Respectfully submitted,

Janis Everhart

Scott Carlson
Assistant City Attorneys
City of Dallas
1500 Marilla, Room 7/D/N
Dallas, Texas

On behalf of the Local Communities

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission

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

Nicholas P. Miller
Tillman L. Lay
Frederick E. Ellrod III

MILLER, CANFIELD, PADDOCK AND STONE
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 785-0600

Their Attorneys

April 1, 1996

TABLE OF CONTENTS

Page

I. INTRODUCTION 2

II. AN OVS OPERATOR MUST BE SUBJECT TO STRONG NONDISCRIMINATION AND REASONABLE RATE OBLIGATIONS TO PREVENT OVS FROM BECOMING A CABLE SYSTEM IN DISGUISE 6

A. The Commission Must Adopt Strong Nondiscrimination Rules 6

1. The OVS Model Is Distinct From the Cable Model 6

2. The Commission's rules must prohibit discrimination and ensure just and reasonable rates, terms, and conditions 8

3. OVS carriage obligations must be far stronger, and less carrier-favorable, than cable leased access 10

4. The Commission cannot rely on competition to restrain OVS operators from discrimination . . 11

5. The OVS rules must affirmatively ensure nondiscrimination, rather than waiting for complaints from programmers that have already been harmed . . 13

B. Specific Rules Must Be Drawn to Prevent Discrimination and Ensure Open Access 13

1. OVS carriage obligations must enable independent programmers to use capacity readily on the OVS 14

2. OVS rules must make it easy for programmers to identify and show discrimination by requiring uniform, public carriage rates . . . 15

3. The Commission must use either a yardstick or a cost-based approach to determine the reasonableness of rates . . . 19

4. The Commission's rules must prevent OVS operator-programmer relationships outside the carrier-user relationship 21

Page

5. Rules for allocation of OVS capacity must protect independent programming competition . 22

6. OVS program marketing and selection rules must protect access by independent programmers 25

7. OVS programmer application and usage rules must protect independent programming competition27

C. An OVS Operator That Violates the Commission's OVS Rules Should Be Required to Obtain a Cable Franchise 28

III. OPEN VIDEO SYSTEMS MUST MEET LOCAL COMMUNITY NEEDS AND INTERESTS 28

A. The Public Interest Necessarily Has Local As Well As Nationwide Components 29

B. PEG Obligations for Open Video Systems Must be Established Consistent With Local Needs and Interests 30

C. An OVS Operator Should Be Subject To A "Match or Negotiate" Requirement: It May Choose Either To Match Each Incumbent Cable Operator's PEG Obligations, Or To Negotiate Agreements Acceptable to the Affected Communities . 31

1. Under the "match" option, the OVS operator must provide exactly what the cable operator provides 32

2. Under the "Negotiate" Option, OVS Operators May Negotiate Alternative Arrangements with Communities, Which Could Result in Greater PEG Benefits for the Community 35

3. In the exceedingly rare case where an OVS system is located in an area where no cable operator is franchised to serve, the OVS operator must negotiate its PEG obligations with the local government 37

4. The Commission should reject any proposals to average or "federalize" OVS PEG obligations across different franchising authority jurisdictions. 39

Page

5. PEG channels should be provided to all subscribers 41

6. The Commission must ensure that any equipment necessary to deliver PEG programming to local communities is made available 43

D. Other Title VI Provisions Must Reflect the Purposes of the OVS Provision 44

1. Program access 44

2. Negative option billing 44

E. The 'Fee In Lieu Of Franchise Fees' Paid By An OVS Operator Must Similarly Be Matched To the Local Cable Operator's Obligations . 45

IV. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY 46

A. A Cable Operator Cannot Be An OVS Operator 46

B. Even If the Commission Were To Conclude That A Cable Operator May Be An OVS Operator, Separate Local Community Consent Would Still Be Required . . 48

