

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

In the Matter of:
Digital Broadcasting OVS
Certification to Operate an
Open Video System

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 2011

Released: June 3, 2011

By the Chief, Media Bureau:

I. INTRODUCTION

1. On May 26, 2011, Digital Broadcasting OVS ("Digital Broadcasting") filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's rules. Digital Broadcasting's projected service area encompasses the Top 50 DMAs in the United States. In accordance with our procedures, the Commission published notice of receipt of Digital Broadcasting's certification application and posted the application on the FCC's website. The National Cable &

1 As designed by Congress, the open video system framework provides an option for the distribution of video programming other than as a "cable system" governed by the provisions of Title VI. See 47 U.S.C. § 571(a)(4). If an open video system operator agrees to permit carriage of unaffiliated video programming providers on just, reasonable and non-discriminatory rates and terms, it can be certified as an operator of an "open video system" and subjected to streamlined regulation under Title VI. See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, 11 FCC Rcd 18223, 18226 (1996) ("Second Report and Order"); 47 U.S.C. §§ 573(a)(1) & (c).

2 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

3 Digital Broadcasting filed this certification application intending to serve the following areas: New York, New York; Los Angeles, California; Chicago, Illinois; Philadelphia, Pennsylvania; Dallas, Texas; San Francisco, California; Boston, Massachusetts; Atlanta, Georgia; Washington D.C.; Houston, Texas; Detroit, Michigan; Phoenix, Arizona; Seattle, Washington; Tampa, Florida; Minneapolis, Minnesota; Miami, Florida; Denver, Colorado; Austin, Texas; Cleveland, Ohio; Orlando, Florida; Sacramento, California; St. Louis, Missouri; Portland, Oregon; Charlotte, North Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Norfolk, Virginia; Baltimore, Maryland; Indianapolis, Indiana; San Diego, California; Nashville, Tennessee; Hartford, Connecticut; Kansas City, Missouri; Salt Lake City, Utah; Cincinnati, Ohio; Milwaukee, Wisconsin; Greenville, South Carolina; San Antonio, Texas; West Palm Beach, Florida; Harrisburg, Pennsylvania; Birmingham, Alabama; Grand Rapids, Michigan; Las Vegas, Nevada; Oklahoma City, Oklahoma; Albuquerque, New Mexico; Greensboro, North Carolina; Memphis, Tennessee; Jacksonville, Florida; and Louisville, Kentucky.

4 See Second Report and Order, 11 FCC Rcd at 18247.

5 See Public Notice, "Digital Broadcasting OVS Files An Application For Open Video System Certification," DA 11-969 (MB rel. May 27, 2011).

Telecommunications Association (“NCTA”),<sup>7</sup> the National Association of Broadcasters (“NAB”),<sup>8</sup> the National Association of Telecommunications Officers and Advisors (NATOA)<sup>9</sup> and the City of Boston filed comments<sup>10</sup> opposing the certification application.<sup>11</sup>

2. Pursuant to Section 653(a)(1) of the Communications Act, any entity certifying that it will comply with the Commission’s open video systems regulations may obtain certification to operate an open video system.<sup>12</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.<sup>13</sup> 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>14</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>15</sup> (b) a representation that the applicant will comply with the Commission's regulations under

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<sup>6</sup> The Digital Broadcasting application is available *via* the Internet at <http://transition.fcc.gov/mb/ovs/csovscer.html>.

<sup>7</sup> NCTA states that it is unclear whether Digital Broadcasting’s claim that its service will provide 1000 IP HDTV channels is consistent with how the term “channels” is defined in the Commission’s rules. NCTA Comments at 2, citing, *Sky Angel U.S. LLC*, 25 FCC Rcd 3879 (MB 2010).

<sup>8</sup> NAB asserts that: (i) the certification application failed to provide sufficient information as to whether Digital Broadcasting is a local exchange carrier eligible for certification as an open video system operator; (ii) Digital Broadcasting improperly proposes providing nationwide video service as opposed to local video service; and (iii) the certification application should be denied because Digital Broadcasting fails to provide sufficient information as to whether its IP based system would meet the definition of an open video system as set forth in Section 76.1500(a) of the Commission’s rules. NAB Comments at 2-3.

<sup>9</sup> NATOA asserts that Digital Broadcasting failed to adequately serve a copy of its application on all of the communities impacted by its open video system application, and additionally failed to properly notify those communities it did actually serve in accordance with Section 76.1502(d)(1) of the Commission’s rules. NATOA Comments at 1-2, citing 47 C.F.R. § 76.1502(d)(1).

<sup>10</sup> The City of Boston asserts that the Commission’s open video system rules “clearly require an applicant to notify each affected community of the procedures for opposing an open video system application, and that notice requirement was not satisfied.” Boston Comments at 1.

