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

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

THIRD REPORT AND ORDER AND SECOND ORDER ON RECONSIDERATION

Adopted: August 7, 1996 **Released: August 8, 1996**

By the Commission: Commissioner Quello issuing a separate statement.

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I. INTRODUCTION

1. The Telecommunications Act of 1996[1] added Section 653 to the Communications Act, establishing open video systems as a new framework for entry into the video programming marketplace.[2] Section 653 required that the Commission, within six months after the date of enactment of the 1996 Act, "complete all actions necessary (including any reconsideration) to prescribe regulations" to govern the operation of open video systems.[3] Accordingly, on March 11, 1996, the Commission issued a *Notice of Proposed Rulemaking* regarding open video systems.[4] Based on the extensive record submitted in response to the *Notice*, on May 31, 1996, the Commission adopted a *Second Report and Order* in which we prescribed rules and policies

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996 (the "1996 Act").

[2]Communications Act of 1934, as amended, § 653, 47 U.S.C. § 573 ("Communications Act").

[3]47 U.S.C. § 573(b), (c).

[4]*Report and Order and Notice of Proposed Rulemaking* in CS Docket No. 96-46 and CC Docket No. 87-266 (terminated), 61 FR 10496 (3/14/96), FCC 96-99, released March 11, 1996 ("*Notice*").

for governing the establishment and operation of open video systems.[5]

2. As designed by Congress and implemented by the Commission, open video systems provide an option, particularly to local exchange carriers ("LECs"), for the distribution of video programming to consumers other than as a traditional cable television system regulated under Title VI.[6] In the *Second Report and Order*, the Commission sought to fulfill Congress' intent by establishing streamlined regulations that provide telephone companies with the flexibility to establish and operate open video systems. We determined that such flexibility would encourage these and other entities to enter the video programming distribution market by deploying open video systems, thereby fostering competition to incumbent cable operators. We further ensured that, as required under Section 653, open video system operators provide unaffiliated video programming providers with non-discriminatory access to their systems.[7]

3. We received 19 petitions for reconsideration of the *Second Report and Order*.[8] In this *Second Order on Reconsideration*, we address issues raised in these filings, and modify or clarify our regulations accordingly. In addition, in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 ("*Cable Reform Proceeding*"), we sought comment on the definition of "affiliate" in the context of open video systems.[9] In light of the six-month deadline set by Congress for the Commission to establish final open video system regulations, we address the affiliate issue in this *Third Report and Order*.

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[5]*Second Report and Order* in CS Docket No. 96-46, 61 FR 28698 (6/5/96), FCC 96-249, released June 3, 1996 ("*Second Report and Order*").

[6]Communications Act § 653(a)(3), 47 U.S.C. § 573(a)(3).

[7]*See, e.g., Second Report and Order* at para. 2.

[8]A listing of the parties' filing petitions for reconsideration and oppositions or comments, and the abbreviations used to refer to such parties, is attached as Appendix A. We note that on July 12, 1996, the Cable Services Bureau issued an Order declining to grant the motion of the National League of Cities, et al. to accept their late-filed petition for reconsideration, but granting their motion, in the alternative, to accept the petition as a filing in opposition to and/or in support of the petitions for reconsideration that were timely filed. *See Order*, CS Docket No. 96-46, DA 96-1127 (released July 12, 1996).

[9]*Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 (Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996) ("*Cable Reform Proceeding*"), 11 FCC Rcd 5937 (1996).

II. THIRD REPORT AND ORDER -- DEFINITION OF "AFFILIATE"

A. Background

4. In the *Cable Reform Proceeding*, we amended certain of our rules to conform with the clear, self-effectuating provisions of the 1996 Act and sought comment on proposed rules to the extent necessary to implement various provisions of the 1996 Act.[10] We specifically sought comment regarding the definition of "affiliate" in the context of the new statutory provisions governing open video systems.[11] We noted that Congress added a new definition of "affiliate" in Section 3 of Title I of the Communications Act. This new provision defined "affiliate" for purposes of the Act, unless the context otherwise requires, as:

> a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to "own an equity interest (or the equivalent thereof) of more than 10 percent.[12]

We noted also, however, that Congress did not alter the separate definition of "affiliate" set forth under Title VI. Under Title VI, the term "affiliate" is defined, when used in relation to any person, to mean "another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person."[13] We sought comment regarding the definition of the term "affiliate" in the context of the new statutory provisions for open video systems.[14]

5. BellSouth maintains that the existing affiliate definition under Title VI should continue to apply in open video systems.[15] BellSouth contends that the Commission should assume that Congress was satisfied with the existing definition in Title VI since had it believed the existing definition inadequate, it could have amended the definition in Title VI as easily as

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[10] *Id.*

[11] *Id.* at 5970. We subsequently received comments in the *Cable Reform Proceeding*, CS Docket 96-85, addressing this issue. For purposes of our decision in this *Third Report and Order*, we incorporate those comments to the extent they specifically address the definition of affiliation in the context of the statutory provisions for open video systems.

[12] Communications Act § 3(1), 47 U.S.C. § 153(1).

[13] Communications Act § 602(2), 47 U.S.C. § 522(2).

[14] *Cable Reform Proceeding*, 11 FCC Rcd at 5970. We also sought comment on the definition of affiliate in the context of other provisions of the 1996 Act. *Id.* at 5963-65, 5970. We will address the affiliation definition for these provisions in the *Cable Reform Proceeding*.

[15] BellSouth Comments in the *Cable Reform Proceeding* at 3-4.

it added the definition of affiliate in Title I.[16] Further, BellSouth cites to 47 C.F.R. § 76.5(z) (definition of "affiliate") as already containing a definition of affiliate that follows the Title VI definition exactly.[17] RCN also concludes that Congress did not intend the Commission to apply a different definition of "affiliate" to LEC systems under Title VI than that applicable to Title VI generally and maintains that the existing Title VI definition of affiliate should be applicable to all provisions of the Title.[18]

6. Some commenters contend that the definition of "affiliate" should focus on common ownership or control between the subject entities.[19] These parties assert that the Title VI definition of affiliate based on control is consistent with Congressional intent because it will lessen the regulatory burden on open video system providers and not duplicate the overly intrusive and burdensome regulatory structure of video dialtone.[20] USTA states that Congress provided for reduced regulatory burdens for an open video system operator and a definition of affiliation premised upon control will further this end.[21] According to USTA, such limited regulation will permit the proper functioning of market forces and competition making an arbitrary percentage determination of ownership unnecessary.[22] Bell Atlantic contends that finding common ownership or control at low levels of equity ownership or non-equity interests could impede the ability of telephone companies and cable operators to construct pro-competitive business arrangements.[23] For example, Bell Atlantic suggests that where a single person owns a majority interest in a particular entity, the other owner(s) should not be deemed to have "control" over the entity, even if their interests exceed a specific threshold.[24]

7. In its comments, Time Warner acknowledges that the 1996 Act's addition of a general definition of "affiliate" under Title I, while retaining the preexisting affiliate definition contained in Title VI, provides the Commission discretion to fashion different affiliation tests to

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[16] *Id.* at 4.

[17] *Id.* at n.9. Section 76.5(z) provides for the definition of affiliate as, "[w]hen used in relation to any person, another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person." 47 C.F.R. § 76.5(z). This is the same definition as provided in Title VI.

[18] *See* RCN Comments in the *Cable Reform Proceeding* at 6.

[19] *See* Bell Atlantic Comments in the *Cable Reform Proceeding* at 2; USTA Comments in the *Cable Reform Proceeding* at 10-11.

[20] *Id.*

[21] USTA Comments in the *Cable Reform Proceeding* at 11.

[22] *Id.*

[23] *See* Bell Atlantic Comments in the *Cable Reform Proceeding* at 2.

[24] *Id.*

effectuate the varying policy goals in each specific context.[25] Time Warner urges the Commission to apply the Title VI definition in the context of the statutory provisions for open video systems, as embodied in the notes accompanying Section 76.501 (cross-ownership) of the Commission's rules.[26] Section 76.501 reflects the broadcast attribution rules contained in the notes to Section 73.3555 of our rules.[27] Time Warner contends that two provisions of the statute -- the statutory prohibition on open video system operators not to discriminate against video programming providers with respect to carriage and the channel occupancy restrictions in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[28] -- are based on the same policy of ensuring that facilities operators affiliated with video programmers do not favor such programmers in determining carriage on their facilities.[29] Because the Commission adopted an attribution standard for the 1992 Cable Act's channel occupancy restrictions based on the notes to Section 73.3555, Time Warner argues that the same definition should be used to accomplish the non-discriminatory requirements that are at the heart of open video systems.[30]

8. City and County of Denver, Colorado states in its comments that the Title VI definition of "affiliate" should be used to determine interest because Congress did not intend for more than one definition of "affiliate" to be used as it regards the provision of cable services and the new Title I definition of "affiliate" would not recognize Congressional intent.[31] In applying Title VI, however, the City and County of Denver asserts that the Commission does not have the discretion to add a percentage of ownership interest to the federally-developed Title VI affiliation standard, and submits that in this regard, any ownership interest constitutes an affiliation between

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[25]Time Warner Comments in the *Cable Reform Proceeding* at 31.

[26]*Id.*

[27]47 C.F.R. § 73.3555. Generally, under the broadcast attribution rules, all voting stock interests of 5% or more are considered attributable. All non-voting stock interests (including most "preferred" stock classes) are generally not attributable. There are several exceptions to the 5% voting stock benchmark. For example, there is a "single majority shareholder" exception, which provides that minority voting stock interests will not be attributed where there is a single holder of more than 50% of the outstanding voting stock. In addition, the interests of sufficiently "insulated" limited partners are not attributable, upon a certification that the limited partner is not materially involved, directly or indirectly, in the management or operations of the licensee's media-related activities. *Id.* at note 2. The broadcast attribution rules are currently the subject of Commission review. *See Notice of Proposed Rulemaking*, MM Docket Nos. 94-150, 92-251, 87-154, 10 FCC Rcd 3606 (1995).

[28]Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992). The 1992 Cable Act amends Title 6 of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

[29]Time Warner Comments in the *Cable Reform Proceeding* at 31-32 (*citing* Sections 573(b)(1)(A) and 533(f)(1)(B) of the 1996 Act).

[30]*Id.* at 31-32.

[31]City and County of Denver, Colorado Comments in the *Cable Reform Proceeding* at 5-6.

the cable service provider and another entity.[32]

9. According to some commenters, the Commission must define any relationship exceeding the carrier-user relationship as "affiliation" for open video system purposes.[33] The National League of Cities, et al. propose that the Commission define "affiliate" broadly in a way that encompasses the variety of equity and non-equity relationships through which an open video system operator might seek effectively to control program selection.[34] The National League of Cities, et al. argue that any relationship between an open video system operator and an ostensibly non-equity related programmer other than that of carrier and user inherently poses a substantial risk that the open video system operator will exercise control over programming, or will have an incentive for discrimination in rates, terms, or conditions.[35] The National League of Cities, et al. contend that all relationships between the open video system operator and a video programmer that exceed a carrier-user relationship must be considered to involve "control" and be counted as "affiliation" for purposes of the open video system capacity limitations.[36] To truly limit "unaffiliated" programmers to a carrier-user relationship, the National League of Cities, et al. propose that the ownership criterion be limited to 1%.[37]

10. Alliance for Community Media, et al. state that the definition of "affiliate" should be broad enough to prevent an open video system operator from exercising editorial and financial control over entities that are formally "unaffiliated" for purposes of this provision.[38] Alliance for Community Media, et al. urge the Commission to adopt regulations which recognize that contractual arrangements through unaffiliated companies may hide affiliations which are not revealed by an "equity" ownership test.[39] Alliance for Community Media, et al. do not believe the "affiliate" definition found in Section 3 of the 1996 Act, which defines ownership as an equity

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[32] *Id.*

[33] *See* National League of Cities, et al. Comments in the *Cable Reform Proceeding* at 7; Alliance for Community Media, et al. Comments in the *Cable Reform Proceeding* at 3; Rainbow Comments (in CS Docket No. 96-46) at 7-8. *See also* Michigan Cities, et al. Reply Comments (in CS Docket No. 96-46) at 6 (stating that they support the comments of National League of Cities, et al. and others that independent programmers must be truly "independent" to be counted towards the two-thirds requirement of the Act).

[34] *See* National League of Cities, et al. Comments in the *Cable Reform Proceeding* at 3.

[35] *Id.* at 12.

[36] *Id.*

[37] *Id.* at 14. However, the National League of Cities, et al. note that a standard based solely on ownership percentage or managerial control would ignore the other types of relationships that can give an open video system operator effective programming control.

[38] Alliance for Community Media, et al. Comments in the *Cable Reform Proceeding* at 2.

[39] *Id.* at 3.

interest of 10%, sufficiently protects would be unaffiliated programmers from manipulation of the system by open video system providers, claiming that there is a significant danger of abuse because the open video system operator may still be able to favor some "unaffiliated" programmers over others for editorial and/or marketing purposes.[40] In order to prevent such potential abuse, Alliance for Community Media, et al. recommend that in every circumstance where an open video system operator has contracted with an entity it certifies as unaffiliated, the Commission should examine that contract and any additional contracts between the operator and the provider.[41]

11. Similarly, TCI and Rainbow have urged the Commission to define the term "affiliate" to include all entities who have any financial or business relationship with the open video system operator, whether by contract or otherwise, directly or indirectly other than the carrier-user relationship.[42] In comments to the *Notice*, these parties submit that this definition would capture all relevant relationships between the LEC and users of its open video system facilities and would encompass the existence of any ownership or financial interest, affiliation, contingent interest, or other agreement.[43] These parties claim that such a definition is necessary because otherwise a LEC would be able to favor video programming providers with whom it has a close relationship without violating the statutory proscription on discrimination.[44] TCI notes that the 1996 Act did not change the special definition of affiliate applicable to Title VI, which does not reference any particular ownership interest but speaks in terms of "ownership or control." TCI contends that the Commission remains free to fashion various applications of this term appropriate to the particular policy goals at issue in a particular context.[45] In response, U S West argues that the Commission should reject TCI and Rainbow's expanded definition of the term "affiliate" because it would make practically every video programming provider over an open video system an affiliate of the open video system operator.[46]

B. Discussion

12. As an initial matter, we agree with those commenters that argue that the new definition of "affiliate" in Title I does not apply to matters under Title VI since Title VI contains a separate definition of that term that does not set a percentage threshold as to what constitutes

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[40] *Id.*

[41] *Id.*

[42] *See* TCI Comments (in CS Docket No. 96-46) at 8; Rainbow Comments (in CS Docket No. 96-46) at 7-8.

[43] *Id.*

[44] *Id.*

[45] *See* TCI Comments (in CS Docket No. 96-46) at n.25.

[46] *See* U S West Reply Comments (in CS Docket No. 96-46) at 10.

ownership.[47] For our purposes, therefore, we must determine the point at which an open video system operator's ownership or control of another entity, or another entity's ownership or control of the open video system operator, makes that entity an affiliate for purposes of Section 653. This determination is an important element of Congress' open video system framework. For instance, where demand for carriage exceeds system capacity, Section 653(b)(1)(B) prohibits an open video system operator "and its affiliates" from selecting the video programming services for carriage on more than one-third of the activated channel capacity.[48] Thus, if we set the threshold too high, and fail to designate as "affiliates" those entities that are in fact controlled by the open video system operator, it could conflict with Congress' intent that open video system operators be permitted to control the programming selection on no more than one-third of the activated channel capacity. On the other hand, if we set the threshold too low, we run the risk of unduly restricting the flow of capital and other beneficial arrangements at levels that pose no threat of actual or effective control by the open video system operator.

13. In defining "affiliate" for purposes of Section 653, we will adopt the attribution standard that we use in the program access context.[49] Thus, as we do in the program access context, we will apply the definitions contained in the notes to 47 C.F.R. § 76.501 (which reflect the broadcast attribution rules contained in the notes to 47 C.F.R. § 73.3555), with certain modifications. For instance, in contrast to the broadcast attribution rules: (a) 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; (b) we will not adopt a single majority shareholder exception;[50] and (c) all limited partnership interests of 5% or greater will qualify, regardless of insulation.[51] In addition, as with both the program access standard and the broadcast attribution rules, actual working control, in whatever manner exercised, will also be deemed a cognizable interest.[52]

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[47]*See* Communications Act § 602(2), 47 U.S.C. § 522(2).

[48]Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

[49]*See* 47 C.F.R. § 76.1000(b). *See also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), First Report and Order*, 8 FCC Rcd 3359, 3370-71 (1993).

[50]Under the single majority shareholder exception, where there is a single holder of more than 50% of a corporation's outstanding voting stock, minority voting stock interests in the corporation are not attributable to shareholders irrespective of whether they exceed the 5% benchmark. *See* 47 C.F.R. § 73.3555 note 2.

[51]*See* 47 C.F.R. § 76.1000(b).

[52]*See* 47 C.F.R. §§ 73.3555 note 1, 76.501 note 1. There is substantial case law interpreting the meaning of "control" under the broadcast attribution rules that we will apply here. *See, e.g., Benjamin L. Dubb*, 16 FCC 274, 289 (1951); *WWIZ, Inc.*, 36 FCC 562, *recon. denied*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824, 828-29 (D.C. Cir. 1965), *cert. denied*, 383 US 967 (1966); *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); *Metromedia, Inc.*, 98 FCC 2d 300, 306 (1984), *recon. denied*, 56 RR2d 1198 (1985), *appeal dismissed sub*

14. We decline Time Warner's suggestion that we adopt an affiliation standard identical to the attribution standard applied to the mass media multiple ownership rules, as set forth in the notes to 47 C.F.R. § 76.501. The mass media multiple ownership rules are intended primarily to ensure diversity of information sources to the American public.[53] Section 653, in addition to promoting diversity of video programming sources, also is designed to reduce the likelihood that open video system operators will discriminate against or otherwise disfavor unaffiliated programming providers.[54] This anti-discrimination objective is analogous to the purpose of the program access rules. These dual objectives warrant adoption of a definition of "affiliate" that is similar to the program access attribution standard. Moreover, by adopting our program access attribution standard, we avoid the possibility that a video programming provider will be considered an affiliate of the open video system operator for one purpose but not for the other.

15. We believe that the certainty provided by the definition we adopt above is preferable to the *ad hoc* inquiries into ownership or control suggested by some of the commenters. In addition, to the extent these commenters are proposing a majority ownership standard, we believe, as noted above, that interests well below 50% ownership are sufficient to provide open video system operators with the incentive to favor an affiliated programming provider over a competing provider with which the operator has no affiliation. Similarly, we decline to adopt the Title I definition of "affiliate." As described above, we believe that our program access standard is the appropriate standard for identifying the interests at issue here. No commenter has proposed that we adopt the Title I standard, or provided any record evidence that would support such a standard. We have no basis to find that the Title I standard would identify the interests at issue as well as our program access standard.

16. We also decline to define "affiliate" as a 1% ownership interest or as any relationship exceeding a carrier-user relationship, as suggested by certain commenters. In essence, many of these commenters argue that a strict standard is necessary because of the inherent risk that an open video system operator would favor a programming provider with which it has any relationship beyond carrier-user. We decline to depart from the focus in Section 602(2) on ownership or control, and believe that the definition we adopt today will permit us to make such determinations.[55] In addition to being inconsistent with Title VI, we believe that these

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nom., California Association of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985).

[53] *See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Broadcast Entities*, 97 FCC 2d 997, 1004 (1984), *recon. granted in part*, 58 RR 2d 604 (1985), *further recon.* 1 FCC Rcd 802 (1986).

[54] *See, e.g.,* Communications Act §§ 653(b)(1)(A), 653(b)(1)(E), 47 U.S.C. §§ 573(b)(1)(A), 573(b)(1)(E).

[55] *See* Communications Act § 602(2), 47 U.S.C. § 522(2). We therefore do not believe it is necessary, as the Alliance for Community Media, et al. suggest, to examine all contracts between open video system operators and unaffiliated programming providers.

restrictive definitions could unnecessarily restrict the flow of capital to unaffiliated programming providers, and could unduly hamper the effective functioning of the platform. For instance, a carrier-user relationship standard could prevent an open video system operator from providing billing and collection services to programming providers, or from entering into co-packaging arrangements. We decline to impose a standard that implicates such relationships.

III. SECOND ORDER ON RECONSIDERATION

A. Qualifications to be an Open Video System Operator

1. Background

17. New Section 653(a)(1) of the Communications Act provides:

> A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section.[56]

In the *Second Report and Order*, we concluded that the second sentence of Section 653(a)(1) authorizes the Commission to allow non-LECs to operate open video systems and to allow LECs to operate open video systems outside of their telephone service areas when the public interest, convenience, and necessity are served.[57] We found that it would serve the public interest, convenience and necessity to permit other entities, besides LECs, to become open video system operators.[58] With respect to cable operators within their cable franchise areas, we concluded that it would serve the public interest, convenience, and necessity to allow a cable operator to operate an open video system in its cable franchise area if it is subject to "effective competition" under Section 623(l)(1) in the franchise area.[59] This condition applies even if a cable operator also provides local exchange service within the franchise area.[60] In addition, we provided an exception for cable operators that are not subject to effective competition within their cable franchise areas if they can demonstrate that the entry of a facilities-based competitor into the

[56]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[57]*Second Report and Order* at para. 12.

[58]*Id.*

[59]*Id.*

[60]*Id.*

cable franchise area would likely be infeasible.[61] We also stated that our decision to allow cable operators to become open video system operators under the above circumstances shall not be construed to affect the terms of any existing franchise agreements or other contractual agreements.[62]

18. Several petitioners contend that a cable operator should not be allowed to convert its cable system into an open video system, regardless of the circumstances. Metropolitan Dade County asserts that effective competition is not an adequate precondition to ensure consumers are offered a real choice and that the open video system alternative was created to stimulate competition in the video marketplace, not to enable cable operators to escape the cable franchising process.[63] Michigan Cities, et al. argue that permitting non-LEC entry into the open video system marketplace will discourage competition because LECs will have less incentive to enter the market if all competitors receive the same regulatory benefits.[64] Michigan Cities, et al. also oppose the exception provided for certain cable systems not subject to effective competition, arguing that the exception is overly broad because there are a variety of reasons why facilities-based competition may be unlikely to develop in a particular cable franchise area.[65]

19. Michigan Cities, et al. claim that various references to "common carriers," "local exchange carriers," and "telephone companies" in the statute and its legislative history demonstrate Congress' intent to limit the open video system option to LECs.[66] According to Michigan Cities, et al., allowing non-LECs to become open video system operators is inconsistent with the plain language of the 1996 Act, and thus the Commission incorrectly concluded that it had the authority under Section 4(i) to permit such a result.[67] The National League of Cities, et al. assert that Congress could not have intended cable operators to become open video system operators because it would defeat the purposes of certain provisions of the Communications Act.[68] For example, they argue that conversion to an open video system would enable a cable operator: (a) to avoid a franchise renewal agreement with updated public, educational, and governmental

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[61] *Id.* at para. 24.

[62] *Id.* at para. 12.

[63] Dade County Petition at 3. *But see* U S West Opposition at 3-4 (the Commission's decision to allow cable operators to convert to open video if they are subject to effective competition serves the public interest).

[64] Michigan Cities, et al. Petition at 7.

[65] *Id.* at 8-9 (*citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report* in CS Docket No. 94-48, 9 FCC Rcd 7442, 7550-54 (1994)).

[66] Michigan Cities, et al. Petition at 3-4.

[67] *Id.* at 6-7.

[68] National League of Cities, et al. Petition at 17-19.

("PEG") requirements; (b) to evade the cable-telco buyout restrictions; and (c) to circumvent a local franchising authority's decision to deny the renewal of the cable operator's franchise.[69] The National League of Cities, et al. also argues that the Commission's decision is inconsistent with the statute's use of cable operators' PEG and franchise fee obligations as a yardstick for open video system operators.[70]

20. U S West urges the Commission to clarify that cable operators may become open video system operators upon the termination of their franchise agreements, even in the absence of effective competition.[71] U S West argues that the Commission's contractual concerns would not apply once a franchise agreement has terminated.[72] The National League of Cities, et al., on the other hand, is concerned that cable operators will simply declare themselves open video system operators upon the expiration of their franchise agreements, rather than seek renewal.[73]

21. Other petitioners claim that all cable operators, without limitation, should be allowed to convert their cable systems to open video systems. NCTA and Cox petition the Commission to eliminate its general restriction that cable operators may not become open video system operators within their cable franchise areas until they are subject to effective competition.[74] NCTA asserts that the inherent design of an open video system, allowing multiple programming providers to compete for subscribers, obviates the need for an effective competition requirement.[75] NCTA argues that Congress would have limited the open video system option to areas already served by franchised cable operators if it had intended open video systems to exist only in areas served by more than one provider.[76] Cox argues that it is inconsistent to preclude cable operators that may eventually become subject to effective competition from converting to an open video system, while allowing an exception for cable operators that can demonstrate that facilities-based competition is infeasible in their franchise areas.[77] Cox reasons that, by allowing

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[69] *Id.*

[70] *Id.* at 17.

[71] U S West Petition at 3-4.

[72] *Id.*

[73] National League of Cities, et al. Petition at 17. *See also* Michigan Cities, et al. Opposition at 11-12 (allowing cable operators to convert to open video upon the termination of their franchise agreements would not stimulate competition).

[74] NCTA Petition at 7-8; Cox Petition at 8-10. *But see* Michigan Cities, et al. Opposition at 9 (the Commission's "effective competition" restriction is a necessary limitation on the ability of cable operators to switch to open video).

[75] NCTA Petition at 7-8.

[76] *Id.* at 7.

[77] Cox Petition at 9-10.

this exception, the Commission implicitly recognizes that the primary reason for reduced regulatory burdens for open video systems is not to foster facilities-based competition, but to foster competition among competing programmers on an open platform.[78] Cox further contends that there are no countervailing public policy reasons for imposing an artificial disadvantage upon incumbent cable operators in contradiction of the Commission's acknowledgement that the same options generally should be available to all entities.[79]

22. Comcast argues that the Commission's decision to permit cable operators that are subject to effective competition to convert to open video systems is rendered meaningless by the qualification that the terms of an existing local franchise agreement remain enforceable until the termination of the agreement.[80] Comcast claims that this restriction eliminates the primary incentive for operating an open video system, i.e., relief from many of the Title VI obligations and regulations.[81] Comcast reasons that, when a cable operator converts its cable system to an open video system, local franchising authorities lose their authority under Section 624 to enforce certain franchise requirements, since that provision is inapplicable to open video systems.[82] In response, Alliance for Community Media, et al. assert that there is "no legal principle which permits unilateral abrogation of existing contractual commitments to permit an entity to take advantage of an *elective* deregulatory option."[83] Alliance for Community Media, et al. further argue that, because Title VI has not been rescinded, the enforcement powers of local franchising authorities under Section 624 remain intact.[84] NATOA claims that exempting cable operators from their franchise obligations would constitute a taking of local government property.[85]

23. Cox and NCTA assert that the Commission incorrectly concluded that Section 653(a)(1) authorizes it to restrict the ability of cable operators that also provide local exchange service within their cable franchise areas to convert to open video.[86] Cox asserts that this conclusion contradicts the Commission's determination that the first sentence of Section 653(a)(1)

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[78] *Id.*

[79] *Id.* at 8 (*citing Second Report and Order* at para. 18).

[80] Comcast Petition at 5.

[81] *Id.*

[82] *Id.* at 6.

[83] Alliance for Community Media, et al. Opposition at 3 (emphasis in original). *See also* Michigan Cities, et al. Opposition at 10-11 (nothing in the 1996 Act indicates that Congress intended to abrogate existing franchise agreements).

[84] Alliance for Community Media, et al. Opposition at 3.

[85] NATOA Opposition at 8.

[86] Cox Petition at 4; NCTA Petition at 6-7.

permits LECs to operate open video systems in their telephone service areas "without qualification."[87] Cox argues that the Commission's interpretation of the second sentence of Section 653(a)(1) would lead to the false conclusion that the Commission could also determine when "any other person" that is providing local exchange service could become an open video system operator.[88] Cox claims that the Commission wrongly views the second sentence as providing an exception limiting which LECs can operate open video systems without qualification, while the more reasonable construction is that the second sentence permits other entities, in addition to LECs, to operate open video systems when deemed by the Commission to serve the public interest, convenience, and necessity.[89] In response, Sprint asserts that Cox and NCTA's argument is based on the incorrect premise that a cable operator that becomes a LEC somehow loses its identity as a cable operator, even though it continues to provide cable services.[90]

2. Discussion

24. We decline to modify our decision in the *Second Report and Order* to allow non-LECs to operate open video systems, and to allow cable operators that are subject to effective competition in their cable franchise areas to convert their cable systems to open video systems. As discussed at length in the *Second Report and Order*, we disagree with Michigan Cities, et al. that our decision allowing non-LECs to operate open video systems is inconsistent with the plain language of the 1996 Act or the Act's legislative history.[91] As we explained in the *Second Report and Order*, permitting non-LECs to become open video system operators is not only a permissible reading of the statute, but is most consistent with Congress' goal of opening all telecommunications markets to competition. Because our decision is consistent with the statute, we also disagree that the Commission does not have the authority under Section 4(i) to permit non-LECs to become open video system operators. In addition, we disagree with the argument of the National League of Cities, et al. that our decision to permit cable operators to convert to open video may defeat the purposes of other Title VI requirements that apply to cable operators. Congress established cable and open video systems as two distinct video delivery models, each offering a particular combination of regulatory benefits and burdens. That an entity, by assuming the regulatory responsibilities of an open video system, may be relieved of regulatory responsibilities relating to cable is neither novel nor improper.

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[87]Cox Petition at 4.

[88]*Id.*

[89]*Id.* at 5. *See also* NCTA Petition at 6-7 (arguing that the language of Section 653(a)(1) plainly allows any entity that qualifies as a LEC to operate open video systems, regardless of whether the entity also fits into other legal categories).

[90]Sprint Opposition at 3-4.

[91]*Second Report and Order* at paras. 14-17. We also described therein the availability of Section 4(i) as an alternative basis for our authority to permit cable operators to operate open video systems. *Id.* at paras. 20-22.

25. While we believe that cable operators should be allowed to operate open video systems, we also decline to alter our decision that cable operators may do so in their existing cable franchise areas only if they are subject to "effective competition." As we stated in the *Second Report and Order*, the underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator.[92] We believe that Congress exempted open video system operators from much of Title VI regulation because, in the vast majority of cases, they will be competing with incumbent cable operators for subscribers.[93] Our effective competition restriction implements Congress' intent by ensuring that, where it is the incumbent cable operator itself that seeks to enter the marketplace as an open video system operator, there is at least one other multichannel video programming provider competing in the market (or, if the cable operator enters under the "low penetration" test for effective competition,[94] that it does not possess a level of market power that Congress believed requires regulation).