C. A Cable Operator May Provide Programming Through An OVS, But Only If Consistent With Its Cable Franchise and the Public Interest 51

V. THE OVS CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY 52

A. An OVS Remains Subject To the Right of Local Communities To Manage Their Public Rights-of-Way and To Receive Fair Compensation For Their Use . . 52

1. Local governments have an inherent right to manage and receive compensation for their rights of way 53

2. The right to control local rights-of-way is a property right like that of any private property owner, which is protected under the Fifth Amendment 55

Page

3. Any Commission intrusion into local governments' property rights would violate the Fifth Amendment 56

a. Commission-mandated access to local rights-of-way would be an impermissible permanent physical occupation 56

b. Forced OVS provider access rises to the level of an unconstitutional taking . 57

4. Because Congress did not explicitly authorize a taking for OVS, the 1996 Act must be construed so as not to require such a taking 58

B. Congress Did Not Give the Commission Power to Take the Property Interests of Local Governments for OVS 60

1. The Commission has no power of eminent domain . 60

2. Congress gave the Commission no implied authority to expose the federal government to fiscal liability 62

3. The "Fee In Lieu Of" provision in Section 653 does not satisfy the requirement of just compensation. 64

C. LECs' Existing Authorizations to Use Local Rights-of-Way to Provide Local Telephone Service do not Extend to OVS 67

D. An OVS certification must demonstrate that the operator has obtained local authority to use the public rights-of-way 69

E. The Commission's rules should recognize that disputes regarding an OVS's right to be in the local public rights-of-way cannot be resolved by the Commission, but only by the courts 73

VI. CONCLUSION 73

SUMMARY

An open video system ("OVS") is one of four options for a local exchange carrier ("LEC") to provide video programming to subscribers. Thus, the OVS rules cannot be meant simply to give the LECs the "flexibility" to compete with cable operators. The LECs can do that by becoming cable operators themselves. Rather, OVS must be distinctly different than a cable system: an open, non-discriminatory access system, not a cynical vehicle for achieving the perceived benefits of being a cable operator while avoiding the obligations Congress left intact under Title VI.

These comments address four key principles:

(1) The Commission Must Adopt Strong Nondiscrimination Rules. The statute requires FCC rules that prohibit an OVS operator from discriminating among video programming providers, and that ensure just, reasonable, and nondiscriminatory rates, terms, and conditions for carriage. An OVS in which the operator could discriminate among programmers would simply be cable under another name. The NPRM is simply wrong in suggesting that the OVS rules should allow for some "discrimination." On the contrary, the OVS rules must affirmatively ensure nondiscrimination, rather than waiting for complaints from programmers that have already been harmed. In particular, the 2/3 capacity requirement should apply not only to OVS as a whole, but also separately to both analog and digital portions. Channel positioning rules must also be nondiscriminatory.

Publicly-posted, uniform rates are the only reliable means of enforcing reasonable and non-discriminatory rates. In place of tariffing, we suggest that OVS operators must make all carriage contracts publicly available. Moreover, the OVS operator must justify any differences in the rates charged for carriage (including rates to affiliates) by verifiable and objective factors, such as special rates for PEG programmers, or volume discounts. All OVS programming contracts should contain a "most favored nations" clause.

To ensure reasonable carriage rates, any programming affiliate of the OVS operator must file standalone financial statements. In addition, as a "reality check," rates should be presumed unreasonable unless (1) at least 1/3 of system capacity is occupied by independent programmers; and (2) at least four such programmers are on the system. The OVS operator's relationship with any such programmer should be restricted to a "carrier-user" relationship.

An OVS operator should not be allowed to manage channel allocation. If initial demand exceeds system capacity, a proportional allocation appears best. But a one-time allocation that is frozen for years would be unacceptable. An OVS operator not fulfilling the 2/3 set-aside requirement should cede capacity to any requesting party within 30 days. Free trading and subleasing of capacity by unaffiliated programmers should be allowed. To prevent discrimination, an OVS operator may not market other programmers' channels, or choose what programming is

carried on shared channels; impose unnecessary financial hurdles on programmers; or favor its affiliates over other programmers.

