

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

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

ORDER ON RECONSIDERATION

Adopted: April 20, 2017

Released: April 21, 2017

By the Acting Chief, Media Bureau:

I. INTRODUCTION

1. On March 15, 2017, Digital Broadcasting OVS (Digital Broadcasting) filed an application for certification to operate an open video system (OVS) 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 several states and United States territories. The OVS framework provides for a streamlined regulatory review of a certification application requiring the Commission to approve or disapprove any OVS certification request within ten days of its receipt. In accordance with our procedures, the Commission publishes notice of receipt of a certification application and posts the application on the internet to allow for notice and comment by interested parties. Because

1 The Digital Broadcasting application is date stamped as having been received by the FCC Mail Room on March 15, 2017. We note that Section 76.1502(d)(2) states that "Parties are required to attach a cover sheet to the filing indicating that the submission is an OVS certification application. The only wording on this cover sheet shall be 'Open Video System Certification Application' and 'Attention: Media Bureau.'" Digital Broadcasting's cover sheet included additional wording, and as such, its certification application filing failed to comply with the Commission's rules. 47 CFR § 76.1502(d)(2). We advise Digital Broadcasting to adhere to the guidelines indicated in this Commission rule in any future certification application filing.

2 As designed by Congress, the OVS 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 OVS 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 subject 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).

3 47 U.S.C. § 573(a)(1); 47 CFR § 76.1502.

4 Digital Broadcasting states that it intends to serve the following areas: California, Florida, Georgia, South Carolina, North Carolina, Connecticut, Vermont, Rhode Island, New Jersey, Delaware, Washington D.C., Puerto Rico and the U.S. Virgin Islands.

5 47 U.S.C § 573(a)(1); 47 CFR § 76.1502(f).

6 Second Report and Order, 11 FCC Rcd at 18247.

of a delay in the delivery of the Commission's mail, the Media Bureau (Bureau) did not receive Digital Broadcasting's application until April 6, 2017, and therefore the Bureau failed to have an opportunity to place the application on Public Notice or to review and assess Digital Broadcasting's application within the ten day timeframe specified by the Communications Act and the Commission's rules.<sup>7</sup> Accordingly, Digital Broadcasting's application was deemed granted on March 25, 2017.<sup>8</sup> Following review of the certification request, we have concluded that Digital Broadcasting's certification application was deficient and its certification must be revoked. Accordingly, we adopt this Order on Reconsideration on our own motion.<sup>9</sup>

## II. BACKGROUND

2. Pursuant to Section 653(a)(1) of the Communications Act, any entity certifying that it will comply with the Commission's OVS regulations may obtain certification to operate an open video system.<sup>10</sup> OVS operators must obtain certification prior to the commencement of service.<sup>11</sup> As part of the certification process, the applicant must acknowledge and accept the obligations associated with operation of an OVS and must provide certain information regarding its proposed system.<sup>12</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>13</sup> (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;<sup>14</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>15</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.<sup>16</sup>

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<sup>7</sup> 47 U.S.C. § 573(a)(1); 47 CFR § 76.1502(f).

<sup>8</sup> See 47 CFR § 76.1502(f).

<sup>9</sup> See 47 CFR § 1.108 ("The Commission may, on its own motion, reconsider any action made or taken by it within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b). When acting on its own motion under this section, the Commission may take any action it could take in acting on a petition for reconsideration, as set forth in § 1.106(k)."). Because we issue this Order on Reconsideration before April 24, 2017 (30 days after Digital Broadcasting's OVS Certification was deemed granted) our action is timely under Section 1.108. See *id.*; 47 CFR § 1.4(c).

<sup>10</sup> See 47 U.S.C. § 573(a)(1); 47 CFR § 76.1502(a) ("an operator of an [OVS] 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>11</sup> *Second Report and Order*, 11 FCC Rcd at 18247, para 34; 47 CFR § 76.1502(a).

<sup>12</sup> *Second Report and Order*, 11 FCC Rcd at 18245-46, para 31.

<sup>13</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 CFR § 76.501, with certain modifications. See 47 CFR §§ 76.1500(g) & (h). Generally, we will consider an entity to be an OVS operator's "affiliate" if the OVS 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, para 13 (1996) ("*Third Report and Order*"); 47 CFR § 76.1500(g) & (h).

<sup>14</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 OVS 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 CFR § 76.1502(a).

<sup>15</sup> 47 CFR § 76.1502(d)(1).

<sup>16</sup> 47 CFR § 76.1501.

