telephone customers ordering telephone service to its OVS or video programming entity. As NCTA explained:

> When a person arrives in a new community or moves within their existing community (an increasingly common experience occurrence in our mobile society), the first call is generally made to "the telephone company" to arrange for that essential service. If at that time the telephone company representative, either directly or through a referral, exclusively recommends the incumbent LEC's cable or OVS service, the LEC will achieve an unfair marketing advantage deriving exclusively from its position as the monopoly supplier of local telephone service. The new telephone customer might even be induced to purchase the LEC's video service without being aware of competitive alternatives.[44]

To level the competitive playing field, our comments explained, the Commission should adopt procedures that prevent LECs from taking unfair advantage of their position as an essential service provider. As a condition of certification, the incumbent LEC should be (1) prohibited from directly referring the telephone customer to its OVS operator representative or video programming entity; and (2) required to inform the telephone customer of the name, address and telephone number of the local cable operator without favor or advantage, if it provides the customer with the name, address and telephone number of the OVS operator or video programming entity.

The Joint Telephone Parties maintain that "The 1996 Act's total silence on joint marketing of telephone and video programming services sends a strong message to the Commission: Do not interfere with the operation of the market."[45] But this reading of the Act equates congressional silence with congressional prohibition. The proper reading is that

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[44] NCTA Comments at 24-25.

[45] Joint Telephone Parties at 22.

Congress' silence on telephone company-video joint marketing evidences congressional intent that the Commission determine the public interest and exercise its discretion accordingly.

C. Separate Subsidiary

NCTA's comments also endorsed the provision of OVS by an incumbent LEC through a subsidiary separate from the entity that offers telephone service. Structural separation is necessary to assist regulators in detection and policing of discrimination and cross-subsidy. The Commission's authority to adopt safeguards where necessary to serve the public interest, including structural separation, is undiminished by the legislation.

Dr. Leland Johnson pointed out in a Declaration attached to NCTA's comments that structural separation would help to ensure against "hidden" transactions between the parent and the affiliate, to facilitate the proper charging of recurring operating expenses to the parent or affiliate, and to enforce the part 64 procedures.[46] These considerations continue to be present, and counsel in favor of structural separation.

The comments of six public interest representatives share NCTA's view that a separate subsidiary is absolutely essential to protect consumers.[47] They point out that LECs will remain dominant monopoly providers of local telephone service for the foreseeable future, and they "will have an enormous incentive to channel [monopoly telephone] revenues into the provision of video programming, since doing so shifts the costs of entry into the unregulated video

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[46] NCTA Comments at 26, citing Johnson Declaration at 13-14.

[47] Public Interest Comments at 4-7.

programming market onto consumers of telephone service."[48] An effective separate subsidiary can be a major step toward preventing this from happening.

IV. NON-LECS SHOULD HAVE THE SAME OPPORTUNITY AS LECS TO OFFER OVS

NCTA noted in its comments that the Act clearly permits a new entrant local exchange carrier that is also a Title VI cable operator to operate an open video system. The Act draws no distinctions between incumbents and new entrants in this regard. It would be contrary to the statute for the Commission to deny OVS certification to new entrant LECs just because they operate cable systems.[49]

NCTA also urged the Commission to use its discretion to authorize non-LECs to offer OVS. "Level playing field" principles argue in favor of providing incumbent LECs and incumbent cable operators with the same regulatory options. Furthermore, the same policy rationale that supports LEC-provided OVS -- encouraging nondiscriminatory access to video transmission capacity for affiliated and unaffiliated programmers -- applies to non-LECs provision of OVS transmission capacity.

The National League of Cities, in comments joined in by other municipal representatives (hereafter, " the Cities"), argues the Act does not permit a non-LEC to function as an OVS operator.[50] Others take the same position.[51] They see meaning not actually present in the

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[48] Id. at 3-4.

[49] NCTA Comments at 27-28.

[50] Comments of the National League of Cities; The United States Conference of Mayors; The National Association of Counties; The National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; The City of Los Angeles, California; The City of Chillicothe, Ohio; The City of Dearborn, Michigan; The City of Dubuque, Iowa; The City of St. Louis, Missouri; The City of Santa Clara, California; and the City of Tallahassee, Florida, Apr. 1, 1996, at 46-48 ("Cities Comments").

different statutory OVS authorization: While a LEC "may provide cable service...through an open video system,"[52] "an operator of a cable system may provide video programming through an open video system"[53] consistent with the public interest and Commission regulations. They interpret this language to mean that a cable operator's role in OVS is limited to that of a programmer on a LEC's OVS platform.