If an OVS operator is found to be in violation of the OVS rules, it should be decertified and required to obtain cable franchises for the relevant areas.

(2) Open Video Systems Should Meet PEG Obligations Through a "Match or Negotiate" Requirement. Congress recognized that OVS must meet local PEG needs and interests and that local governments have unique expertise in ascertaining those needs and interests. Thus, an OVS operator should be subject to a "match or negotiate" requirement: it may choose either to match each incumbent cable operator's PEG obligations, or to negotiate agreements acceptable to the affected communities. In either case, the OVS operator's certification should include an endorsement by the local government of its PEG requirements.

If an OVS operator chooses to match the cable operator, it must also match any future changes in PEG obligations. These conditions extend to PEG and I-net facilities as well as capacity. The matching obligation of an OVS operator must be cumulative with the PEG obligations of the cable operator.

Under the "negotiate" option, the franchising authority and the OVS operator may negotiate PEG obligations that provide an equivalent benefit to the community, with equivalent burdens on the two operators. In any areas where no cable operator is authorized to serve, the OVS operator must negotiate with the local government.

The Commission should reject any proposals to average or "federalize" OVS PEG obligations. PEG requirements must be based on the particular needs and interests of each local community. Thus, where an OVS will overlap several franchise areas, it should be designed with the capability to fulfill the separate PEG requirements of <u>each</u> affected community. PEG channels should be provided to all subscribers. If special equipment is necessary to have PEG programming distributed over the OVS, the OVS operator must provide that equipment.

The 'fee in lieu of franchise fees' paid by an OVS operator must be matched to the local cable operator's obligations.

(3) Cable Operators Should Not Be Permitted to Become OVS Operators, But If They Are, Separate and Prior Local Approval Will Be Necessary. The statute makes clear that only a LEC may be an OVS operator. A cable operator may provide programming through an OVS, but only if consistent with its cable franchise and the public interest. In any case, a cable system cannot become an OVS without prior local community approval. A cable operator's only right to be in the public rights-of-way comes from its cable franchise. If a cable operator could unilaterally abrogate the local government's contractual rights under that franchise agreement, that would be a taking of the local government's property rights under contract.

(4) The Certification Process Must Ensure That An OVS Complies With Local Rights Regarding the Public Rights-of-Way. OVS rules must acknowledge local governments' property interests

in the public rights-of-way. Thus, a certification must show that the prospective OVS operator has obtained all necessary local consents to use of the rights-of-way for OVS. Any suggestion in the OVS rules that the Commission's approval makes local approval unnecessary would be a "taking" within the meaning of the Fifth Amendment, subject to the constitutional requirement of just compensation. Neither the OVS provisions of the 1996 Act, nor the legislative history, gives the Commission any authority to effect a taking of local government property. Nor would the "fee in lieu of franchise fees" provide just compensation for such a taking.

No past grant of authority to a LEC could be construed to include a right to use the rights-of-way for OVS, which is not telephone service and which did not exist at the time of such grants. A prospective OVS operator must be required to show that it has obtained the authorizations necessary under state and local law to use local public rights-of-way for OVS.

The short review period for OVS certification approval means that a prospective OVS operator must be required to prove that it has obtained local authority to use rights-of-way and fulfilled its PEG obligations <u>before</u> certification. Facial approval subject to later review is unacceptable

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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

To: The Commission

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, by their attorneys, and, where appropriate, on behalf of their members, hereby file the following comments in response to the Report and Order and Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released March 11, 1996. These joint commenters have combined their comments in response

to the Commission's request that filings be streamlined and consolidated wherever possible.

I. INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act" or "Act") repeals the former telco-cable cross-ownership ban by providing not one, but four options for a local exchange carrier ("LEC") that wishes to provide video programming to subscribers. A LEC may:

(1) provide video programming using radio transmission under Title III of the Communications Act of 1934 ("Communications Act");

(2) provide transmission on a common carrier basis under Title II of the Communications Act;

(3) be a cable operator under Title VI of the Communications Act; <u>or</u>

(4) operate an "open video system" ("OVS") under new § 653.[1]

The fourth option, OVS, is a hybrid model. Particularly when viewed in light of the other three options, OVS is best viewed as a hybrid between the common carrier option and the cable option: one-third a cable system (in which all programming is selected and controlled by the system operator), and two-thirds a common carrier video transport system (in which the operator has no control or influence over content selection and

---

[1] <u>See</u> 1996 Act, section 302(a) (adding new § 651(a)); <u>NPRM</u> at ¶ 3.

unaffiliated parties may select programming independently and transmit it over the system). Because two-thirds of the OVS system is not cable-like, Congress exempted an OVS from many provisions of the Cable Communications Policy Act of 1984, as amended ("Cable Act").[2]

Thus, under the 1996 Act there is no longer a question as to whether telephone companies will be able to offer video programming. They will. The new question is: how will they do it?

The NPRM as a whole appears to suggest that the Commission believes it must make very loose, or "flexible" OVS rules because OVS must succeed, in order to allow the LECs to compete with the cable industry in the video market. This approach is fundamentally misguided. It reflects the pre-1996 Act assumption that a LEC could not be a cable operator. That assumption is now false. OVS is not the only way for a LEC to compete with cable; it is merely one of four. Thus, OVS must succeed or fail on its own merits as an alternative to the cable model that is distinctively different from that model, not as a replacement for the cable model.

The NPRM misconstrues the type of "flexibility" that the Act gives LECs.[3] Congress encouraged LECs to enter the video distribution field and compete with established cable operators not (as the NPRM suggests at ¶ 6) through lighter, more

---

[2] See 1996 Act, Section 302(a), adding new § 653(c)(1).

[3] See NPRM, ¶¶ 2, 12, 13, 15, 31.

"flexible" OVS regulatory burdens, but through the "flexibility" of having four alternative options to enter the market. This means that (1) cable operators should not be allowed to become OVS operators; and (2) OVS is intended to be an alternative distinct from cable, not a cynical vehicle for achieving the perceived benefits of being a cable operator while avoiding the obligations Congress left intact under Title VI. If a LEC chooses to take advantage of the unique privileges of OVS, it may not at the same time be permitted in effect to seize those of a cable operator as well.

Thus, for example, the NPRM quotes the Conference Report to the effect that OVS operators should be allowed great flexibility so that they can "tailor services to meet the unique competitive and consumer needs of individual markets."[4] But the full sentence in the Conference Report makes clear that this "tailoring" is accomplished through the LEC's choice among the four statutory alternatives, not through the single option of OVS.[5] The NPRM is simply wrong in suggesting that the Act sanctions such broad further "flexibility" within the OVS option. If it did, the other three options that Congress made available — especially the cable franchise option — would become meaningless.

The purpose of the OVS rules cannot be simply to give the LECs the "flexibility" to compete with cable operators, since the

---

[4] NPRM, ¶ 15.

[5] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 177, 178 (1996) ("Conference Report").

LECs can do that simply by becoming cable operators themselves. Rather, the purpose of the OVS provision must be to give another model a chance: an open, non-discriminatory access system, fundamentally distinct from the closed, proprietary model of cable. In a sense, Congress has set out to see whether an open, nonproprietary scheme can do for video carriage what it did for the personal computer: create a level field on which numerous players may compete.

Congress did not decree that LECs must choose the OVS option; nor did it suggest that OVS was favored over the other three options given LECs. Congress also did not set out to replace the cable franchise model of Title VI with OVS. If Congress had intended to do that, it could simply have deleted Title VI from the Communications Act, rather than widening its scope to include LECs, as the 1996 Act does.