26. We are not convinced, as NCTA argues, that the potential presence of multiple video programming providers on open video systems obviates the need for an effective competition requirement. There is no assurance that any particular system will generate sufficient competition between providers of "comparable" video programming services to qualify as a meaningful stand-in for effective facilities-based competition.[95] Nor do we find significant the fact that Congress did not specify that open video systems may operate only in areas currently served by cable. Given that cable passes approximately 96% of all television households nationwide, we do not believe that any purposeful intent can be inferred from the fact that Congress did not limit open video systems to only those areas already served by franchised cable operators.[96]

27. Moreover, the underlying competitive premise of Section 653 is not dependent on the contractual nature of the cable operator's franchise agreement. While we agree with U S West that the expiration of a franchise agreement may remove a contractual impediment to a cable operator's conversion to an open video system, the public interest rationale that gave rise to the effective competition restriction remains. So long as a cable operator has the ability to exercise market power -- i.e., is not subject to effective competition -- it has not met the necessary pre-condition for operating an open video system. Thus, in response to U S West, we find that it would not serve the public interest to allow incumbent cable operators, in the absence

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[92] *Second Report and Order* at para. 24.

[93] *Id.*

[94] *See* Communications Act § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A).

[95] *See* Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

[96] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Second Annual Report* in CS Docket No. 95-61, 11 FCC Rcd 2060, 2063 (1996) ("*Second Competition Report*").

of effective competition, to become open video system operators upon the termination of their franchise agreements.

28. We also continue to disagree with Cox's argument that the Commission has no authority to determine whether cable operators that are also LECs may operate open video systems. As explained in the *Second Report and Order*, the second sentence of Section 653(a)(1) authorizes the Commission to determine whether any cable operator may convert to open video, regardless of other services it may also provide, including local exchange service.[97] The Commission retains its authority over cable operators that also become LECs because, as Sprint notes, a cable operator does not lose its identity as a cable operator simply by offering additional types of services.[98] Finally, we disagree with Comcast that, since Title VI franchise agreements are unenforceable against open video system operators, conversion to open video should preempt the terms of a valid franchise agreement.[99] Comcast cites no basis for its belief that Congress intended to give cable operators the discretion to revoke their franchise agreements at will, or that requiring cable operators to abide by their valid agreements would be contrary to Congress' open video system framework. To the contrary, cable operators may operate open video systems only to the extent the Commission finds it serves the public interest, convenience and necessity. We do not believe that it would be in the public interest to permit cable operators to abrogate their otherwise valid and enforceable franchise agreements in order to become open video system operators.

B. Certification Process

1. Background

29. Section 653(a)(1) requires open video system operators to certify compliance with the Commission's regulations under Section 653(b).[100] The Commission must publish notice of receipt of a certification filing and must approve or disapprove the certification within ten days of receipt.[101] In the *Second Report and Order*, the Commission found that Congress intended the certification process to be streamlined and declined to impose extensive pre-certification requirements.[102] For example, open video system operators are not required to revise their cost

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[97]*Second Report and Order* at para. 25.

[98]*See* Sprint Opposition at 3-4.

[99]Franchise agreements are binding contracts. *See Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, __U.S.__, 116 S. Ct. 2374, 2410 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[100]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[101]*Id.*

[102]*Second Report and Order* at paras. 28-30.

allocation manuals prior to certification, but must certify that they will file changes to their manuals at least 60 days before the commencement of service.[103] Comments or oppositions to a certification filing must be filed within five days of the Commission's receipt of the certification.[104] Any certification filings that the Commission does not disapprove within ten days of receipt will be deemed approved.[105]

30. Several petitioners reiterate previous arguments that the Commission should require an open video system operator, as a precondition to certification: (a) to obtain the consent of local governments for use of public rights-of-way;[106] (b) to obtain approval from local franchising authorities regarding the manner in which PEG obligations will be fulfilled;[107] (c) to file a revised cost allocation manual;[108] and (d) to create a separate subsidiary to operate its open video systems.[109] Alliance for Community Media, et al. are concerned that using the dispute resolution process to resolve conflicts involving these issues will be unnecessarily cumbersome and difficult.[110] NCTA asserts that open video system operators must demonstrate compliance with specific rules governing channel allocation and carriage rates, and the Commission must make "affirmative findings compliance" within the ten-day review period.[111] In response to these petitions, several parties expressed their opposition to pre-certification requirements.[112]

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[103] *Id.* at para. 33.

[104] *Id.* at para. 35.

[105] *Id.*

[106] Dade County Petition at 4; Village of Schaumburg Petition at 1; Alliance for Community Media, et al. Petition at 17-18.

[107] *Id.*

[108] NCTA Petition at 3-4; Alliance for Community Media, et al. Petition at 17-18.

[109] Alliance for Community Media, et al. Petition at 2-4.

[110] *Id.* at 17. *See also* NCTA Petition at 4 (urging the Commission to enforce compliance with its revised cost allocation rules prior to the certification process, rather than engage in *post facto* proceedings and remedies). *But see* USTA Opposition at 4-5 (extensive pre-certification requirements are unnecessary since "the Commission developed an appropriate mechanism for dispute resolution should LEC compliance be in doubt").

[111] NCTA Petition at 3-6. *But see* USTA Opposition at 3-4 (requiring detailed filings incorporating non-discrimination requirements would turn the certification process into a "back door" Section 214 requirement); MFS Communications Opposition at 4 (Congress required certification of compliance, not documentary proof of compliance).

[112] U S West Opposition at 4-5 (adopting burdensome pre-certification requirements would deter LECs from electing the open video system option, in contravention of Congress' intent); Residential Communications Opposition at 10-11 (adopting stringent pre-certification requirements would contradict the language of the statute and would violate the 1996 Act's pro-competitive underpinnings); NYNEX Opposition at 3-5 (proponents of pre-certification

31. The Telephone Joint Petitioners ask the Commission to reconsider its decision to require open video system operators to obtain Commission approval of their certifications prior to the commencement of construction, when new physical plant is required.[113] These petitioners argue that it is not the Commission's responsibility to "ensure that the public rights-of-way are disrupted only by those who are authorized to operate open video systems."[114] They contend that permission to use rights-of-way is a matter for local governments and the owners of any private property that may be involved, and that cable operators are not required to obtain federal certification before constructing in public rights-of-way.[115]

32. Several petitioners claim that the Commission did not establish adequate procedures for providing notice of certification filings. The National League of Cities, et al. seek a requirement that certifications specify which local governments are affected and are served on those local governments.[116] Failure to require adequate notice, they allege, violates due process and hinders the ability of local authorities to apply the necessary management conditions over public rights-of-way.[117] Municipal Services, et al. argue that, in order to provide municipalities a meaningful opportunity to respond within the five-day period for comments and oppositions, an open video system operator must simultaneously notify a municipality that it is requesting a certification within the municipality's jurisdiction.[118] In response, MFS Communications claims that these notice proposals are unnecessary because local governments will learn of any proposed open video system well in advance of its operation when the operator negotiates its PEG obligations and obtains any necessary rights-of-way permits.[119]

2. Discussion

33. The *Second Report and Order* fully explains our reasons for not imposing pre-certification requirements regarding public rights-of-way, PEG obligations, revisions to cost

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requirements are merely seeking a competitive or negotiating advantage); MFS Communications Opposition at 3-5 (the Commission already considered and properly rejected the imposition of pre-certification requirements).

[113]Telephone Joint Petitioners Petition at 10.

[114]*Id.* (quoting *Second Report and Order* at para. 34).

[115]*Id.*

[116]National League of Cities, et al. Petition at 12 n.32.

[117]*Id.* at 12-13 n.32.

[118]Municipal Services, et al. Petition at 6-7. *See also* Alliance for Community Media, et al. Petition at 15-16 (requesting that open video system operators be required to provide local public notice in advance of filing for certification and to include proof of notice in their certification filings).

[119]MFS Communications Opposition at 5.

allocation manuals, or separate subsidiaries.[120] Petitioners have presented no new evidence or arguments that would cause us to change our earlier conclusion.

34. In addition, we will maintain our rule that certification filings will be deemed approved unless disapproved by the Commission within ten days. Petitioners have not demonstrated that affirmative approval is necessary to provide notice to outside parties or to assure adequate Commission review. Also, because certification precedes the operator's actual implementation of the Commission's rules, we disagree with NCTA that the Commission is required, at this stage of the process, to do more than obtain adequate representations that the applicant will comply with the Commission's requirements. Further, we believe that any conflicts that arise regarding the operator's conduct can be addressed more fully in the 180-day dispute resolution process than in the ten-day certification process. Finally, we will not modify our rule that, if new physical plant is required, open video system operators must obtain Commission approval of their certification prior to the commencement of construction.[121] This requirement poses no significant additional burden on operators and will inform local authorities which entities have been granted enforceable rights to use the public rights-of-way.

35. We do believe, however, that it is appropriate for a local government to have a reasonable opportunity to respond to a certification filing that implicates its community. We therefore will revise FCC Form 1275, our proposed certification form, to require applicants to list the names of the local communities in which they intend to operate, rather than describe them generally.[122] This modification will reduce the potential for confusion or ambiguity by providing more useful and precise information to local communities. Because some local communities may not have ready access to the Internet or to the Commission's public notices, we will also require applicants for certification to serve a copy of their FCC Form 1275 filing on the clerk or other designated official of all affected local communities on or before the date on which it is filed with the Commission. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the filing of the FCC Form 1275 with the Commission. Applicants also must inform the local communities that any oppositions and comments must be filed with the Commission within five days of an applicant's filing and must be served on the applicant.

[120] *Second Report and Order* at paras. 28-30.

[121] *See Id.* at para. 34.

[122] A revised FCC Form 1275 and instructions, reflecting the changes herein, is attached at Appendix C. This revised FCC Form 1275 is subject to approval by the Office of Management and Budget.

C. Carriage of Video Programming Providers

1. Notification and Enrollment of Video Programming Providers

a. Background

36. In the *Second Report and Order*, we stated that the Commission will: (a) issue a Public Notice to announce receipt of an open video system operator's "Notice of Intent" to establish an open video system; (b) list the Public Notice in the Commission's Daily Digest; (c) place the Notice of Intent on the Commission's Internet site; (d) make the Notice of Intent available for inspection in the Cable Services Bureau's Reference Room; and (e) require that the Notice of Intent be served on all local cable television franchising authorities located in the anticipated service area of the open video system. In so doing, we specifically rejected suggestions that an open video system operator's notice be disseminated directly to community information providers, local newspapers, trade publications and the local media, among others. We found that any benefits of additional distribution would be outweighed by the costs and that the Commission's Public Notice process will disseminate the information.[123]

37. On reconsideration, the Alliance for Community Media, et al. urge the Commission to require an open video system operator to provide local notice of its intent to establish an open video system by placing the Notice of Intent in local newspapers and in telephone bill inserts, if the system operator is also a telephone company. They argue that the current requirements are insufficient for local and non-profit program services because many people still do not have access to the Internet and those with access may not check the Commission's Internet site on a regular basis. Contrary to the Commission's finding, these parties assert that the additional cost imposed on an open video system operator of disseminating notice as they urge will not outweigh the public interest benefits resulting from the increased diversity of programming provided by these services.[124]

b. Discussion

38. In the *Second Report and Order* we fully considered the costs and benefits of requiring an open video system operator to provide local notice of its intent to establish an open video system.[125] The Alliance for Community Media, et al. do not provide additional evidence concerning these costs or benefits. We reiterate our finding that dissemination of the Notice of Intent as required under the *Second Report and Order* will be a sufficient means for an entity to notify the public of its intention to establish an open video system.

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[123] *Id.* at paras. 45-46.

[124] Alliance for Community Media, et al. Petition at 16.

[125] *Second Report and Order* at paras. 45-46.

2. *Open Video System Operator Discretion Regarding Video Programming Providers*

a. *Background*

39. In the *Second Report and Order*, we found that it would serve the public interest, convenience and necessity to permit an open video system operator to limit the ability of a competing, in-region cable operator, or a video programming provider affiliated with such a cable operator, to obtain capacity on the open video system.[126] We stated, however, that we will consider petitions from competing, in-region cable operators showing that facilities-based competition will not be significantly impeded in their particular circumstances, such that the cable operator should be granted access to the open video system. In this regard, we provided a specific exception for the situation where: (a) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (b) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.[127]

40. On reconsideration, NCTA states that Section 653(b)(1)(a) directs the Commission to promulgate rules that "prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system."[128] NCTA argues that this provision requires the unqualified non-discriminatory treatment of video programming providers by open video system operators, and that the Commission therefore erred in allowing an open video system operator to discriminate against one particular class of entities seeking access, namely, cable operators.[129]

41. In addition, NCTA and Cox dispute the Commission's reliance on Section 653(a)(1) in distinguishing between cable operators and other potential video programming providers.[130] Cox asserts that Section 653 only addresses who may operate an open video system and, that contrary to the Commission's findings, "has nothing to do with who may obtain capacity on an [open video] system." Cox argues that, if Congress had intended the provision to address the access rights of video programming providers, it would have placed it with the other exceptions to the general prohibition against discrimination among video programming providers (e.g., PEG and must-carry obligations), rather than in the section regarding the certification

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[126] *Id.* at para. 52.

[127] *Id.* at para. 56.

[128] NCTA Petition at 8 (*citing* Communications Act § 653(b)(1)(A)).

[129] *Id.*

[130] NCTA Petition at 9-10; Cox Petition at 7-8.

process.[131]

42. Third, NCTA and Cox dispute the Commission's finding that an open video system operator may limit the access of a cable operator but not other potential video programming providers. Cox states that the Commission's finding in the *Second Report and Order* that, given Section 653(a)(1)'s reference to "any other person," the Commission erred in not permitting an open video system operator to also deny access to other multichannel video programming distributors, such as direct broadcast satellite ("DBS") services and wireless cable service providers.[132] NCTA states that the Commission's reasoning that allowing an open video system operator to limit access by cable operators would foster facilities-based competition compels the Commission to allow system operators to also limit access by DBS and wireless providers.[133]

43. Finally, NCTA argues that, having found in Section 653(a)(1) the discretion to decide when cable operators may obtain open video system capacity, the Commission erred in delegating this decision to the open video system operator. NCTA contends that it violates basic administrative law for a government agency to delegate its statutory authority to private parties absent express authority to do so.[134]

44. In its opposition to these cable operators' petitions, MFS argues that Congress, in enacting Section 653(a)(1), specifically authorized the Commission to limit cable operators' use of open video systems to instances that are "consistent with the public interest, convenience and necessity."[135] MFS states that, until open video system operators can establish meaningful competition for cable operators, it would not be in the public interest to force these start-up entities to provide access to their competitors because: (a) it would allow cable operators to tie up capacity on an open video system without any reciprocal ability of the open video system operator to use the cable operator's facilities; (b) it would allow the cable operator to avoid its own construction costs; and (c) it would give cable operators access to confidential business plans or information.[136]

45. Tele-TV disputes the cable operators' arguments that the 1996 Act gives incumbent cable operators an "unqualified" right to use open video systems. Tele-TV argues that Section 653(b)(1)(A) must be read in conjunction with Section 653(a)(1), such that the discrimination

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[131] *Id.*

[132] *Id.* at 6-7.

[133] NCTA Petition at 9-10.

[134] *Id.* at 8-9 (*citing,* among others, *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936)).

[135] MFS Communications Opposition at 6-7 (*citing* Communications Act § 653(a)(1)).

[136] *Id.* at 7-8. *See also* NYNEX Opposition at 6.

"among video programming providers" forbidden under Section 653(b)(1)(A) must be discrimination among only those entities eligible to "provide video programming" under Section 653(a)(1).[137] Second, Tele-TV rejects NCTA's assertion that the Commission erred in "delegating" its authority under Section 653(a)(1) to open video system operators. Tele-TV states that the Commission has not delegated any statutory authority; rather, it has merely established a specific exception to the general rule concerning cable operators' access to open video systems, which Tele-TV contends is within the Commission's rulemaking authority.[138]

46. The Staff of the FTC and DOJ Antitrust Division also dispute cable operators' assertions, stating that the Commission's approach is consistent with well established legal and economic principles. For example, the FTC and DOJ Antitrust Division state the Supreme Court has held that a restraint on competition, such as the Commission's rule permitting open video system operators to preclude access by cable operators, is reasonable if it enhances consumer welfare.[139] They assert that the Commission's approach will enhance consumer welfare by fostering competition among cable and telephone companies, which likely will reduce prices and increase quality of service. The FTC and DOJ Antitrust Division also reject NCTA's argument that the Commission should have extended an open video system operator's ability to preclude access by cable operators to cover DBS and wireless service providers. The FTC and DOJ Antitrust Division explain that only cable operators possess market power in multichannel video programming distribution, and therefore may have different incentives than DBS and wireless providers, such as using open video mainly as a means to protect the market power of cable systems rather than as a means of expanding their penetration.[140] The FTC and DOJ Antitrust Division emphasize that only an open video system, independent from competitors with market power, will provide consumers with the benefits of competition.[141]

47. The petitions of the Telephone Joint Petitioners generally support our rules concerning cable operators' access to open video systems. They seek clarification of the second prong of the exception to this general rule, where a competing, in-region cable system and its affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area. Specifically, the Telephone Joint Petitioners urge the Commission to clarify that this exception coincides with an exception to the cable-telephone buy-out restriction in the 1996 Act, which applies only to small, rural cable systems that have no more than 17,000 subscribers in total and that are not owned by one of the 50 largest multiple cable system

[137]Tele-TV Opposition at 8-9.

[138]*Id.* at 10.

[139]FTC and DOJ Antitrust Division Opposition at 5 (*citing*, among others, *NCAA v. Board of Regents*, 468 U.S. 85 (1984)).

[140]*Id.* at 6-8.

[141]*Id.* at 8.

operators ("MSOs"). These parties assert that our present rules may require an open video system operator whose system overlaps with a small portion of a cable system to allow a cable operator to gain access to the open video system even though the cable operator is owned by large MSO, and even though the large MSO in question also owns the incumbent cable system that might overlap a majority of the open video system's service area. The Joint Telephone Petitioners believe that this approach will ensure that an open video system operator must lease capacity only to truly small, rural cable systems.[142]

b. Discussion

48. We find that the *Second Report and Order* fully considered most of the arguments and evidence raised on reconsideration by NCTA and Cox, as described above. We explained in the *Second Report and Order* that Section 653(a)(1) specifically permits the Commission, "consistent with the public interest, convenience and necessity" to determine when a cable operator may provide programming through an open video system.[143] We also fully explained our construction of Section 653(b)(1)(A), which gives the Commission the discretion to determine when it is in the public interest, convenience and necessity for a cable operator either to become an open video system operator[144] or to provide video programming over another entity's open video system.[145] In the latter context, we determined that, because Section 653(a)(1) specifically addresses a cable operator's provision of video programming, the provision allows the Commission to determine when to permit a cable operator to provide such programming, notwithstanding the 1996 Act's general non-discrimination requirements contained in Section 653(b)(1)(A).[146] We therefore deny the petitions of NCTA and Cox to the extent they raise these particular contentions.

49. We also reject the cable operators' argument concerning access to open video systems by DBS and wireless service providers. As explained in the *Second Report and Order*, and expanded upon by the Staff of the FTC and DOJ Antitrust Division, the 1996 Act expressed a clear preference for facilities-based competition between cable operators and telephone companies, and allowing an open video system operator generally to limit the ability of a competing, in-region cable operator to obtain capacity on its system would encourage cable operators to develop and upgrade their own wireline systems.[147] In addition, as the Staff of the

[142]Telephone Joint Petitioners Petition at 11-12.

[143]*Second Report and Order* at para. 51.

[144]*Id.* at paras. 13-22.

[145]*Id.* at paras. 51-56.

[146]*Id.* at para. 51.

[147]*Id.* at para. 52.

FTC and DOJ Antitrust Division argue, cable operators possess substantial market power, and because these markets have been protected by high entry barriers, cable operators have been able to maintain prices above the level that would prevail if the market were competitive.[148] Because of this market power, cable operators may have different incentives for seeking open video system capacity than would MVPDs that do not have such market power, such as DBS and wireless cable providers. For instance, a cable operator may have an incentive to see that the open video system is not successful, and thus may seek to obtain capacity merely to protect and continue to exploit its market power.

50. As the Staff of the FTC and DOJ Antitrust Division also point out, enabling a cable operator to obtain open video system capacity means that less capacity will be available for use by the system operator and for other entities.[149] The open video system therefore could become a less attractive alternative for consumers, which would help preserve the cable operator's market power. We believe that these rationales currently do not apply to DBS or wireless cable providers because these MVPDs do not enjoy substantial market power. We therefore reaffirm our conclusion in the *Second Report and Order*. However, at such time that DBS or wireless cable providers possess sufficient market power to raise concerns similar to those associated with existing in-region, competing cable operators, we will reexamine this conclusion.

51. We also disagree with NCTA's argument that the Commission impermissibly delegated to open video system operators the discretion to preclude cable operators from obtaining capacity on the system. In determining that Section 653(a)(1) allows the Commission to determine when a cable operator may access an open video system, we merely interpreted the statute to allow the Commission to prescribe regulations to govern this situation. As aptly characterized by Tele-TV, we adopted regulations that set forth the parameters for where a competing, in-region cable operator's access to an open video system may be limited, and for where access may not be limited. In any case, we will modify our regulations to emphasize our decision that, pursuant to the second sentence of Section 653(a)(1), the public interest, convenience and necessity is served by generally prohibiting a competing, in-region cable operator from obtaining capacity on an open video system. As described in the *Second Report and Order*, we believe that this approach will foster facilities-based competition and encourage competing, in-region cable operators to develop its own system rather than occupy open video system capacity that could be used by another entity.

52. We clarify that there are two exceptions to this general rule. First, a competing, in-region cable operator may access an open video system when the open video system operator determines that it is in its interests to grant access. For example, as the Staff of the FTC and

[148]FTC and DOJ Antitrust Division Opposition at 5 (*citing First Report and Order in the Matter of Annual Assessment of the Status of Competition in Video Programming*, 9 FCC Rcd 7442, 7545 (1994)).

[149]*Id.* at 8.

Antitrust Division state, an open video system operator may have less incentive to exclude a cable operator that is the most efficient provider of programming in part of the open video system's service area.[150] Moreover, an open video system operator may determine that the viability of its system is enhanced by carriage of video programming that is offered by the competing, in-region cable operator. We believe that it is not appropriate for the Commission to deny an open video system operator the independent business discretion to decide that a cable operator's presence on its system may be beneficial. This business discretion may prove critical to the success of the open video system, and we believe that because such success will foster competition in the video delivery marketplace, this exception will serve the public interest. Second, a competing, in-region cable operator will be granted access to an open video system when such access will not significantly impede facilities-based competition. As previously determined, one situation in which facilities-based competition will be deemed not to be significantly impeded is where: (a) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (b) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area. We believe that this slightly modified approach continues to provide broad flexibility to administer the open video system and to allow market forces to emerge as determinatives, thereby encouraging entities to deploy open video systems.

53. Finally, in response to the Telephone Joint Petitioners' petition, we clarify the specific exception under which a competing, in-region cable operator may access an open video system. These parties argue that the exception may require an open video system operator whose system overlaps with a small portion of a cable system to allow that cable system to obtain capacity on the open video system even though the cable system might be owned by a large MSO that also operates the cable system covering a majority of the open video system's service area. We believe that the Telephone Joint Petitioners misunderstand when the exception will apply. We reiterate that, in order for a competing, in-region cable operator to fit within the exception, such a cable operator and its affiliated systems must serve a total of less than 17,000 subscribers within the open video system's service area, regardless of whether the systems are owned by or affiliated with one of the 50 largest MSOs. Under the scenario posited by the Telephone Joint Petitioners, the cable system that overlaps the open video system service area only to a small degree would not have to be granted carriage on the open video system because that cable operator's subscribership, when combined with the subscribership of the affiliated cable system serving a majority of the open video system's service area, presumably would exceed 17,000.

[150] *Id.*

3. *Allocation of Open Video System Channel Capacity to Unaffiliated Video Programming Providers*

a. General Approach

(1) Background

54. In the *Second Report and Order*, we permitted an open video system operator to implement its own method for allocating channel capacity to unaffiliated video programming providers, so long as capacity is allocated in an open, fair, non-discriminatory manner. We stated that the process must be verifiable and insulated from any bias by the system operator.[151]

55. On reconsideration, NCTA reiterates arguments contained in its earlier comments that the Commission should adopt uniform rules for the allocation of open video system capacity because this approach will allow video programming providers to avoid an increase in their costs of doing business by having to learn the allocation procedures in each jurisdiction where they seek access.[152] NCTA adds that uniform rules also will relieve aggrieved programmers of the "dual burdens" of initiating the complaint process and suffering any competitive imbalance while such a complaint is pending.[153]

56. NYNEX rejects NCTA's approach as unsupported by any evidence that it would benefit any party. NYNEX states that, even under NCTA's approach, parties still would have many issues to discuss, and that a "real and substantial loss" would result from the delay required for the Commission to determine national standards. NYNEX believes that NCTA would have the Commission stifle creativity among new entrants.[154]

57. The Telephone Joint Petitioners also refute NCTA's argument that uniform allocation rules will decrease video programming providers' costs of doing business. They argue that the existing primary outlet for video programming are cable systems, all of which have varying practices for obtaining programming. The Telephone Joint Petitioners thus assert that programming vendors already incur the costs of accommodating multiplicity in pursuing access to multichannel video programming distribution systems, and that there is no reason to believe that dealing with open video system operators will be any more costly than dealing with cable

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[151] *Id.* at para. 72.

[152] NCTA Petition at 17 (*citing* NCTA Comments (filed April 1, 1996) at 13-14).

[153] *Id.* at 18.

[154] NYNEX Opposition at 5.

operators.[155]

(2) Discussion

58. NCTA's arguments were fully considered and addressed in the *Second Report and Order*. NCTA offers no additional facts or arguments to support their position. Accordingly, we decline to reconsider our previous conclusion.

b. Reallocation of Channel Capacity

(1) Background

59. In the *Second Report and Order*, we required open video system operators to allocate open capacity, if any is available, at least once every three years.[156] On reconsideration, the Joint Telephone Petitioners urge the Commission to increase this period to at least once every five years. They state that it typically takes at least five years for a new programming service to become viable, and that such new services thus have sought carriage arrangements on cable systems of between five and ten years in duration. The Joint Telephone Petitioners state that, if an open video system operator knows it may have to reduce the number of channels it controls on its system in three years in order to accommodate additional demand for carriage from other video programming providers, it will be unlikely to offer these new, independent channels a carriage agreement of longer than three years.[157]

(2) Discussion

60. Other parties urged the Commission to adopt a five-year period in the record for the *Second Report and Order*.[158] In requiring that an open video system operator reallocate open capacity at least every three years, we stated that requiring reallocation every three years will permit an open video system operator to sufficiently accommodate subsequent requests for carriage by video programming providers, while not causing unreasonable disruption to the

[155]Telephone Joint Petitioners Opposition at 2-3. On July 16, 1996, the Telephone Joint Petitioners filed a Motion to Accept Late-Filed Opposition, stating that despite a good faith effort, they were unable to file their opposition to petitions for reconsideration filed in response to the *Second Report and Order* by the July 15, 1996 deadline. Pursuant to 47 C.F.R. §§ 1.3 and 1.45, we hereby grant the Telephone Joint Petitioners' motion and will consider their opposition herein. We find good cause for accepting the pleading and that the public interest is served because accepting the pleading will allow the Commission to consider the issues raised on reconsideration on a more complete record.

[156]*Second Report and Order* at para. 92.

[157]Joint Telephone Petitioners Petition at 12.

[158]*See* HBO Comments (in CS Docket No. 96-46) at 7-8; NYNEX Comments (same) at 8-9.

system.[159] The Telephone Joint Petitioners do not provide evidence that would compel the Commission to reconsider that conclusion. We note in this regard that no new programming service, which the Telephone Joint Petitioners assert would favor a longer reallocation period, have filed for reconsideration in this proceeding.

c. Channel Positioning

(1) Background

61. In the *Second Report and Order*, we permitted an open video system operator to assign channel positions, subject to Section 653's non-discrimination requirements.[160] On reconsideration, the Alliance for Community Media, et al. state that an open video system operator still may discriminate against an unaffiliated video programming provider by offering a provider an unattractive channel or block of channels. They urge the Commission to reconsider its decision to allow an open video system operator to assign channel positions and require the involvement of an independent office or board to impartially assign channel positions.[161]

(2) Discussion

62. In the *Second Report and Order* we determined that the statute and our implementing regulations will prevent discrimination against unaffiliated video programming providers, notwithstanding an open video system operator's participation in the channel allocation process. We specifically rejected the assertions of commenters that an open video system operator should be required to delegate responsibility for channel capacity allocation to an independent entity.[162] The Alliance for Community Media, et al. do not present new facts or arguments to support the mandatory involvement of an independent entity. Accordingly, we decline the Alliance for Community Media's request for reconsideration.

4. Channel Sharing

a. Background

63. In the *Second Report and Order*, we found that the statute permits an open video system operator to administer channel sharing on its system, and to determine whether to create shared channels for some or all of the duplicative programming on the system. We further clarified that each video programming provider offering a programming service that is placed on

[159]*Second Report and Order* at paras. 96-97.

[160]*Id.* at para. 99.

[161]Alliance for Community Media, et al. Petition at 20.

[162]*Second Report and Order* at para. 41.

a shared channel must reach its own agreement with the programming service to offer that service to subscribers. We stated that, once the programming service has reached agreements with all of the relevant providers, additional consent of the programming service is not necessary for the open video system operator to place the programming service on a shared channel.[163]

64. On reconsideration, Alliance for Community Media, et al. argue that our channel sharing rules, taken in combination with our regulations governing carriage rates charged by an open video system operator, will allow an open video system operator to exercise unreasonable control over the programming on the platform. They assert that our rules will permit a system operator to refuse to place a programming service carried by an unaffiliated video programming provider on a shared channel, thereby requiring that provider to lease a full channel instead of only a pro-rata share of a channel if the programming was placed on a shared channel. The Alliance for Community Media, et al. believe that this could make it impossible for unaffiliated video programming providers to compete, and urges the Commission to modify its rules to ensure that an unaffiliated provider can avail itself of the benefits of channel sharing at its own request.[164]

65. ESPN argues on reconsideration that the Commission erred in not conditioning the placement of a programming service on a shared channel upon the consent of the programming service. ESPN believes that all video programming providers must have the explicit permission of a programming service in order to participate in a channel sharing arrangement with an open video system operator. If each provider has obtained such consent from the programming service, ESPN states that it would be unnecessary for the system operator to obtain additional consent from the programming service in order to place the service on a shared channel.[165]

66. NCTA urges the Commission to state that any advertising availabilities ("ad avails") be shared on a proportional basis among all video programming providers carrying that programming service.[166] NCTA states that the revenue from the sale of these time slots is an increasingly important source of income for cable operators, and that if an open video system operator or its affiliates are able to receive all such revenues they will have a significant financial advantage over other video programming providers offering that programming service.[167]

67. Both USTA and the Telephone Joint Petitioners reject ESPN's argument that

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[163] *Id.* at paras. 102-104.

