

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

Metropolitan Fiber Systems/New York Inc.,)
d/b/a/ MFS Telecom of New York)
Certification to Operate an)
Open Video System)
)
Metropolitan Fiber Systems/McCourt, Inc.)
Certification to Operate an)
Open Video System)
)

CONSOLIDATED ORDER

Adopted: November 15, 1996

Released: November 15, 1996

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, we consolidate two proceedings into one and rule on the merits in each.¹ In deciding this matter, the Bureau has reviewed all the pleadings filed in each of the separate proceedings. We have determined that the two proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.

2. On November 5, 1996, Metropolitan Fiber Systems/New York Inc., d/b/a/ MFS Telecom of New York filed an application for certification to operate an open video system on the Island of Manhattan, New York City, New York, pursuant to Section 653(a)(1) of the Communications Act and the Commission's rules.² Also on November 5, 1996, the applicant filed an election to transition its alleged video dialtone system to an open video system and a

¹Metropolitan Fiber Systems of New York, Inc. d/b/a/ MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc. filed separate FCC Form 1275s.

²Communications Act of 1934, as amended, § 653(a)(1), 47 U.S.C. § 573(a)(1) ("Communications Act"). See also 47 C.F.R. § 76.1502.

motion for extension of time to accomplish such a transition.³ The election and motion for extension of time will be addressed in a separate Order.

3. On November 5, 1996, Metropolitan Fiber Systems/McCourt, Inc. filed an application for certification to operate an open video system in Boston, Massachusetts, pursuant to Section 653(a)(1) of the Communications Act and the Commission's rules.⁴ Also on November 5, 1996, the applicant filed an election to transition its alleged video dialtone system to an open video system and a motion for extension of time to accomplish such a transition.⁵ The election and motion for extension of time will be addressed in a separate Order.

4. Metropolitan Fiber Systems/New York Inc., d/b/a/ MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc. are both wholly owned subsidiaries of MFS Network Technologies, Inc., which in turn is a wholly owned subsidiary of MFS Communications Company, Inc. Both Metropolitan Fiber Systems/New York Inc., d/b/a/ MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc. have made substantially the same representations in their separate Form 1275 applications. For the purposes of this order, we will refer to both entities collectively as "MFS".

5. As provided in its rules, the Commission published notice of receipt of the certification applications and posted the applications on the Internet.⁶ Comments on the certification applications were timely filed on November 12, 1996 by the National Cable Television Association (NCTA), the City of New York (New York City), Time Warner Cable of New York City (Time Warner) and the Boston Community Access and Programming

³See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46, FCC 96-312, First Order on Reconsideration (released July 23, 1996) (*First Order on Recon.*).

⁴Communications Act of 1934, as amended, § 653(a)(1), 47 U.S.C. § 573(a)(1) ("Communications Act"). See also 47 C.F.R. § 76.1502.

⁵See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems, CS Docket No. 96-46, FCC 96-312, First Order on Reconsideration (released July 23, 1996) (*First Order on Recon.*).

⁶See In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46, 61 FR 28698 (6/5/96), FCC 96-249, released June 3, 1996 at ¶ 34. ("Second Report and Order"). The Commission's revised rules adopted in the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Third Report and Order and Second Order on Reconsideration, CS Docket No. 96-46, 61 FR 43160 (8/21/96), FCC 96-334, released August 8, 1996 ("Third Report and Order") were in effect at the time of MFS's applications. The applications were placed on the Internet on November 5, 1996 and published in the Daily Digest on November 7, 1996.

Foundation (BCAPF).⁷ For the reasons stated below, we deny each of MFS's applications for certification.

6. Pursuant to Section 653(a)(1) of the Communications Act, any person may obtain certification to operate an open video system.⁸ In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended a streamlined certification process.⁹ Open video system operators may apply for certification at any point prior to the commencement of service, subject to two conditions. If construction of new physical plant is required, the applicant must obtain Commission approval of its certification prior to the commencement of construction. If no new construction is required, certification must be obtained prior to the commencement of service, allowing sufficient time to comply with the Commission's notification requirements to programming providers.¹⁰

7. Despite its streamlined nature, the Commission intended the certification process to provide purposeful representations regarding the responsibilities of the open video system operator, by requiring, *inter alia*, the submission of specified information and that certifications be verified.¹¹ To obtain certification, a party must file FCC Form 1275 which requires, among other things: (a) a statement of ownership, including a list of all affiliated entities;¹² (b) a representation that the applicant will comply with the Commission's regulations under Section

⁷NCTA filed separate comments regarding the Form 1275s for MFS's Boston and New York systems. New York City's comments addressed only the Form 1275 for MFS's New York system. The BCAPF's comments addressed only the Form 1275 for MFS's Boston system.

