburg Comments at 3.

¹² *Id.* at 1.

¹³ *Id.* at ii,1-2, 5.

¹⁴ *Id.* at 4-5.

III. DISCUSSION

5. TDS has submitted an application on FCC Form 1275 for certification to operate an open video system in the Service Area. We have reviewed the information contained in TDS' application. As required by Form 1275, the TDS application provides the following: company information and a separate statement of ownership listing affiliated entities; eligibility and compliance representations; and system information and verification statements. TDS also confirmed that it served its application upon the designated telecommunications officials in Fitchburg, Wisconsin.

6. With regard to the public rights-of-way and the franchising issue, we note that these concerns do not relate to the adequacy and accuracy of TDS' application and therefore are beyond the scope of the open video system certification process. Nevertheless, we note that the Commission has stated that "[m]anagement of the rights-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashions without the imposition of unique requirements for open video systems."¹⁵ Thus, the Commission has made clear that the open video system certification process does not usurp the authority of local governments to control use of the public rights-of-way. With regard to the process of obtaining local franchising authority, in the *Order on Remand* of the Fifth Circuit's decision in *City of Dallas, Texas v. FCC*, the Commission stated that the Fifth Circuit determined that localities retain existing franchising authority, but that localities need not exercise this authority through the imposition of open video system franchises.¹⁶ The Commission stated that the decision of whether to impose a franchise on an open video system operator is committed to the discretion of the locality.¹⁷

7. We find that TDS has provided the requisite facts and representations concerning the open video system it intends to operate and has certified that it "agrees to comply and remain in compliance with each of the Commission's regulations" under Section 653(b) of the Communications Act. We note that if any representation in the TDS certification filing proves to be materially false or materially inaccurate, the Commission retains the authority to revoke TDS' certification or impose such other penalties it deems appropriate, including forfeiture.

¹⁵ See *Third Report and Order*, 11 FCC Rcd at 20311.

¹⁶ *Open Video Systems*, 14 FCC Rcd 19700, 19704 (1999); see *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), reh'g denied, Nos. 96-60502, 96-90581 and 96-60844 (5th Cir. May 28, 1999).

¹⁷ *Open Video Systems*, 14 FCC Rcd at 19704.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the application of TDS Metrocom, LLC for certification to operate an open video system in the Service Area **IS GRANTED**.

9. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission's Rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

¹⁸ 47 C.F.R. § 0.283.