[164] Alliance for Community Media, et al. Petition at 19.

[165] ESPN Petition at 2-3.

[166] NCTA Petition at 19-20. By "ad avails," we mean the time slots to be made available by a programming service carried on a shared channel to video programming providers offering that service for local advertising.

[167] *Id.*

programming services should be allowed to approve channel sharing arrangements. While USTA believes that a video programming vendor should have the protections provided for in law, USTA believes that an open video system operator would not be the appropriate party "to become enmeshed in any potential dispute" between a programming vendor and a video programming provider. USTA states, that in practice, an open video system operator will need to be able to rely on the representations of a video programming provider that it may enter into channel sharing arrangements.[168] The Telephone Joint Petitioners state that ESPN's approach would give programming services veto power over an open video system operator's decision to use shared channels, which would contravene the plain language of Section 653(b)(1)(C).[169]

b. Discussion

68. In response to the Alliance for Community Media, et al.'s petition, we first clarify that there is no requirement that a system operator charge a video programming provider a pro-rata fee because a programming service carried by that provider is placed on a shared channel.[170] Thus, even if a video programming provider's programming service is placed on a shared channel, the video programming provider may be required to pay the same rate as if the programming service was placed on a non-shared channel. We think this clarification addresses the Alliance for Community Media, et al.'s concern that an open video system operator will engage in rate discrimination by placing favored video programming providers' programming services on shared channels. We decline the Alliance for Community Media's request for reconsideration on this issue.

69. Second, ESPN argued that channel sharing should be conditioned on the approval of programming services in its reply comments to the *Notice*. We fully considered those views in the *Second Report and Order*, where we stated that so long as each video programming provider has the contractual right to offer a particular program service to subscribers, it is unnecessary for the open video system operator to obtain the consent of the programming service in order to place that service on a shared channel.[171] In addition, we note that a programming service will be placed on a shared channel only if more than one video programming provider secures the rights to offer the particular programming service to subscribers as part of their package of programming. We reiterate that channel sharing is merely a technical method by which an open video system operator may enhance the efficiency of its system by using only one channel to carry programming offered by multiple video programming providers, and again decline to adopt ESPN's proposal.

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[168]USTA Opposition at 12-13.

[169]Telephone Joint Petitioners Opposition at 14.

[170]*See* Section III.D., below.

[171]*Second Report and Order* at para. 103.

70. We agree with NCTA that ad avails associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner. Examples of acceptable methods of sharing ad avails include apportioning the revenues from such ad avails on a per subscriber basis or apportioning the rights to sell the avails themselves. We will clarify that arrangements with regard to ad avails will be considered a term or condition of carriage, and an open video system operator must comply with Section 653(b)(1)(A) in negotiating their apportionment.[172]

5. Open Video System Operator Co-Packaging of Video Programming Selected by Unaffiliated Video Programming Providers

a. Background

71. In the *Second Report and Order* we concluded that Section 653(b)(1)(B), which states that nothing in that section should be construed to limit "the number of channels that the carrier and its affiliates may offer to provide directly to subscribers," permits an open video system operator to enter into agreements to co-package the video programming selected by unaffiliated video programming providers with the operator's selected programming, and market the combined offerings as one package to subscribers.[173] In addition, we determined that an unaffiliated video programming provider may enter into such agreements with other unaffiliated providers.[174] We also noted that Congress applied Section 616 of the Communications Act governing the regulation of carriage agreements to open video system operators, and that under this section, an open video system operator may not generally engage in anti-competitive behavior with respect to unaffiliated video programming providers and programming services.[175]

72. ESPN argues on reconsideration that the Commission should require that co-packaging arrangements be conditioned on the consent of any programming services involved. ESPN states that program license agreements frequently contain negotiated terms related to the marketing of a programming service, including packaging parameters and trademark use guidelines. In addition, programming services themselves often are under contractual restraints as to the use of program vendor trademarks and the names or likenesses of persons appearing in programs. ESPN therefore argues that programming services must be able to approve co-packaging arrangements in order to comply with their license agreements.[176]

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[172]Communications Act § 653(b)(1)(A).

[173]*Second Report and Order* at para. 108.

[174]*Id.*

[175]*Id.* at para. 109.

[176]ESPN Petition at 3-4.

73. The Joint Telephone Petitioners respond that the Commission's rules do not, and could not, alter the copyright laws. They argue merely that any programmer wishing to enter into a co-packaging arrangement will have an obligation to ensure that any copyright or trademark restrictions to which it is subject are not violated, regardless of whether the Commission takes action as ESPN requests.[177]

b. Discussion

74. We decline to adopt ESPN's proposal to require the consent of any programming services involved before a video programming provider may enter into a co-packaging agreement. We recognize ESPN's legitimate concerns that its program license agreements frequently contain negotiated terms related to the marketing of a programming service, including packaging parameters and trademark use guidelines. However, these are contractual matters that we believe are best left to the individual negotiations between the parties involved. If a video programming provider enters into a co-packaging arrangement that breaches its contractual obligations, we believe that ESPN and other such programming services already possess adequate remedies at law. Nothing in our rules should be construed to infringe upon the rights of programming services with respect to their program license obligations.

D. Rates, Terms, and Conditions of Carriage

1. Just and Reasonable Carriage Rates

a. Background

75. Section 653 (b)(1)(A) requires that rates for carriage on open video systems be just and reasonable and not unjustly or unreasonably discriminatory. In the *Second Report and Order* we noted that this provision reflects the goal of affording unaffiliated video programming providers access to, and fair treatment on, open video systems, while at the same time preserving for open video system operators the ability to realize a return on the economic value of their investment.[178] Our rules in this area are intended to preserve the incentive of open video system operators to enter and compete with existing video programming distributors. Consistent with this goal, we eschewed traditional common carrier-style rate regulation approaches in favor of a two-step approach intended to balance the public interest in promoting competition for the provision of video programming services against the statutory requirement that we ensure just and reasonable open video system carriage rates. In general, the approach provides that rates are presumed reasonable where specified conditions are met; and, upon the filing of a complaint where the presumption conditions are not present, the burden is on the open video system operator to demonstrate that the contested carriage rate is no greater than a carriage rate imputed

[177]Telephone Joint Petitioners Opposition at 13-14.

[178]*Second Report and Order* at paras. 112, 119-120.

to the operator's affiliated video programming provider under a specified formula.

76. The just and reasonable presumption attaches to open video system carriage rates where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where the rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator. We further concluded that the mathematical average rate may be adjusted to account for legitimate variances in rates, such as discounts given for volume, contract length, creditworthiness, or the number of subscribers reached. These elements were not intended to be exclusive.

77. Once the open video system operator demonstrates that the presumption conditions are present, the burden shifts to the complainant to demonstrate that the rate is not just and reasonable. This presumption of reasonableness permits the open video system operator to implement its carriage rates and provide service without prior regulatory rate filings or review. We further concluded that this structure would provide the open video system operator with flexibility and an incentive to attract unaffiliated programming providers to the system, and would reduce litigation and administrative expenses associated with prior rate review processes. In addition, the *Second Report and Order* found that these conclusions also apply when a group of unaffiliated programming providers negotiate and obtain capacity equal to that of the open video system operator and its affiliates, if the operator or affiliate occupies less than one-third capacity.[179]

78. Where the presumption conditions are not met, and a potential video programming provider files a complaint with the Commission, the *Second Report and Order* placed the burden on the open video system operator to demonstrate that the contested carriage rate is no greater than a carriage rate that could be imputed to the operator's affiliated video programming. The *Second Report and Order* required the operator to show that it charges the unaffiliated programmer no more for carriage than it earns from carrying its own affiliates' programming, and treated analog and digital channel capacity separately for this purpose.[180] It stated that the imputed rate approach provides a legitimate basis to fulfill the law's requirement that the rate be just and reasonable, and explains that, in principle, the method chosen to arrive at the imputed carriage rate was an application of the efficient component pricing rule ("ECPR") to open video systems.[181]

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[179] *Id.* at para. 123.

[180] *Id.* at paras. 114, 125-128.

[181] William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. Reg. 171 (1994); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 Yale J. Reg. 225 (1994).

79. A number of parties filed petitions for reconsideration or clarification of these open video system carriage rate requirements.[182] In general, incumbent LECs supported the overall approach, but challenged the use of the imputed rate formula, where the presumption conditions are not met, as too regulatory.[183] In contrast, cable companies, local authorities, and other competitors argue that the procedures established are too cumbersome from a procedural perspective, and fail to protect adequately both unaffiliated programmers and LEC telephone rate payers.[184]

80. National League of Cities, et al. critique the pricing rules as inadequate to fulfill the statutory requirements of ensuring open access, nondiscrimination, and reasonable rates. It argues that the presumption approach places an undue financial and regulatory burden on the unaffiliated programmer to determine whether the LEC's terms are fair; that the Commission's rules will encourage the routine filing of carriage complaints by all video programmers that will "flood" the Commission; and that the presumption's conditions fail to protect unaffiliated programming providers. National League of Cities, et al. maintain that the criteria related to average rates is largely meaningless since only the LEC has the necessary information to make such a determination and the average may be adjusted in a variety of ways left totally indeterminate under the Commission's rules.[185]

81. MCI contends that the rules fail to establish a mechanism that prevents incumbent LECs from pricing open video system carriage rates below incremental cost due to the transfer, by means of improper cost allocation, of video-related costs to their telephone customers.[186] MCI argues further that the Commission has recognized that incumbent LECs have an incentive and opportunity to shift costs from unregulated to regulated services. MCI submits that the likelihood that open video system carriage rates will be set below incremental costs nearly guarantees that one-third of open video system capacity will be occupied by parties not affiliated with the incumbent LECs that are unlikely to complain about the carriage rates, for they will share in the cross-subsidy provided by the incumbent LEC's telephone customers.[187] National League of Cities, et al. also argue that the presumption approach permits a LEC to control effectively two-thirds of the capacity directly, and one-third indirectly, by finding and favoring a single

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[182] *See* Alliance for Community Media, et al. Petition at 19; Telephone Joint Petitioners Petition at 5-10; City of Indianapolis Petition at 3; National League of Cities, et al. Petition at 20-24; MCI Petition at 2-5; NCTA Petition at 18-19.

[183] *See* Telephone Joint Petitioners Petition at 5-10.

[184] *See* NCTA Petition at 20-24; City of Indianapolis Petition at 3; National League of Cities, et al. Petition at 20-24; MCI Petition at 2-6.

[185] National League of Cities, et al. Petition at 20-23.

[186] MCI Petition at 2-3.

[187] *Id.* at 3-4.

"unaffiliated" programmer so as to meet the presumption conditions.[188]

82. MCI also contends that the open video system pricing rules will permit incumbent LECs to charge discriminatory rates once one-third of their open video system capacity is occupied by non-affiliates. MCI argues that the large amount of common telephone and open video system costs will result in a gap between the below-incremental cost rate (resulting from cross-subsidies) offered to existing non-affiliated programmers and a rate equal to incremental cost plus common costs. MCI contends that the Commission has compounded this problem by unilaterally excluding the parties harmed by the possibility of this cross-subsidization from challenging open video system carriage rates by bringing complaints against the presumptive reasonableness of the rates.[189] MCI argues, therefore, that the Commission should: (a) permit any party potentially affected by an open video system carriage rate to file a complaint with the Commission; and (b) require telephone companies seeking open video system status to publicly file incremental and stand alone telephone and video cost studies, along with appropriate subscriber and usage data as part of their open video system applications.[190]

83. In response, LECs generally urge the Commission to reject requests to reconsider the open video system pricing rules based on allegations of the potential for discriminatory pricing.[191] They state that MCI's request that the Commission reverse many of the key determinations made in crafting a rate regulation scheme suited to open video systems as new entrants without any market share or power, is simply a rehash of MCI's earlier unsuccessful advocacy of Title II-like regulation for open video systems, which should be rejected by the Commission on reconsideration.[192] USTA contends that competition would be disserved by requiring LECs to file incremental and stand-alone telephone and video cost studies with the Commission along with subscriber and usage data as MCI requests. USTA claims that the only result of such requirements would be to hamper LEC market entry, delay competition and increase costs for the LECs.[193] Similarly, RCN supports the Commission's goal of avoiding the imposition of barriers to entry similar to those that have hindered the development of competition in the multichannel video distribution market thus far. RCN notes that the Commission has long recognized, with respect to the non-dominant new entrants in the long distance and local telephone market, and in other telecommunications markets where competition exists, that Title II-type rate and entry regulation is (a) not necessary to protect consumers or to assure just and

[188]National League of Cities, et al. Petition at 22-23.

[189]MCI Petition at 3-4.

[190]*Id.* at 4-6.

[191]*See, e.g.*, USTA Opposition at 5.

[192]Telephone Joint Petitioners Opposition at 13; NYNEX Opposition at 11; USTA Opposition at 3-4.

[193]USTA Opposition at 6.

reasonable rates, and (b) likely to impair the ability of open video system operators to compete effectively in the market by "stifl[ing] price competition and service and marketing innovation."[194]

84. The Telephone Joint Petitioners also respond that there is no possibility that an open video system operator who charges one group of programmers below cost rates, and then seeks to charge another programmer a discriminatorily high rate, will escape detection by the Commission when it compares the latter programmer's rate to the weighted average rate of the first group. They strongly disagree with MCI's request that third-parties be permitted to bring complaints regarding open video system carriage rates, as well as MCI's request that open video system operators be required to produce stand alone cost studies for telephony and video.[195] The Telephone Joint Petitioners also urge the Commission to reject MCI's requests on grounds that such requirements would recreate the type of tariff proceedings that the Commission conducted under the video dialtone regime.[196] NYNEX argues that permitting third-party complaints would lead to the same results that the Commission obtained in the video dialtone process, where most, if not all, challenges against video dialtone were raised by incumbent cable interests and their affiliated programmers, rather than by unaffiliated programmers. NYNEX states that the Commission's open video system rate scheme properly focuses on that latter, rather than the former, group, and that the Commission should not countenance the regulatory tactics of competitors seeking to impede open video system.[197]

85. In their petition, the Telephone Joint Petitioners request that the Commission modify the requirements for applying the presumption. They argue that the Commission's threshold capacity requirement is unrelated to whether carriage rates are just and reasonable and will penalize open video system operators using advanced technologies. For example, the Telephone Joint Petitioners assert, operators of switched-digital open video systems will be unable to show that unaffiliated video programming providers occupy a threshold amount of capacity and will be unable to meet the presumption conditions.[198] The Telephone Joint Petitioners suggest that the Commission remove the minimum capacity requirement and instead find that the presumption applies when two unaffiliated programmers purchase any level of capacity on an open video system.[199] USTA supports the Commission's commitment to flexibility, and urges that it be extended further to permit and encourage the introduction of new technologies by

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[194]RCN Opposition at 11 (*citing Policy and Rules of Competitive Common Carrier Service and Facilities Authorizations* in CC Docket No. 79-252 (*Competitive Carrier Proceedings*), Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*) (subsequent history omitted).

[195]Telephone Joint Petitioners Opposition at 12-13.

[196]*Id.* at 13.

[197]NYNEX Opposition at 12-13.

[198]Telephone Joint Petitioners Petition at 6; *see also* USTA Opposition at 5-6.

[199]Telephone Joint Petitioners Petition at 7-8.

focusing on the presence of unaffiliated programmers, rather than the use of an arbitrary percentage of capacity utilitization before allowing LECs the safe-harbor of the presumption of just and reasonable rates.[200]

86. The Telephone Joint Petitioners further argue that the phrase "unaffiliated programmers as a group" in our presumption conditions could be interpreted as a requirement that the unaffiliated programmers market their programming as a package in competition with the open video system operator and its affiliates to meet the presumption conditions.[201] The Telephone Joint Petitioners suggest that the Commission clarify that the presumption applies whether the unaffiliated programmers market their programming in competition or in cooperation with the open video system operator's programming.[202]

87. While the Telephone Joint Petitioners agree as a general matter that the Commission's imputed rate approach is preferable to more overtly regulatory prescriptions for setting prices, they argue that the Commission has not properly applied the ECPR methodology, and that computing an imputed rate is not necessary for the purpose of establishing just and reasonable open video system carriage rates.[203] The Telephone Joint Petitioners include with their petition a "Declaration of William E. Taylor," one of the authors of an economics article on ECPR cited in the *Second Report and Order*.[204] Taylor's declaration discusses several ways in which the *Second Report and Order* allegedly misstates and misapplies the ECPR, including the premise that open video system carriage is an essential input. It generally concludes that the circumstances of the evolving video programming marketplace will not warrant the search for ECPR-based pricing standards, and urges that the marketplace itself should be able to determine the proper rates for open video system carriage.[205] The Telephone Joint Petitioners suggest that if the pricing methodology is retained, the Commission should clarify its use of the imputed rate approach and how ECPR is to apply to open video system carriage rates. The Telephone Joint Petitioners argue that the imputed rate will set an artificially low ceiling on carriage rates because it omits the incremental cost of carriage, and that a ceiling on carriage rates based on the ECPR is inappropriate because open video system operators are new entrants that will compete with incumbent cable operators and other video programming distributors.[206] They also suggest

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[200]USTA Opposition at 6 n.15.

[201]Telephone Joint Petitioners Petition at 7.

[202]*Id.* at 8.

[203]*Id.* at 8-10.

[204]*Second Report and Order* at para. 126 n.295.

[205]Telephone Joint Petitioners Petition, Declaration of William E. Taylor at 4-8.

[206]Telephone Joint Petitioners Petition at 8-10, Declaration of William E. Taylor at 6-8; *accord* NYNEX Opposition at 12.

that the use of the terms "earn" and "profit allowance" require clarification.[207]

88. Other petitioners challenge the methodology as inadequate to protect unaffiliated programmers. The City of Indianapolis and the Alliance for Community Media, et al. object to the imputed rate formula on the ground that it improperly compensates the open video system operator for lost subscribers. They argue that unaffiliated programmers will pay higher carriage rates than affiliated programmers, and this will cause unaffiliated programming provision to be unprofitable.[208] The National League of Cities, et al. interpret the imputed rate formula as improperly permitting open video system operators to charge unaffiliated programming providers a price for carriage equal to the price they charge subscribers for affiliated programming.[209]

89. MCI contends that the Commission may not use ECPR as a means of ensuring nondiscriminatory open video system carriage rates, because there is no practical method of determining whether an open video system carriage rate is greater than the rate that would be established by the ECPR. According to MCI, this is due in part to the Commission's inability to determine a carrier's actual opportunity cost.[210] MCI instead proposes that the incumbent LECs be required to charge video carriage rates in excess of the incremental cost of providing video services.[211] In response, USTA urges the Commission to dismiss MCI's efforts to increase LEC regulatory burdens by urging that video carriage rates must be delivered in excess of incremental cost.[212]

b. Discussion

90. In the *Second Report and Order* we specifically noted MCI's concerns as to the need for effective cost accounting and auditing procedures to ensure that incumbent LECs do not engage in the allocation of excessive costs to their regulated telephone services. We stated that the substantive cost allocation requirements are being addressed in a separate rulemaking.[213] In its petition, MCI has provided no new facts or arguments to justify reconsideration of these concerns in the instant proceeding.[214] We also decline to impose the other pre-certification and

[207]Declaration of William E. Taylor at 6-8.

[208]City of Indianapolis Petition at 3; Alliance for Community Media, et al. Petition at 19.

[209]National League of Cities, et al. Petition at 23.

[210]MCI Petition at 5.

[211]*Id.* at 6.

[212]USTA Opposition at 6.

[213]*Second Report and Order* at para. 29 n.92.

[214]*See generally*, 47 C.F.R. § 1.429(b) and (c).

reporting requirements MCI seeks. We believe that these requirements are inconsistent with our flexible regulatory approach to the provision of open video system, and are not necessary to protect either unaffiliated programmers or the public in general. In addition, we decline to require open video system operators to base their carriage rates on detailed studies of incremental and stand alone cost and estimates of actual opportunity cost, as suggested by MCI,[215] because of the 1996 Act's direction that Title II requirements not be applied to open video systems,[216] and the limited time allowed for the review of certifications and complaints.[217] Instead, as we discuss below, we reaffirm our imputed rate approach for determining whether carriage rates are just and reasonable where the presumption conditions are not present.

91. We also decline to adopt MCI's proposal to allow parties other than potential video programming providers seeking carriage on the open video system to file complaints with the Commission regarding the carriage rates offered by the system operator. We think that such a rule would inevitably result in the filing of numerous complaints by parties with no direct interest in providing programming over open video systems, and thus delay the initiation of open video system service. We therefore reaffirm our decision to allow only potential video programming providers to file complaints regarding open video system carriage rates. This decision does not leave other parties who claim to be adversely affected by an open video system operator's carriage rate without remedies. For example, a party seeking to challenge a rate it pays for common carrier services provided by that operator on the ground of improper cost-shifting from an open video system, retains its rights under section 208 of the Communications Act to file a complaint.[218] These statutory rights afford adequate protection in the event that third parties believe open video system operators are improperly shifting costs relating to video carriage at the expense of telephone customers.

92. We disagree with the general assertion by the National League of Cities, et al. that our presumption conditions will not provide adequate protection to unaffiliated video programming providers. As we noted in the *Second Report and Order*, where the presumption conditions are met, there is sufficient reason to conclude that the open video system is accessible and the negotiated carriage rates are just and reasonable.[219] The National League of Cities et al. have presented no new arguments or data to refute this conclusion. Moreover, we disagree with National League of Cities et al.'s contention that the presumption approach places a undue financial and regulatory burden on the unaffiliated programmer to determine whether the

[215]MCI Petition at 5.

[216]*See* Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3); Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 178 (February 1, 1996) ("Conference Report").

[217]*Second Report and Order* at para. 120.

[218]*See* 47 U.S.C. § 208.

[219]*Second Report and Order* at para. 122.

operators' rates are fair.[220] Our presumption approach strikes an appropriate balance between the interests of the open video system operator in establishing service to end users quickly, without undue regulatory intervention by competitors, and the interests of unaffiliated programmers in obtaining just and reasonable carriage rates. To the extent National League of Cities, et al.'s argument is directed at the pre-complaint rate disclosure process, we further clarify the rights of unaffiliated programmers to obtain preliminary rate estimates, and the information these estimates must contain, *infra* in Section III.H., Dispute Resolution.

93. The National League of Cities, et al. also expressed the specific concern that the presumption conditions will allow the average rate paid by the unaffiliated programming providers receiving carriage to be "weighted" or adjusted, but that only the open video system operator will possess the information necessary to calculate the average or to "weight" the average.[221] We clarify that, as part of its burden of showing that the presumption conditions are met, an open video system operator will be required to make available to a complainant all information needed to calculate the average rate paid by the unaffiliated programming providers receiving carriage on its system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate. The complainant may challenge the weighting methodology used by the open video system operator as part of its case. Requests for confidential treatment of particular information shall be addressed consistent with our rules concerning proprietary information.[222]

94. The Telephone Joint Petitioners have reiterated their original request that carriage rates be presumed just and reasonable even if a small number of unaffiliated video programming providers occupied only one channel each.[223] We again reject their suggestion on the grounds, stated in the *Second Report and Order*, that the presence of one or more unaffiliated programmers on a diminutive portion of an open video system's channel capacity is not sufficient to show that its carriage rates are just and reasonable.[224] We agree with the Telephone Joint Petitioners that the one-third threshold capacity requirement may not be appropriate in the future when advanced technologies that are under development, such as switched digital video, may be deployed. Because these technologies have not yet been deployed, however, we will not now modify the requirement. We will consider requests
to waive or otherwise modify the threshold capacity requirement to reflect the special circumstances of such advanced systems.

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[220]National League of Cities, et al. Petition at 21.

[221]*Id.* at 22.

[222]*See* 47 C.F.R. § 76.1513(j).

[223]Telephone Joint Petitioners Petition at 7-8; *see* NCTA Opposition at 7-9 (disagreeing).

[224]*Second Report and Order* at para. 124.

95. Moreover, the presumption requirement is met not only when unaffiliated programmers occupy one-third of capacity, but also when unaffiliated programmers occupy the same amount of capacity as the open video system operator or its affiliate. Take, for example, the case of a system that has a theoretical capacity of 1,000 channels, and assume that the open video system operator and its affiliate choose to occupy 100 of these channels. Under these conditions, it will not be necessary for unaffiliated programmers to occupy 333 channels (one-third of system capacity) to meet the presumption requirements. Rather, the open video system operator will meet the presumption requirements if unaffiliated programmers occupy 100 channels. This factor may eliminate the problems that the Telephone Joint Petitioners foresee.

96. In response to the Telephone Joint Petitioners' request, we clarify that in the *Second Report and Order*, the phrase "unaffiliated programmers as a group" does not impose a requirement that the programmers market their programming in competition with the operator.[225] Rather, the phrase is used to give open video system operators greater flexibility in meeting the presumption conditions. It allows operators to meet the requirement by providing carriage to several unaffiliated programmers that in total occupy the threshold capacity requirement.

97. We reaffirm our basic imputed rate approach for ensuring just and reasonable open video system carriage rates where the presumption conditions are not met, but clarify our use of certain terminology. We structured the imputed rate in the *Second Report and Order* to reflect what the open video system operator, or its affiliate, effectively "pays" for its own carriage of programming over the system by starting with the revenues received from the end user subscriber, and subtracting the costs avoided by the open video system operator by permitting another programming provider to serve that subscriber.[226] No petitioner has convinced us that an imputed rate approach is not suitable to the circumstances of open video system carriage, where a new market entrant (the open video system operator) will, in the majority of areas, face competition from an established incumbent (the cable operator). We continue to believe that, under these circumstances, the imputed rate approach will produce carriage rates that encourage market entry and therefore result in greater competitive choices for video programming customers.[227] Therefore, we reaffirm that the imputed carriage rate established in the *Second Report and Order*, which equals the revenues received from subscribers for the open video system operator's programming package, minus the cost to the operator of creating the package, provides a sound basis for comparison to the challenged carriage rate offered the unaffiliated programmer.

98. Telephone Joint Petitioners have instead urged us to let the market set the rates for carriage. We do not, however, find that market conditions alone are sufficiently competitive to produce just and reasonable carriage rates for unaffiliated programmers. One of the premises of the open video system is that it will be providing independent programmers an alternative video

[225] *Id.* at para. 122.

[226] *Id.* at para. 127.

[227] *Second Report and Order* at para. 127.

carriage outlet that will encourage multiple programming sources. Today, independent programmers have limited ability to obtain carriage on cable systems on an open basis. Other alternatives to the open video system, e.g., DBS and wireless cable, currently serve approximately 9% of the market.[228] Accordingly, these alternatives similarly appear to offer limited opportunities for carriage on an open basis for unaffiliated programmers. We therefore reject the position of the Joint Telephone Petitioners that the market alone will ensure just and reasonable carriage rates. We believe that the imputed rate approach will encourage entry by open video systems, while ensuring that video carriage rates are just and reasonable for unaffiliated programmers.

99. As we noted in the *Second Report and Order*, open video systems are essentially a combination of: (a) the creative development and production of programming, (b) the packaging of various programs for the open video system operator's offering, and (c) the creation and maintenance of infrastructure for the carriage of both the operator's affiliated programming and unaffiliated programming.[229] Our rules are intended to ensure that unaffiliated programming providers pay a rate for carriage that is no more than the carriage price that can be fairly imputed for the carriage of the operator's affiliated programming packages. In so doing we seek to attain an important result of the ECPR, which is that the price the operator charges unaffiliated programming providers for carriage must be no higher than the sum of its incremental cost of carriage and the contribution to fixed infrastructure costs in its retail price of programming.[230]

100. We disagree with the assertion by the Telephone Joint Petitioners that the Commission errs by using an ECPR methodology to establish carriage pricing on open video systems, where it is not appropriate, while declining to use ECPR to establish LEC interconnection pricing in situations where they assert it is appropriate.[231] Like ECPR, our imputed rate approach will provide the open video system operator the same return when it carries unaffiliated programming as when it carries its own programming. We believe that in the case of open video systems, application of an ECPR methodology provides full economic incentives for LEC entry into video in competition with incumbent cable providers.

101. By contrast, in the case of interconnection to the local telephone network, application of ECPR would reduce the incentives for entry into local exchange services by enabling incumbent LECs to charge higher rates for interconnection than would result from a forward-looking economic cost model. In this latter case, application of the ECPR for network

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[228] *See Second Competition Report*, 11 FCC Rcd at 2063.

[229] *Id.* at para. 127.

[230] Declaration of William E. Taylor at 5.

[231] Telephone Joint Petitioners Petition, Declaration of William E. Taylor at 5 n.15, *citing* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking* (1996) (*Interconnection Notice*) at para. 148.

interconnection under sections 251 and 252 of the 1996 Act would be inappropriate, and we have therefore declined to use it.[232] More specifically, the Commission has concluded that the ECPR is not appropriate in the pricing of unbundled local telephone network elements for the purposes of interconnection.[233] There are significant differences in the market circumstances open video systems will face, as compared to the pricing of unbundled local telephone network elements. As we have noted, open video systems, as the new market entrant, will face competition from the established incumbent cable operator. By contrast, existing end user rates in local telecommunications services are not competitively set. In the Commission's interconnection proceeding under section 251, we noted the ECPR's potential to permit higher rates than those established by a forward-looking economic cost model, to limit competitive entry, and to preserve pricing inefficiencies.

102. We disagree also with the assertion by the Telephone Joint Petitioners that the imputed price omits the incremental cost of carriage.[234] Under normal market conditions, the imputed price of carriage will exceed the open video system operator's incremental cost of carriage (which is greater than zero) and make a contribution to the fixed infrastructure cost of the open video system. For this reason, we reject the Telephone Joint Petitioners' assertion that the imputed rate approach will produce a carriage rate of zero or less.[235] The imputed rate is based in part on the price charged by the open video system operator or its affiliate to end-user subscribers. The price charged the subscriber will generally be greater than the incremental cost of carriage. In addition, the imputed rate subtracts out the costs of developing the programming and creating the package, which removes the costs avoided when unaffiliated programming is carried. After subtracting these costs, the imputed rate will correspond to the carriage rate that the open video system operator "pays" to carry its own programming. The imputed rate approach is designed to give the open video system operator the same economic return when it sells carriage to unaffiliated programming providers as when it "sells" carriage to its own programming. Consequently, we would expect the use of the ECPR approach to minimize any disincentives the open video system operator may have to carry unaffiliated programming.