⁸47 C.F.R. § 76.1501. An operator of a cable system, however, generally may not obtain such certification within its cable service area unless it is subject to "effective competition" as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). *See also* 47 C.F.R. § 76.1501.

⁹*Second Report and Order* at ¶ 28.

¹⁰*Second Report and Order* at ¶ 34; 47 C.F.R. § 76.1502 (a).

¹¹*Second Report and Order* at ¶ 31.

¹²We 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, with certain modifications. 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. *Third Report and Order* at ¶ 13.

653(b);¹³ (c) a general description of the anticipated communities or areas to be served; (d) a statement on the anticipated type and amount of capacity that the system will provide.

II. POSITIONS OF THE PARTIES

8. In each of its filings, MFS provides: company information including a separate statement of ownership, with all affiliated entities; makes the required eligibility and compliance representations; and makes the required verification statements. Under the category of eligibility and compliance representations, MFS has checked off the "not applicable" box in response to the question directed at cable operators seeking to operate open video systems pursuant to 47 C.F.R. 76.1501.¹⁴ Additionally, MFS has represented that its systems will have no digital or switched digital capacity.¹⁵ As to anticipated analog capacity, MFS states in each application, respectively, that MFS "will configure channel capacity and network facilities according to programmer demand for its system. It currently anticipates that fiber optic open video system facilities on any part of its network will consist of minimum of 110 analog channels."¹⁶

9. The objections to MFS's application go to both the accuracy and adequacy of the information contained in MFS's Form 1275s, as well as to issues outside the scope of the Form 1275. There are two issues with respect to the accuracy and adequacy of the information provided by MFS. First, as raised by New York City, there is a question regarding MFS's representations of its channel capacity of the New York system. New York City alleges that MFS's current plans do not indicate that it anticipates operating an open video system with a significant presence from non-affiliated programmers.¹⁷ In support of its assertion, New York City notes that although press reports show that RCN plans to offer 105 channels, the capacity of MFS's network is a minimum of 110 analog channels.¹⁸ Therefore, unaffiliated programmers may be limited to only five channels. Moreover, as argued by New York City, if the Commission determines that MFS was not a video dialtone operator, but in fact is a cable operator, MFS should have, but failed to, check the box on the Form 1275 stating that it was

¹³Under this section the applicant agrees to comply with 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 select programming when demand for carriage exceeds system capacity; channel sharing; application of the rules concerning sports exclusivity, network non-duplication, and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers.

¹⁴MFS's Form 1275, Box C1.

¹⁵*Id.* at D2.

¹⁶*Id.* at Exhibit 2.

¹⁷New York City Comments at 8.

¹⁸*Id.*

permitted to transition from a cable operator to an open video system either due to the existence of effective competition or because such a conversion is in the public interest of subscribers.¹⁹

10. Second, with respect to issues outside the scope of the Form 1275, the parties raise three arguments: the ambiguity of MFS's video dialtone status; its failure to allow non-affiliated programmers access to the inside wiring of subscribers' homes; and its failure to comply with program access regulations. Both NCTA and Time Warner challenge MFS's status as a video dialtone operator in New York and Boston. They contend that MFS never requested the authority to offer video dialtone or received Commission authority to provide video dialtone services in any area of the country.²⁰

11. Time Warner complains that MFS will preclude non-affiliated video programming providers from using its system. Time Warner alleges that MFS, through its affiliate, RCN, will refuse to allow non-affiliated programmers access to the internal wiring running from the curb to the subscribers' homes, and thus will prevent non-affiliated programmers from gaining access to the system.²¹ In support of this claim, Time Warner notes that RCN is currently the only programmer making use of the MFS facility.²²

12. BCAPF raises complaints regarding MFS's alleged failure to negotiate public, educational, and governmental channels (PEG) access requirements.²³ BCAPF complains that no information has been provided, either through the Form 1275 certification form or otherwise, to enable it to determine how MFS plans to meet the PEG requirements set forth in the Commission's regulations.²⁴ BCAPF further asserts that it has attempted, to no avail, to meet

¹⁹*Id* at 6-7.

