

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

In the Matter of: )  
 )  
Paul Bunyan Rural Telephone Cooperative )  
 )  
Certification to Operate an )  
Open Video System )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 3, 2001**

**Released: May 3, 2001**

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

**I. INTRODUCTION**

1. On April, 24 2001, Paul Bunyan Rural Telephone Cooperative ("Bunyan") 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.<sup>1</sup> Bunyan seeks to operate an open video system in various communities in Minnesota (the "Service Areas").<sup>2</sup> In accordance with our procedures,<sup>3</sup> the Commission published notice of receipt of the Bunyan certification application<sup>4</sup> and posted the application on the Internet.<sup>5</sup> The City of Bemidji, Minnesota ("the City" or "Bemidji") filed comments to which Bunyan filed a reply.

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.<sup>6</sup> In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended

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<sup>1</sup>47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

<sup>2</sup>The Service Areas for which Bunyan seeks certification in Minnesota are: City of Bemidji; City of Solway; Northern Township; Bemidji Township; Grant Valley; Turtle Lake Township; Jones Township; Lammers Township.

<sup>3</sup>See *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18247 (1996) ("*Second Report and Order*").

<sup>4</sup>See *Public Notice*, "Paul Bunyan Rural Telephone Cooperative Files An Application For Open Video System Certification," DA 01-1074 (CSB, rel. April 24, 2001).

<sup>5</sup>The Bunyan application is available *via* the Internet at <http://www.fcc.gov/csb/ovs/csovsr.html>.

<sup>6</sup>See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1501. However, an operator of a cable system 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(l)(l).

there to be a streamlined certification process.<sup>7</sup> Open video system operators may apply for certification at any point prior to the commencement of service. Open video system operators must obtain certification 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.<sup>8</sup>

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.<sup>9</sup> 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;<sup>10</sup> (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;<sup>11</sup> (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. In its comments, the City first points out that it supports Bunyan's provision of cable service in its community, but files its comments to compel Bunyan's compliance with certain state and local franchising requirements.<sup>12</sup> It states that Bunyan initially sought to provide video services for Bemidji through the process of obtaining a cable franchise.<sup>13</sup> Prior to filing an application and gaining authorization, the City states that Bunyan decided to withdraw its request for a cable television franchise and to instead seek open video system certification.<sup>14</sup> Bemidji indicates pursuant to state law, that notwithstanding the filing of the open video system certification, a cable franchise is required prior to initiating video service.<sup>15</sup> The City argues that under Minnesota law, the service that Bunyan will provide under the OVS regulatory

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<sup>7</sup>*Second Report and Order*, 11 FCC Rcd at 18243.

<sup>8</sup>*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).

<sup>9</sup>*Second Report and Order*, 11 FCC Rcd at 18245-46.

<sup>10</sup>We note that 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. § 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, Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd 20227, 20235 (1996) ("*Third Report and Order*"); 47 C.F.R. § 1500(g).

<sup>11</sup>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. § 1502(a).

<sup>12</sup>Comments at 1.

<sup>13</sup>*Id.* at 2.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

regime is a cable service.<sup>16</sup> According to Minnesota law, a “cable communications system” is defined as a system which operates the service of receiving and amplifying programs and distributing those programs by wire, cable, microwave, or other means, whether the means are owned or leased, to those persons who subscribe to the service.<sup>17</sup> The City asserts that Minnesota municipalities must require a franchise “of any cable communications system providing service within the municipality.”<sup>18</sup> Consequently, the City contends that state law compels Minnesota municipalities to require a cable franchise as a pre-condition of providing OVS service. It urges that the Commission stay or otherwise withhold action on Bunyan’s certification application until the City certifies that Bunyan has complied with applicable state law.<sup>19</sup> Alternatively, the City urges that the Commission grant Bunyan’s request but make clear the City retains all of its existing state law franchising authority over Bunyan’s open video system and confirm that the Commission’s OVS certification may not be sufficient authorization under Minnesota law to initiate service over an open video system.<sup>20</sup>

5. In reply, Bunyan states that it has filed a complete and accurate FCC Form 1275 and related attachments, has fully satisfied the requirements for open video system certification, and that it is fully eligible and qualified to receive the Bureau grant of the requested certification.<sup>21</sup> Bunyan points out that it has had informal, exploratory discussions with City representatives regarding a potential cable franchise, but has never filed an application with the City for a cable television franchise or an open video system franchise and adds that the Bureau not need address the concerns expressed by the City regarding Bunyan’s brief interest in seeking a cable franchise.<sup>22</sup> However, Bunyan maintains that it will not commence provision of open video service to the City residents unless and until the franchising issues raised by the City are resolved to the satisfaction of both the City and Bunyan.<sup>23</sup>

### III. DISCUSSION

6. Bunyan has submitted an application on FCC Form 1275 for certification to operate an open video system in the Service Areas. We have reviewed the information contained in Bunyan’s application. As required by Form 1275, the Bunyan 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. Bunyan also confirmed that it served its application upon the designated telecommunications officials in each of the communities involved.

7. The ten day statutorily mandated review period for open video system certification applications requires us to confine our review to issues concerning Bunyan’s FCC Form 1275 and its related attachments.<sup>24</sup> The purpose of the open video system certification process is to determine whether Bunyan’s application complies with Congress’ mandate and our regulations.<sup>25</sup> By submitting a completed Form 1275,

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<sup>16</sup>*Id.* at 4.

<sup>17</sup>*Id.* at 3 *citing* Minn. Stat. § 238.02, Subd. 3.

<sup>18</sup>Comments at 3.

<sup>19</sup>*Id.* at 6.

<sup>20</sup>*Id.*

<sup>21</sup>Reply at 9.

<sup>22</sup>*Id.* at 5.

<sup>23</sup>*Id.*

<sup>24</sup>*See RCN Telecom Services of California, Inc. d/b/a RCN of California*, 13 FCC Rcd 12009 (1998).

<sup>25</sup>*Id.*

Bunyan has certified that it will comply with all of the Commission's rules for open video systems. The comments received relate to a franchising issue and the City's assertion that a franchise is required to provide open video service. With regard to the process of obtaining local franchising authority, we note that this issue relates to matters beyond the adequacy and accuracy of Bunyan's application. Nevertheless, we note in the *Order on Remand* of the Fifth Circuit's decision in *City of Dallas, Texas v. FCC*,<sup>26</sup> 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.<sup>27</sup> In addition 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.<sup>28</sup>

8. We find that Bunyan 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 Bunyan certification filing proves to be materially false or materially inaccurate, the Commission retains the authority to revoke Bunyan's certification or impose such other penalties it deems appropriate, including forfeiture.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the application of Paul Bunyan Rural Telephone Cooperative for certification to operate an open video system in the Service Areas<sup>29</sup> **IS GRANTED**.

10. This action is taken by the Chief, Consumer Protection and Competition Division, Cable Services Bureau, pursuant to the authority delegated by Section 0.321 of the Commission's Rules.<sup>30</sup>

FEDERAL COMMUNICATIONS COMMISSION

Deborah Klein, Chief  
Consumer Protection and Competition Division  
Cable Services Bureau

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<sup>26</sup>*City of Dallas, Texas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999).

<sup>27</sup>*Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19704 (1999).

<sup>28</sup>*Id.*

<sup>29</sup>*See supra* n. 2, listing the communities contained within the Service Areas.

<sup>30</sup>47 C.F.R. § 0.321.