

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

In the Matter of :
Black Rock Cable, Inc.
Open Video Systems
Petition for Special Relief and Request for Waiver
of Section 76.1503(c)(2)(ii) of the Commission's
rules
CSR 5669

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2001

Released: July 13, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Black Rock Cable, Inc. ("Black Rock"), certified to operate an open video system in the counties of Snohomish, Skagit, and Whatcom, Washington, has filed a petition for special relief pursuant to Section 76.7 of the Commission's rules seeking a waiver of the Commission's rules that require open video system operators to allocate available capacity every three years. The Cities of Snohomish and Marysville, Washington filed oppositions to Black Rock's petition. For the reasons discussed herein, we deny the petition.

II. BACKGROUND

2. The Telecommunications Act of 1996 added Section 653 to the Communications Act of 1934, as amended ("Communications Act"). Section 653 of the Communications Act establishes a framework for entry into the video programming delivery marketplace - the open video system. In Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, the Commission stated that, as designed by Congress, the open video system framework provides an option for the distribution of video programming other than as a cable system fully subject to the provisions of

1These counties include the cities of Woodway, Mountainlake Terrace, Brier, Bothell, Lynnwood, Edmonds, Arlington, Mukilteo, Mill Creek, Snohomish, Marysville, Everett, Monroe, Mount Vernon, Sedro Wooley, Anacortes, Burlington, and Bellingham. See Black Rock Cable, Inc., 13 FCC Rcd 4714 (CSB 1998); Black Rock Cable, Inc., 14 FCC Rcd 6802 (CSB 1999).

2See 47 C.F.R. § 76.7.

347 U.S.C. § 573.

Title VI of the Communications Act.⁴ In addition, 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.”⁵ Although generally enjoying more streamlined regulation than operators of cable systems, open video system operators are subject to clearly defined regulations. Open video system operators are required to offer up to two-thirds of their channel capacity to unaffiliated programmers.⁶ Open video system 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.⁷ The Commission determined that “by requiring open video system operators to provide carriage opportunities for video programming providers. . . Congress sought to foster competition by encouraging multiple programming sources on open video systems.”⁸

III. DISCUSSION

3. With regard to the Notices of Intent⁹ that were filed in connection with establishing open video systems in the aforementioned communities in Washington, Black Rock states that it sought to find video programming providers that desired to provide a bundle of services beyond video and that it planned to find unaffiliated providers that wanted significant amounts of available capacity.¹⁰ Black Rock states that its business plan did not contemplate that Black Rock would be a programming provider on its open video systems.¹¹ Instead, Black Rock intended to allocate 100% of its capacity to unaffiliated programmers.¹² Black Rock asserts that the Notices of Intent failed to generate any responses from unaffiliated programmers.¹³

4. In light of its difficulty in initiating an open video system, Black Rock states that it has formulated a “multi-path approach to the use of the open video system.”¹⁴ It maintains, however, that it will continue to attempt to attract unaffiliated providers. Black Rock asserts that it envisions use of its open video system facilities to eventually provide cable and data services.¹⁵ Black Rock seeks to raise

⁴*Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18226 (1996) (“*Second Report and Order*”).

⁵*Id.* at 18227.

⁶*Id.* at 18230-31.

⁷47 U.S.C. § 573; 47 C.F.R. § 76.1502-4; *Second Report and Order*, 11 FCC Rcd at 18230, 18285-93.

⁸*Id.* at 18227.

⁹Black Rock filed two separate Notices of Intent with the Commission. The Notice of Intent with regard to Bellingham, Washington is dated May 24, 1999. The Notice of Intent with regard to the counties of Whatcom, Skagit, and Snohomish County, Washington is dated October 27, 1999.

¹⁰Petition at 2.

¹¹*Id.*

¹²*Id.* at 2-3.

¹³*Id.* at 3.

¹⁴*Id.* at 4.