Rather, Congress decided that the market, rather than federal mandate, should determine whether subscribers would prefer OVS to cable. The Commission's role here, then, is merely to ensure that the two video delivery models are distinguished from another — that OVS does not become a cable system in disguise — and to ensure that market forces will then decide which model LECs prefer.

The following sections address four key principles that must guide the Commissioner in formulating OVS rules. First, the Commission must adopt nondiscrimination provisions that prevent an OVS from becoming a cable system in disguise, and instead

ensure that both large and small, and favored and unfavored, programmers will have truly open and affordable access to OVS. Second, the Commission's rules regarding the PEG obligations and other Title VI requirements mandated for OVS by the Act must ensure that OVS operators will meet local community needs and interests; this should be accomplished through a "match or negotiate" PEG requirement for OVS operators. Third, the statute does not permit cable operators to become OVS operators; but even if the Commission should (erroneously) conclude otherwise, a cable operator still cannot become an OVS operator without prior franchising authority consent and approval. Fourth, the Commission's rules must acknowledge the property interests that local governments hold in the local public rights-of-way that will be used by OVS systems; the Commission's OVS certification process must ensure that those property rights are protected by requiring an OVS applicant to demonstrate that it has obtained the necessary local permissions.

II. AN OVS OPERATOR MUST BE SUBJECT TO STRONG NONDISCRIMINATION AND REASONABLE RATE OBLIGATIONS TO PREVENT OVS FROM BECOMING A CABLE SYSTEM IN DISGUISE.

A. The Commission Must Adopt Strong Nondiscrimination Rules.

1. The OVS Model Is Distinct From the Cable Model.

The guiding principle in the Commission's carriage rules for OVS must be that OVS is a distinct option under the Act, fundamentally different from cable. This fundamental difference,

as the name indicates, consists in the open character of the system. Like its predecessor, video dialtone, OVS is intended to provide a genuine opportunity for independent programmers not of the OVS operator's choosing to obtain affordable capacity and compete not only with the OVS, but with the local cable operator as well.

For this arrangement to work, the network must be truly accessible on a fair and practical basis, and not influenced by the OVS operator's preferences. An OVS in which the operator could either select most of the programmers or discriminate among programmers — including discrimination among different unaffiliated programmers — would simply be a classic cable system under another name. Just as a cable operator selects Discovery, ESPN, HBO, Nickelodeon, AMC, and the Family Channel, none (or not all) of which may be affiliated with the cable operator, so an OVS operator allowed to discriminate could select Discovery, ESPN, HBO, Nickelodeon, AMC, and the Family Channel, none of which might be affiliated with the OVS operator, as ostensibly independent programmers on its system, exercising the same degree and kind of editorial control over what the subscriber can receive.

Such a "cable clone" model of OVS would achieve nothing. OVS must be more than merely cable under another name. If Congress had intended the regulatory structure of OVS to replace that of cable, Congress could simply have repealed Title VI and declared every cable system an OVS. But Congress did not do so.

It is evident from the structure of the Act — the four options offered to LECs to provide video service — that OVS is intended to be a regulatory regime substantially different from that of the Cable Act, characterized by open access. Thus, to the extent rules proposed in the NPRM would give OVS operators "flexibility" comparable to that of cable operators, they do not comply with the statutory mandate.

2. The Commission's rules must prohibit discrimination and ensure just and reasonable rates, terms, and conditions.

The language of the statute is unconditional: the Commission's rules must "prohibit an operator of an open video system from discriminating among video programming providers," and must "ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory."[6] The Commission may not merely hope that the unrestrained marketplace will yield fairness and reasonable rates. Rather, the Commission must make rules to ensure that an OVS has these attributes.[7]

---

[6] 1996 Act, section 302(a) (adding new § 653(b)(1)(A)) (emphasis added).