This argument makes no sense at all. As the Comments of Tele-Communications, Inc. ("TCI") explain:

> Congress has used the phrase "provide video programming" and even the term "transmission" of video programming interchangeably with the term "cable service." For example, in the now-repealed cable-telephone company cross-ownership provision, former Section 613(b)(1), Congress made it unlawful for any local exchange carrier to "provide video programming" directly to subscribers. Interpreting the term "provide video programming," the Fourth Circuit determined that Section 613(b)(1) "essentially prohibits local telephone companies from offering, with editorial control, cable television services with their common carrier subscribers." Indeed, even the "transmission" of video programming has been used to mean the provision of cable service.[54]

TCI further states that the most reasonable conclusion, in light of the previous use by Congress of the term "provide video programming," is that use of the term in Section 653(a)(1) is intended "to avoid the confusion that would have resulted from the use of the term 'cable service' in referring to cable operators offering video programming pursuant to Section

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[51] See, e.g., Comments of the Below-Named Political Subdivisions of the State of Minnesota, Apr. 1, 1996, at 14-15; City of Seattle Department of Administrative Services, Apr. 1, 1996, at 2; Public Interest Comments at 36-37.

[52] 1996 Act, § 653 (a) (1).

[53] Cities Comments at 46-47, quoting 1996 Act, section 302 (a) (adding new § 653 (a) (1)) (emphasis in quotation).

[54] Comments of Tele-Communications, Inc., Apr. 1, 1996, at 23 (citations omitted).

653(a)(1)."[55] Congress' intent was to distinguish between traditional cable operators that exercise editorial control over the vast majority of channels, and cable operators operating pursuant to the OVS scheme that, like telephone company-provided OVS operations, must cede control of up to two-thirds of the system's capacity.[56]

Several telephone parties raise a different, but no more valid objection. While they support the offering of OVS by cable operators,[57] they seek discretion to refuse access to incumbent cable operators should they wish to lease capacity.[58] Without this restriction, they claim, "incumbent cable operators will be able to interfere with the successful operation of competing open video systems."[59]

This objection is easily answered. Since the OVS operator is assured one-third of the activated channels, and is obliged to offer the remaining two-thirds on a nondiscriminatory basis, the operator should be indifferent with respect to the remaining two-thirds. There seems little reason why the OVS operator should care whether the incumbent cable operator, or anyone else, consumes the remaining capacity -- unless, of course, the OVS operator intends to block an effective intra-model competitor or to use the capacity itself if no other competitors appear.

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[55] Id. at 23-24 (citation omitted).

[56] See, also, Comments of Cox Communications, Inc., Apr. 1, 1996, at 2-4.; Comments of Comcast Cable Communications, Inc., et al., Apr. 1, 1996 at 4. ("If Congress, in directing the Commission to promulgate rules allowing cable operators and others to provide video programming through an OVS, meant to authorize such entities only to provide video programming on a telephone company's OVS, it would not have placed such a provision in the section dealing with certification by OVS operators.")

[57] See, e.g., Joint Telephone Parties at 29.

[58] Id. at 15-16.

[59] Id. at 15.

V. TITLE VI APPLICABILITY

NCTA's comments noted that although open video systems are substantially relieved of the obligation to comply with Title VI, several provisions are explicitly applied to OVS operators. In particular, OVS operators are required to comply with the must carry/ retransmission consent, PEG access, program access, subscriber privacy, negative option billing and equal employment opportunity sections, as well as certain cross-ownership provisions. An OVS operator, as well as its video programming entity, must also pay franchise fees. These obligations are clearly laid out in the statute. Except for several questions of implementation, they are not controversial.

A. Must Carry/Retransmission Consent

The application of Sections 614 and 615 to OVS, NCTA explained, means that the OVS operator's package, and any package established by an unaffiliated entity (except for programming provided by part-time users), "must contain the equivalent of a tier of channels, including local broadcast and PEG channels, that all subscribers must purchase and 'buy-through' to reach other programming on the system."[60] If multiple packagers develop, the must carry (and PEG) channels should be designated as "shared," and should be operated consistent with NCTA's proposal, described above, for the sharing of channels.

Telephone companies concede that they are subject to must carry and retransmission consent. The Joint Telephone Parties advocate the application of these rules "in the same way they apply to cable systems."[61] Other telephone parties share this view.[62] Furthermore, U S

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[60] NCTA Comments at 32.

[61] Joint Telephone Parties at 26.

[62] See, e.g., NYNEX Comments at 16; U S WEST Comments at 19-20.

WEST agrees with NCTA that every subscriber must arrange for a packager to carry the local broadcast stations, but the subscriber should pay for the local broadcast stations only once.[63] But in contrast to NCTA's position that the shared must carry channels should be administered jointly, U S WEST would have the OVS operator or its designee perform channel administration. As explained above, shared administration is more likely to promote nondiscriminatory access of capacity to programmers.

B. PEG Access

Telephone parties seek flexibility and an absence of regulatory supervision, but they generally do not offer solid commitments as to their statutory PEG access obligations. The Joint Telephone Parties urge that there be no requirement to dedicate "entire channels to individual PEG entities,"[64] while U S WEST opposes PEG requirements that "could stifle experimentation with new approaches."[65]

In response, the Commission should adopt a "no excuses" policy, that makes plain the requirements for PEG access on OVS systems. In addition, the Commission should not adopt a requirement that existing cable operators share channel feeds or other assets with OVS operators.