¹⁵*Id.*

capital to pursue its overbuild business plan and to ensure that funds are available for future open video system ventures.¹⁶ It states the waiver of the rules with regard to the three-year capacity allocation requirement would remove a great deal of the uncertainty from the perspective of those entities that might potentially provide capital.¹⁷ It also proposes marketing its open video system franchises to potential buyers and argues that waiver of the allocation regulation would stimulate interest among such buyers.¹⁸ Black Rock asserts that “avoiding” the allocation of capacity requirements for a nine-year period will allow for a much greater potential for open video system success and a greater potential benefit for the public.¹⁹ It requests that the Commission waive the provisions of Section 76.1503(c)(2)(ii) with regard to Black Rock for 3 consecutive periods of 3 years, or 9 years total.²⁰

5. In opposition, the Cities of Snohomish and Marysville argue that the request for waiver should not be granted and that Black Rock’s marketing dysfunction should not be a basis for a waiver of the capacity sharing requirements of an open video system.²¹ Snohomish and Marysville also state that the allocation requirements promote effective competition and that allowing a nine-year hiatus from having competitors enter the market through Black Rock’s system is contrary to the purpose and intent of the rules governing open video systems.²² Moreover, the Cities maintain that a waiver will negatively impact the communities where Black Rock has acquired franchises because competitors, unable to gain access to Black Rock’s system, will be forced to negotiate their own separate franchises and will essentially force cities to expend resources in negotiating such agreements.²³ Further, the Cities assert that separate franchise agreements will have the potential for multiple disruptions of the Cities’ rights-of-way.²⁴

6. As an open video system operator, Black Rock accepted and is subject to the obligation to allocate available capacity, at least once every three years on an open, non-discriminatory basis.²⁵ Affording capacity to unaffiliated programmers is a fundamental precept of the open video system framework. While Black Rock states that there is no current demand for capacity on its system, we find that it would be contrary to the basic intent of the open video system framework to grant a nine-year waiver of the Commission’s rules. Congress intended that up to two-thirds of the capacity of such systems be available to unaffiliated programmers and that any available capacity be made available on a nondiscriminatory basis. In implementing this intent, the Commission determined that available capacity be reallocated at least every three years.²⁶ To grant a nine-year waiver of this requirement, a period as long or longer than some cable franchises, would significantly undercut the open video system

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 5.

¹⁹*Id.*

²⁰*Id.*

²¹Comments of Snohomish at 4; Comments of Marysville at 4.

²²*Id.*

²³*Id.* at 5.

²⁴*Id.*

²⁵*Second Report and Order*, 11 FCC Rcd at 18227; *see also* 47 C.F.R. § 76.1503(c)(2)(ii).

²⁶*Id.*

framework. The requested waiver would, in essence, convert Black Rock into a turn-key contractor for an unaffiliated programmer to become a cable operator. This is not what Congress intended when it enacted the open video system provisions of the 1996 Act.

7. We also do not believe the requested waiver is necessary to achieve the ends articulated by Black Rock. After the initial nondiscriminatory allocation of system capacity commenced by the Notice of Intent, Section 76.1503(c)(2)(ii) requires only that an open video system operator “allocate open capacity, *if any*, at least once every three years”²⁷ If Black Rock, pursuant to its Notice of Intent procedures, allocates 100% of its capacity to an unaffiliated programmer or programmers and at the end of three years such programmer or programmers desire to retain all of their system capacity, there is no excess capacity for Black Rock to allocate. The same would also prove true after six years and nine years. Black Rock is required to reallocate capacity under our rules only when excess capacity exists.

8. Finally, it is unclear as to what is planned by Black Rock for the available capacity. While Black Rock states that it envisions providing other than video service through its open video system, we emphasize that certification as an open video system authorizes only the provision of video programming. Should Black Rock desire to provide other services bundled with its open video system service, it must do so in compliance with all appropriate Federal, state, and local requirements. We have previously informed Black Rock of this fact.²⁸

9. In view of the fact that Black Rock has not made a sufficient showing, we deny Black Rock’s petition for special relief.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition for special relief filed by Black Rock Cable, Inc. **IS DENIED**.

11. This action is taken pursuant to authority delegated under Section 0.321 of the Commission’s rules.²⁹

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Cable Services Bureau

²⁷47 C.F.R. § 76.1503(c)(2)(ii)(emphasis added).

²⁸See Letter to Black Rock Cable, Inc. from Deborah Lathen, Chief, Cable Services Bureau, dated June 2, 1999.

²⁹47 C.F.R. § 0.321.