ORDER ON RECONSIDERATION

Adopted: May 26, 2000 Release: June 5, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. The City and County of San Francisco (collectively, the “City”) has filed with the Commission a petition to intervene and for reconsideration of the decision adopted by the Cable Services Bureau to grant open video system certification to RCN Telecom Services of California, Inc. d/b/a RCN of California (“RCN”).

RCN filed an opposition.

II. DISCUSSION

2. Although it did not participate in the certification proceeding, we grant the City’s petition to intervene as an interested party to RCN’s certification to provide open video system service to San Francisco and will consider the issues raised by the City in its petition.

3. The City maintains that the five-day comment period for open video system certification
applications, provided by Section 76.1502(e)(1) of the Commission's rules, result in the denial of a meaningful opportunity to be heard and, thus, a denial of due process. RCN, in opposition, points out that, in the context of another open video system certification proceeding, the City has previously raised, and the Commission addressed, this issue. In Digital Broadcasting OVS ("Digital"), the Commission noted that the ten-day review period for open video system applications is mandated by statute and, given that constraint, the Commission established the five-day comment period to provide affected parties the maximum opportunity to be heard consistent with the statutorily mandated certification period. The Commission further noted that its rules governing open video systems afford adequate opportunity to interested parties, particularly through the complaint process, to seek a remedy of any violation of law or regulation. The City has raised no new arguments in this proceeding to persuade us to reconsider this conclusion.

4. With regard to the City's claim of insufficient service, the City states that RCN served the City on June 5, 1998 rather than 2 days earlier as required by Section 76.1502(d)(1) of the Commission's rules. Section 76.1502(d)(1) requires that service of an open video system certification application be made on or before the date an open video system certification application is filed with the Commission. However, if service is made by mail, the open video system application must be postmarked at least three days prior to filing with the Commission. Apparently, the underlying rationale was to provide for sufficient time for delivery by the Postal Service to affected parties prior to the date of filing with the Commission. In this case, RCN served the City by Federal Express for receipt by affected parties on the same date as the date of filing with the Commission. Items sent by Federal Express are not postmarked and are based upon a guaranteed delivery date. As a result, RCN's open video system application was received by the City "on or before" the date that RCN filed its application with the Commission. Thus, we find that RCN's service complied with the requirements of Section 76.1502(d)(1) of the Commission's rules. The City cites prior Commission decisions in Urban Communication Transport Corporation ("Urban") and Digital to support its contention with regard to defective service. Those cases are distinguishable from the facts of this proceeding. In Urban, the open video system applicants did not serve the proper entity that was responsible for telecommunications matters within the relevant jurisdiction. In Digital, the Commission found that the open video system applicant in fact complied with the rules governing service of process.

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6 Id. at 2.
7 Opposition at 2.
8 13 FCC Red 13349, 13352; see also 47 U.S.C. § 573(a)(1).
10 76 C.F.R. § 1502(d)(1).
11 See Petition at 4; see also FCC Form 1275 Certification for Open Video System, filed by RCN Telecom Services of California, Inc., June 5, 1998.
13 11 FCC Red at 17497.
14 13 FCC Red at 13351.
5. The City also argues that, pursuant to the Takings Clause of the Fifth Amendment of the Constitution, a grant of an open video system certification leads to forced occupation of City property for which it must be justly compensated. The Commission has previously determined that the narrow "preemption authority granted to the Commission by Congress to preempt local governments from imposing Title VI franchise or Title VI ‘franchise-like’ requirements on open video system operators does not raise a Fifth Amendment taking because Congress provided for ‘just compensation’ to the local governments." The Commission further found that local governments may recover "normal fees associated with the zoning and construction of open video systems, as long as it imposes them in a non-discriminatory, neutral manner that does not duplicate the compensation provided by a gross revenues fee." Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the Commission’s conclusion regarding franchise preemption, holding that:

Section 621 [of the Communications Act] states that a cable operator may not provide cable service without a franchise. This amounts to a federal requirement that a cable operator obtain a franchise from a local authority before providing service. Eliminating [Section] 621 results in the deletion of the federal requirement that cable operators get a franchise before providing service; it does not eviscerate the ability of local authorities to impose franchise requirements, but only the obligation to do so. Consequently, simply saying that [Section] 621 shall not apply to [open video system] operators does not expressly preempt local franchising authority …

On remand, the Commission clarified that local franchising authorities retained their existing state law franchising authority over open video systems. Accordingly, because we conclude that there was no Fifth Amendment takings issue before the City of Dallas decision and the Commission’s remand order and that such issues are even more remote after these decisions, we will not grant reconsideration on this issue.

6. We find that the City has not raised arguments that warrant the reversal of the grant of open video system certification to RCN. Thus, we affirm the Order adopted by the Cable Services Bureau and deny the petition for reconsideration.

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15 Petition at 5-7.
17 13 FCC Rcd at 13352; see also Third Report and Order, 11 FCC Rcd at 20309-11.
18 City of Dallas, Texas v. FCC, 165 F.3d 341, 348 (5th Cir. 1999), reh’g and suggestion for reh’g en banc denied, (May 28, 1999) (“City of Dallas”).
III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition to intervene filed by the City and the County of San Francisco **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the petition for reconsideration filed by the City and the County of San Francisco **IS DENIED**.

9. This action is taken pursuant to authority delegated under Section 0.321 of the Commission’s rules.\(^{20}\)

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

\(^{20}\) 47 C.F.R. § 0.321.