103. We believe that this result of the imputed rate approach should be achieved even under the competitive conditions assumed by the Telephone Joint Petitioners in their petition.[236] Even assuming that, at the outset of open video system operations, competition lowered the retail price of video programming to subscribers to the point that the open video system operator

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[232]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Report and Order,* (adopted August 1, 1996).

[233]*Id.*

[234]Declaration of William E. Taylor at 6.

[235]Telephone Joint Petitioners *Petition for Reconsideration* at 9.

[236]*Id.* at 9.

incurred losses, this would not justify the operator's shifting the burden of such losses to unaffiliated video programming providers by charging them a higher carriage rate than the rate that it effectively "charges" itself. The unaffiliated programming providers would also face lower retail prices for their programming under the competitive conditions assumed by the Telephone Joint Petitioners. We disagree with the Telephone Joint Petitioners' assertion that unaffiliated programmers would be largely unaffected by retail price competition.[237] Unaffiliated programming providers would be offering services to subscribers in the same area as the open video system operator and would, as a result, face essentially the same competitive conditions faced by the operator.

104. The imputed rate approach was chosen as a flexible regulatory approach for determining what are just and reasonable carriage rates in an imperfectly competitive carriage market. However, it may not be the sole means of establishing just and reasonable carriage rates. There may be alternative, market-based approaches to demonstrating that a challenged rate is just and reasonable, that may also be useful in particular cases. We would consider such an argument in response to a complaint regarding a carriage rate. The open video system operator would be required to demonstrate that its carriage service is subject to sufficiently strong competitive forces to ensure that its carriage rates are just and reasonable, or that it has computed its rate using a methodology that aims to produce or replicate the working of a competitive carriage market.

105. In addition, on reconsideration, we find that certain aspects of our explanation and use of terminology should be clarified. As we stated above, under our approach, the imputed price of carriage for an affiliated programming package equals the price of the package delivered to a subscriber minus the cost of creating the package. To clarify the terms identified by the Telephone Joint Petitioners, in the *Second Report and Order* we use the term "earning" to refer to the difference between the price of the package delivered to a subscriber and the cost of creating the package.[238] We use the term "profit allowance" to refer to one type of cost of creating the programming package, namely the cost of capital used to create the package. We also clarify Section 76.1504 of the rules to indicate more clearly the types of avoided costs that must be subtracted by an open video system operator in calculating the imputed rate.

106. We also clarify in response to the National League of Cities, et al. that the imputed rate formula will not allow open video system operators to charge unaffiliated programming providers a price for carriage equal to the price they charge subscribers for affiliated programming. The imputed rate formula, as we have discussed, requires open video system operators to subtract the cost of creating affiliated programming from the price of the programming. The carriage rate that unaffiliated programming providers pay will be less than the price subscribers pay for affiliated programming.

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[237]Declaration of William E. Taylor at 6.

[238]*See supra* at para. 87.

107. The concerns of the City of Indianapolis and the Alliance for Community Media, et al. regarding how subscriber losses will affect the imputed carriage rate are overstated because they do not reflect the effects of subscriber gains. We wish to clarify that the imputed carriage rate will recognize both losses and gains in the number of subscribers to the open video system operator's programming package resulting from carrying unaffiliated programming. Increases in subscribers may occur because unaffiliated programming attracts subscribers to the open video system from cable or broadcast television. Decreases in subscribers may occur because unaffiliated programming attracts subscribers away from affiliated programming on the open video system. The average of these individual channel effects, which may be an increase or a decrease, is the one that will be recognized by the imputed carriage rate.

108. We also wish to clarify that, contrary to MCI's suggestion, our imputed rate approach does not require that we determine an open video system operator's actual opportunity cost. Because it is computed by averaging costs over all channels carrying affiliated programming, the imputed carriage rate will include an estimate of the average opportunity cost resulting from the carriage of unaffiliated programming. This average is adequate to achieve the goal of ensuring that the operator's carriage rates are just and reasonable, without determining the operator's actual opportunity cost.

2. *Open Video System Carriage Rates Must Not be Unjustly or Unreasonably Discriminatory*

a. Background

109. In the *Second Report and Order*, we concluded that some level of open video system carriage rate differentiation is permissible, provided that the bases for the differences are not unjust or unreasonable. We suggested that some legitimate, objective factors on which rate differences could be based are volume discounts, differences in creditworthiness and financial stability, differences in the number of subscribers reached, and preferential rates for not-for-profit programming providers.[239]

110. NCTA challenges the sufficiency of the presumption approach to protect unaffiliated programmers from discrimination, and requests that it be changed. NCTA states that the scheme leaves opportunities for open video system operators to "game the system" to discriminate against selected programmers. NCTA submits that the simplest and most effective means of preventing such discrimination is to require, unless open video system operators can justify the difference, that each programmer be charged the same rate. NCTA contends that the Commission should not place the burden of proof on the programmer alleging a violation of section 653(b)(1)(A) standard; rather, open video system operators should always bear the burden

[239] *Second Report and Order* at para. 130.

of demonstrating that rate differences are justified by the circumstances.[240]

111. MCI argues that would be complainants will be unable to ensure that open video system carriage rates are nondiscriminatory because there is no practical method of determining whether a rate is greater than the rate that would be established by ECPR.[241] The Alliance for Community Media, et al. argues that the Commission should require open video system operators to charge non-profit video programming providers a reduced carriage rate.[242]

b. Discussion

112. The petitioners' concerns about whether open video system rates are nondiscriminatory ignores the wording of the 1996 Act, which prohibits rate differences only when unjust or unreasonable.[243] As we noted in the *Second Report and Order*, we decided to permit carriage rate differentiation because requiring open video system operators to charge all programming providers the same carriage rate would exclude providers whose programming has a low market value.[244] Neither NCTA nor MCI has offered new factual or legal arguments to refute this reasoning. We will continue to permit open video system operators to charge different rates based on objective factors.

113. MCI's rate discrimination concern arising from our use of an ECPR pricing model to compute an imputed rate is misplaced.[245] In the *Second Report and Order*, we decided to rely on the complaint process to ensure that open video system carriage rates are not unjustly or unreasonably discriminatory. If a rate discrimination complaint is filed, the challenged rate difference will have to be justified by legitimate, objective factors.[246] We have heard no new argument that demonstrates that the complaint process will fail to ensure that differences in open video system carriage rates have just and reasonable bases.

114. We disagree with the Alliance for Community Media, et al., that open video system operators should be required to charge reduced carriage rates to non-profit programming providers. In the *Second Report and Order*, we identified not-for-profit status as one of the legitimate, objective factors on which open video system operators could base reduced rates. We

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[240]NCTA Petition at 18-19.

[241]MCI Petition at 5.

[242]Alliance for Community Media, et al. Petition at 9-11.

[243]*Notice* at para. 32.

[244]*Second Report and Order* at para. 130.

[245]*See* our discussion of the imputed carriage rate, *supra* at paras. 97-108.

[246]*Second Report and Order* at para. 130.

also cited comments that identified PEG channels as a source of carriage for non-profit programmers.[247] We note that the Alliance for Community Media, et al. recognize the significant contribution that PEG requirements will make.[248] Moreover, we are concerned about the impact of mandatory reduced carriage rates on a new entrant in the markets for video carriage and distribution. Our decision to allow preferred carriage rates for non-profit programmers on a voluntary basis reflects our goals of promoting open video system entry and competition with incumbent cable systems, while providing access to carriage by unaffiliated programming providers. We will stand by our decision not to make reduced rates for non-profit programmers mandatory.

E. Gross Revenues Fee

1. Background

115. Section 653(c)(2)(B) provides that an open video system operator shall be subject to a fee on the gross revenues of its cable service, "in lieu of" the cable franchise fee under Section 622.[249] In the *Second Report and Order*, we concluded that the gross revenues fee should be based on all revenues received by an open video system operator or its affiliate relating to its provision of video services (including all subscriber revenues and all carriage revenues received from unaffiliated programming providers), but should exclude the gross revenues of unaffiliated video programming providers.[250]

116. On reconsideration, some local governments argue that the gross revenues fee should be applied to a broader revenue base than that specified in the *Second Report and Order*. The Village of Schaumburg and Metropolitan Dade County argue that the fee should be applied to all revenues derived from the operation of open video systems, regardless of whether they are received by the open video system operator, the operator's affiliate, or an unaffiliated video programming provider.[251] These petitioners assert that the Commission's formulation of the gross

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[247] *Id.* at para. 130 n.300.

[248] Alliance for Community Media, et al. Petition at 13 n.39.

[249] Specifically, Section 653(c)(2)(B) provides:

> An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental agency, in lieu of the franchise fees permitted under Section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area.

[250] *Second Report and Order* at paras. 218-220.

[251] Village of Schaumburg Petition at 2; Metropolitan Dade County Petition at 3. *See also* NCTA Opposition at 5-7; Michigan Cities, et al. Opposition at 3-4.

revenues fee will reduce the amount of fees collected by local authorities. Metropolitan Dade County speculates that this "could lead to claims of discrimination from existing cable operators to be released from cable franchises to the extent that OVS operators have lesser fiscal burdens."[252] The National League of Cities, et al. and NATOA argue that the Commission's gross revenues fee fails to adequately compensate local governments for the use of public rights-of-way.[253] In addition, the National League of Cities, et al. and Municipal Services, et al. assert that the Commission has not made it clear that local governments have a positive authority to charge and receive the fee.[254] Finally, NATOA requests that we clarify that advertising revenues received by an open video system operator or its affiliate should be included in the fee calculation.[255]

117. By contrast, telephone companies generally argue that the gross revenues fee should be applied to a narrower revenue base than the base specified in the *Second Report and Order*. In their petitions, the Telephone Joint Petitioners and NYNEX argue that, on its face, Section 653(c)(2)(B) applies only to the gross revenues of the open video system operator and not the operator's affiliate.[256] These petitioners differ, however, regarding which operator revenues should be included in the fee calculation. The Telephone Joint Petitioners argue that the fee should be based only on the open video system operator's revenues from subscribers, and should exclude carriage revenues from unaffiliated video programming providers.[257] NYNEX, on the other hand, argues that the fee should be based only on the operator's carriage revenues from affiliated and unaffiliated programming providers, and should exclude all subscriber revenues.[258] Finally, NYNEX and U S West are concerned that collecting a fee solely from the open video system operator and its affiliates will discriminate in favor of unaffiliated programming providers, which will not be burdened by a similar fee.[259] U S West proposes that open video system operators be permitted to include a portion of the gross revenues fee on the bills of all subscribers to an open video system -- not just those receiving programming directly

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[252]Village of Schaumburg Petition at 2; Metropolitan Dade County Petition at 3.

[253]National League of Cities, et al. Petition at 5; NATOA Opposition at 2-5.

[254]National League of Cities, et al. Petition at 8; Municipal Services, et al. Petition at 3.

[255]NATOA Opposition at n.4 (responding to statement in NYNEX's Petition at n.5 indicating that NYNEX appeared to believe that advertising revenues were excluded).

[256]Telephone Joint Petitioners Petition at 4-5; NYNEX Petition at 3-9 and Opposition at 17-18.

[257]Telephone Joint Petitioners Petition at 4-5.

[258]NYNEX Petition at 3-9.

[259]NYNEX Petition at 7-8; U S West Petition at 7-8. NYNEX adds that unless some mechanism is established to relieve the affiliated provider of this unique burden, that the resulting scheme could violate the affiliated provider's constitutional right to equal protection. NYNEX Petition at n.11.

from the operator or its affiliates.[260]

118. In response, NATOA argues that excluding the open video system operator affiliate's revenues from the gross revenues fee calculation would defeat the entire purpose of the fee, and would permit an open video system operator to pay far less than a cable operator by the simple expedient of creating a corporate subsidiary.[261] Similarly, Michigan Cities, et al. argue that excluding the affiliate's revenues would thwart Congress' goal of ensuring equal treatment among video providers, and would permit an operator to engage in a corporate "shell game" in which the operator provided essentially no services and had all revenue-generating activities provided by its affiliates.[262] In addition, NCTA argues that the Telephone Joint Petitioners' proposal to exclude carriage revenues from the fee calculation "is simply beyond the pale, as it would allow LECs to avoid paying any gross revenue fee by the simple expedient of providing "cable" service through an affiliate.[263] Conversely, NCTA and the Alliance for Community Media, et al. argue that NYNEX's proposal to include only those revenues derived from carriage in the fee calculation would understate the revenues derived from open video service,[264] ignores the significance of the statute's use of the term "cable service" instead of carriage, and would create a fee that is not nearly equivalent to the franchise fee imposed on cable operators.[265]

2. *Discussion*

119. We generally reaffirm our conclusions in the *Second Report and Order*. We continue to believe that our interpretation represents the best reading of Section 653(c)(2)(B). We will, however, clarify our rule to make clear our intent that local governments have the authority to charge and receive the gross revenue fee. In addition, consistent with Congress' intent of ensuring "parity among video providers,"[266] we will clarify that any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming should be included in the fee calculation, where such revenues are included in the incumbent cable operator's franchise fee calculation.

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[260]U S West Petition at 8.

[261]NATOA Opposition at 3-5 (arguing that an open video system operator's carriage and other non-subscriber revenues that would not exist "but for" the operator's provision of video services must also be included in the fee calculation).

[262]Michigan Cities, et al. Opposition at 5-6.

[263]*See* NCTA Opposition at 6 (emphasis in original).

[264]*Id.*

[265]Alliance for Community Media, et al. Opposition at 6.

[266]Conference Report at 178.

120. Those petitioners seeking to include the gross revenues of unaffiliated programming providers in the fee calculation have largely repeated arguments made by the National League of Cities, et al. earlier.[267] In our view, those arguments fail to account for the clear statutory language that the gross revenues fee applies to the open video system operator's revenues relating to its provision of cable service.[268] We also disagree with these petitioners that our formulation necessarily will result in lost revenues to local governments. Petitioners assume that an entity would build the same system, whether it was going to provide cable service or open video service. This may not be accurate. For example, an open video system operator may have additional incentives to build a large capacity system in order to be assured of a sufficient number of channels to compete head-to-head with the incumbent cable operator. Similarly, whether the fee that a local government receives is greater or lesser than the incumbent cable operator pays will vary depending upon the relative channel capacity of the systems, the amount of channel capacity occupied by the open video system operator, and the carriage rates the operator is able to negotiate with unaffiliated providers.[269]

121. On the other hand, we do not agree with the Telephone Joint Petitioners and NYNEX that the revenues of an open video system operator's affiliates should be excluded from the calculation of the gross revenue fee. Section 653(c)(2)(B) applies to gross revenues attributable to an open video system operator's "provision of cable service." Under the Communications Act, "cable service" is defined as "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service . . . "[270] Thus, to the extent that an open video system operator employs an affiliate to provide video programming to subscribers, the revenues that its affiliate receives from subscribers are subject to the gross revenues fee.[271] To hold otherwise would place form over substance and would create a disparity between open video system operators that use affiliates to provide video programming and those that provide programming themselves. The Telephone Joint Petitioner's proposal to exclude carriage revenues from the fee calculation would widen this potential difference. There is no indication in Section

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[267]*See, e.g.,* National League of Cities, et al. Comments (filed April 1, 1996) at 45-46, and Reply Comments (filed April 11, 1996) at 38-39. We address the Fifth Amendment argument raised by the National League of Cities, et al. and NATOA in Section III.F.5., below.

[268]Communications Act § 653(c)(2)(B), 47 U.S.C. § 573(c)(2)(B).

[269]In addition, we find no ground for Dade County's belief that any difference in the total fees assessed on an incumbent cable operator and a competing open video system would entitle the cable operator to be released from its franchise agreement. The gross revenues fee provision is part of Congress' overall open video framework. The fact that, in relation to cable, Congress' open video framework imposes certain obligations and provides certain benefits, does not constitute actionable "discrimination." Dade County Petition at 3.

[270]Communications Act § 602(6), 47 U.S.C. § 522(6).

[271]On similar grounds, we reject NYNEX's proposal to apply the gross revenues fee only to carriage revenues received by the open video system operator, whether from affiliated or unaffiliated programming providers. *See* NYNEX Petition at 3-9.

653(c)(2)(B) that Congress intended to limit "gross revenues of the operator" to those revenues derived solely from the sale of its own programming. Indeed, the Telephone Joint Petitioner's proposal could result in an open video system operator that provided its programming through an affiliate paying little or no fee, contrary to Congress' intent "to ensure parity among video providers."[272]

122. Finally, we agree with NYNEX and U S West that the application of the gross revenues fee provision should not disadvantage any particular video programming provider. Like the costs of PEG and must-carry, we believe that the gross revenues fee is a cost of the platform -- in this case, the cost of using the rights-of-way -- that should be shared equitably among all users of the system. We therefore will permit open video system operators to recover the gross revenues fee from all video programming providers on a proportional basis as an element of the carriage rate.

F. Applicability of Title VI Provisions

1. Public, Educational and Governmental Access Channels

a. Establishing Open Video System PEG Access Obligations

(1) Background

123. In the *Second Report and Order*, the Commission found that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator.[273] We also provided a default mechanism in case an agreement cannot be reached, whereby the open video system operator will be required to satisfy the same PEG access obligations as the local cable operator.[274] We stated that this could be accomplished through connection to the local cable operator's PEG access channel feeds and by sharing the costs directly related to supporting PEG access, including the costs of PEG equipment and facilities, and equipment necessary to achieve the connection.[275]

124. Alliance for Community Media, et al. state that the Commission must require the open video system operator to add PEG resources to those provided by the existing cable operator as opposed to cutting those resources in half and forcing entities providing PEG access to perform

[272]Conference Report at 178.

[273]*Second Report and Order* at para. 137.

[274]*Id.* at para. 141.

[275]*Id.*

more services on existing budgets.[276] National League of Cities, et al. claim that because a cable operator's PEG access obligations are established by franchise agreement, the Commission may not reduce them.[277] Furthermore, according to National League of Cities, et al., the Commission mistakenly assumes that a community has obtained all the PEG support it needs from the cable operator.[278] National League of Cities, et al. claim that the local franchising authority has the right to obtain additional compensation in the form of PEG from the open video system operator.[279]

125. Telephone Joint Petitioners assert that the Commission's approach may remove a local franchising authority's incentive to negotiate PEG access obligations that do not match or exceed those of the incumbent cable operator. In addition, Telephone Joint Petitioners claim that the Commission's approach may give local franchising authorities the power to demand other obligations from open video system operators.[280] According to Telephone Joint Petitioners, if no agreement with the local franchising authority can be reached, an open video system operator should be permitted a third option of demonstrating (either in a complaint proceeding before the Commission or in arbitration) that it is not possible to satisfy the local franchising authority's demands or to duplicate exactly the PEG access obligations of the cable operator, or that the open video system operator's proposal is different but "no greater or lesser" than the local cable operator's obligations.[281] NATOA argues that this third option urged by Telephone Joint Petitioners would allow an open video system operator to be able to impose its own conception of equivalent support unilaterally and would not allow local communities to take a proactive role

[276]Alliance for Community Media, et al. Petition at 6; *see also* National League of Cities, et al. Petition at 14; City of Indianapolis Petition at 2 (unclear whether cable operators' obligations are to be doubled or halved); Cablevision Opposition at 8 (the Commission has cited no evidence supporting its conclusion that duplication of PEG facilities would be inefficient and not in the public interest); Michigan Cities, et al. Opposition at 12-13.

[277]National League of Cities, et al. Petition at 14; *see also* Alliance for Community Media, et al. Petition at 6 (a cable operator and an open video system operator cannot share an existing contractual commitment to the local franchising authority); Michigan Cities, et al. Opposition at 12 (the Commission cannot abrogate existing franchise agreements with respect to PEG access requirements by allowing the cable operator to reduce its contractual obligations).

[278]National League of Cities, et al. Petition at 14-15; *see* Michigan Cities, et al. Opposition at 12 (open video systems should increase the local PEG access availability to subscribers). *But see* NYNEX Opposition at 8.

[279]National League of Cities, et al. Petition at 15. *But see* NYNEX Opposition at 8.

[280]Telephone Joint Petitioners Petition at 13-14. *But see* NATOA Opposition at 7 (the LECs provide no support for their claim that local franchising authorities could or would attempt to extract other concessions); Michigan Cities, et al. Opposition at 12 (the Commission's approach provides no incentive for the open video system operator to negotiate with the local franchising authority).

[281]Telephone Joint Petitioners Petition at 14-15. *But see* Alliance for Community Media, et al. Opposition at 4-5 (opposing binding arbitration in the event of a stalemate).

in establishing open video system PEG access obligations.[282]

126. According to Comcast, because cable operators do not have a "default mechanism" of interconnection if their franchise negotiations with the local franchising authority fail, the open video system rules fail to ensure that the open video system's PEG access obligations are "no greater or lesser" than those of the cable operator.[283] Comcast also contends that neither the cable operator nor the open video system operator should be required to agree to a connection and cost sharing arrangement, and that, if an open video system operator and the cable operator do agree to connect their PEG access channel feeds and cost share, the open video system operator and the cable operator should be required to negotiate the terms and conditions of the sharing and connection.[284] NCTA claims that forced connection with the cable operator's channel feeds violates the 1996 Act's mandate to ensure that the open video system's PEG access obligations are "no greater or lesser" than those of the cable operator.[285] NCTA also asserts that requiring such connection is inconsistent with the statutory proscription against regulating cable systems as common carriers.[286]

127. In their opposition, Telephone Joint Petitioners also ask the Commission to eliminate the requirement for open video systems to share in the costs of facilities or equipment for PEG access, claiming that open video systems are required to provide only channel capacity for PEG access.[287] They claim that a local franchising authority's power to require cable operators to provide PEG-related services, facilities and equipment is derived from Section 621,

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[282]NATOA Opposition at 6.

[283]Comcast Petition at 8. *But see* Telephone Joint Petitioners Opposition at 9; NYNEX Opposition at 7 (the Commission's decision recognizes that open video system operators are not required to negotiate franchises but are required to provide PEG access, and that it is not efficient to require that a burden be suffered twice where it can be satisfied once).

[284]Comcast Petition at 11-12; *see also* NCTA Petition at 16 (absent a voluntary agreement with a cable operator to share PEG facilities, an open video system operator must meet its PEG access obligations independently).

[285]NCTA Petition at 16; *see also* Cablevision Opposition at 5-8 (connection and cost sharing impose more costs and burdens on the cable operator than on the open video system operator and therefore contravene the 1996 Act and unfairly benefit open video system operators); Michigan Cities, et al. Opposition at 12, 13 (simply connecting and sharing costs are not satisfying the same PEG access requirements). *But see* MFS Communications Opposition at 6 (cost sharing will result in apportioning the burdens on both open video system and cable operators and will be more efficient than requiring duplicate facilities).

[286]NCTA Petition at 16; *see also* Cablevision Comments at 4. *But see* Telephone Joint Petitioners Opposition at 7-8; NYNEX Opposition at n.18 (the Commission's approach does not burden cable companies as "PEG utilities," but instead reduces their contractual franchise burden through cost sharing); USTA Opposition at 11-12 (stating that the Commission's rule is entirely within Congress' directive to speed the introduction of competition for the cable incumbents, and that to require separate PEG facilities would be inefficient and burdensome).

[287]Telephone Joint Petitioners Opposition at 8-9.

not Section 611, and therefore cannot be extended to open video systems.[288]

128. In addition, Municipal Services, et al. request that the Commission clarify that existing LECs seeking to provide open video system service may be required in their telecommunications franchise to provide PEG access.[289] City of Indianapolis asserts that by not allowing local franchising authorities to require specific channel alignment for PEG access channels, the Commission has given open video system operators the ability to realign PEG access channels on a whim and presents identity and logistical problems for many access channels, especially those that are known simply by channel number.[290]

(2) Discussion

129. We continue to believe that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator. Furthermore, we continue to believe that it is necessary to have a default mechanism in case the open video system operator and the local franchising authority are unable to agree. We disagree with Comcast that open video system operators should be required to negotiate with local franchising authorities.[291] Providing a "backstop" is an appropriate balance between imposing Section 611's requirements and not imposing franchise requirements on open video systems. If the open video system operator matches the PEG access obligations of the cable operator, the actual PEG access obligations imposed on the open video system operator will be, as the statute requires, to the extent possible no greater or lesser than those imposed on the cable operator. This is true even if the open video system operator's obligations are established through our default mechanism and the cable operator's obligations are established through negotiation and the franchise process.

130. After considering the arguments made by the various petitioners, we believe, however, that some modification of our rule regarding how to establish open video system PEG access obligations is appropriate. We believe that imposing Section 611 obligations on open video system operators so that to the extent possible the obligations are "no greater or lesser" than those imposed on cable operators means that, in the absence of an agreement with the local franchising authority, an open video system operator must match, rather than share, the annual PEG access financial contributions of the local cable operator. Under our current rule, open

[288] *Id.*

[289] Municipal Services, et al. Petition at 5-7; *see also* Telephone Joint Petitioners Opposition at 7 (whether existing rights-of-way agreements cover open video systems is a matter between the LEC and the local government or private property owner).

[290] City of Indianapolis Petition at 3-4.

[291] *See* Telephone Joint Petitioners Opposition at 9-10 (it is the 1996 Act not the Commission's default mechanism that relieves open video system operators of the requirement to negotiate with local franchising authorities).

video system operators are required to match the PEG access channel capacity provided by the local cable operator, but are required to share the contributions towards PEG access services, facilities and equipment. Our modified rule will apply the matching principle which we have applied to channel capacity also to PEG contributions that cable operators make, and that are actually used for PEG access services, facilities and equipment. For instance, if a cable operator makes an annual contribution of $15,000 that is used to purchase PEG access equipment, the open video system operator will now be required to do likewise.

131. For in-kind contributions (e.g., cameras, production studios), we believe that precise duplication would often be unnecessary, wasteful and inappropriate. Instead, open video system operators may work out mutually agreeable terms with cable operators over in-kind equipment, studios and the like so that PEG service to the community is improved or increased and the open video system operator fulfills its statutory obligation. As a backstop, however, we will permit the open video system operator to pay the local franchising authority the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value. Any matching PEG access contributions provided by an open video system operator are to be used by the local franchising authority to fund activities arising under Section 611. We believe that information on the cable operator's PEG access contributions should be available to the local franchising authority, since a cable operator's monetary costs of complying with franchising requirements, including PEG access requirements, are identified as "external costs" under our cable rate rules.[292]

132. We decline to modify our rule that requires the local cable operator to permit the open video system operator to connect with the cable operator's PEG access channel feed.[293] We clarify, however, that any costs associated with the open video system operator's connection to the cable operator's PEG access channel feed shall be borne by the open video system operator. These costs shall be counted towards the open video system operator's matching obligation described above. Contrary to NCTA's assertion, we do not believe that this connection requirement impermissibly treats cable operators as common carriers. The connection requirement here is far different from a common carrier interconnection requirement.[294] We are not requiring the local cable operator to permit others to interconnect with and use their cable system to reach consumers.[295] Rather, we are simply requiring the local cable operator to provide

[292]*See* 47 C.F.R § 76.922(c)(3)(iv)(C).

[293]The connection requirement we affirm herein is not intended to affect any copyright protections applicable to PEG access channel feeds.

[294]*See, e.g.,* Communications Act § 251(c)(2), 47 U.S.C. § 251(c)(2).

[295]*See Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994), *citing National Ass'n of Reg. Utility Commissioners*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (two characteristics of a "common carrier" are that the entity: (1) deals indifferently with the public; and (2) provides a system on which customers transmit intelligence of their own design and choosing).

its PEG access channel feed to a particular competitor that shares a similar PEG access obligation in order to avoid an unnecessary duplication of facilities and promote Congress' goal of competitive entry.

133. We do not agree with Telephone Joint Petitioners that the open video system operator should be allowed to decide unilaterally how to satisfy its PEG access obligations, subject to a complaint before the Commission or arbitration. This approach would be inefficient and would increase the burdens on the local franchising authority, as well as the Commission.[296] Telephone Joint Petitioners' approach does not allow the local communities, which we recognized in the *Second Report and Order* are often in the best position to determine the needs and interests of the local community,[297] to participate effectively in establishing open video system PEG access obligations.[298] We believe that the Telephone Joint Petitioners' argument that the adopted approach will reduce a local franchising authority's incentive to negotiate is misplaced. Our approach should not be used to coerce local franchising authorities into agreeing to less than what Section 653(c)(2)(A) provides, specifically ". . . obligations that are no greater or lesser" than the obligations imposed on cable operators. In addition, as NATOA states, the record in this proceeding does not contain any evidence that local franchising authorities will use their ability to negotiate open video system PEG access obligations to obtain other concessions.[299]

134. We also disagree with Telephone Joint Petitioners with respect to whether open video system operators are required under the statute to provide more than channel capacity for PEG access. Telephone Joint Petitioners argue that, because open video system operators are required only to provide channel capacity, and not programming or other services, cable operators and local franchising authorities must cooperate in providing access to existing PEG programming feeds. Telephone Joint Petitioners also claim that the Commission has erroneously included the provision of "services, facilities or equipment which relate to PEG use" as a PEG access requirement to be imposed on open video systems. As stated in the *Second Report and Order*, Section 611(c) permits a local franchising authority to enforce any requirement in a franchise regarding the provision or use of PEG channel capacity, including provisions for services, facilities or equipment which relate to PEG use of channel capacity.[300] This provision incorporates the requirement of providing PEG access services, facilities and equipment into Section 611 and therefore, as applied through Section 653(c), imposes a responsibility on open video system operators to contribute toward PEG access services, facilities and equipment to the

[296] *See* Alliance for Community Media, et al. Opposition at 4-5.

[297] *Second Report and Order* at para. 137.

[298] *See* NATOA Opposition at 6.

[299] *Id.* at 7.

[300] *Second Report and Order* at para. 142; Communications Act § 611(c), 47 U.S.C. § 531(c).

same extent as the local cable operator.[301] We therefore refuse to modify our rule as requested by Telephone Joint Petitioners.