²⁰NCTA comments at 1; Time Warner comments at 11-15. NCTA and Time Warner dispute MFS's argument that its video transport service tariff suffices for a video dialtone tariff. NCTA and Time Warner assert that video dialtone and video transport are not synonymous. NCTA at 2; Time Warner at 6. NCTA and Time Warner point out that in video transport the ultimate lessee must obtain a cable franchise. NCTA and Time Warner assert because MFS and its programmer, RCN which is the ultimate lessee, have not obtained a cable franchise in either the New York or Boston area, they cannot be deemed to be providing video transport service. Moreover, even if MFS did not need to obtain a Section 214 facilities authorization to provide video dialtone service or have a valid video dialtone tariff on file, NCTA and Time Warner assert that MFS and RCN have not complied with the non-discrimination requirements of video dialtone, and thus have not met the ongoing requirements to be a video dialtone operator. NCTA at 3 n.4; Time Warner at 15.

²¹Time Warner at 11.

²²*Id.*

²³BCAPF at 3-4.

²⁴*See* 47 C.F.R. § 76.1505.

with MFS to discuss its PEG obligations.²⁵ According to BCAPF, MFS has not yet engaged in negotiations with either the City of Boston or the Massachusetts Community Antenna Television Commission. BCAPF requests that the Commission deny MFS's application to provide open video system service for the City of Boston until MFS is able to demonstrate that it will comply with the PEG requirements of the Commission's rules.

III. DISCUSSION

13. We find that New York City has raised a significant issue regarding the ambiguity of MFS's representations of its anticipated system channel capacity. This issue is shared by MFS's representations in its Boston application. With respect to system capacity, MFS states that it will configure its channel capacity and network facilities according to programmer demand for its system.²⁶ Furthermore, it states that it currently anticipates that fiber optic facilities on any part of its network will consist of a minimum of 110 analog channels.²⁷ However, MFS does not provide the maximum total anticipated channel capacity of its system.

14. This determination is important for two reasons. First, our rules provide that if demand for capacity does not exceed channel system capacity (after video programming providers have been allowed a reasonable opportunity to seek carriage) there is no limit on the amount of capacity on which the open video system operator and its affiliates may select programming.²⁸ However, if demand for carriage exceeds system capacity, our rules limit the open video system operator and its affiliates to selecting programming on one-third of the system.²⁹ Without the total anticipated channel capacity of MFS's systems, prospective providers and the Commission will be unable to discern when demand for carriage will exceed the channel capacity of MFS's system. Second, if demand for carriage exceeds system capacity, the Commission and programming providers will be unable to discern whether MFS and its affiliates are confined to their one-third share of the system without knowing the full extent of the size of the system. Accordingly, an open video system applicant must state the specific number of channels the applicant anticipates its system will carry. If the actual number of channels available at the time the system becomes operational differs, the operator may amend its certification.

15. Additionally, Time Warner, NCTA, and New York City have raised significant issues regarding MFS's status as a video dialtone provider. If these parties' arguments have merit, and if MFS is currently not providing video services as a video dialtone operator, but is

²⁵*Id.*

²⁶MFS's Form 1275s, Exhibit 2.

²⁷*Id.* In addition, New York has provided evidence that MFS or its affiliates intend to use most of the capacity.

²⁸*Second Report and Order* at ¶ 84.

²⁹*Id.* at ¶ 7.

in fact operating a cable system, its applications would contain misrepresentations because they would have failed to indicate MFS's cable operator status on the applications.

16. With respect to the allegations regarding PEG negotiations, program access and wire access, these issues are beyond the scope of the certification process. The certification process was established to examine the adequacy and accuracy of the information contained in the Form 1275 filing.

17. We note that denial of an open video system certification application does not preclude an applicant from filing a revised certification or from refileing its original submission with a statement addressing the issues in dispute.³⁰ Such refileings must be served on any objecting party or parties and affected local communities. In this instance, MFS may file revised certifications or refile its original submissions with a statement addressing the concerns raised regarding its system channel capacity.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the certification of Metropolitan Fiber Systems/New York Inc., d/b/a/ MFS Telecom of New York to operate an open video system is **DENIED**.

19. **IT IS FURTHER ORDERED** that the certification of Metropolitan Fiber Systems/McCourt, Inc. to operate an open video system is **DENIED**.

20. This action is taken by the Chief, Cable Services Bureau, pursuant to the authority delegated by § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

John E. Logan
Deputy Chief, Cable Services Bureau

³⁰47 C.F.R. § 76.1502(d).