

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

In the Matter of:)
)
WH LINK, LLC)
)
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 26, 2001, WH LINK, LLC ("LINK") 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 LINK seeks to operate an open video system in various communities in Minnesota (Service Areas).² In accordance with our procedures,³ the Commission published notice of receipt of the LINK certification application⁴ and posted the application on the Internet.⁵ Northwest Suburbs Cable Communications Commission ("NWSCC") and the Cities of Medina and Otsego ("the Cities") 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.⁶ In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended

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

²The Service Areas for which LINK seeks certification in Minnesota are: Buffalo (CUID 0468); Otsego (CUID 0502); Plymouth (CUID 1111); Medina (CUID 0568); Maple Grove (CUID 0311); Rockford (CUID 0457).

³See *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*").

⁴See *Public Notice, "WH LINK LLC Files An Application For Open Video System Certification,"* DA 01-1107 (CSB, rel. April 27, 2001).

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

⁶See 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.⁷ 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.⁸

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.⁹ 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;¹⁰ (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;¹¹ (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. The Cities of Plymouth and Maple Grove, Minnesota are part of a nine-city consortium referred to as the NWSCCC that acts as the franchising authority for the participating communities. In its brief one-page comments, NWSCCC does not oppose LINK's certification, but argues that local communities retain franchising authority in connection with OVS service. It states that based upon the Commission's *Order on Remand* from the Fifth Circuit's decision in *City of Dallas v. FCC*,¹² localities retain their existing franchising authority with respect to OVS operators. Consistent with this finding, NWSCCC requests that any action on LINK's certification application affirm the cities' continuing franchising authority under applicable Minnesota law.¹³ Similarly, in their comments, the Cities do not oppose certification, but state that Minnesota law requires franchising of competitive systems such as open video system's and request that any Commission certification issued to LINK acknowledge that the Cities

⁷*Second Report and Order*, 11 FCC Rcd at 18243.

⁸*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).

⁹*Second Report and Order*, 11 FCC Rcd at 18245-46.

¹⁰We 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).

¹¹47 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).

¹²*City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

¹³NWSCCC Comments at 1.

retain existing state law franchising authority over LINK's open video system.¹⁴ Moreover, it asks that the Commission conclude that the open video certification may not be sufficient authorization under Minnesota law to initiate service of an open video system.

III. DISCUSSION

5. LINK 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 LINK's application. As required by Form 1275, the LINK 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. LINK also confirmed that it served its application upon the designated telecommunications officials in each of the communities involved.

6. The ten day statutorily mandated review period for open video system certification applications requires us to confine our review to issues concerning LINK's FCC Form 1275 and its related attachments.¹⁵ The purpose of the open video system certification process is to determine whether LINK's application complies with Congress' mandate and our regulations.¹⁶ By submitting a completed Form 1275, LINK 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 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 LINK's application. Nevertheless, we note 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.¹⁷ 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.¹⁸

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

¹⁴*Id.* at 3.

¹⁵*See RCN Telecom Services of California, Inc. d/b/a RCN of California*, 13 FCC Rcd 12009 (1998).

¹⁶*Id.*

¹⁷*Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19704 (1999).

¹⁸*Id.*

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the application of WH LINK, LLC for certification to operate an open video system in the Service Areas¹⁹ **IS GRANTED**.

9. 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.²⁰

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁹See *supra* n. 2, listing the communities contained within the Service Areas.

²⁰47 C.F.R. § 0.321.