135. In response to the request of Municipal Services, et al., we clarify that the negotiated PEG access obligations of an open video system operator may be enforced regardless of where and when the agreement is made.[302] Regarding City of Indianapolis's assertion that channel alignment should not be at the discretion of the open video system, we affirm our decision in the *Second Report and Order* that there is insufficient evidence to support mandating that PEG access channels be carried at the same channel location on the open video system operator as on the cable system.[303] City of Indianapolis has presented no new evidence or argument not presented to the Commission before.

b. Establishing Open Video System PEG Access Obligations Where No Local Cable Operator Exists

(1) Background

136. We stated in the *Second Report and Order* by way of example that if a cable system converts to an open video system, the operator will be required to maintain the previously existing terms of its PEG access obligations.[304] Alliance for Community Media, et al. assert that if a common carrier buys the facilities of a cable operator, and at the expiration of the franchise term converts the system into an open video system, the PEG access obligations at the time of the purchase should not necessarily be retained by the open video system operator. Alliance for Community Media, et al. contend that this would leave many communities without PEG access as only 16% of cable systems have PEG access obligations.[305] Alliance for Community Media, et al. suggest that the local franchising authority should be able to request PEG access obligations at the time the cable system converts to an open video system, and then once every ten years

[301]Telephone Joint Petitioners claim that the Commission misinterpreted the legislative history of the 1996 Act by relying on language in the Conference Report which explained language in H.R. 1555 which was not carried over to the 1996 Act as adopted. Telephone Joint Petitioners Opposition at 9. We note that our primary reliance was and is on the statute itself, and that, as described above, Section 611(c) together with Section 653(c) impose an obligation on open video system operators to contribute toward PEG services, facilities and equipment to the same extent as the local cable operator.

[302]*See also* Telephone Joint Petitioners Opposition at 7.

[303]*See Second Report and Order* at para 141 n.329.

[304]*Id.* at para. 151.

[305]We believe that many of these cable systems with PEG access obligations are located in large urban areas, and therefore that the percentage of cable subscribers nationwide that receive PEG access channels may be far higher than 16%.

thereafter.[306]

(2) Discussion

137. Our discussion in the *Second Report and Order* regarding the establishment of open video system PEG access obligations where no local cable operator exists was not intended to foreclose a local franchising authority from negotiating with the open video system operator. The discussion, which was premised on the idea that the local franchising authority and the open video system operator may in the first instance negotiate the operator's PEG access obligations, was intended to explain how to establish open video system PEG access obligations where no local cable operator exists and the local franchising authority and the open video system operator cannot agree.[307] The parties are therefore free to negotiate PEG access obligations as Alliance for Community, et al. request.[308] As stated in the *Second Report and Order*, however, if the open video system operator and the local franchising authority cannot agree, the operator must make a reasonable amount of channel capacity available for PEG use. In the *Second Report and Order*, we found that where a cable franchise previously existed, such as where a cable system is able to convert to an open video system, what constitutes a reasonable amount of channel capacity is to be governed by the previously existing franchise agreement with respect to PEG access obligations.[309] This approach was formulated to comply with the statutory requirement that to the extent possible the PEG access obligations of open video system operators are to be no greater or lesser than those imposed on cable operators.[310]

138. While we do not believe that Congress intended open video system PEG access obligations to correct deficiencies in what the local franchising authority negotiated for cable operator PEG access obligations, we also recognize the concern that PEG access requirements should not be frozen in time in perpetuity. We will therefore modify our approach for a situation in which there was a previously existing cable franchise, such as where a cable system converts to an open video system, and provide that, when the open video system operator and the local franchising authority cannot agree on PEG access obligations, the local franchising authority may either keep the previously existing PEG access obligations or may elect to have the open video system operator's PEG access obligations determined by comparison to the franchise agreement

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[306]Alliance for Community Media, et al. Petition at 8-9; *see also* Michigan Cities, et al. Opposition at 12-13.

[307]*See Second Report and Order* at para. 151 ("Where there is no local cable operator and the open video system operator and the local franchising authority cannot agree on appropriate PEG access obligations, . . .").

[308]As stated above, Alliance for Community Media, et al. propose that the local franchising authority be permitted to request PEG access obligations once every ten years. The local franchising authority and the open video system operator are free to negotiate as often as the wish. We conclude that, if the parties cannot agree, however, the open video system operator's PEG access obligations should be re-established every 15 years, as discussed below.

[309]*Second Report and Order* at para. 151.

[310]*See* Communications Act § 653(c), 47 U.S.C. § 573(c).

for the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. We believe the PEG access obligations should be revisited every 15 years (unless the parties otherwise agree) because this is a common term length of a franchise agreement.[311] This approach will allow PEG access obligations to change over time with the needs and interests of the communities, rather than being frozen in perpetuity simply because a cable system has been converted to an open video system. With this modification, we otherwise affirm our decision regarding open video system PEG access obligations where no local cable operator exists as contained in the *Second Report and Order*.

c. Provision of PEG Access Channels to All Subscribers

(1) Background

139. In the *Second Report and Order*, the Commission found that PEG access channels should be provided to all subscribers, but that open video system operators should have the flexibility to determine how all subscribers will receive access channels, i.e., whether to provide a basic programming tier similar to that provided by cable systems, or to require unaffiliated video programming providers to offer PEG access channels to their subscribers.[312] NCTA believes that to make implementation more certain and enforcement more likely the Commission should institute a national approach to the required delivery of must-carry and PEG channels to subscribers, rather than leaving the method of implementation to the open video system operator. According to NCTA, programmers and packagers should not be responsible for PEG and must-carry provision if subscribers purchase these channels from another source.[313] USTA states that the Commission correctly determined that the open video system operator should have discretion over the manner in which it would fulfill its PEG access obligations.[314]

(2) Discussion

140. We affirm our decision that PEG access channels should be provided to all subscribers, but that open video system operators should have the discretion to determine how best to accomplish this. As stated in the *Second Report and Order*, this flexibility will permit the operator to provide PEG access channels in an efficient manner while not diminishing the

[311] *See, e.g.,* National League of Cities, et al. Petition at Appendices 1-5 (four of the five franchise agreements attached to the Petition are for a term of 15 years; one is for a term of ten years).

[312] *Second Report and Order* at para. 153.

[313] NCTA Petition at 15.

[314] USTA Opposition at 11.

provision of the PEG access channels to the community.[315] NCTA provides no new arguments or evidence as to why we should change our decision. NCTA simply restates its position previously presented in its comments which the Commission rejected.

d. Open Video System PEG Obligations Where System Overlaps with More than One Franchise Area

(1) Background

141. The *Second Report and Order* stated that open video system operators should be required to satisfy the PEG access obligations for all franchise areas with which their systems overlap.[316] Telephone Joint Petitioners assert that, from a technical standpoint, open video systems may be configured in a potentially significantly different manner than cable systems, and that the Commission therefore erred in relying on cable operators' claims that it is possible to configure overlapping systems in order to meet multiple PEG access requirements.[317]

(2) Discussion

142. While we do not disagree with Telephone Joint Petitioners that open video systems may be configured differently from cable systems, as Alliance for Community Media, et al. point out, Telephone Joint Petitioners provide insufficient support for why open video systems will not be able to be configured to comply with the PEG access obligations for each franchise area with which each system overlaps.[318] In fact, Michigan Cities, et al. demonstrate that, in at least one situation, it is indeed possible.[319] We therefore deny Telephone Joint Petitioners' petition with respect to this matter.

e. Institutional Networks

(1) Background

143. With regard to institutional networks, we stated in the *Second Report and Order* that Section 611 does not specifically authorize local franchising authorities to require cable operators to build institutional networks, and that we would therefore not require open video

[315] *Second Report and Order* at para. 153.

[316] *Id.* at para. 154-155.

[317] Telephone Joint Petitioners Petition at 14-15. *But see* Alliance for Community Media, et al. Opposition at 5; NATOA Opposition at 7; Michigan Cities, et al. Opposition at 15-16.

[318] Alliance for Community Media, et al. Opposition at 5.

[319] Michigan Cities, et al. Opposition at 15-16.

system operators to build institutional networks. We also provided that if an open video system operator does build an institutional network, the local franchising authority may require that educational and governmental access channels be designated on that network to the extent such channels are designated on the institutional network of the local cable operator.[320] Alliance for Community Media, et al. state that, under Section 653(c)(2)(B), an open video system operator must provide institutional networks if a cable operator is required to provide institutional networks. If such a requirement is not imposed on open video system operators, according to Alliance for Community Media, et al., the open video system operator is not contributing towards PEG access obligations to the same extent as the cable operator.[321] Alliance for Community Media, et al. believe it is "an incongruous reading of Section 611 that a franchising authority could require that an OVS operator require educational and governmental access on an institutional network without being able to require construction of the underlying network."[322] City of Indianapolis asks that we clarify what an institutional network is, apparently because "the Act forbids municipalities from asking for telecommunication services from cable operators as part of a franchise agreement, which is what the cable industry is claiming an I-NET is."[323]

144. Michigan Cities, et al. assert that local franchising authorities have the power under Section 611 to require cable operators to provide institutional networks, and that they should therefore be permitted to require them of open video system operators. According to Michigan Cities, et al., the Commission must defer to the local franchising authorities on the interpretation of Section 611.[324] Similarly, National League of Cities, et al. contend that institutional networks are entirely a creature of PEG, and that the open video system operator must therefore have exactly the same institutional network requirements as the cable operator.[325]

145. USTA supports our interpretation of Section 611. USTA asserts that the fact that cable operators are resisting efforts by local franchising authorities to require the building of institutional networks is not a viable basis to misconstrue Section 611, and that the requiring open video system operators to build institutional networks would serve as a disincentive for LECs

[320]*Second Report and Order* at para. 143; *see also* Communications Act § 611, 47 U.S.C. § 531.

[321]Alliance for Community Media, et al. Petition at 7; *see also* Michigan Cities, et al. Petition at 19 (the "no greater or lesser" requirement is not met unless institutional network requirements are met on a franchise area by franchise area basis).

[322]Alliance for Community Media, et al. Petition at 7; *see also* Michigan Cities, et al. Petition at 14; National League of Cities, et al. Petition at 16.

[323]City of Indianapolis Petition at 2; *see also* Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D).

[324]Michigan Cities, et al. Petition at 13-14.

[325]National League of Cities, et al. Petition at 16. *But see* Telephone Joint Petitioners Opposition at 4-5.

to enter the video marketplace through open video systems.[326]

(2) Discussion

146. We affirm our decision to preclude local franchising authorities from requiring open video system operators to build institutional networks[327] because the cable operator is required to do so under the terms of its franchise agreement. Because there is confusion over our interpretation of Section 611 as it applies to institutional networks, however, we make the following clarifications. Contrary to the understanding of certain petitioners,[328] we agree that institutional networks may be required of a cable operator, but we do not agree that this requirement is found in Section 611.[329] As stated in the *Second Report and Order*, Section 611 only provides that a local franchising authority may require that channel capacity on institutional networks be designated for educational or governmental use and does not authorize local franchising authorities to require cable operators to build institutional networks.[330] The building of an institutional network is a requirement negotiated in the franchise agreement.[331] Section 621(b)(3)(D), as added by the 1996 Act, makes clear that a local franchising authority may require a cable operator to provide institutional networks as a condition of the initial grant,

[326]USTA Opposition at 10-11.

[327]As stated above, City of Indianapolis requests that we clarify what an institutional network is. As stated in the *Second Report and Order*, institutional networks are defined in Section 611. *Second Report and Order* at n.334. Section 611(f) defines an institutional network as a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers. Communications Act § 611(f), 47 U.S.C. § 531(f). We decline to define institutional networks other than as the statute states. See, however, Michigan Cities, et al. Petition at 10-13 describing examples of the functions of institutional networks. As stated above, City of Indianapolis expresses concern over the definition of institutional networks apparently because the 1996 Act forbids municipalities from asking for telecommunication services from cable operators as part of a franchise agreement, "which is what the cable industry is claiming an I-NET is." City of Indianapolis Petition at 2. We note that Section 621(b)(3)(D), which contains the prohibition to which City of Indianapolis appears to be referring, specifically excludes institutional networks. *See* Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D). Although institutional networks may be telecommunications services, local franchising authorities are not restricted from requiring them.

[328]*See, e.g.,* Michigan Cities, et al. Petition at 14 and Opposition at 13-14.

[329]*See* Telephone Joint Petitioners Opposition at 3-4 (the issue is not whether local franchising authorities may require institutional networks, but whether that right is derived from Section 611).

[330]*Second Report and Order* at para. 143. We note that Michigan Cities, et al. misquotes Section 611 as providing that local franchising authorities may require "channel capacity for institutional networks." *See* Michigan Cities, et al. Petition at 15. Furthermore, contrary to the claim of Michigan Cities, et al., the Commission does not have to defer to local franchising authorities in interpreting Section 611, a federal statute.

[331]*See, e.g.,* Michigan Cities, et al. Petition at 15-16.

renewal or transfer of a franchise.[332] Pursuant to Section 653(c)(1)(C), open video system operators are not subject to franchise requirements, so we cannot apply an institutional network requirement to open video systems.[333]

147. While institutional networks may or may not function like PEG access as National League of Cities, et al. assert, the statutory definition is broader than merely PEG use. We do not agree that precluding the local franchising authority from requiring an open video system operator to build an institutional network, but permitting the local franchising authority to require channel capacity on a network if an open video system operator does build one, is inconsistent, as Michigan Cities, et al. suggest.[334] Rather, once an open video system operator decides to build an institutional network, the 1996 Act's mandate that an open video system operator's PEG access obligations be no greater or lesser than those of the cable operator become operative. We thus deny the petitions for reconsideration with respect to this matter.

2. Must-Carry and Retransmission Consent

a. Background

148. In the *Second Report and Order*, the Commission promulgated rules pursuant to Section 653(c)(1) that apply the provisions of Sections 325, 614, and 615 to open video system operators certified by the Commission.[335] In applying these provisions to open video system operators, we attempted to impose obligations that were, to the extent possible, "no greater or lesser" than the obligations imposed on cable operators.[336]

149. Sections 614 and 615 set forth a cable operator's "must-carry" obligations regarding local commercial and local noncommercial educational television signals, respectively.[337] They require that cable operators set aside a portion of their capacity for carriage of qualified local broadcast stations. Section 325 sets forth a cable operator's retransmission

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[332]Communications Act § 621(b)(3)(D), 47 U.S.C. § 541(b)(3)(D). *See also* Telephone Joint Petitioners Opposition at 5 (the separate references to Section 611 and institutional networks contained in Section 621(b)(3)(D) indicate that Congress understood that Section 611 is not the source of any right that franchising authorities may have to require cable operators to provide institutional networks). We also note that National League of Cities, et al. are therefore wrong when they state that the only mention in the Cable Act of institutional networks is in Section 611. *See* National League of Cities, et al. Petition at 16.

[333]*See* Telephone Joint Petitioners Opposition at 4-5.

[334]*See* Michigan Cities, et al. Petition at 14.

[335]*See Second Report and Order* at paras. 157-70; Communications Act § 653(c)(1), 47 U.S.C. § 573(c)(1).

[336]*See* Communications Act § 653(c)(2)(A), 47 U.S.C. § 573(c)(2)(A).

[337]Communications Act §§ 614, 615, 47 U.S.C. §§ 534, 535.

consent obligations, which generally prohibit cable operators and other multichannel video programming distributors from carrying a commercial broadcast station without obtaining the station's consent.[338] Local commercial stations seeking carriage must choose to proceed according to either the must-carry or retransmission consent requirements.[339] Stations choosing to proceed under must-carry are entitled to insist on carriage in their local market area.[340] Stations choosing to pursue carriage through retransmission consent must negotiate the terms of a carriage arrangement with a multichannel video programming distributor, and may receive compensation in return for carriage.[341] Non-local commercial stations may also be carried by a cable system pursuant to a retransmission consent agreement because Section 325 applies to broadcast stations in general.[342]

150. In the *Second Report and Order*, the Commission found that our must-carry and retransmission consent rules should apply to open video systems in largely the same manner as they currently apply to cable systems.[343] We stated that the operator of an open video system must "ensure that every subscriber on the open video system receives all appropriate must-carry channels carried in accordance with our rules," and we provided open video system operators the flexibility to choose the most appropriate method of complying with this requirement.[344] In addition, as with cable systems that span multiple television markets, we gave open video system operators the option of providing must-carry broadcast stations to all of the subscribers on their systems or configuring their systems so that subscribers only receive the signals of eligible television broadcast stations in their local market.[345] The Commission also found that with respect to must-carry and retransmission consent elections, certain anomalies might result as a consequence of the potentially vast size of open video systems. We found that it was not necessary for broadcast stations to apply the same election to all cable and open video systems serving the same geographic area.[346]

151. In its petition for reconsideration, NCTA recommends that the Commission specify

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[338]Communications Act § 325, 47 U.S.C. § 325.

[339]Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B).

[340]Communications Act §§ 614(a), 615(a), 47 U.S.C. §§ 534(a), 535(a).

[341]Communications Act § 325, 47 U.S.C. § 325.

[342]*Id.*

[343]*See Second Report and Order* at paras. 160-61.

[344]*Id.* at para. 162.

[345]*Id.* at para. 166.

[346]*Id.* at para. 169.

exactly how an open video system operator must satisfy its obligation to provide must-carry signals to all subscribers.[347] NCTA argues that if the Commission imposed some mechanism akin to the cable "basic tier" requirement, implementation would be more certain and enforcement would be easier.[348] NCTA also urges the Commission to find that programmers are not responsible for providing must-carry signals to subscribers if subscribers purchase those signals from some other source.[349]

152. ALTV urges the Commission to prohibit an open video system's widespread carriage of local signals beyond a station's local market area.[350] First, ALTV argues that the rule allowing cable operators to "narrowcast" the must-carry signals to the particular areas or to deliver signals throughout a system should not be applied to open video systems.[351] ALTV argues that unlike the cable systems that were already established when the must-carry rules were adopted, open video systems are still being designed and can be built to distribute must-carry signals to specific local markets.[352] ALTV also argues that stations will not be able to use retransmission consent outside of their local markets if open video systems carry these stations beyond their local markets pursuant to the must-carry rules.[353] Finally, ALTV argues that stations may encounter prohibitive copyright fees if open video systems are eventually subject to the cable compulsory license.[354] It argues that on very large open video systems that are not configured to limit distribution of must-carry signals to the station's local market, the copyright fees will be prohibitively high, since the open video system operator will be allowed to recover from the station all such fees incurred as a result of carriage beyond the station's local market area.[355]

153. In response, NYNEX argues that the Commission should avoid creating "stringent regulatory solutions" for problems characterized by NYNEX as "speculative."[356] NYNEX also suggests that the issues raised by ALTV may be irrelevant because open video systems have not yet been developed and may be able to "carry programming to households on a selective,

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[347]NCTA Petition at 15.

[348]*Id.*

[349]*Id.*

[350]ALTV Petition at 1.

[351]The term "narrowcast," as used in this section, means the transmission of a signal to a limited geographic area.

[352]ALTV Petition at 1.

[353]*Id.*

[354]*Id.* at 3.

[355]*Id.* at 1-3.

[356]NYNEX Opposition at 9.

'addressable' basis."[357]

154. Tele-TV recommends that the Commission reconsider its decision not to require broadcasters to make the same election among open video systems and cable systems serving the same geographic area.[358] Tele-TV argues that the Commission's decision is inconsistent with its finding that the technical and size differences between open video systems and large cable systems are insufficient to warrant application of significantly different must-carry and retransmission consent rules.[359] Tele-TV submits that if broadcasters are allowed to make different elections, they may discriminate between open video systems and cable systems in areas serving the same subscribers.[360] It states that such a rule could result in unfair situations, such as open video systems being forced to pay for competitively valuable signals that are provided to cable systems for free.[361] Tele-TV asserts that the Commission need not assume that large open video systems will be unable to provide signals to specific parts of their systems pursuant to either must-carry or retransmission consent.[362] It argues that the Commission's current rule should apply until an open video system operator is able to certify to broadcasters that made different elections in different franchise areas that its system is capable of operating in conformity with those elections.[363] U S West supports Tele-TV's proposal.[364]

155. ALTV opposes Tele-TV's recommendation that the Commission reconsider its decision to permit broadcasters to make different must-carry and retransmission consent elections for open video systems and cable systems serving the same geographic area. ALTV argues that Tele-TV has failed to show that the Commission's findings in the *Second Report and Order* were inconsistent or unreasonable.[365] It further argues that it is speculative for Tele-TV to suggest that open video systems may be able to implement different must-carry/retransmission consent elections in different areas served by their systems.[366]

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[357]*Id. See also* Joint Telephone Petitioners Opposition at 14-15 (arguing that network efficiencies will drive open video system configurations rather than attempts to game the must-carry/retransmission consent rules).

[358]Tele-TV Petition at 8-13.

[359]*Id.* at 8-9.

[360]*Id.* at 9-10.

[361]*Id.*

[362]*Id.* at 12.

[363]*Id.* at 13.

[364]U S West Opposition at 6-7.

[365]ALTV Opposition at 2-3.

[366]*Id.* at 3.

b. Discussion

156. In the *Second Report and Order*, the Commission considered and rejected suggestions similar to NCTA's that we specifically require the use of a basic tier-type arrangement in order to provide all subscribers on a system with the signals carried in fulfillment of the must-carry requirements.[367] As we noted in the *Second Report and Order*, the basic tier requirement is contained in Section 623 of the Communications Act, which does not apply to open video systems.[368] NCTA has presented no new evidence in support of a basic tier requirement. We therefore decline to adopt NCTA's request. We agree with NCTA, however, that video programming providers should not be required to duplicate must-carry programming already provided to subscribers from another source.

157. The Commission recognizes ALTV's valid concern that stations electing must-carry status will have to reimburse open video system operators for extensive copyright fees that may result from carriage beyond their local market areas.[369] As ALTV notes, these dangers may be avoided if open video system operators tailor the distribution of must-carry signals to the parts of their system that are located within a station's local market.[370] We believe that our rules provide open video system operators with an incentive to design and construct their systems with this capability. Where an open video system has such a capability, we will require open video system operators to limit the distribution of must-carry signals to the appropriate local markets, unless a local broadcast station consents otherwise. If an open video system operator cannot limit its distribution of must-carry signals in this manner, the open video system operator will be responsible for any increase in copyright fees and may not pass through such increases to the local station electing must-carry treatment.[371]

158. Finally, we agree with Tele-TV and U S West that we should amend our current rule that allows broadcasters to make different elections among open video systems and cable systems serving the same geographic area.[372] The "common election" requirement is contained in Section 325(b)(3)(B): "If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."[373] In Section 653(c),

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[367] *Second Report and Order* at para. 163.

[368] *Id.*

[369] ALTV Petition at 3.

[370] *Id.* at 4.

[371] The Commission does not here intend to prejudge the issue of the applicability of the cable compulsory license to open video systems.

[372] Tele-TV Petition at 12-13; U S West Opposition at 6-7.

[373] *See* Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B)

Congress provided that Section 325 should apply to open video system operators, to the extent possible, no greater or lesser than it applies to cable operators.[374] By directing equal treatment under Section 325, we believe that Congress intended to remove Section 325 as a distinguishing factor between those entering the video marketplace as a cable operator and those entering as an open video operator. Thus, since LECs and other entities entering the video marketplace as overbuilding cable operators would be entitled to rely upon Section 325's common election requirement, we believe that overbuilding open video system operators should be entitled to do the same. To hold otherwise would tip the balance in favor of the traditional cable option in a manner that Congress did not intend.

159. In the *Second Report and Order*, however, we found that as a practical matter the potential size differences between open video systems and cable systems could make common election on overlapping cable and open video systems infeasible.[375] We agree with Tele-TV that our concern in the *Second Report and Order* may no longer apply to the extent that an open video system can tailor the distribution of local broadcast stations to the appropriate communities.[376] As noted above, we believe that our rules provide open video system operators with an incentive to construct their systems with this "narrowcast" capability.[377] We will therefore amend our rules to require that broadcasters make the same election for open video systems and cable systems serving the same geographic area unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

3. Program Access

a. Background

160. In the *Second Report and Order*, we concluded that, pursuant to Section 653(c)(1)(A), the program access restrictions should apply to the conduct of open video system operators in the same manner as they are currently applied to cable operators and common carriers or their affiliates that provide video programming directly to subscribers.[378] We concluded that it was most appropriate to apply Section 628 to open video system operators by creating parallel provisions for cable operators and open video system operators, such that, for example, open video system operators are prohibited from entering into exclusive agreements with satellite programming vendors in which an open video system operator has an attributable interest,

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[374]Communications Act § 653(c), 47 U.S.C. § 573(c).

[375]ALTV supports the rule we adopted in light of this potential difficulty. ALTV Opposition at 2-3.

[376]Tele-TV Petition at 12.

[377]*See supra* at Section III.F.2.b.

[378]*Second Report and Order* at para. 175.

but are permitted to enter into an exclusive agreement with a satellite programming vendor in which a cable operator has an attributable interest.[379] We also stated that, in order to effectuate the purposes of the program access statute in the open video system context, open video system programming providers should be subject to the program access provisions. Specifically, we concluded that we would extend our program access rules to prohibit cable-affiliated satellite programmers and cable-affiliated open video system programming providers from entering into exclusive programming agreements, unless the Commission first determines that the exclusive arrangement is in the public interest under the factors listed in Section 628(c)(4).[380] Finally, we found that open video system programming providers that provide more than one channel of programming clearly fit within the definition of an MVPD and that they are therefore entitled to the benefits of the program access provisions.[381]

161. NCTA and Rainbow ask the Commission to reconsider its decision to apply the program access rules to video programming providers on an open video system.[382] They argue that the Commission impermissibly extended the exclusivity provisions of Section 628 to open video system video programming providers, contrary to the plain language of Section 653(c)(1)(C), which extends the program access rules solely to open video system operators.[383]

162. Rainbow also argues that the Commission's interpretation of the 1996 Act contravenes the policy underlying open video systems.[384] Rainbow states that by giving competing video programming providers the right to access each other's programming, the Commission has undermined the competition and diversity open video systems were intended to promote.[385] Rainbow cautions that if the Commission expands the program access rules to open video system programming providers, Rainbow will be forced to provide its programming directly to its potential competitors and will have no incentive to use open video systems on its own.[386]

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[379] *Id.* at paras. 176-177, 179.

[380] *Id.* at paras. 186-194.

[381] *Id.* at paras. 195-196.

[382] NCTA Petition at 10; Rainbow Petition at 6. *See Second Report and Order* at para. 182.

[383] NCTA Petition at 10; Rainbow Petition at 6-9.

[384] Rainbow Petition at 10.

[385] *Id.* at 11; *see also* NCTA Petition at 11 (arguing that the effect of the Order's prohibition on certain exclusive arrangements between programmers and open video system video programming providers will reduce competition among such providers).

[386] *Id.* at 12. Conversely, in its opposition to petitions for reconsideration, RCN argues that under Rainbow's model "only OVS programming providers that are affiliated with satellite programmers (most of whom are also affiliated with cable operators) could survive." RCN at 8.

163. USTA and NYNEX support the Commission's decision to apply the program access rules to open video system video programming providers.[387] USTA argues that despite claims by cable incumbents, "parity of access is an essential pre-condition for LECs to provide meaningful competition to incumbent cable operators, due to the concentration of control over vast portions of . . . programming among a handful of vertically integrated cable operators."[388] RCN characterizes Rainbow and NCTA's arguments as "merely an attempt by cable affiliated entities to maintain their dominant market position despite the procompetitive policy of the 1996 Act."[389] RCN submits that the Commission's application of Section 628 to open video system programming providers is based on the 1992 Cable Act, and that the Commission had no need to rely on the extension of that provision in the 1996 Act.[390]

164. Rainbow further objects to the Commission's conclusion that open video system programmers qualify as multichannel video programming distributors ("MVPDs").[391] Rainbow argues that Congress declined to add open video system video programming providers to the list of representative entities under the definition of MVPDs in Title VI.[392] Rainbow asserts that this omission is significant, in that the listed MVPDs all operate the vehicle for distribution (e.g., cable, MMDS, DBS), whereas open video system video programming providers distribute their product on a common platform in direct competition with other programming providers.[393]

165. In opposition to Rainbow's argument that programming providers are not MVPDs, MPAA, RCN, and Tele-TV argue that open video system programming providers are MVPDs, based on the illustrative, not exhaustive, list of MVPDs set forth in Section 602(13).[394] MPAA, RCN and Tele-TV argue that open video system video programming providers clearly fit the definition of MVPD because they "make available for purchase, by subscribers or customers, multiple channels of programming."[395]

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[387]USTA Opposition at 6; NYNEX Opposition at 15-16.

[388]Rainbow Petition at 7.

[389]RCN Opposition at 3-4.

[390]*Id.* at 4.

[391]Rainbow Petition at 17.

[392]*Id.* at 18.

[393]*Id.*

[394]MPAA Comments at 3; RCN Opposition at 9-10; Tele-TV Opposition at 1-2.

[395]Communications Act § 602(13), 47 U.S.C. § 522(13). *See* MPAA Comments at 3; RCN Opposition at 9-10; Tele-TV Opposition at 1-2.

166. NCTA contends that the Commission erred in applying the exclusivity provisions of Section 628 to contracts between cable-affiliated satellite programmers and cable-affiliated open video systems video programming providers.[396] NCTA contends that the exclusivity prohibitions in Sections 628(c)(2)(C) and (D) apply only to exclusive contracts between cable operators and cable-affiliated satellite programmers.[397] NCTA points out that Sections 628(c)(2)(C) and (D) do not say "cable operator *or its affiliate*."[398] Nor, according to NCTA, is the Commission authorized to reach such exclusive arrangements under Section 628(b), since 628(b) is limited by its plain language to unfair or deceptive acts or practices of a cable operator, not a cable-affiliated open video system programming provider.[399]

167. Finally, NCTA argues that the *Second Report and Order* impermissibly precludes individual vertically integrated satellite programmers from marketing directly to open video system subscribers unless they accept a "duty to deal" with open video system video programming providers on the system.[400] NCTA submits that there is nothing *per se* unreasonable or anticompetitive about a supplier choosing to retail directly to customers.[401] In any event, NCTA submits that the Commission cannot artificially create and discriminate against a subclass of the open video system technology (i.e., open video system programming providers).[402]

b. Discussion

168. We believe that our initial interpretation applying the provisions of Section 628 to open video system programming providers is reasonable and should stand. First, Rainbow and NCTA's argument that Congress limited the applicability of the program access rules to open video system operators was expressly considered and rejected in the *Second Report and Order*.[403] Nevertheless, we will take this opportunity to reiterate the basis for our decision. We reject NCTA's challenge to our authority to apply the exclusivity provisions of Section 628(c)(2)(C) and (D) to the exclusive arrangements between satellite programmers in which a cable operator has an attributable interest and open video system programming providers in which a cable operator has an attributable interest. The structure of Section 628 confers broad authority on the

[396]NCTA Petition at 11.