VI. PROGRAM EXCLUSIVITY

NCTA also supported the Act's requirement for the extension of syndicated exclusivity, sports exclusivity and network nonduplication regulations to the OVS environment. We

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[63] U S WEST Comments at 19-20.

[64] Joint Telephone Parties at 28

[65] U S WEST Comments at 18.

explained that for programming on shared channels, the channel administrator is in "the best position to track schedules to determine when the display of particular programming by any of the programmers on the system will violate the exclusivity rights exercised by broadcasters."[66] The channel administrator should, therefore, be in a position to block programming on the shared channels. With respect to exclusive channels, in contrast, the initial responsibility for blocking should be left to the packager leasing the channel, although the actual task of blocking might be performed by the channel administrator for a fee.

The parties commenting on this matter recognize that OVS operators and packager/programmers must comply with these program exclusivity requirements. We continue to believe that exclusivity will be most efficiently enforced by a channel administration jointly operated by the programmers taking capacity on the system.

VII. CERTIFICATION

NCTA's comments noted that prior to offering service, OVS operators must seek Commission certification that individual proposals comply with the Commission's regulations. The Commission is directed to approve or disapprove certification proposals within ten days of their filing.

Recognizing that the ten day period is insufficient to properly evaluate compliance, the Commission suggests, and we heartily endorse, a pre-filing procedure under which applicants submit basic information first, and submit the actual certification request only after the staff has found that the pre-filed information complies with the regulations. NCTA called for the inclusion of the following pre-filed information:

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[66] NCTA Comments at 36.

- A demonstration that the operator's plan for allocating integrated system costs between telephone service and OVS has been approved by the Commission;

- A demonstration that the operator has either established or intends to establish a separate subsidiary that complies with the Commission's regulations;

- The number of analog and digital channels that the operator proposes to offer when service commences;

- The operator's plan for offering two-thirds of the activated channels on a nondiscriminatory basis, including an "open enrollment" procedure that complies with the Commission's procedures;

- The operator's proposal, if any, to provide the technical capability for the sharing of channels;

- A demonstration that the operator intends to enter into an agreement for the joint administration of shared channels, including must carry and PEG channels, or for channel administration by a channel administrator collectively chosen by all of the programmers;

- A demonstration that the rates, terms and conditions under which the channel administrator proposes to offer service are just and reasonable, and are not unjustly or unreasonably discriminatory;

- A demonstration that the operator has adopted a procedure whereby, if its telephone affiliate informs customers of the affiliated OVS or video programming service, it will simultaneously and without favor inform customers of competitive alternatives;

- A demonstration that the operator is either in compliance with, or intends to comply, with Cable Act provisions relating to must carry, PEG access, program access and other matters; and

- A demonstration that the operator is in compliance with, or intends to comply with, Commission regulations regarding network nonduplication, syndicated exclusivity and sports exclusivity.[67]

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[67] Id. at 38-39.

By making this preliminary showing, an OVS operator will provide the Commission with the minimum information necessary to establish that it is in compliance with the regulations.

Telephone companies see things differently. U S WEST, for example, contends that all the Commission need do is to accept a carrier's "intent to comply" with the statute.[68] NYNEX recommends a truncated process in which areas served and must carry/PEG eligibility are identified, and descriptions are provided of the methods by which the operator intends to comply with nondiscrimination and cost allocation requirements.[69] USTA claims that the filing of basic identification information, along with a statement that the operator either complies or intends to comply with the regulations, is all that is necessary.[70] The Joint Telephone Parties oppose a pre-certification process and claim such a process would violate the statute.[71]

All of the telephone company comments have two things in common: they emphasize the shortness of the review period once certifications are filed over the Commission's obligation to certify compliance with the regulations. And they attempt to use the short review period to justify an inadequate review. The Commission's task is to certify compliance, and it properly asks whether that task can be accomplished within ten days of filing. The incontestable answer is that the determination of compliance will require a longer period, and the pre-certification process, including the specific filing requirements that we propose, are the proper way to go about making the compliance determination.

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[68] U S WEST Comments at 22.

[69] NYNEX Comments at 26-27.

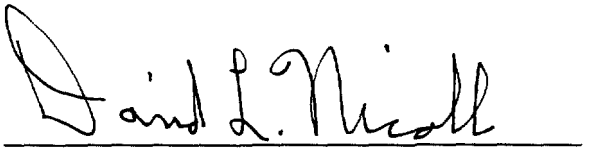
[70] USTA Comments at 20-21.

[71] Joint Telephone Parties at 22-23.

CONCLUSION

For the foregoing reasons, the Commission should adopt regulations and policies consistent with NCTA's Comments and Reply Comments.

Respectfully submitted,



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April 11, 1996

CERTIFICATE OF SERVICE

I, Staci M. Pittman, do hereby certify that on this 11th day of April, 1996, copies of the foregoing **"Reply Comments of the National Cable Television Association, Inc."** were delivered by first-class, postage pre-paid mail upon the attached list:

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