[7] The NPRM erroneously appears to read new § 653(b)(1)(B), which states that the one-third capacity limitation shall not be construed to limit the absolute number of channels that the OVS operator may offer to subscribers, as if it reversed the nondiscrimination requirement in subparagraph (A) and permitted the Commission to allow some discrimination by OVS operators. Such an inconsistent interpretation of the statute cannot be countenanced. Rather, the "no limit" provision in subparagraph (B) must be read merely as making clear that the one-third limit is not a numerical limit on the number of channels: if the OVS operator builds additional capacity, its

Moreover, the Commission is not free to devise new interpretations of these terms at will. The key terms — "discrimination," "just and reasonable" — are already in use elsewhere in the Communications Act. The only logical conclusion is that Congress intended these terms of art to be used in the same way in the OVS section, since the OVS terms are not distinguished or redefined in that section.[8] Thus, the OVS provision requires the Commission to achieve the same ends as in Title II, although not necessarily by the same means.

What distinguishes OVS from cable is the carriage requirements for independent programmers that are not editorially selected or influenced by the OVS operator, either directly or indirectly. These obligations must foster new, non-facilities-based competitors on the OVS, or they would be pointless. Independent programmers and program packagers must exercise independent editorial selection, something that will be impossible in practice if the OVS operator is allowed to have any indirect or direct influence over any "unaffiliated" programmer or program packager.[9]

---

one-third share expands based on the newly increased capacity.

[8] See, e.g., Johns-Manville Corp. v. U.S., 855 F.2d 1556, cert. denied, 109 S. Ct. 1342 (1988) (where statute defines term, all other unstated meanings are excluded from consideration); American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied sub nom. Connecticut v. FCC, 485 U.S. 959 (1988) (if statutory language is clear, definition should be applied in all circumstances).

[9] We endorse the comments of the Alliance for Community Media, et al., on this issue.

3. OVS carriage obligations must be far stronger, and less carrier-favorable, than cable leased access.

The NPRM appears to suggest that the cable leased access rules might be an appropriate model for the OVS carriage rules.[10] But this suggestion is flatly contradicted by the statute. Even a cursory comparison of new Section 653 and existing Section 612 makes clear that an OVS operator's 2/3 capacity set-aside obligation and its non-discrimination and reasonable rate obligations are far different — and far more exacting — than a cable operator's leased access obligations under Section 612.

Thus, cable leased access is entirely the wrong model to use for OVS, both statutorily and as a matter of policy. Choosing that model would guarantee that OVS would fail as a true vehicle for independent programming. Rather, OVS would become merely cable in sheep's clothing.

Cable leased access has failed as a device for providing meaningful access to programmers unchosen by the cable operator, even though the leased access set-aside requirement is much smaller (in terms of percentage of capacity) than that required under new Section 653. This is because cable operators have been able — both through the delays and costs of the individualized complaint process and through the lack of concrete, cost-based and non-discriminatory rate formulas — to set their barriers to entry high enough that no programmers other than those favored by the cable operators can succeed.

---

[10] See, e.g., NPRM, ¶¶ 12, 72.

Absent a substantially different regulatory regime, OVS operators will have every incentive to do the same, because gaining control of all the capacity on the OVS would allow the OVS operator to gain more of the revenues paid by subscribers for program offerings (as on a cable system). Absent strong safeguards, OVS operators will be inclined to discourage independent programmers or, alternatively, enter into discriminatory relationships with favored unaffiliated programmers. Thus, the FCC's OVS rules should assume that any loopholes allowing the OVS operator "flexibility" to "tailor" its system's offerings will defeat the statute's purpose of a truly open system.

4. The Commission cannot rely on competition to restrain OVS operators from discrimination.

Contrary to the NPRM's suggestion (at ¶ 31), the FCC cannot assume that competition in the video delivery market will deter either OVS or cable operators from taking advantage of any such loopholes the FCC may create.[11] As an initial matter, it is not yet clear whether there will be any such competition. While the Act clearly seeks to encourage vigorous competition, the market will determine whether it actually arrives.