[397]Rainbow Petition at 11.

[398]NCTA Petition at 12 (emphasis in original).

[399]*Id.*

[400]*Id.* at 13.

[401]*Id.*

[402]*Id.* at 14.

[403]*See Second Report and Order* at paras. 182, 186.

Commission to adopt regulations in order to promote "the public interest . . . by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technology."[404] Congress required that such regulations specify particular conduct prohibited by Section 628(b), which makes it:

> unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[405]

Therefore, we reject NCTA's argument that Section 628(b) and our implementing regulations only apply to the conduct of cable operators. Our regulations clearly can extend to the conduct of cable-affiliated satellite programmers, including, of particular relevance here, the manner in which such programmers deal with open video system programming providers.

169. Moreover, as we stated in the *Second Report and Order*, Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives "should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming."[406] The Commission has called Section 628(b) a "clear repository of Commission jurisdiction" to address those obstacles.[407] By entitling Section 628(c) "Minimum Contents of Regulations," Congress gave the Commission authority to adopt additional rules that will advance the purposes of Section 628; it did not limit the Commission to adopting rules only as set forth in that statutory provision.[408]

170. As we stated in the *Second Report and Order*, an exclusive contract between a cable-affiliated video programming provider on an open video system and a cable-affiliated programmer presents many of the same concerns as an exclusive contract between a cable operator and a vertically integrated satellite programming vendor. A primary objective of the

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[404]Communications Act § 628(c)(1), 47 U.S.C. § 548(c)(1).

[405]Communications Act § 628(b), 47 U.S.C. § 548(b).

[406]*See Second Report and Order* at para. 186; *First Report and Order* in MM Docket No. 92-265 *("First Report and Order")*, 8 FCC Rcd 3359, 3374; *Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order on Reconsideration of the First Report and Order* in MM Docket No. 92-265 (*"DBS Order"*), 10 FCC Rcd 3105, 3126-3127 (1994).

[407]*First Report and Order,* 8 FCC Rcd at 3374.

[408]*See* RCN Opposition at 6 (discussing the Commission's broad mandate to adopt additional regulations that it finds necessary to effectuate the purpose of Section 628(b)).

program access requirements is the release of programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.[409] Exclusive arrangements among cable-affiliated open video system programming providers and cable-affiliated satellite programmers may impede the development of open video systems as a viable competitor to cable.[410] NCTA and Rainbow fail to challenge or address these concerns.

171. Second, we believe that the benefits of the program access provisions apply to open video system providers. Contrary to Rainbow's arguments, open video system programming providers fall within the definition of MVPDs, which Section 628 identified as the intended beneficiaries of the program access regime.[411] Specifically, in response to Rainbow's argument that Congress did not amend Section 602(13) to add open video system video programming providers to the list of MVPDs, we agree with MPAA, Residential Communications and Tele-TV that the list of entities enumerated in that section is expressly a non-exclusive list. Section 602(13) states that the term MVPD "means a person such as, *but not limited to,* a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service. . . . "[412] We also agree with those commenters that asserted that open video system video programming providers fit the definition of MVPD because they make "available for purchase, by subscribers or customers, multiple channels of video programming.[413] Furthermore, we find Rainbow's argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.[414] The conclusion that open video system programming providers are MVPDs is further supported by the amendment to the effective competition "test' of Section 623(d) added by the 1996 Act.[415] That section explicitly refers to "a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)."[416] In light of these factors, an open video system video

[409]*See Second Report and Order* at para. 188.

[410]*See id.* at paras. 189-191.

[411]*See, e.g.,* Communications Act § 628(b), 47 U.S.C. § 548(b) (prohibiting certain conduct which "hinder[s] significantly or [prevents] any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.")

[412]Communications Act § 602(13), 47 U.S.C. § 522(13) (emphasis added).

[413]*Id.*

[414]*See also* Tele-TV Opposition at 2 (the fact that most open video system programming providers will use another party's network has no relevance under Section 602(13)).

[415]Communications Act § 623(d), 47 U.S.C. § 543(d) (emphasis added).

[416]Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

programming provider clearly constitutes such an MVPD.

172. Third, we reject NCTA's argument that intra-system competition would be harmed by applying the program access rules to cable-affiliated video programming providers on an open video system. As we stated in the *Second Report and Order*, our concern is the same as in the cable context -- that a cable operator would use its control over programming to keep that programming from other competing MVPDs. Specifically, as we stated in the *Second Report and Order*, we are concerned that exclusive arrangements among cable-affiliated open video system programming providers and cable-affiliated satellite programmers may serve to impede development of open video systems as a viable competitor to cable to the extent that popular programming services are denied to open video system operators or unaffiliated open video system programming providers that seek to package such programming for distribution to subscribers.

173. We reiterate that the prohibition, absent a Commission public interest finding, on exclusive contracts applies only to contracts between cable-affiliated satellite programmers and cable-affiliated open video system programming providers and contracts between satellite programmers affiliated with an open video system operator and open video system programming providers affiliated with an open video system operator.[417] We note that, consistent with the *DBS Order*, a vertically integrated satellite programmer is not generally restricted from entering into an exclusive contract with an MVPD that is not affiliated with a cable operator, although such a contract is subject to challenge under Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules.[418]

174. Finally, we disagree with NCTA's contention that by applying the program access rules to open video system video programming providers, the Commission has deemed retailing directly to customers to be patently unreasonable or anticompetitive. The open video system rules do not prohibit any open video system video programming provider from selling directly to customers. Rather, the open video system rules address dealings between satellite programmers (in particular, those affiliated with cable operators and open video system operators) and open video system programming providers.

[417]Rainbow's comments misleadingly fail to make the distinction between cable-affiliated video programming providers and non-affiliated video programming providers.

[418]*See Second Report and Order* at paras. 184-85. *See also* MPAA Opposition at 3 (under the principles of the *DBS Order*, the program access rules do not preclude an exclusive arrangement by a cable-affiliated satellite programming vendor and a non-cable MVPD (including an open video system MVPD)).

4. *Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity*

a. Background

175. In the *Second Report and Order*, the Commission prescribed regulations pursuant to Section 653(b)(1)(D) that "extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network non-duplication (47 C.F.R. 76.92 *et seq.*), and syndicated exclusivity (47 C.F.R. 76.151 *et seq.*).[419] These regulations allow the holders of certain exclusive rights to prohibit cable systems from carrying various sports, network and syndicated programming within specified geographic zones.[420]

176. In the *Second Report and Order*, we generally found that our exclusivity and non-duplication rules should be applied to open video systems in the same manner as they apply to cable systems.[421] Specifically, the Commission found that open video system operators should be responsible for compliance with our exclusivity and non-duplication rules.[422] In order to account for the administrative differences between open video systems and cable systems, the Commission provided that all notices of exclusive or non-duplication rights must be received by the open video system operator. We further required that the open video system operator make all such notices immediately available to all appropriate video programming providers so that they have the opportunity to either delete or substitute signals where possible.[423] The Commission recognized that some systems would be configured to allow individual programmers to substitute or delete the necessary signals. Therefore, we decided that an operator would not be subject to our sanctions when that operator provided proper notices to the necessary programming providers and took prompt steps to stop distribution of the infringing program once it was notified of a violation.[424]

177. The Joint Sports Petitioners request that the Commission reconsider its findings regarding sports exclusivity because the current rules give sports teams and leagues holding exclusive rights less protection than they receive in the cable context.[425] The Joint Sports Petitioners argue that our rules improperly permit open video system operators to escape liability

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[419] *Second Report and Order* at paras. 199-204.

[420] 47 C.F.R. §§ 76.67, 76.92-.97 and 76.151, .153-.159, .163.

[421] *Second Report and Order* at para. 201.

[422] *Id.* at para. 202.

[423] *Id.* at para. 204.

[424] *Id.*

[425] Joint Sports Petitioners Petition at 2.

if they notify the appropriate unaffiliated programming providers of the request for deletion and take steps to stop the distribution of infringing programs once they are notified of a violation.[426] The Joint Sports Petitioners argue that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be re-couped once missed.[427] The Joint Sports Petitioners suggest that the Commission require that the open video system operator always be responsible for compliance even after notifying programming providers and taking steps after a violation occurs.[428] The Joint Sports Petitioners suggest that open video system operators be allowed to require indemnification as a condition of carriage, for any monetary sanctions it may receive.[429]

178. Further, the Joint Sports Petitioners ask the Commission to clarify that it is not necessary for a sports team or league to notify both the individual programming providers and the open video system operator.[430] They also ask that the Commission make clear when such notifications will be deemed to have been made "immediately available" to a programmer and suggest that the Commission require open video system operators to transmit such notices to the necessary program providers on the same day that they are received.[431]

179. In its opposition, MFS urges the Commission not to alter the open video system rules regarding sports exclusivity.[432] It argues that open video system operators will be unnecessarily burdened if they are required to do anything more than notify individual programming providers of any notifications they receive.[433] For instance, the Joint Telephone Petitioners argue that operators should not be placed in the middle of such disputes because they risk liability from either the party claiming exclusive rights or the programmer depending on who's directions they follow.[434]

180. In its petition for reconsideration, U S West asks the Commission to provide guidance as to the necessary "prompt steps" that must be taken by an open video system operator

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[426] *Id.* at 2-3.

[427] *Id.* at 3.

[428] *Id.*

[429] *Id.* at 3 n.4.

[430] *Id.* at 4.

[431] *Id.*

[432] MFS Communications Opposition at 8.

[433] *Id.* at 8-9.

[434] Joint Telephone Petitioners Opposition at 12.

in order to avoid being subject to sanctions for any violation of our non-duplication and exclusivity rules.[435] U S West suggests that the Commission avoid the complication of involving the operator by placing the compliance burden on the alleged violator, the video programming provider.[436] Alternatively, U S West suggests that the Commission find that sanctions will not be imposed on open video system operators if proper notice has been given to the programming providers that have allegedly violated the rules.[437] In its opposition, NYNEX argues that open video system operators cannot ensure compliance.[438] It submits that the individual video programmers on an open video system should be responsible for blocking distribution of necessary signals or negotiating over the validity of any claims of exclusive or non-duplication rights.[439]

b. Discussion

181. Upon reconsideration, we grant the petition filed by the Joint Sports Petitioners regarding our current rule governing sports exclusivity. We find merit in their position that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be recouped once missed. We believe that our rule that extends the Commission's regulations concerning sports exclusivity to open video systems must be amended in order to preserve the same level of protection received by sports teams and leagues in the cable context.[440] While we hold open video system operators responsible for compliance with our rules, we also recognize that they are forced by the structure of an open video system to rely, to a degree, on individual programming providers who may dispute a claim of exclusivity or may attempt to substitute a signal for the signal that is to be deleted.

182. In the *Second Report and Order*, we stated that the open video system operator would be responsible for compliance with these rules and would be liable if it failed to delete signals once it was made aware that a violation had occurred.[441] We amend our rule to provide that open video system operators will be subject to sanctions for any violation of our sports

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[435]U S West Petition at 5.

[436]*Id. See also* Joint Telephone Petitioners Opposition at 11-12.

[437]U S West Petition at 5.

[438]NYNEX Opposition at 14.

[439]*Id.* at 14-15. *See also* Joint Telephone Petitioners Opposition at 11-12.

[440]We are also not persuaded by the arguments raised in the oppositions filed by MFS Communications and NYNEX. In the *Second Report and Order*, the Commission considered and rejected proposals similar to those made by NYNEX that we hold the individual programming providers on the system responsible for compliance with our sports exclusivity rules. *Second Report and Order* at paras. 202-203.

[441]*Second Report and Order* at paras. 202-204.

exclusivity rules. Operators generally may effect the deletion of signals for which they receive deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. If a programmer challenges the validity of claimed exclusive or non-duplication rights, the open video system operator shall not delete the signal. However, we agree with the Joint Sports Petitioners that an open video system operator should be allowed to require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.[442]

183. Contrary to the further concerns mentioned by the Joint Sports Petitioners, our current rules do not require a sports team or league to provide notifications to individual video programming providers in addition to the open video system operator. The holder of exclusive or non-duplication rights is, of course, free to notify individual programming providers when it notifies the open video system operator as required by our rules. In addition, our rules require an open video system operator to make the notices it receives "immediately available" to the appropriate programming providers on its system.[443] Given the different types of systems and different circumstances in which notice will be provided, we do not believe at this time that a specific time requirement is necessary or appropriate.

184. We also deny U S West's petition for reconsideration which suggests that the Commission hold individual programming providers responsible for compliance with our exclusivity and non-duplication rules, and asks the Commission to further define the "prompt steps" that must be taken by an operator in order to avoid liability after a violation of our rules has occurred.[444] In the *Second Report and Order*, the Commission responded to the issues raised in U S West's petition.[445] U S West does not present any further evidence to support the adoption of different rules. We also recognize that the procedures necessary to stop the distribution of infringing programs may vary from system to system. Therefore, we decline to state the specific steps that an open video system operator will be required to take in order to promptly stop the further distribution of infringing programs.

5. Local Franchising Requirements

a. Background

185. In the *Second Report and Order*, we found that Congress' open video system framework permits state and local authorities to impose conditions on an open video system

[442]Joint Sports Petitioners Petition at 3 n.4.

[443]*See* 47 C.F.R. §§ 76.1506(m)(2), 76.1508(c), 76.1509(c).

[444]U S West Petition at 5.

[445]*Second Report and Order* at paras. 202-204.

operator for use of the rights-of-way, so long as such conditions are applied equally to all users of the rights-of-way (i.e., are non-discriminatory and competitively neutral).[446] We also found that, in light of Congress' stated intent, state and local governments cannot require any open video system operator to obtain a Title VI franchise from a state or local authority for use of public rights-of-way necessary to operate its open video system. We therefore concluded that a state or local government requirement that directs an open video system operator to obtain a Title VI franchise, or seeks to impose Title VI "franchise-like" requirements, directly conflicts with Section 653 of the Communications Act and is preempted.[447] In addition, we disagreed in the *Second Report and Order* that this narrow preemption necessarily constitutes a "taking" under the Fifth Amendment, specifically finding that Congress has provided "just compensation" to local authorities for use of the public rights-of-way.[448]

186. Several parties representing state and local interests have requested reconsideration of the *Second Report and Order*. The National League of Cities, et al. state that, at times, the *Order's* language regarding preemption is too broad and the Commission should clarify that its intent was only to preempt local franchising authority under Title VI.[449] In the absence of a specific directive from Congress, the National League of Cities, et al. argue that the Commission has no authority to preempt any non-Title VI local franchising requirement.[450]

187. The National League of Cities, et al. also reiterate its claim that any preemption of non-Title VI franchises would violate the Fifth Amendment.[451] In particular, the National League of Cities, et al. argue that the *Second Report and Order* grossly underestimates the compensation due to local franchising authorities, which in the cable context goes far beyond a monetary franchise fee.[452] Since the *Second Report and Order's* rules fall short of requiring that the open video system operator's compensation will match the cable operator's obligations (i.e., the market value of the public rights-of-way), the Commission has deprived the community of just compensation.[453] Finally, the National League of Cities, et al. assert that open video systems

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[446] *See Id.* at paras. 207-222.

[447] *Id.* at paras. 208-212.

[448] *Id.* at paras. 217-222.

[449] National League of Cities, et al. Petition at 2.

[450] *Id.* at 3.

[451] *Id.* at 4-12.

[452] *Id.* at 5-8 (noting that local governments receive compensation from cable operators that include franchise fees, in-kind compensation such as PEG facilities, and other community benefits such as build-out requirements, system design parameters and customer service standards).

[453] *Id.* at 8-9.

will impose massive costs on local governments for the repair and maintenance of the rights-of-way, including costs attributable to street cuts, paving and repaving.[454]

188. In addition, the National League of Cities, et al. and the City of Indianapolis argue that the *Second Report and Order* mistakenly equates the 1996 Act's "non-discriminatory and competitively neutral" standard for local management of the public rights-of-way with "equal" treatment, which is a far more inflexible standard.[455] The Village of Schaumburg, while it concurs with the Commission's statement that local authorities may ensure the public safety in the use of rights-of-way by "gas, telephone, electric, cable and similar companies, "requests that the Commission clarify that "similar companies" includes open video system operators.[456] The Village of Schaumburg also states that the *Second Report and Order* does not outline mechanisms for local governments to impose terms and conditions on the use of the rights-of-way, and requests the Commission to require open video system operators to enter into contractual agreements with local authorities regarding such use.[457]

189. Municipal Services, et al. contend that municipalities in a majority of states have existing franchises with their LECs, pursuant to state laws that require the telephone company to obtain local authorization prior to using the public rights-of-way. Municipal Services, et al. request the Commission to state that LECs using the public rights-of-way for open video service remain subject to pre-existing and otherwise valid telephone franchise requirements.[458]

190. In response, NYNEX argues that the arguments of the National League of Cities, et al. are based on a "fundamentally flawed misunderstanding."[459] The source of local governments' cable franchising authority, according to NYNEX, is Part III of Title VI of the Communications Act, and Congress clearly stated in the 1996 Act that local governments did not have similar franchising authority over open video operators.[460] NYNEX asserts that the National League of Cities, et al. compounds their error by reciting a litany of mechanisms by which local governments obtain in-kind compensation and services from cable operators in excess of the maximum permissible 5% franchise fee.[461] According to NYNEX, such attempts to evade the

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[454] *Id.* at 9-12.

[455] *Id.* at 13; City of Indianapolis Petition at 1.

[456] Village of Schaumburg Petition at 1.

[457] *Id.* at 2.

[458] Municipal Services, et al. Petition at 2-6.

[459] NYNEX Opposition at 18.

[460] *Id.* at 18-19.

[461] *Id.* at 19.

5% limit through the franchise process was precisely the concern that led Congress to establish the 5% cap in the first place -- a concern that Congress may have had in mind when it exempted open video system operators from local franchise requirements and provided instead for a payment in lieu of franchise fee.[462]

191. U S West also disagrees with the National League of Cities, et al. that the Commission does not have the authority to preempt non-Title VI state and local franchise requirements.[463] U S West argues that, contrary to the claim of the National League of Cities, et al., the key is not how such requirements are labeled, but their effect. If the local requirements are Title VI-like requirements that would frustrate Congress' intent in adopting the 1996 Act's open video provisions, the Commission has sufficient authority to preempt any such requirements; whereas if the local requirements are non-discriminatory and competitively neutral, the Commission would have no grounds for preemption.[464]

192. In their response, the Telephone Joint Petitioners object to the suggestion that local authorities should have the same degree of regulatory control over open video that Congress has permitted them to exercise over cable service.[465] The Telephone Joint Petitioners argue that both open video and cable are activities in interstate commerce, over which Congress is supreme.[466] According to the Telephone Joint Petitioners, the Commission therefore must follow Congress' direction limiting local regulation of open video to non-discriminatory and competitively neutral management of public rights-of-way, and prescribing the "compensation" that local authorities may receive for use of the rights-of-way.[467]

b. Discussion

193. We thoroughly explained the bases of our findings in the *Second Report and Order* on these issues.[468] No parties on reconsideration raise any arguments that lead us to revisit our conclusions therein. We continue to believe that the general distinction we adopted reflects Congress' stated intent: state and local authorities may manage the public rights-of-way in a non-discriminatory and competitively neutral manner, but may not impose Title VI franchise or Title

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[462]*Id.* at 20 (quoting *Memorandum Opinion and Order in the Matter of United Artists Cable of Baltimore*, FCC 96-188 (released April 26, 1996) at para. 17).

[463]U S West Opposition at 5-6.

[464]*Id.*

[465]Telephone Joint Petitioners Opposition at 6.

[466]*Id.*

[467]*Id.*

[468]*See Second Report and Order* at paras. 207-222.

VI "franchise-like" requirements on open video system operators.

194. We do, however, clarify our decision in several respects. First, we clarify that the preemption is limited to Title VI or Title VI "franchise-like" requirements, and does not extend to all types of potential franchises. If, for example, a state or local government characterizes permission to use the public rights-of-way as a "franchise," such franchises are not preempted so long as they are issued in a non-discriminatory and competitively neutral manner. We agree with U S West that the key in this regard is not how such requirements are labeled, but their effect. If the local requirements are Title VI-like requirements that would frustrate Congress' intent in adopting the 1996 Act's open video provisions, we continue to believe they are preempted.

195. Second, we clarify that "non-discriminatory and competitively neutral" treatment does not necessarily mean "equal" treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities "equally." Third, we clarify that when the *Second Report and Order* stated that local authorities may ensure the public safety in the use of rights-of-way by "gas, telephone, electric, cable and similar companies," an open video system would qualify as a "similar company."

196. In addition, we continue to disagree with the National League of Cities, et al. that the narrow preemption in the *Second Report and Order* violates the Fifth Amendment. First, although the National League of Cities, et al. assert that the *Second Report and Order* "grossly underestimates" the compensation due to local authorities, they fail to address the Commission's finding that the "before and after" test -- in which the measure of compensation is the difference in the value of the property before a partial taking and the value of the property after the partial taking -- is the proper test to apply.[469] Second, we do not agree with the National League of Cities, et al. that the local community has not received just compensation unless an open video system operator matches the franchise and other obligations imposed upon the incumbent cable operator. Such a requirement would obviously render meaningless Congress' exemption of open video from Section 621 franchising requirements, since an open video system operator would be forced to comply with each of the incumbent cable operator's franchise terms or be subject to a Fifth Amendment "takings" claim. Third, the *Second Report and Order* specifically permits the recovery of normal fees associated with the construction of an open video system: "[A] state or local government could impose normal fees associated with zoning and construction of an open video system, so long as such fees [are] applied in a non-discriminatory and competitively neutral manner."[470] We clarify, however, that these "normal fees associated with zoning and construction" should not duplicate the compensation provided by the gross revenues fee. As we

[469] *See Second Report and Order* at para. 221 (*citing United States v. 8.41 Acres of Land*, 680 F.2d 388, 391 (5th Cir. 1982)).

[470] *Id.* at para. 209.

stated in the *Second Report and Order*, it is apparent that the gross revenue fee "in lieu of" a franchise fee was intended as compensation by open video system operators for use of the public rights-of-way.[471] The National League of Cities, et al. have not explained why the fees associated with the construction of open video systems would be any different than the fees associated with any other users of the rights-of-way, and why regulations applied in a non-discriminatory, competitively neutral manner on all users of the rights-of-way would be insufficient to deal with such matters.[472]

197. Finally, we find that a determination of whether LECs that use the rights-of-way for open video service remain subject to the same conditions contained in the pre-existing telephone franchise agreements can only be made on a case-by-case basis in light of the particular agreement between the parties. Thus, we make no general conclusions here. Similarly, we do not believe it necessary, as the Village of Schaumburg suggests, to require open video system operators to enter into contractual agreements with local authorities for use of the rights-of-way. Management of the rights-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashion without the imposition of unique requirements for open video service.

G. Information Provided to Subscribers

1. Background

198. In the *Second Report and Order*, we stated that an open video system operator is not relieved of the non-discrimination provisions of Section 653(b)(1)(E)(i) if it offers a navigational device that works only with affiliated programming packages.[473] Similarly, we found that an open video system operator should not be able to evade its non-discrimination obligations by having its affiliate nominally provide the navigational device, guide or menu.[474]

199. On reconsideration, the Joint Telephone Petitioners, Tele-TV, and NYNEX contend that Section 653(b)(1)(E) requires only that open video system operators, and not their affiliates, be prohibited from discriminating with respect to information provided for the selection of programming.[475] According to the Joint Telephone Petitioners, applying this non-discrimination requirement to affiliated programmers effectively makes affiliates the servant of non-affiliates and

[471] *See Second Report and Order* at paras. 219-222.

[472] *See* Joint Telephone Petitioners Opposition at 6.n.13.

[473] *Second Report and Order* at para. 231.

[474] *Id.*

[475] Joint Telephone Petitioners Petition at 2; Tele-TV Petition at 4; NYNEX Petition at 10-12.

subjects affiliates to substantial cost and competitive disadvantages.[476] NYNEX states that the application of the requirement to affiliates should be limited to situations in which there is only one navigational device available on the system.[477]

200. The Joint Telephone Petitioners, Tele-TV, U S West and NYNEX also object to any implication that there will only be a single navigational device provided by the open video system operator or its affiliate.[478] According to the Joint Telephone Petitioners, while consumers may only want a single navigational device, the device could be provided by any programming provider that has created its own navigational device.[479] Tele-TV states that affiliated programmers will face a distinct disadvantage if they are unable to highlight their own programming while unaffiliated programmers are able to offer individualized navigational devices.[480] The Joint Telephone Petitioners state that "the OVS operator may choose to allow programmers obtaining carriage on its system to provide such devices by making the necessary technical information available as part of the information provided in the open enrollment period."[481] Similarly, NYNEX states that it will provide all programming providers with the necessary technical specifications for development of independent program guides and navigational devices.[482]

201. The Joint Telephone Petitioners assert that if an OVS operator chooses to allow programming packagers to provide their own navigational devices, the operator should be permitted to offer a system-wide menu or guide (electronic or paper) to all subscribers to fulfill its obligations under Section 653(b)(1)(E)(i) and (v).[483] The guide would provide a non-discriminatory listing of all programming providers on the system, along with instructions on how to subscribe to that provider's programming.[484] If the menu or guide were electronic, it would be part of the mandatory package of PEG and must carry channels that the operator requires as

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[476]Joint Telephone Petitioners Petition at 2

[477]NYNEX Petition at note 16.

[478]Joint Telephone Petitioners Petition at 2-3; NYNEX Petition at 12; Tele-TV Petition at 3-4; U S West Petition at 6-7.

[479]Joint Telephone Petitioners Petition at 3.

[480]Tele-TV Petition at 6.

[481]Joint Telephone Petitioners Petition at 3.

[482]NYNEX Petition at 12.

[483]Joint Telephone Petitioners Petition at 3.

[484]*Id.*

a condition of carriage.[485] Similarly, U S West states that the non-discrimination requirement should be satisfied if all programming providers on the system are displayed in a non-discriminatory manner in an introductory guide or menu and all programming is equally accessible at the initial navigational level, such as a cable-ready TV set.[486] Sprint states that, rather than applying the requirement to affiliates, the Commission should instead prohibit operators from providing a navigational device that only works with its affiliate.[487]

202. In response, the Alliance for Community Media, et al. and MPAA agree with the Commission's finding that the non-discrimination provisions of Section 653(b)(1)(E) apply to an open video system's affiliate if the affiliate, and not the operator, provides a navigational device.[488] According to the Alliance for Community Media, et al., applying the non-discrimination provisions of Section 653(b)(1)(E) only to an operator when its affiliate provides the navigational device renders the non-discrimination provisions meaningless.[489] The Alliance for Community Media, et al., however, recommend that, because the precise configuration of navigational devices is currently unknown, the Commission should state that the rules in this area will be revisited by the Commission as systems develop.[490]

2. Discussion

203. On reconsideration, we agree that video programming providers, including those affiliated with the open video system operator, should be permitted to develop and use their own navigational devices. We agree with Tele-TV and NYNEX that individualized navigational devices could be a factor in subscribers' choice of programming providers, thereby fostering innovation and competition among providers. While for technical considerations we will not require open video system operators to permit programming providers to use their own navigational devices, we do not believe that the same limitation should be placed on a provider's right to develop and use their own individualized guides and menus. We believe that it would be an impermissible term or condition of carriage under Section 653(b)(1) for an open video system operator to restrict a video programming provider's ability to use part of its channel capacity to provide an individualized guide or menu to its subscribers.

204. In light of the above decision, we believe that several safeguards are necessary to

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[485] *Id.*

[486] U S West Petition at 7.

[487] Sprint Opposition at 6.

[488] Alliance Opposition at 1-2; MPAA Opposition at 2.

[489] Alliance Opposition at 1-2.

[490] *Id* at 2.

effectuate congressional intent and protect unaffiliated programming providers. First, we reaffirm our conclusion in the *Second Report and Order* that an open video system operator cannot evade its non-discrimination obligations under Section 653(b)(1)(E) simply by having its navigational devices, guides, or menus nominally provided by an affiliate.[491] By this statement, we meant that where an open video system operator provides no navigational device, guide or menu of its own, its affiliate's navigational device, guide or menu will be subject to the requirements of Section 653(b)(1)(E) even though such services are not formally provided by the open video system operator. We therefore will continue to apply the non-discrimination requirements of Section 653(b)(1)(E) to the open video system operator's affiliate where the affiliate provides a navigational device, guide or menu and the operator does not.

205. Second, if an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system. These menus or guides should also inform the viewer how to obtain additional information on each of the services listed. If an operator provides a system-wide menu or guide that meets these requirements, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E).

206. Third, an open video system operator may not require programming providers to develop and/or use their own navigational devices. Not all programming providers will have the desire or the resources to supply their own navigational devices. This may be especially true of smaller video programming providers seeking carriage on the open video system. Upon request, such programming providers must have access to the navigational device used by the open video system operator or its affiliate. Thus, for example, an open video system operator may not require a subscriber of its affiliated programming package to purchase a second set-top box in order to receive service from an unaffiliated programming provider that does not wish to use its own set-top box. An open video system operator need not physically integrate such programming providers into its affiliated programming package, or list such programming providers on its affiliate's guide or menu, so long as it meets the requirement set forth in the *Second Report and Order* that no programming service on its navigational device be more difficult to select than any other programming service.[492]

H. Dispute Resolution

1. Background

207. In the *Second Report and Order*, we adopted procedures for resolving disputes

[491] *Second Report and Order* at para. 231.

[492] *Id.* at para. 230-31.

under Section 653 that are modeled after our rules governing program access disputes. Among other things, we decided that requiring open video system operators to disclose their carriage contracts with video programming providers was unnecessary and undesirable. In order to protect video programming providers from discrimination, we required open video system operators to make preliminary rate estimates available to potential video programming providers. In addition, we made carriage contracts subject to discovery if a complaint was filed.[493] We determined that discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by Commission staff.[494]

208. On reconsideration, the National League of Cities, et al., argue that even where an unaffiliated programming provider has the financial resources to file a complaint challenging rates as discriminatory, it must, under the Commission's pleading rules, provide documentary evidence or an affidavit describing the differential of which it complains.[495] Yet, under the open video system carriage pricing rules, open video system operators are not required to disclose their carriage arrangements. National League of Cities, et al., argue that these rules place the unaffiliated programming provider in a "Catch-22" situation: it cannot file a discrimination complaint without evidence of other parties' rates, but it can get no evidence of others' rates until it files a complaint, and then can get discovery only at the Commission's discretion.[496]

209. Similarly, the Alliance for Community Media, et al. argue that the Commission's decision not to require the disclosure of carriage contracts between the open video system operator and programming providers, whether affiliated or unaffiliated, will significantly undermine the Commission's ability to enforce the non-discriminatory access provisions of the 1996 Act.[497] The Alliance for Community Media, et al. also argue that the Commission's decision not to require disclosure of open video system carriage contracts will result in economic inefficiency because some carriage rates will differ from the most efficient marginal price.[498] The Alliance for Community Media, et al. urge that the Commission require the filing of such contracts with the Commission and require that any subsequent unaffiliated programming providers that wishes to obtain carriage be subject to the same price, terms and conditions as any contract already on file (with any pro rata adjustments and bulk discounts as may be necessary). At a minimum, the Alliance for Community Media, et al. argue, the Commission should require that open video system operators provide copies of contracts upon request to unaffiliated

[493] *Id.* at para. 132.