### III. DISCUSSION

3. We revoke Digital Broadcasting's certification because we find that its application was deficient under our rules in two respects.<sup>17</sup> First, the Commission's rules expressly require that "the applicant must serve a copy of its filing" on "the anticipated *local* communities to be served on completion of the system."<sup>18</sup> The Commission's rules clearly require that an OVS application that does not identify all of the local communities in the intended service area is deficient and must be denied.<sup>19</sup> Although Digital Broadcasting's application indicates that it served a copy of its certification application on the above-enumerated state and territorial authorities,<sup>20</sup> it failed to serve a copy of its application on countless local communities, thereby depriving affected local communities of an opportunity to participate in the Commission's process, including filing oppositions and/or comments.

4. Second, based on our review of the certification application, we also find that Digital Broadcasting's application violates the requirements to be certified as an OVS Operator as defined in the Commission's rules. Specifically, Section 76.1500(b) provides that an OVS Operator is "Any person or group of persons who provides cable service over an OVS and directly or through one or more affiliates owns a significant interest in such OVS, or otherwise controls or is responsible for the management and operation of such an OVS."<sup>21</sup> Digital Broadcasting states that it will be providing "Advanced Telecommunications Services over IP Online Video Distribution" and "All transport traffic will be via existing Utility line Internet connections to subscribers via IP Online Video Distribution, including IP information services."<sup>22</sup> The Commission's rules require that an OVS operator either own a significant interest in the OVS or control and manage the operation of the system and the facility from which the cable service will be provided.<sup>23</sup> In contrast, Digital Broadcasting indicates that it will transport service over the public Internet. That description does not satisfy the definition of an OVS Operator in that Digital Broadcasting asserts that "all transport traffic will be via existing utility line Internet

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<sup>17</sup> We note that Digital Broadcasting's certification application suffers from the same deficiency as its previous OVS certification that was denied by the Commission. See *Digital Broadcasting OVS*, 26 FCC Rcd 7903, 7905-06, para 3 (MB 2011). In *Digital Broadcasting OVS*, Digital Broadcasting stated that the anticipated areas it intended to serve upon completion of its system included "[t]he Greater Nielson [sic] DMA Metropolitan Areas, by 2011 Universe Top 50 Market ratings." The Bureau denied Digital Broadcasting's certification filing because it failed to indicate the numerous local communities it intended to provide service to and failed to adequately serve a copy of its application on designated telecommunications officials in such local communities, as required by the Commission's rules. *Id.*; see 47 CFR § 76.1502(c)(6).

<sup>18</sup> See 47 CFR § 76.1502(c)(6) (emphasis added); 47 CFR § 76.1502(d)(1) ("On or before the date an FCC Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on *all local communities* identified pursuant to paragraph (c)(6) of this section . . . ." (emphasis added)).

<sup>19</sup> See *Digital Broadcasting OVS*, 26 FCC Rcd at 7905-06, para 3; *Urban Communications Transport Corporation Certification to Operate an Open Video System*, 11 FCC Rcd 17495, 17498, para 8 (CSB 1996) (denying as incomplete Urban's OVS 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 six other communities located in Westchester County).

<sup>20</sup> See *supra* n. 4 (listing the states and territories that Digital Broadcasting proposes to serve). We note that each of the states and territories listed in Digital Broadcasting's application perform cable franchising at the state level and service on these entities was appropriate. However, that does not obviate the express requirement of our rules that each local community to be served by the OVS be identified in the FCC Form 1275 and that each of these communities are served a copy of the OVS certification application.

<sup>21</sup> 47 CFR § 76.1500(b).

<sup>22</sup> Digital Broadcasting application at 1-2.

<sup>23</sup> 47 CFR § 76.1500(b).

connections,”<sup>24</sup> which is separate, independent of, and not individually owned, managed or controlled by Digital Broadcasting.<sup>25</sup> Accordingly, for the reasons discussed above, Digital Broadcasting’s certification application was deficient and its certification must be revoked.<sup>26</sup>

#### IV. ORDERING CLAUSES

5. 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), and Sections 76.1500(b), 76.1501(c)(6) and (d)(1) of the Commission’s rules, 47 CFR §§ 76.1500(b); 76.1501(c)(6) and (d)(1), that the open video system certification of Digital Broadcasting OVS IS REVOKED.

6. This action is taken by the Acting Chief, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission’s rules, 47 CFR § 0.283.

#### FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey  
Acting Chief,  
Media Bureau

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<sup>24</sup> Digital Broadcasting application at 1-2.

<sup>25</sup> See 47 CFR § 76.1500(b).

<sup>26</sup> We note that, under our rules, an applicant may refile a certification application. The Commission will consider a revised or refiled FCC Form 1275 to be a new proceeding. See 47 CFR § 76.1502(f).