

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

In the Matter of: )  
 )  
Everest Midwest Licensee, L.L.C. )  
 )  
Certification to Operate an )  
Open Video System )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 13, 2003**

**Released: March 14, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. On March 4, 2003, Everest Midwest Licensee, L.L.C. ("Everest") 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.<sup>1</sup> Everest seeks to operate an open video system in Kansas City, Missouri (the "Service Area").<sup>2</sup> In accordance with our procedures,<sup>3</sup> the Commission published notice of receipt of the Everest certification application<sup>4</sup> and posted the application on the Internet.<sup>5</sup> The City of Kansas City ("the City") 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.<sup>6</sup> In light of the brief period (ten days) for Commission review of certification filings, the Commission concluded that Congress intended there to be a streamlined certification process.<sup>7</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

<sup>1</sup> 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502.

<sup>2</sup> The Service Area for which Everest seeks certification in Missouri is Kansas City (CUID MO1107).

<sup>3</sup> See *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*").

<sup>4</sup> See *Public Notice*, "Everest Midwest Licensee, L.L.C. Files An Application For Open Video System Certification," DA 03-671 (MB, rel. March 6, 2003).

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

<sup>6</sup> See 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1501. An operator of a cable system however, 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(1)(l). The effective competition requirement does not apply to a local exchange carrier that is also a cable operator that seeks open video system certification within its cable service area.

<sup>7</sup> *Second Report and Order*, 11 FCC Rcd at 18243.

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.<sup>8</sup>

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.<sup>9</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>10</sup> (b) a representation that the applicant will comply with the Commission's regulations under Section 653(b) of the Communications Act;<sup>11</sup> (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 City of Kansas City indicates that on April 23, 2000, Everest was granted a franchise to provide cable television service within the City, and that subsequently the City granted Everest's request to extend the period for completing construction of the system until April 22, 2007.<sup>12</sup> The City states that it was recently informed that Everest would be unable to continue with its construction of the system, even with the extended construction schedule, because of difficulty negotiating economically feasible pole attachment agreements and other financial concerns.<sup>13</sup> The City states that Time Warner Cable is the primary source of multi-channel video programming within Kansas City and asserts that the potential for competition is its overriding concern with respect to Everest's continued presence in Kansas City.<sup>14</sup> It asserts that because of the priority placed on competition in the multi-channel video programming market in Kansas City, the City does not oppose the application of Everest to become an OVS provider rather than serve the City as a cable television system operator.<sup>15</sup> However, the City states its intention to require of any OVS provider a franchise, to impose the 5% gross revenue charge identical

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<sup>8</sup> *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).

<sup>9</sup> *Second Report and Order*, 11 FCC Rcd at 18245-46.

<sup>10</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. 47 C.F.R. § 76.1500(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. § 76.1500(g).

<sup>11</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>12</sup> Comments at 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> *Id.* at 7.

to that imposed on a cable operator, and to implement fair PEG requirements and obligations.<sup>16</sup>

### III. DISCUSSION

5. Everest has submitted an application on FCC Form 1275 for certification to operate an open video system in the Service Area. We have reviewed the information contained in Everest's application. As required by Form 1275, the Everest 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. Everest also confirmed that it served its application upon the designated telecommunications officials in the community involved.

6. The ten day statutorily mandated review period for open video system certification applications requires us to confine our review to issues concerning Everest's FCC Form 1275 and its related attachments.<sup>17</sup> The purpose of the open video system certification process is to determine whether Everest's application complies with Congress' mandate and our regulations.<sup>18</sup> By submitting a completed Form 1275, Everest 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 the City will require Everest to have a franchise in order to provide open video service. With regard to the process of obtaining local franchising authority, we note that this issue related to matters beyond the adequacy and accuracy of Everest'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.<sup>19</sup> In addition, the Commission states that the decision of whether to impose a franchise on an open video system operator is committed to the discretion of the locality.<sup>20</sup>

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

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<sup>16</sup> *Id.*

<sup>17</sup> See *RCN Telecom Services of California, Inc. d/b/a RCN of California*, 13 FCC Rcd 12009 (1998).

<sup>18</sup> *Id.*

<sup>19</sup> *Open Video Systems*, Order on Remand, 14 FCC Rcd 19700, 19704 (1999).

<sup>20</sup> *Id.*

**IV. ORDERING CLAUSES**

8. Accordingly, **IT IS ORDERED**, that the application of Everest Midwest Licensee, L.L.C. for certification to operate an open video system in the Service Area<sup>21</sup> **IS GRANTED**.

9. This action is taken by the Deputy Chief, Policy Division, Media Bureau, pursuant to the authority delegated by Section 0.283 of the Commission's Rules.<sup>22</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>21</sup> See *supra* n. 2, listing the community contained within the Service Area.

<sup>22</sup> 47 C.F.R. § 0.283.