[494] *Id.* at paras. 237-238.

[495] *See* 47 C.F.R. § 76.1513(e)(1)(viii).

[496] National League of Cities, et al. Petition at 22-23 (*citing* 47 C.F.R. § 76.1513(i)).

[497] City of Indianapolis Petition at 3; Alliance for Community Media, et al. Petition at 13-15.

[498] Alliance for Community Media, et al. Petition at 13-14.

programmers if negotiations for carriage are unsuccessful. The Alliance for Community Media, et al. suggest that such pre-complaint disclosure will enable aggrieved parties to determine whether their allegations are justified before they approach the Commission with a complaint.[499]

2. *Discussion*

210. We disagree with the Alliance for Community Media, et al. that not mandating public disclosure and filing of carriage contracts will result in economic inefficiency. Economic efficiency is promoted by increased competition. In similar contexts, we have discussed the economic inefficiencies and disincentives that tariff filings have in competitive markets.[500] Open video system operators generally will be new entrants into markets that, although characterized by a degree of competition, have relatively few sellers of channel capacity over which video programming may be offered to subscribers. In such markets, increased competition is promoted when sellers of capacity, such as open video system operators, can negotiate contracts privately with individual buyers (i.e., video programming providers), and rival sellers cannot immediately match the contracts' terms and conditions. Thus, our rules are designed to increase economic efficiency by promoting competition in video programming carriage markets.

211. In addition, we believe that the National League of Cities, et al. raise valid concerns that would-be complainants may lack sufficient information to file a complaint under our pleading rules. We believe it appropriate to give unaffiliated programming providers seeking carriage on open video systems some access to other programmer's carriage rates under certain circumstances. We first reiterate that the complaint process appropriately may be initiated when the unaffiliated programmer uses the preliminary rate estimates that open video system operators will be required to make available to potential video programming providers. To ensure that the open video system operator provides useful information to the would-be complainant, we clarify that the preliminary rate estimates must include, upon request, all information needed to calculate the average rate paid by the unaffiliated programmers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.[501] This information may be made available subject to a reasonable non-disclosure agreement. In addition, we reiterate that the operator's carriage contracts may be subject to discovery as part of the complaint procedure. We believe that this approach will

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[499] *Id.* at 14-15.

[500] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended* in CC Docket No. 96-61, Notice of Proposed Rulemaking (1996), at paras. 21-39 (proposing the elimination of non-dominant carrier tariff filing requirements for domestic services, and discussing costs of requiring non-dominant common carrier to file tariffs, including removing carriers' ability to make rapid, efficient responses to changes in demand and cost; impeding and removing incentives for competitive pricing discounting; and imposing costs on carriers attempting to make new offerings).

[501] As discussed in Section III.D.1. above, the complainant also may challenge the weighting methodology used by the open video system operator as part of its case.

prevent the filing of pleadings whose sole purpose is to seek rate information, while avoiding unnecessary regulatory intervention in the contract negotiation process.

I. Joint Marketing, Bundling and Structural Separation

1. Joint Marketing

a. Background

212. In the *Second Report and Order*, we declined to impose joint marketing restrictions on open video system operators, noting that Congress chose not to adopt joint marketing restrictions in Section 653 even though it specifically applied joint marketing restrictions to other provisions of the 1996 Act, and restricted joint marketing in some provisions of the 1996 Act until the introduction of competition in the local telephone market.[502] We also noted, however, that any entity that offers any telecommunications service will be subject to both the customer proprietary network information ("CPNI") restrictions set forth in Section 222 of the Communications Act (and any regulations the Commission establishes pursuant to Section 222), and that any provider of cable or open video service will be subject to the cable privacy restrictions set forth in Section 631.[503]

213. On reconsideration, NCTA asserts that, until there is "workable competition for local telephone service," incumbent LECs stand in a unique position with regard to any other supplier of telecommunications or information services, since they are frequently the first company contacted by new residents in an area in order to start up essential telephone service.[504] NCTA argues that the Commission should reconsider its rejection of NCTA's prior proposal to require incumbent LECs, in the case of inbound marketing, to advise consumers that other video offerings are available in their area.[505] NCTA further argues that we should not infer from Congress' silence on joint marketing that it intended to foreclose this option, but that it left the issue to the Commission's discretion.[506] In response, Sprint argues that NCTA's motion should be denied, because it has introduced no new evidence nor presented any persuasive argument that the Commission erred in its previous decision.[507]

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[502] *See Second Report and Order* at paras. 246-47.

[503] *Id.* at para. 247.

[504] NCTA Petition at 21-22.

[505] *Id.*

[506] *Id.* at 22.

[507] Sprint Opposition at 2.

b. Discussion

214. We again decline to adopt NCTA's proposed restriction on joint marketing. While we agree that Congress' silence is not determinative, in light of Congress' silence on the issue, we believe that the burden is on those proposing joint marketing restrictions to demonstrate that such restrictions are necessary. NCTA requests that open video system operators be required to inform incoming callers that other video service providers exist in the area. To justify such a requirement, NCTA, at a minimum, would have to make some showing that consumers otherwise would likely be unaware of the existence of other video service options, such as cable service. NCTA made no such showing in its initial comments and has presented no new evidence here. In the absence of record evidence, the Commission declines to find that consumers would be unaware of the existence of other video providers such as cable, especially since cable currently accounts for 91% of multichannel video programming subscribers nationally, and passes 96% of all television households.[508] NCTA's petition is denied.

2. Bundling

a. Background

215. The *Second Report and Order* declined to prohibit "bundling,"[509] but imposed certain safeguards to protect consumers. First, the open video system operator, where it is the incumbent LEC, may not require that a subscriber purchase its video service in order to receive local exchange service. Second, while the open video system operator may offer subscribers a discount for purchasing the bundled package, the LEC must impute the unbundled tariff rate for the regulated service.[510]

216. AT&T and NCTA request that the Commission reconsider its decision on bundling. AT&T argues that until incumbent LECs have met their obligations under Sections 251 and 252 of the 1996 Act, and effective competition for local exchange service has emerged, incumbent LECs will have the incentive and ability to leverage unfairly their monopoly status into the emerging video market.[511] AT&T asserts that incumbent LECs can foreclose their potential competitors from the local market by "locking in" customers with bundled offers before those

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[508] *See Second Competition Report* in CS Docket No. 95-61, FCC 95-491 (released December 11, 1995) at paras. 5-7.

[509] *Second Report and Order* at para. 248. By "bundling," we stated that we meant the offering of video service and local exchange service in a single package at a single price, or the situation in which an entity offers one service at a discount if the customer purchases another service. *Id.*

[510] *Id.*

[511] AT&T Petition at 2-3. *See also* NCTA Opposition at 2-3.

new entrants have the ability to match those offers with competitive plans of their own.[512] AT&T asserts that this concern is not addressed by the safeguards adopted by the Commission.[513] Similarly, NCTA asserts that its concern regarding cross-subsidization is not addressed by the Commission's safeguards.[514]

217. In response, Sprint and NYNEX assert that AT&T has presented no new arguments or rationale for its position and that its petition should be denied.[515] USTA argues that the one-stop shopping attacked by AT&T in the open video context is of major convenience and benefit to consumers, and that the Commission's Part 64 cost allocation rules and the specific safeguards adopted in the *Second Report and Order* will adequately protect consumers.[516]

b. Discussion

218. AT&T and NCTA's concerns were considered and addressed in the *Second Report and Order*. They adduce no new evidence here, nor have they explained why the safeguards adopted by the Commission are inadequate to protect consumers' interests. The petitions for reconsideration are denied.

219. On our own motion, we will correct a typographical error in our rule regarding the bundling of video and local exchange services. The current text provides, in part, that any local exchange carrier offering a bundled package must impute the unbundled tariff rate for the "unregulated service."[517] The rule will be corrected to be consistent with the text of the *Second Report and Order*, which states that a bundled package must impute the unbundled tariff rate for the "regulated service."[518]

3. Structural Separation

a. Background

220. In the *Second Report and Order*, we declined to impose a separate affiliate requirement on LECs providing open video service, concluding that Congress did not intend to

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[512]AT&T Petition at 3.

[513]*Id.* at 3.

[514]NCTA Petition at 22.

[515]Sprint Opposition at 4; NYNEX Opposition at 9-10.

[516]USTA Opposition at 8-9.

[517]47 C.F.R. § 76.1514.

[518]*Second Report and Order* at para. 248.

impose such a requirement.[519] NCTA and the Alliance for Community Media, et al. request that the Commission reconsider that decision.[520] NCTA argues the Commission ignored the record evidence supporting the need for structural separation to protect against cross-subsidization and discrimination, and improperly took Congress' silence on the issue as limiting its discretion to impose such a requirement.[521] Similarly, the Alliance for Community Media, et al. asserts that the absence of a specific separate affiliate requirement in Section 653 does not relieve the Commission of its general duty to ensure competition and non-discrimination in the open video context.[522] The Alliance for Community Media, et al. further state that requiring a separate affiliate "is probably the simplest and most effective way of preventing cross-subsidization and securing full and fair competition."[523] Although the Alliance for Community Media, et al. believe such a requirement should become a permanent safeguard, they urge the Commission to at least require separate affiliates until an order is adopted in the cost allocation docket, the rules it approves are tested in the marketplace, and effective cost allocation rules are in place.[524]

221. In response, Sprint asserts that NCTA's petition advances no new evidence or persuasive arguments on this issue that would warrant reconsideration.[525] USTA states that the Commission correctly concluded that a separate affiliate requirement for open video is without basis in the 1996 Act, and, if imposed, could "decisively affect" the Commission's balance between a LEC's incentives to provide open video service and its regulatory burdens.[526] NYNEX asserts that the Telephone Joint Petitioners' argument that the Commission has the power to impose a separate subsidiary requirement misses the mark, and that the Commission should not impose such regulatory constraints and operating inefficiencies without a compelling reason.[527]

b. Discussion

222. We deny the motions of NCTA and the Alliance for Community Media, et al. to reconsider our decision in the *Second Report and Order*, and accordingly decline to impose a

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[519] *Id.* at para. 249.

[520] *See* NCTA Petition at 23; Alliance for Community Media, et al. Petition at 2-4.

[521] NCTA Petition at 23.

[522] Alliance for Community Media, et al. Petition at 3.

[523] *Id.* at 4.

[524] *Id.*

[525] Sprint Opposition at 2.

[526] USTA Opposition at 9-10.

[527] NYNEX Opposition at 10-11.

separate affiliate requirement. First, while both NCTA and the Alliance for Community Media, et al. point out that the Commission need not be restricted by congressional silence, they both fail to address the point raised in the *Second Report and Order* that Congress expressly directed in Section 653 that Title II requirements not be applied to "the establishment and operation of an open video system."[528] In addition, as we stated in the *Second Report and Order*, we believe that the Commission's Part 64 cost allocation rules and any amendment thereto will adequately protect regulated telephone ratepayers from a misallocation of costs that could lead to excessive telephone rates.[529] Neither NCTA nor the Alliance for Community Media, et al. has advanced any new evidence or substantive arguments that a separate affiliate requirement is a necessary additional safeguard to protect against cross-subsidization. We therefore do not believe that it is necessary, as the Alliance for Community Media, et al. suggest, to impose a separate affiliate requirement until new cost allocation rules are adopted and tested in the marketplace.

IV. REGULATORY FLEXIBILITY ACT ANALYSIS

223. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Report and Order and Notice of Proposed Rulemaking* ("*Notice*") in CS Docket No. 96-46 and CC Docket No. 87-266 (terminated) (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems), FCC 96-99, 61 FR 10496 (3/14/96), released March 11, 1996. The Commission sought written public comments on the proposals in the *Notice* including comments on the IRFA, and addressed these responses in the *Second Report and Order* in CS Docket No. 96-46 (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems), FCC 96-249, 61 FR 28698 (6/5/96), released June 3, 1996. In addition, in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 ("*Cable Reform Proceeding*"), 11 FCC Rcd 5937 (1996), we sought comment regarding the definition of "affiliate" in the context of the new statutory provisions governing open video systems. The *Third Report and Order and Second Order on Reconsideration* adopts or modifies regulations only to the extent necessary to respond to comments filed with respect to the definition of affiliate in the context of the statutory provisions governing open video systems in the *Cable Reform Proceeding* and to petitions for reconsideration of the *Second Report and Order*. No IRFA was attached to the *Second Report and Order* because the *Second Report and Order* only adopted final regulations and did not propose regulations. This Final Regulatory Flexibility Analysis (FRFA) therefore addresses the impact of regulations on small entities only as adopted or modified in this *Third Report and Order and Second Order on Reconsideration* and not as adopted or modified in earlier stages of this rulemaking proceeding. The FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA),

[528] *Second Report and Order* at para. 249. *See* Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3).

[529] *Id.* at para. 248.

Pub. L. No. 104-121, 110 Stat. 847.[530]

224. *Need for Action and Objectives of the Rule.* The rulemaking implements Section 302 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Section 302 directs the Commission to promulgate regulations governing the establishment and operation of open video systems.[531] The purposes of this action are to establish a structure for open video systems that provides competitive benefits, including market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of video programming choices and increased consumer choice.[532]

225. *Summary and Assessment of Issues Raised by Petitioners in Response to the IRFA.* With respect to the *Third Report and Order*, several parties filed comments in the *Cable Reform Proceeding* and also filed petitions for reconsideration of the *Second Report and Order* regarding the definition of the term "affiliate" in the context of the new statutory provisions for open video systems. These comments and the Commission's report are summarized in Section III, above. As mentioned, no IRFA was attached to the *Second Report and Order*. In petitions for reconsideration of the *Second Report and Order*, however, some parties raised issues that generally could involve small entities. For example, local cities urge the Commission to: (1) require that open video system operators obtain approval from local franchising authorities ("LFAs") regarding the manner in which public, educational and governmental ("PEG") access obligations will be fulfilled as a precondition of certification; (2) further ensure that local governments receive notification of an operator's intent to establish an open video system, by requiring an operator to serve a copy of FCC Form 1275 on all affected local municipalities; (3) expand the base of open video system revenues on which gross revenue fees due the cities would be applied; and (4) require an open video system operator to match, rather than share, the local cable operator's PEG access obligations. As discussed in the *Second Order on Reconsideration*, we deny reconsideration of the first and third contentions, and grant reconsideration of the second and fourth. Other parties, including potentially small business video programming providers, urge the Commission to: (1) require an open video system operator to place the Notice of Intent in local newspapers and in telephone bill inserts to enhance the opportunities for non-profit video programming providers to become aware of the establishment of an open video system; (2) modify its regulations to further guard against an open video system operator's rate discrimination among unaffiliated video programming providers; and (3) modify its regulations to enhance programming providers' ability to access information necessary to pursue a rate complaint against an open video system operator. As discussed in the *Second Order on Reconsideration*, we deny reconsideration on the first two grounds and grant reconsideration on the third. Local television stations urge the Commission to require that open video system operators tailor the distribution

[530]Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 610 *et seq.* (1996).

[531]1996 Act § 302.

[532]Conference Report at 172, 177-78.

of must-carry signals to the parts of their system that are located within a station's local service area so that stations electing must-carry status do not have to reimburse the operators for extensive copyright fees that may result from carriage beyond their local service areas. We grant reconsideration on this point.

226. The Commission also notes the positive economic impact that the new and modified rules will have on many small businesses. For example, the new rules will allow small businesses that use video programming delivery services to select from a broader range of service providers, which could result in significant economic benefits because providers will compete for customers, which, in turn, should result in improved service at lower prices. In addition, small business video programming providers will face fewer entry hurdles, and thus will be able to develop their markets and compete more effectively.

227. *Description and Estimate of the Number of Small Entities Impacted.* The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under Section 3 of the Small Business Act."[533] A small concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[534] The rules we adopt today apply to municipalities, television stations, and business video programming providers. The rules also apply to entities that are likely to become open video system operators, including local exchange carriers and cable systems.

228. *Local Exchange Carriers.* The rules we adopt or modify in the *Second Order on Reconsideration* may affect local exchange carriers (LECs), as LECs are permitted under the Telecommunications Act of 1996 to establish open video systems. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[535] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent

[533]RFA, 5 U.S.C. § 601(3) (1980).

[534]Small Business Act, 15 U.S.C. § 632 (1996).

[535]Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (*TRS Worksheet*).

LECs that may be affected by the decisions and rules adopted in this Order.

229. *Cable Systems*: Under certain conditions explained in the *Second Order on Reconsideration*, cable operators may become open video system operators, and therefore, may be affected by the rules adopted or modified in this Order. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.[536]

230. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.[537] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[538] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

231. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[539] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[540] Based on available data, we find that

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[536] *1992 Census*, *supra*, at Firm Size 1-123.

[537] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[538] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[539] 47 U.S.C. § 543(m)(2).

[540] 47 C.F.R. § 76.1403(b).

the number of cable operators serving 617,000 subscribers or less totals 1,450.[541] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

232. *Municipalities*: The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."[542] There are 85.006 governmental entities in the United States.[543] This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to open video systems will typically be undertaken by LFAs, which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules adopted in this *Third Report and Order and Second Order on Reconsideration.*

233. *Television Stations*: The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts. 13 C.F.R. § 121.201.

234. *Estimates Based on Census and BIA Data.* According to the Census Bureau, in 1992, there were 1,155 out of 1,478 operating television stations reported revenues of less than $10 million for 1992. This represents 78% of all television stations, including non-commercial stations. *See 1992 Census of Transportation, Communications, and Utilities, Establishment and Firm Size*, May 1995, at 1-25. The Census Bureau does not separate the revenue data by commercial and non-commercial stations in this report. Neither does it allow us to determine the number of stations with a maximum of 10.5 million dollars in annual receipts. Census data also indicates that 81 percent of operating firms (that owned at least one television station) had revenues of less than 10 million dollars.[544]

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[541]Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[542]5 U.S.C. § 601(5).

[543]United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments.*

[544]Alternative data supplied by the U.S. Small Business Administration Office of Advocacy indicate that 65 percent of TV owners (627 of 967) have less than $10 million in annual revenue and that 39 percent of TV stations (627 of 1,591) have less than $10 million in annual revenue. These data were prepared by the U.S. Census bureau under contract to the Small Business Administration. These data show a lower percentage of small businesses than the data supplied directly to us by the Census Bureau. Therefore, for purposes of our worst case analysis, we will use the data supplied directly to us by the Census Bureau.

235. We have also performed a separate study based on the data contained in the BIA Publications, Inc. Master Access Television Analyzer Database, which lists a total of 1,141 full-power commercial television stations.[545] It should be noted that, using the SBA definition of small business concern, the percentage figures derived from the BIA data base may be underinclusive because the data base does not list revenue estimates for noncommercial educational stations, and these are therefore excluded from our calculations based on the data base.[546] The BIA data indicate that, based on 1995 revenue estimates, 440 full-power commercial television stations had an estimated revenue of 10.5 million dollars or less. That represents 54 percent of commercial television stations with revenue estimates listed in the BIA program. The data base does not list estimated revenues for 331 stations. Using a worst case scenario, if those 331 stations for which no revenue is listed are counted as small stations, there would be a total of 771 stations with an estimated revenue of 10.5 million dollars or less, representing approximately 68 percent of the 1,141 commercial television stations listed in the BIA data base.

236. Alternatively, if we look at owners of commercial television stations as listed in the BIA data base, there are a total of 488 owners. The data base lists estimated revenues for 60 percent of these owners, or 295. Of these 295 owners, 156 or 53 percent had annual revenues of less than 10.5 million. Using a worst case scenario, if the 193 owners for which revenue is not listed are assumed to be small, the total of small entities would constitute 72 percent of owners.

237. In summary, based on the foregoing worst case analysis using census data, we estimate that our rules will apply to as many as 1,150 commercial and non-commercial television stations (78 percent of all stations) that could be classified as small entities. Using a worst case analysis based on the data in the BIA data base, we estimate that as many as approximately 771 commercial television stations (about 68 percent of all commercial televisions stations) could be classified as small entities. As we noted above, these estimates are based on a definition that we tentatively believe greatly overstates the number of television broadcasters that are small businesses. Further, it should be noted that under the SBA's definitions, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. The estimates overstate the number of small entities since the revenue figures on which they are based do not include or aggregate such revenues from non-television affiliated companies.

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[545]We have excluded Low Power Television (LPTV) stations or translator stations from the calculations because such stations could be affected by our open video system must-carry and retransmission consent regulations only under extremely limited circumstances. As of May 31, 1996, there were 1,880 LPTV stations and 4,885 television translators in the United States. FCC News Release, *Broadcast Station Totals as of May 31, 1996*, Mimeo No. 63298, released June 6, 1996.

[546]In the Joint Comments of the Association of America's Public Television Stations and the Public Broadcasting Service (p. 6), it is reported that there are 38 public televisions stations (out of 197 public television licensees) with annual operating budgets of less than $2 million.

238. *Video Programming Providers*: Open video systems are an entirely new framework for delivering video programming to consumers. No open video systems have yet been certified to operate. Therefore, it is not possible at this time to estimate the size or number of video programming providers that may seek capacity on open video systems. We anticipate that two types of video programming providers may arise: (1) video programming providers seeking to utilize an open video system to offer a package of individual programming services via open video systems to subscribers; and (2) providers seeking to offer only one programming service. It is not possible to estimate the impact on or the number of video programming providers in the first category because no such entities exist. With respect to the second category, however, we believe that small cable programming services may provide a reasonable substitute. The Census Bureau category most similar to cable programming services is "motion picture and video tape production." *See* SIC Code 7812. Under this category, entities with less than $21.5 million in annual receipts are defined as small motion picture and video tape production entities. 13 C.F.R. § 121.201. There are a total of 7,265 motion picture and video tape production entities; of those, 7,002 have annual receipts of less than $24.5 million. The figures are not broken down further. Thus, we estimate that approximately 7,000 small cable programming services, or video programming providers, may be affected by the rules adopted in this Order. In addition, we note that the Census Bureau data does not reflect a likely significant number of small, independent motion picture and video tape production companies. Such companies may seek to become video programming providers on open video systems, although it is not possible at this time to estimate this number because no publicly available data is available that is specific to such entities. We therefore estimate that a minimum of 7,000 small cable programming services, or video programming providers, may be affected by this rule.

239. *Reporting, Recordkeeping and Other Compliance Requirements.* The following addresses the requirements of regulations adopted, amended, modified or clarified on reconsideration in the *Third Report and Order and Second Order on Reconsideration.*

1. *Affiliate.* In the *Third Report and Order,* the Commission adopts a definition of "affiliate" that will impact open video system operators and their affiliates, including open video system operators that are small entities. A primary effect of this rule concerns situations where demand for carriage exceeds the open video system's channel capacity. In such situations, the open video system operator and its affiliates are prohibited from selecting the video programming services for carriage on more than one-third of the activated channel capacity on its system.[547]

2. *Certification.* We revise FCC Form 1275 to require that applicants to become open video system operators, including applicants that are small businesses, list the names of the local communities in which they intend to operate.[548] An applicant will have already identified

[547] *See* Section II., above.

[548] *See* Section III.B., above.

the local communities in which it intends to operate prior to preparing the form. Listing the names of the communities will neither require any specialized skills nor impose significant new burdens.

3. *Service of FCC Form 1275.* We modify our regulations to require that an open video system applicant, including those that are small entities, serve a copy of its FCC Form 1275 on all affected local communities on or before the date it is filed with the Commission.[549] An applicant will have already prepared the form for submission to the Commission. Therefore, merely serving the form on all affected local communities will not require any specialized skills.

4. *Ad Avails.* We modify our regulations to require that advertising availabilities ("ad avails") associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner.[550] This may impose burdens on open video system operators, including those that are small entities, because an operator must now share the revenues or other benefits of such ad avails with unaffiliated entities, rather than keeping all such revenues. In certain instances, this approach may impose burdens on video programming providers that may have been able to keep all such revenues. We find that implementing this approach requires no specialized skills.

5. *Gross Revenues Fee.* We modify our regulations to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate.[551] This approach may impose additional burdens on video programming providers, including those that are small entities, because the carriage rate may be increased to reflect the open video system operator's gross revenues fees. We find that implementing this approach requires no specialized skills.

6. *Matching of PEG Access Obligations.* We modify our regulations to require open video system operators, in the absence of a negotiated agreement, to match, rather than share, all public, educational and governmental ("PEG") access financial contributions of the local cable operator.[552] This matching requirement could result in additional financial burdens on open video system operators, including those that are small entities, because matching the cable operator's PEG access financial contributions will be more costly in many situations than merely sharing the cable operator's contributions towards PEG access services, facilities and equipment, as permitted under the previous approach. We find that implementing this approach requires no specialized skills.

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[549] *See* Section III.B., above.

[550] *See* Section III.C., above.

[551] *See* Section III.E., above.

[552] *See* Section III.F., above.

7. *LFA Election.* We modify our regulations so that, in areas where a cable franchise previously existed, such as where a cable operator is able to convert its cable system to an open video system, the local franchise authority will be permitted, absent a negotiated agreement, to elect either: (1) to maintain the previously existing PEG access requirements; or (2) to have the open video system operator's PEG access obligations determined by comparison to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. Every 15 years thereafter, the LFA is permitted to make a similar election.[553] This requirement could impose new burdens on open video system operators, including those that are small entities, because an operator's PEG access obligations may be increased when compared to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. In addition, these obligations may be subject to increases every 15 years, rather than frozen in perpetuity.

8. *Must-Carry/Retransmission Consent Election.* The order requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area. We estimate that this requirement will have an impact on some broadcast stations. We anticipate that this requirement will not require any more professional skills than are required to make such elections and notify operators in the context of cable systems.

9. *Must-Carry Copyright.* The order requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local signal outside of its local service area.[554] We estimate that this requirement may affect a limited number of large open video system operators. We anticipate that distribution of signals outside of a local market will most likely occur on large systems that overlap several markets. We also anticipate that many open video systems will have the ability to limit distribution of signals to local markets. If additional copyright fees are incurred by an open video system operator, we do not anticipate that the operator will have to use any professional skills beyond those already used to comply with the copyright rules.

10. *Sports Exclusivity.* The order holds an open video system operator responsible for any violation of our sports exclusivity rules.[555] We estimate that this requirement will have an impact on open video system operators and programmers. We do not anticipate that this rule will require the use of any additional professional skills beyond the skills normally required for a programmer to assess the validity of exclusive rights to sports programming.

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[553] *See* Section III.F.

[554] *See* Section III.F.2, above.

[555] *See* Section III.F.4, above.

11. *Navigational Devices.* In this Order, we allow open video system operators to permit programming providers, including those affiliated with the open video system, to use their own navigational devices, subject to certain conditions.[556] If the open video system operator permits programming providers to use their own navigational devices, the open video system operator must provide a nondiscriminatory guide or menu that all programming providers must carry, showing all programming available on the systems. We estimate that the requirement could result in additional burdens on open video system operators including small open video system operators. We find that implementing this approach requires no specialized skills.

12. *Dispute Resolution.* We clarify our regulations to require that the preliminary rate estimate provided by an open video system operator to video programming providers must include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.[557] This clarification may impose new burdens on open video system operators, including those that are small entities, because an open video system operator may have to prepare this information earlier than under the previous approach. This will occur because an operator must now provide a video programming provider with the information upon request, rather than after a complaint is filed. On the other hand, an open video system operator is likely to have prepared such information in order to determine carriage rates to be charged. In such situations, the rule clarification may not impose significant new burdens because an open video system operator merely will have to provide a video programming provider with existing material, which should not require any specialized skills.

240. *Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Rejected.* This section analyzes the impact on small entities in the contexts of regulations adopted, amended, modified or clarified in this *Third Report and Order and Second Order on Reconsideration.*

1. *Affiliate.* In the *Third Report and Order and Second Order on Reconsideration* with respect to the definition of affiliate, we adopt the attribution standard that applies in the cable program access context. The factual, legal and policy reasons are set forth in Section II, above. The definition of affiliate we adopt will create opportunities for unaffiliated programmers, many of which may be small entities, by promoting diversity of video programming sources, and is intended to reduce the likelihood that open video system operators will discriminate against or otherwise disfavor unaffiliated programming providers, including small unaffiliated programmers. In addition, by adopting consistent standards, we reduce the burdens associated with determining whether a video programming provider will be considered an affiliate of the open video system operator for one purpose but not for the other. We rejected several alternatives to this definition

[556] *See* Section III.G., above.

[557] *See* Section III.H., above.

of affiliate, as described in Section II, above.

2. *Certification.* Requiring applicants to list the names of all local communities in which they intend to operate will not impose significant new burdens on applicants for the reasons stated above and will reduce burdens on the affected local communities, including those that are small entities. This approach will also reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system.

3. *Service of FCC Form 1275.* Requiring service of FCC Form 1275 on local communities, as described above, will impose only minimal new burdens on open video system operators, including those that are small entities. These burdens are outweighed by the benefits to local communities, such as ensuring that a local community without ready access to the Internet or the Commission's Public Notices will be made aware of the applicant's filing. The factual, legal and policy reasons are described in Section III.B. This approach will reduce burdens on local communities by enhancing their ability to become aware of an open video system's establishment. This approach will also reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system. The primary significant alternative is not requiring such service, but as stated, we find that the benefits to local communities outweigh any minimal burdens of complying with this rule.

4. *Ad Avails.* Requiring that advertising availabilities ("ad avails") associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider be shared in an equitable manner may impose burdens on open video system operators, including those that are small entities. Such burdens are described in the preceeding section of this FRFA. However, we find these burdens are outweighed by the benefits of this requirement, which include providing unaffiliated video programming providers with an equitable share of income from ad avails and preventing the open video system operator or its affiliate from having a significant financial advantage over unaffiliated video programming providers.[558] The factual, legal and policy reasons are described in Section III.C. We reduce the burdens on open video system operators by specifying examples of acceptable methods of sharing ad avails, including apportioning the relevant revenues or apportioning the rights to sell the avails themselves. The primary significant alternative is maintaining our current rules which do not require such sharing; however, as stated, we find that the benefits to unaffiliated video programming providers outweigh the burdens of complying with this rule.