However, even if geographically widespread facilities-based competition develops between OVS and cable systems, the result will at best be a duopoly. That is hardly robust competition in

---

[11] See NPRM, ¶ 31.

the classic sense, since a two-player market is subject to market distortions and anticompetitive tactics (particularly through signaling and tacit collusion between the duopolists) only slightly less damaging than those typical of a monopoly. Thus, the hope of competition will not permit the Commission to avoid the need to make strong rules that will prophylactically protect against any sort of discrimination.

Indeed, the presence of a cable operator competitor will increase, not decrease, an OVS operator's incentive to discriminate. To compete with the cable operator, the OVS operator will want to behave like a cable operator — to control all capacity on the system, directly or indirectly, picking the programming that it believes (rightly or wrongly) will attract the most subscribers. To this end, a rational OVS operator is likely to use any cable operator-like techniques of discrimination that the Commission's OVS rules permit. For example, an OVS operator may seek to fulfill its 2/3 set-aside obligation with "friendly" unaffiliated programmers. The OVS operator could accomplish this in many indirect and hard-to-detect ways, such as providing attractive financing, promotion or cooperative marketing arrangements only to its favored unaffiliated programmers. Certainly some LECs employed such artifices in efforts to evade the former cable-telco cross-ownership rules,[12] and there is evidence that some cable

---

[12] See, e.g., Northwestern Indiana Tel. Co., Inc. v. FCC, 872 F.2d 465 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990).

operators have used similar devices to avoid their leased access obligations.[13]

5. The OVS rules must affirmatively ensure nondiscrimination, rather than waiting for complaints from programmers that have already been harmed.

The complaint-based process suggested in the NPRM at ¶¶ 12-13 will not suffice to protect independent programmers against discrimination. Without clear rules, it is too easy for the OVS operator, controlling all access to the system, to fend off potential programmers through a series of legal proceedings that place an intolerable and inequitable financial burden on the frequently less well-heeled programmers seeking access. This has been thoroughly demonstrated in the cable leased access area. Small independent entrepreneurs in particular will need both certainty and assured, ready access to prosper in the open programming business. Thus, the statute requires the Commission to make rules that will ensure just, reasonable, and non-discriminatory rates, terms and conditions — not just correct injustices after the fact.

B. Specific Rules Must Be Drawn to Prevent Discrimination and Ensure Open Access.

In light of the Act's strong and essential nondiscrimination requirements, many of the NPRM's proposals are misguided. They would impermissibly result in indirect, but nevertheless

---

[13] See, e.g., United Broadcasting Corp. v. TCI TKR of South Dade, CSC-366 (filed Apr. 8, 1994).

effective, OVS operator control over most or all programming on the system — in other words, in a cable system.

1. OVS carriage obligations must enable independent programmers to use capacity readily on the OVS.

The Commission must shape specific antidiscriminatory OVS rules to make it possible for independent programmers to compete without depending on the operator's discretion for carriage. The first such rule, clearly, must protect the statutory requirement that 2/3 of system capacity be actually available to independent programmers.

The 2/3 capacity requirement should apply not only to the OVS system as a whole, but also separately to both analog and digital portions, since (at least for the near term) most programmers will not be able to use all modes of transmission.[14] For the same reason, it would be inconsistent with the Act to allocate all analog capacity to one programmer.[15] An OVS must provide nondiscriminatory access, not only to capacity in general, but to specified types of capacity. All programmers, including the OVS operator and its affiliates, must have an equal opportunity to use each type of capacity

For the same reasons, if the Commission allows an OVS operator to impose limits on the amount of capacity that one independent programmer may occupy,[16] such a limit must not be

---

[14] Cf. NPRM ¶ 17.

[15] NPRM, ¶ 21.

[16] NPRM, ¶ 20.