<sup>11</sup> We note that NATOA and the City of Boston’s Comments were not filed within five calendar days of the Commission’s receipt of the certification application and are therefore untimely. See 47 C.F.R. § 76.1502(e)(1). In the interest of amassing as complete a record as possible given the important issues raised by Digital Broadcasting’s application and the extremely brief comment deadline, we will consider NATOA and the City of Boston’s submissions as informal comments to the Commission.

<sup>12</sup> See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502(a) (“an operator of an open video system must certify to the Commission that it will comply with the Commission’s regulations in 47 CFR 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513.”).

<sup>13</sup> *Id.* at 18247; 47 C.F.R. § 76.1502(a).

<sup>14</sup> *Second Report and Order*, 11 FCC Rcd at 18245-46.

<sup>15</sup> 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. See 47 C.F.R. §§ 76.1500(g) & (h). 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) & (h).

Section 653(b) of the Communications Act;<sup>16</sup> (c) a list of the names of the communities the applicant intends to serve; (d) proof that a copy of its filing was served on all the local communities listed in (c) above;<sup>17</sup> (e) a statement of the anticipated type and amount of capacity that the system will provide; and (f) a statement as to whether the applicant is a cable operator applying for certification within its cable franchise area.

## II. DISCUSSION

3. Based on our review of the certification application, we find that Digital Broadcasting has failed to satisfy the requirements to be certified as an open video system operator. Specifically, Digital Broadcasting has failed to sufficiently and exhaustively indicate to the Commission the local communities it intends to serve and has failed to adequately serve a copy of its application on designated telecommunications officials in such local communities. As noted above, the Commission's rules require that "the applicant must serve a copy of its filing" on "the anticipated local communities to be served on completion of the system" and include a statement informing the local communities of the Commission's requirements for filing oppositions and comments.<sup>18</sup> Digital Broadcasting's description of the "anticipated communities or areas to be served upon completion of the system" is "[t]he Greater Nielson [sic] DMA Metropolitan Areas, by 2011 Universe Top 50 Market ratings . . . ."<sup>19</sup> However, its application reveals that it has failed to serve all of the impacted communities.<sup>20</sup> For example, in the New York DMA, Digital Broadcasting served the New York City Department of Technology & Telecommunications and the New York Public Service Commission Cable Franchise Authority. This does not remotely approach informing the Commission of, and serving a copy of its certification application on, all the communities in the New York DMA that Digital Broadcasting intends to serve. Digital Broadcasting failed even to serve New Jersey and Connecticut state authorities, even though parts of New Jersey and Connecticut are included in the New York DMA. Service was similarly inadequate for the other 49 DMAs identified in Digital Broadcasting's Form 1275. The Bureau has concluded that an open video system application that identifies some, but not all, of the local communities in the intended service area, is deficient and must be denied.<sup>21</sup> The record indicates that Digital Broadcasting failed to serve a copy of its application on countless local communities within the 50 DMAs listed in Digital Broadcasting's application, thereby depriving affected local communities of an opportunity to participate

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<sup>16</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. § 76.1502(a).

<sup>17</sup> 47 C.F.R. § 76.1502(d)(1).

<sup>18</sup> 47 C.F.R. §§ 76.1502(c)(6) & (d)(1).

<sup>19</sup> Digital Broadcasting OVS FCC Form 1275 at D.

<sup>20</sup> In addition, several cities and states referenced in Digital Broadcasting's FCC Form 1275 were described inconsistently and raise further questions as to whether the application was correctly served on all impacted communities. For example, Digital Broadcasting listed Kansas City, Kansas as the area it intends to serve on Part D of the FCC Form 1275 it submitted to the Commission. However, the certificate of service attached to the FCC Form 1275 indicates that Digital Broadcasting served the local telecommunications official located in Kansas City, Missouri.

<sup>21</sup> *See Urban Communications Transport Corporation Certification to Operate an Open Video System*, 11 FCC Rcd 17495, 17498 ¶ 8 (CSB 1996) (denying as incomplete Urban's open video system certification application because the applicant served a copy of its application on the designated local telecommunications official of Westchester County, NY, but failed to serve officials in 6 other communities located in Westchester County.).

in the Commission's process, including filing oppositions and/or comments. Therefore, we find that Digital Broadcasting's open video system certification application is deficient and must be denied.<sup>22</sup>

### III. ORDERING CLAUSES

4. Accordingly, **IT IS ORDERED**, pursuant to Section 653(a)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 573(a)(1), that the open video system certification application filed by Digital Broadcasting OVS **IS DENIED**.

5. This action is taken by the Chief, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission's Rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>22</sup> We note that commenters have raised significant questions related to other aspects of Digital Broadcasting's proposed open video system operation, such as whether Digital Broadcasting's proposed service offering satisfies the definition of an "open video system" under our rules and whether it would offer "channels" of service. Because we find that Digital Broadcasting's open video system application was not appropriately served on all of the communities encompassed in its FCC Form 1275 and therefore must be denied, we need not reach these issues.