5. *Gross Revenues Fee.* Modifying our rules to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate may impose additional burdens

[558] *See* Section III.C., above.

on video programming providers, including those that are small entities. However, we find that these burdens, as described above, are outweighed by the benefits to open video system operators and are in the interests of competition. Permitting this recoupment of the gross revenues fee should promote competition on the platform among video programming providers by not disadvantaging any particular video programming provider with respect to the payment of the gross revenues fee. The factual, legal and policy reasons for this approach are described above in Section III.E. This approach will reduce burdens on open video system operators by permitting them to recoup a proportion of these costs from video programming providers. The primary significant alternative we rejected is maintaining our current regulations which may have permitted unaffiliated video programming providers to avoid paying any share of the gross revenues fee; however, as stated, we find that the benefits to open video system operators outweigh the burdens of this approach on video programming providers.

6. *PEG Access Obligations.* Requiring open video system operators to match, rather than share, all public, educational and governmental ("PEG") access financial contributions of the local cable operator may impose burdens on open video system operators, including those that are small entities. These burdens are described in the preceeding section of this FRFA. We find that these burdens are outweighed by the benefits of this revised approach. The factual, policy and legal reasons for this approach are described in Section III.F. We believe that this approach may reduce burdens on open video system operators by providing further certainty as to their PEG access financial obligations. Significant alternatives we rejected include: (1) maintaining our current rules which permit an open video system operator to share the PEG access contributions; (2) requiring an open video system operator to match precisely any in-kind contributions (e.g., cameras); and (3) not requiring open video system operators to share the costs of services, facilities or equipment for PEG access.[559] Generally, we rejected the first alternative because we find that the matching principle more accurately fulfills the 1996 Act's mandate to impose PEG access obligations on open video system operators that are "no greater or lesser" than those imposed on cable operators. We rejected the second because we find that precise duplication would often be unnecessary, wasteful and inappropriate. We rejected the third alternative because we believe that providing support for PEG access services, facilities and equipment is a part of the open video system operator's PEG obligation under Section 611 of the Communications Act.[560]

7. *LFA Election.* Modifying a local franchise authority's ability to make an election concerning the PEG access obligations of an open video system operator, as described in the preceeding section of this FRFA, may impose additional burdens on open video system operators, including those that are small entities. These burdens are described above. However, we find that these burdens are outweighed by the benefits of this approach, which include preventing PEG access obligations from being frozen in perpetuity, thereby providing significant

[559] *Id.*

[560] *Id.*

benefits to local franchise areas and communities. The factual, policy and legal reasons for this approach are described above in Section III.F. This approach may reduce burdens on local communities by permitting them to negotiate with open video system operators with respect to PEG access obligations, and on open video system operators by providing them certainty as to their PEG access obligations for a period of up to 15 years. The primary significant alternative we rejected is maintaining our current regulations which do not permit local franchise areas to make this election;[561] however, as stated, we find that the benefits to local communities outweigh the burdens of this approach on open video system operators.

8. *Must-Carry/Retransmission Consent Election.* The rule which requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area, may impose a burden on broadcast stations. The policy, factual and legal reasons for adopting this final rule are set forth in Section III.F.2.b. of this Order. The rule adopted in the *Second Report and Order* did not require a broadcast station to make the same election for open video and cable systems serving the same geographic area. The rule adopted in this order promotes parity between open video system operators and cable operators, in accordance with Section 653 of the Communications Act, and may reduce burdens on both open video system operators and television stations by providing further certainty with respect to the must-carry status of television stations.

9. *Must-Carry Copyright.* The rule which requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local station beyond its local market area may impose a burden on open video system operators. It has not been necessary to take significant steps to minimize the burden on small open video system operators because we do not believe that this rule is likely to affect many open video systems and especially not smaller open video systems, because it will only apply to open video systems capable of carrying broadcast signals beyond their local service areas. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.2.b. Any burden on open video system operators is outweighed by the benefit to broadcast stations, especially small stations that might not be able to elect must-carry status if they were subject to copyright fees in distant markets.

10. *Sports Exclusivity.* The rule which holds an open video system operator responsible for any violation of our sports exclusivity rules may impose a burden on open video system operators. This burden is justified by the interest in protecting exclusive rights to sports programming. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.4.b. The rule adopted in the *Second Report and Order*, did not hold an open video system operator responsible for a violation of the sports exclusivity rules if the operator took prompt steps to delete the programming once it was notified of a violation. The rule adopted in

[561] *Id.*

this order applies our sports exclusivity rules to open video systems more fairly than the Commission's previous rule for the reasons cited in Section III.F.4.b.

11. *Navigational Devices.* Allowing open video system operators to permit programming providers, including those affiliated with the open video system operator, to use their own navigational devices subject to certain conditions may impact open video system operators and their affiliates, including those that are small entities. If an operator permits programming providers, including its affiliate, to develop their own navigational devices, the operator must create an electronic menu or guide containing a non-discriminatory listing of programming providers or programming services available on the system that every programming provider must carry. If an operator creates a system-wide non-discriminatory menu or guide, then its programming affiliate may create its own menu or guide without being subject to the non-discrimination requirements of Section 653(b)(1)(E). The factual and policy reasons for adopting the final rule are found in Section III.G., above. We believe that this rule minimizes burdens on open video system operators and their programming affiliates, by allowing the affiliated programmers the flexibility to develop and use their own navigational devices, guides and menus.

However, under the rule adopted, programming providers cannot be required to use their own navigational devices. Such providers must, upon request, have access to the navigational device used by the open video system operator or its affiliate. As is explained in Section III.G., above, not all programming providers will have the desire or resources to supply their own navigational devices. This may be especially true of smaller video programming providers seeking carriage on the open video system. This requirement can help minimize burdens on small programming providers by allowing them access to the navigational device used by the open video system operator or its affiliate.

12. *Dispute Resolution.* Requiring that the preliminary rate estimate provided by an open video system operator to video programming providers include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate, may impose burdens on open video system operator, including those that are small entities. These burdens are described in the preceeding section of this FRFA. However, we find that these burdens are outweighed by the benefits of this clarification, which include providing an unaffiliated video programming provider with relevant information regarding whether to pursue a rate complaint against an open video system operator. The factual, policy and legal reasons are described above in Section III.H. The primary significant alternative rejected by the Commission is to maintain our current rules which do not require a system operator's provision of such information upon request but only in formal discovery; however, as stated, we find that the benefits to unaffiliated video programming providers outweigh the burdens of complying with this rule.

241. *Report to Congress.* The Commission shall send a copy of this FRFA, along with this *Third Report and Order and Second Order on Reconsideration*, in a report to Congress

pursuant to the SBREFA, 5 U.S.C. § 801(a)910(A). A copy of this FRFA will also be published in the Federal Register.

V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

242. The requirements adopted in the *Third Report and Order and Second Order on Reconsideration* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Third Report and Order and Second Order on Reconsideration* as required by the 1995 Act.[562] OMB comments are due 60 days from date of publication of this *Third Report and Order and Second Order on Reconsideration* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

243. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of the *Third Report and Order and Second Order on Reconsideration* in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the *Third Report and Order and Second Order on Reconsideration* in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725 -17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

VI. ORDERING CLAUSES

244. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 573 the rules, requirements and policies discussed in this *Third Report and Order and Second Order on Reconsideration* ARE ADOPTED and Sections 76.1000 and 76.1500 through 76.1515 of the Commission's rules, 47 C.F.R. §§ 76.1000 and 76.1500 through 1515, ARE AMENDED as set

[562]Pub. L. No. 104-13.

forth below.

245. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 573 the rules, the Petitions for Reconsideration set forth in Appendix A are GRANTED IN PART and DENIED IN PART, as provided herein.

246. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than 60 days after publication in the Federal Register.

247. IT IS FURTHER ORDERED that the Motion to Accept Late-Filed Opposition filed by the Telephone Joint Petitioners is HEREBY GRANTED.

248. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *Third Report and Order and Second Order on Reconsideration* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Parties Filing Petitions for Reconsideration
and Oppositions to Petitions for Reconsideration

Petitions for Reconsideration

Note: Unless otherwise specified, all filings listed below were styled as "Petition for Reconsideration" and are referred to in the text of this Order as "Petition."

Alliance for Community Media; Alliance for Communications Democracy; People for the American Way; Center for Media Education; and Media Access Project Petition for Reconsideration and Clarification (Alliance for Community Media, et al.)
Association of Local Television Stations, Inc. (ALTV)
AT&T Corporation (AT&T)
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and affiliated domestic telephone companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications, Inc. and Southwestern Bell Telephone Company (Telephone Joint Petitioners)
City of Indianapolis, IN (City of Indianapolis)
Comcast Cable Communications, Inc. (Comcast)
Cox Communications, Inc. (Cox)
ESPN, Inc. (ESPN)
Metropolitan Dade County (Dade County)
MCI Telecommunications Corp. (MCI)
Michigan; Illinois; and Texas Communities (Michigan Cities, et al.)
Municipal Administrative Services, Inc.; David M. Griffith & Associates; and Lloyd, Gosselink, Fowler, Blevins & Matthews, P.C. (Municipal Services, et al.)
National Cable Television Association, Inc. (NCTA)
NYNEX Corporation (NYNEX)
Office of the Commissioner of Baseball; National Basketball Association; National Football League; and National Hockey League Request for Clarification or, in the Alternative, Petition for Reconsideration (Joint Sports Petitioners)
Rainbow Programming Holdings, Inc. (Rainbow)
Tele-TV
U S West, Inc. Petition for Clarification (U S West)
Village of Schaumburg, IL Comments in Opposition to Certain Portions of FCC Second Report and Order (Village of Schaumburg)

Oppositions to Petitions for Reconsideration

Note: All filings listed below are referred to in the text of this Order as "Opposition."

Alliance for Community Media; Alliance for Communications Democracy; and Center for Media Education Opposition to Petition for Reconsideration (Alliance for Community Media, et al.)

Association of Local Television Stations, Inc. Opposition to Petition for Reconsideration (ALTV)

Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and affiliated domestic telephone companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; and SBC Communications, Inc. and Southwestern Bell Telephone Company Opposition to Petitions for Reconsideration (Telephone Joint Petitioners)

Cablevision Systems Corporation Comments on the Petition for Reconsideration of the National Cable Television Association (Cablevision Systems)

MFS Communications Company, Inc. Opposition to Petitions for Reconsideration (MFS Communications)

Michigan; Illinois; and Texas Communities, Reply to Petitions for Reconsideration (Michigan Cities, et al.)

Motion Picture Association of America, Inc. Comments on Petitions for Reconsideration (MPAA)

National Cable Television Association, Inc. Opposition to Petitions for Reconsideration (NCTA)

National Association of Telecommunications Officers and Advisors Opposition to Petitions for Reconsideration (NATOA)

National League of Cities; United States Conference of Mayors; National Association of Counties; Montgomery County, MD; and the City of Los Angeles, CA (National League of Cities, et al.)

NYNEX Corporation Opposition to Petition for Reconsideration (NYNEX)

Residential Communications Networks, Inc. Opposition to Petitions for Reconsideration (RCN)

Sprint Local Telephone Companies, Comments of the (Sprint)

Staff of the Federal Trade Commission and the Antitrust Division of the Department of Justice Comments in Opposition to Petitions for Reconsideration (FTC and DOJ Antitrust Division)

Tele-TV Opposition to Petitions for Reconsideration Regarding Application of Program Access Rules to OVS and Incumbent Cable Operators' Use of OVS Capacity (Tele-TV)

United States Telephone Association Opposition and Comments to Certain Petitions for Reconsideration (USTA)

U S West, Inc. Opposition to Petitions for Reconsideration (U S West)

Comments in the *Cable Reform Proceeding*

Alliance for Community Media, Consumer Project on Technology and Alliance for Communications Democracy (Alliance for Community Media, et al.)
Bell Atlantic Telephone Companies and Bell Atlantic Video Services Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
City and County of Denver, Colorado (City of Denver)
National League of Cities and the National Association of Telecommunications Officers and Advisors (National League of Cities, et al.)
Residential Communications Network, Inc. (RCN)
Time Warner Cable (Time Warner)
United States Telephone Association (USTA)

Reply Comments in the *Cable Reform Proceeding*

Michigan, Illinois, and Texas Communities (Michigan Cities, et al.)
National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida (National League of Cities, et al.)
U S West, Inc. (U S West)

APPENDIX B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1500 is amended by redesignating paragraph (g) as paragraph (h) and adding new paragraph (g) to read as follows:

* * * * *

(g) Affiliate. For purposes of determining whether a party is an "affiliate" as used in this subpart, the definitions contained in the notes to Section 76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to Section 76.501 and the limited partner insulation provisions of Note 2(g) to Section 76.501 shall not apply; and

(2) The provisions of Note 2(a) to Section 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(h) Other terms. Unless otherwise expressly stated, words not defined in this part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in Part 47 of the Code of Federal Regulations.

* * *

3. Section 76.1502 is amended by revising paragraphs (c)(6) and (d) and by adding paragraph (e) to read as follows:

* * * * *
* * * * *
(c) * * *

(6) A list of the names of the anticipated local communities to be served upon completion of the system;

* * *

(d) 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) and must include a statement informing the local communities of the Commission's requirements in paragraph (e) for filing oppositions and comments. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the filing of the FCC Form 1275 with the Commission.

(e) Comments or oppositions to a certification must be filed within five days of the Commission's receipt of the certification and must be served on the party that filed the certification. If the Commission does not disapprove certification within ten days after receipt of an applicant's request, the certification will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties and on all local communities in which the applicant intends to operate.

4. Section 76.1503 is amended by deleting paragraph (c)(2)(iv)(C) and adding paragraph (c)(2)(v) to read as follows:

* * * * *
* * * * *

(c) * * *

(2) * * *

(iv) Notwithstanding the foregoing, an operator of an open video system may:

(A) Require video programming providers to request and obtain system capacity in increments of no less than one full-time channel; however, an operator of an open video system may not require video programming providers to obtain capacity in increments of more than one full-time channel; and

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage.

(v) Notwithstanding the general prohibition on an open video system operator's

discrimination among video programming providers contained in paragraph (a) of this section, a competing, in-region cable operator or its affiliate(s) that offers cable service to subscribers located in the service area of an open video system shall not be entitled to obtain capacity on such an open video system, except:

(A) Where the operator of an open video system determines that granting access to the competing, in-region cable operator is in its interests; or

(B) Where a showing is made that facilities-based competition will not be significantly impeded.

Note to paragraph (c)(2)(v)(B): The Commission finds that facilities-based competition will not be significantly impeded, for example, where: (1) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (2) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

* * * * *

Section 76.1504 is amended by revising paragraph (e) and adding paragraphs (e)(1) and (2) to read as follows:

(e) Determining just and reasonable rates subject to complaints pursuant to the imputed rate approach or other market based approach. Carriage rates subject to complaint shall be found just and reasonable if one of the two following tests are met:

(1) The imputed rate will reflect what the open video system operator, or its affiliate, "pays" for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program

provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

Note to paragraph (e)(1): Examples of specific "avoided costs" include (a) all amounts paid to studios, syndicators, networks or others, including but not limited to payments for programming and all related rights; (b) packaging, including marketing and other fees; (c) talent fees; (d) a reasonable overhead allowance for affiliated video service support.

(2) An open video system operator can demonstrate that its carriage service rates are just and reasonable through other market based approaches.

6. Section 76.1505 is amended by revising paragraphs (d)(1), (d)(4), (d)(6) and (d)(8) to read as follows:

* * * * *

(d) * * * * *

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by providing the same amount of channel capacity for public, educational and governmental access and by matching the local cable operator's annual financial contributions towards public, educational and governmental access services, facilities and equipment that are actually used for public, educational and governmental access services, facilities and equipment. For in-kind contributions (e.g., cameras, production studios), the open video system operator may satisfy its statutory obligation by negotiating mutually agreeable terms with the local cable operator, so that public, educational and governmental access services to the community is improved or increased. If such terms cannot be agreed upon, the open video system operator must pay the local franchising authority the monetary equivalent of the local cable operator's depreciated in-kind contribution, or, in the case of facilities, the annual amortization value. Any matching contributions provided by the open video system operator must be used to fund activities arising under Section 611 of the Communications Act.

* * * * *

(4) The costs of connection to the cable operator's public, educational and governmental access channel feed shall be borne by the open video system operator. Such costs shall be counted towards the open video system operator's matching financial contributions set forth above.

* * * * *

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the local franchising authority may elect either to impose the previously existing public, educational and governmental access obligations or determine the open video system operator's public, educational and governmental access obligations by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. Absent a previous franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable system with a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size.

Note to paragraph (d)(6): This subsection shall apply, for example, if a cable operator converts its cable system to an open video system under section 76.1501 of these rules.

*****

(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in section 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's public, educational and governmental access obligations under this subsection (d).

7. Section 76.1506 is amended by revising paragraphs (d), (l)(3) and (m)(2) to read as follows:

(d) Definitions applicable to the must-carry rules. Section 76.55 shall apply to all open video systems in accordance with the provisions contained in this section. Any provision of Section 76.55 that refers to a "cable system" shall apply to an open video system. Any provision of section 76.55 that refers to a "cable operator" shall apply to an open video system operator. Any provision of section 76.55 that refers to the "principal headend" of a cable system as defined in section 76.5(pp) shall apply to the equivalent of the principal headend of an open video system. Any provision of section 76.55 that refers to a "franchise area" shall apply to the service area of an open video system. The provisions of Section 76.55 that permit cable operators to refuse carriage of signals considered distant signals for copyright purposes shall not apply to open video system operators. If an open video system operator cannot limit its distribution of must-carry signals to the local service area of broadcast stations as used in 17 U.S.C. § 111(d), it will be liable for any increase in copyright fees assessed for distant signal carriage under 17 U.S.C.

§ 111.

***

(l)***

(3) Television broadcast stations are required to make the same election for open video systems and cable systems serving the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

***

(m)***

(2) Notification of programming to be deleted pursuant to this section shall be served on the open video system operator. The open video system operator shall make all notifications immediately available to the appropriate video programming providers on its open video system. Operators may effect the deletion of signals for which they have received deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. The open video system operator shall not delete signals for which it has received notice from the programming provider that the rights claimed are invalid. An open video system operator shall be subject to sanctions for any violation of these rules. An open video system operator may require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.

***

8. Section 76.1511 is amended to read as follows:

An open video system operator may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622 of the Communications Act. Local governments shall have the authority to assess and receive the gross revenue fee. Gross revenues under this paragraph means all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. In addition gross revenues under this paragraph includes any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming, where such revenues are included in the calculation of the incumbent cable operator's cable franchise fee. Gross revenues does not include revenues collected by unaffiliated video programming providers, such as subscriber or advertising revenues. Any gross revenues fee that the open video

system operator or its affiliate collects from subscribers or video programming providers shall be excluded from gross revenues. An operator of an open video system or any programming provider may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill. An operator of an open video system may recover the gross revenue fee from programming providers on a proportional basis as an element of the carriage rate.

9. Section 76.1512 is revised to read as follows:

§ 76.1512 Programming information.

* * * * *

(b) In accordance with paragraph (a) of this section:

(1) An open video system operator shall not discriminate in favor of itself or its affiliate on any navigational device, guide or menu;

(2) An open video system operator shall not omit television broadcast stations or other unaffiliated video programming services carried on the open video system from any navigational device, guide (electronic or paper) or menu;

(3) An open video system operator shall not restrict a video programming provider's ability to use part of the provider's channel capacity to provide an individualized guide or menu to the provider's subscribers;

(4) Where an open video system operator provides no navigational device, guide or menu, its affiliate's navigational device, guide or menu shall be subject to the requirements of Section 653(b)(1)(E) of the Communications Act;

(5) An open video system operator may permit video programming providers, including its affiliate, to develop and use their own navigational devices. If an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system and informing the viewer how to obtain additional information on each of the services listed;

(6) An open video system operator must grant access, for programming providers that do not wish to use their own navigational device, to the navigational device used by the open video system operator or its affiliate;

(7) If an operator provides an electronic guide or menu that complies withparagraph (5) of this subsection, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E) of the Communications Act.

(c) An open video system operator shall ensure that video programming providers or copyright holders (or both) are able to suitably and uniquely identify their programming services to subscribers.

(d) An open video system operator shall transmit programming identification without change or alteration if such identification is transmitted as part of the programming signal.

* * *

10. Section 76.1513 is amended by adding a note to paragraph (e)(viii) to read as follows:

* * * * *

(e) * * *

(viii) * * *

Note to paragraph (e)(viii): Upon request by a complainant, the preliminary carriage rate estimate shall include a calculation of the average of the carriage rates paid by the unaffiliated video programming providers receiving carriage from the open video system operator, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.

* * *

11. Section 76.1514 is revised to read as follows:

* * * * *

(2) Any local exchange carrier offering such a package must impute the unbundled tariff rate for the regulated service.

* * *

APPENDIX C

INSTRUCTIONS FOR FCC FORM 1275
OPEN VIDEO SYSTEM CERTIFICATION OF COMPLIANCE

Purpose of this Form

Section 653(a)(1) of the Communications Act, 47 U.S.C. § 573(a)(1), provides that an open video system operator must certify to the Commission that it complies with the Commission's regulations under Section 653(b) of the Communications Act, 47 U.S.C. § 573(b). This FCC Form 1275 is to be used by an open video system applicant to obtain certification from the Commission. The Commission will publish notice of the receipt of FCC Form 1275 and will post the Form on its Internet site. The certification will be deemed approved if the Commission does not disapprove the certification within ten days of the Commission's receipt of the filing.

Please be sure to review all relevant FCC regulations and these instructions before completing this Form.

Filing Information

A hard copy of FCC Form 1275 and all attachments must be filed with the Office of the Secretary, Federal Communications Commission, 1919 M Street N.W., Room 222, Washington D.C., 20554, and with the Office of the Bureau Chief, Cable Services Bureau, 2033 M Street, N.W., Washington, D.C. 20554. The applicant must also file the Form 1275 on computer disk at these same two locations. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using Windows 3.1 and Excel 4.0 software. The diskettes should be submitted in "read only" mode. The diskettes should be clearly labelled as an open video system certification filing, should indicate the applicant's name and date of submission, and should be accompanied by a cover letter. Any attachments or other material not easily stored on computer disk may be filed in hard copy only.

On or before the date the Form 1275 is filed with the Commission, the applicant must serve a copy of its filing on all local communities listed in Module D, Line 1 of the Form. The applicant must include a statement informing the local communities that any oppositions or comments must be filed with the Commission within five days of the applicant's filing and must be served on the applicant. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the date the applicant files the Form 1275.

Instructions

Module A: Company Information. Indicate the applicant's name, address, telephone and fax numbers and the name of a person to contact for further information.

Module B: Ownership Information. Attach a statement of ownership interest in the open video

system, including all affiliated entities.

Module C: Eligibility and Compliance Representations.

Line 1: If you are a cable operator applying for certification to operate within your cable franchise area, indicate whether you are qualified to become an open video system operator under Section 76.1501 of the Commission's rules. You must also attach a brief statement explaining how you qualify under Section 76.1501. Section 76.1501 provides that a cable operator is qualified to operate within its cable franchise area if it is subject to "effective competition" in the franchise area, as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). If a cable operator is not subject to effective competition in its cable franchise area, it may still qualify to operate an open video system under Section 76.1501, provided that the Commission has issued a finding that such operation would serve the public interest, convenience, and necessity. If you are not a cable operator applying for certification within your cable franchise area, check "N/A" to indicate that the question is not applicable.

Line 2: Indicate whether you agree to comply with Sections 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513 of the Commission's rules, implementing Section 653(b) of the Communications Act. In certifying compliance with these regulations, you agree to abide by 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.

Line 3: Indicate whether you agree to comply with the Commission's requirements for enrollment of and for notice to unaffiliated video programming providers.

Line 4: If you are required under Section 64.903(a) of the Commission's rules to file a cost allocation manual, indicate whether you agree to file changes to your cost allocation manual at least 60 days before the commencement of service. If you are not required under Section 64.903(a) to file a cost allocation manual, check "N/A" to indicate that the question is not applicable.

Module D: System Information.

Line 1: List the names of the anticipated local communities to be served upon completion of your open video system. If the space provided on the form is insufficient, attach additional sheets as necessary.

Line 2: Indicate the amount of digital capacity anticipated on the open video system.

Line 3: Indicate the amount of analog capacity anticipated on the open video system.

Line 4: For switched digital systems, indicate the anticipated number of available channel input ports.

Module E: Verification Statement.

An officer or director of the applicant must sign and date Form 1275 certifying that, to the best of his or her information and belief, all representations contained in the filing are accurate according to the most recent information available.

FCC NOTICE TO INDIVIDUALS REQUIRED BY THE PRIVACY ACT AND THE PAPERWORK REDUCTION ACT

The solicitation of personal information in this form is authorized by the Communications Act of 1934, as amended. The information provided in this form is used by the Commission to determine that open video system operators comply with the Commission's regulations under Section 653(b) of the Communications Act. In reaching that determination, or for law enforcement purposes, it may become necessary to provide personal information contained in this form to another government agency. If information requested on this form is not provided, processing may be delayed. All information provided in this form will be available for public inspection. Your response is required to obtain the requested certification. Individuals are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Public reporting burden for this information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Records Management Division, Washington, D.C. 20554. **Do not send completed forms to this address.**

Federal Communications Commission
Washington, D.C. 20554

Approved by OMB XXXX-XXXX

FCC FORM 1275
CERTIFICATION FOR OPEN VIDEO SYSTEMS

A. Company Information		
Company Name:		
Contact Person:		
Mailing Address:		
City:	State:	Zip Code:
Phone Number:	Fax Number:	

B. Attach a statement of ownership, including all affiliated entities

C. Eligibility and Compliance Representations

	Yes	No	N/A
1. If you are a cable operator applying for certification within your cable franchise area, are you qualified to operate an open video system under 47 C.F.R. § 76.1501?			
2. Do you agree to comply and to remain in compliance with each of the Commission's regulations in 47 C.F.R. §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513?			
3. Do you agree to comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers?			
4. If applicable, do you agree to file changes to your cost allocation manual at least 60 days before the commencement of service?			

D. System Information

1. List the names of the anticipated local communities to be served upon completion of the system.

2. Anticipated Digital Capacity:			3. Anticipated Analog Capacity:		
4. If Switched Digital, Anticipated Number of Channel Input Ports:					

E. Verification Statement

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE TITLE 18, SECTION 1001), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503)

To the best of my knowledge and belief, the representations made herein are accurate according to the most recent information available.

Name:	Signature:
Title:	Date:

August 8, 1996

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

Re: Implementation of Section 302 of the Telecommunications Act; Open Video Systems, Third Report and Order and Second Order on Reconsideration, (CS Docket 96-46)

This Third Report and Order and Second Order on Reconsideration generally affirms the Commission's prior decision on the operation of open video systems (OVS), pursuant to the six-month deadline set by Congress in the Telecommunications Act of 1996 requiring the Commission to complete implementation of final rules.

When the Commission adopted OVS rules in June, I stated that it was necessary to be especially aware of the potential implications arising from the fact that this complicated proceeding, unlike many other pressing matters raised in the Telecommunications Act of 1996, was to be completed through reconsideration by August 1996. The Commission has been most careful to follow the express will of Congress and in doing so has established a framework for the development of OVS in the video marketplace. I remain concerned, however, that this accelerated timeframe for completing final rules may result in unintended consequences through exacerbated uncertainty and potential competitive imbalances as companies in the video marketplace work to follow those rules.

In terms of specific rules adopted in this proceeding, I continue to question the decision to expand the application of program access rules in the context of programming services, video program packagers, and OVS operators rather than to follow past precedent in applying these rules. In particular, I question the necessity of prohibiting the use of exclusive contracts between cable-affiliated programming services and cable-affiliated programming packagers on the OVS system. The Commission previously has distinguished between the legitimate and beneficial uses of exclusivity, especially in the context of developing technologies such as DBS, as compared to practices that restrict the availability of programming to subscribers.[1] The Commisison found regarding DBS that "...an outright ban on any MVPD exclusive contracts in areas unserved by cable, without any determination of the effect of such exclusivity on competition, defeats the very purpose of the 1992 Cable Act to foster competition from other non-cable technologies."[2]

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[1] See Implementation of Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Program Distribution and Carriage, First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993); See also Memorandum Opinion and Order on Reconsideration in MM Docket No. 92-265, 10 FCC Rcd 3105 (1994).

[2] 10 FCC Rcd 3126 (1994).

Moreover, the Commission's original decision to implement Section 628 regarding program access, especially concerning exclusive contracts in areas served by cable, treated exclusive contracts between vertically integrated programming vendors and cable operators "in a somewhat less restrictive manner" by not applying a *per se* prohibition and finding that contracts of this type are not prohibited where the Commission determines that "such [a] contract is in the public interest."[3] In that context, the Commission also stated that "exclusivity under this provision is not prohibited" and that "the public interest in exclusivity in the sale of entertainment programming is widely recognized."[4]

The program access rules have been applied over time to preserve legitimate practices and to preclude practices that restrict the availability of programming to subscribers or favor a particular distribution technology to the exclusion of other competing distributors. As a result, I continue to believe that the Commission's application of program access rules in the context of OVS fails to find a similar level of balance, and I question how the original, specific competitive concerns that became the basis for program access rules are manifested in the context of this new service.

Meanwhile, we all continue to await the resolution of the pressing matter of treatment of cost allocation for OVS, which is being addressed in a separate rulemaking. Throughout the extensive and contentious history of the video dialtone proceedings, perhaps no other issue was as critically important, and yet as tentatively treated, as the issue of cost allocation. While the 1996 Act establishes a new framework for LEC entry into the video marketplace through the advent of open video systems, the same analytical questions regarding cost allocation have to be answered, because the potential competitive inequities surrounding the treatment of common costs for OVS and voice networks have not in any way been changed. It is my hope that the Commission's treatment of cost allocation issues in the future will address my concerns, especially that the cost allocation mechanism: (1) should be understood by all parties at the outset of OVS development, and (2) should account for the carrier's incentive in competing with incumbent cable operators to set a price for video service that is artificially low. Accordingly, we still must face the question of how we will identify and analyze costs underlying the lower rate that might otherwise go unseen or underestimated, as opposed to scrutinizing inflated cost estimates that might be used to justify a higher rate. I look forward to addressing the cost allocation matter in the near future.

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[3] 8 FCC Rcd 3383 (1993).

[4] 8 FCC Rcd 3384 (1993).

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