

C. Carriage of Video Programming Providers

1. Allocation of Open Video System Channel Capacity

a. Summary

37. This section summarizes the rules and policies we adopt below regarding the allocation of channel capacity on open video systems. These rules and policies are designed to implement Sections 653(b)(1)(A)¹⁰⁶ and 653(b)(1)(B)¹⁰⁷ of the Communications Act. Among other things, those provisions generally prohibit an open video system operator from discriminating among video programming providers with regard to carriage on its system and provide that if demand for carriage exceeds the system's channel capacity, the open video system operator may select the programming services on no more than one-third of the activated channel capacity.

38. Under the rules and policies set forth below, the allocation process generally will proceed as follows:

- An open video system operator will file a "Notice of Intent" ("Notice") with the Commission. The Commission will release the Notice to the public. The Notice will contain certain information that a video programming provider reasonably would need in order to assess whether to seek carriage on the system. The Notice must describe, among other things, the system's projected service area, the system's projected channel capacity and a description of the steps a video programming provider must follow to obtain carriage on the system. In addition to the information contained in the Notice, the open video system operator will be required to make available certain information upon written request from a video programming provider, including specific technical information regarding the system.

¹⁰⁶Section 653 (b)(1)(A) provides that the Commission shall prescribe regulations that:

[E]xcept as required pursuant to section 611, 614, or 615, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory.

¹⁰⁷Section 653(b)(1)(B) provides that the Commission shall prescribe regulations that:

[I]f demand exceeds the channel capacity of the open video system, prohibit an operator of an open video system and its affiliates from selecting the video programming services for carriage on more than one-third of the activated channel capacity on such system, but nothing in this subparagraph shall be construed to limit the number of channels that the carrier and its affiliates may offer to provide directly to subscribers

- The open video system operator may establish terms and conditions of carriage for video programming providers that are just and reasonable, and are not unreasonably or unjustly discriminatory. For instance, an open video system operator may: (1) take reasonable steps to ensure that a prospective video programming provider's request for capacity is *bona fide*; (2) generally exclude a competing, in-region cable operator from obtaining capacity on its system; (3) require video programming providers to obtain capacity in full-channel increments (i.e., prohibit part-time programming); (4) preclude unaffiliated video programming providers from selecting the programming on more capacity than the operator itself and its affiliates are selecting programming; (5) negotiate co-packaging agreements with unaffiliated video programming providers; and (6) require assurances that a video programming provider will actually deliver video programming over its allotted open video system capacity within some reasonable period of time after system activation.
- At the conclusion of the open enrollment or notice period, the open video system operator will determine whether demand for carriage, including its own demand, exceeds the system's channel capacity. For this purpose, analog and digital capacity must be treated separately. Specifically, if the system contains both analog and digital capacity, the open video system operator must separately assess whether analog demand exceeds analog capacity and whether digital demand exceeds digital capacity.
 - If demand for carriage does not exceed system capacity, the open video system operator should fill all video programming providers' demands for capacity, including its own.
 - If demand for carriage exceeds capacity, the open video system operator may select the programming services to be carried on no more than one-third of the system's activated channel capacity. PEG and must-carry channels carried pursuant to Sections 611, 614 and 615 of the Communications Act will not count against the operator's one-third limit. Channels carrying "shared" programming will count against the operator's one-third limit on a pro-rata basis. e.g., if the operator shares the channel with one other video programming provider, it will count as half of a channel against the operator's limit.
 - The remaining two-thirds of capacity, other than PEG and must-carry channels, must be allocated to unaffiliated video programming providers on an open, non-discriminatory basis. The Commission does not, however, require that a specific allocation methodology be used.
- After service commencement, an open video system operator will be required to allocate open capacity, if any is available, at least once every three years on an

open, non-discriminatory basis, to the extent that there is demand. Such open capacity will include capacity that becomes available during the three year period, e.g., due to a system upgrade or the expiration of carriage contracts, and any capacity on which the open video system operator selects the video programming in excess of the one-third limit of activated channel capacity provided for under Section 653(b)(1)(B).

39. The following discussion addresses the issues summarized above.

b. Open Video System Operator Participation in the Allocation Process

(1) Notice

40. Since the open video system provides the opportunity for the operator as well as independent entities to distribute video programming, the administration of the system must reflect fair opportunities for all interested parties to pursue their strategies. To this end, Section 653 prohibits discrimination against independent entities with regard to carriage. The plain language of Section 653(b)(1)(A) refers to carriage of video programming providers by an "open video system operator." In the *Notice*, we thus tentatively concluded that Section 653's prohibition of discrimination did not require the Commission to prohibit an open video system operator from participating in the allocation of channel capacity.¹⁰⁸

(2) Discussion

41. We affirm our tentative conclusion that the 1996 Act does not require that the open video system operator be prohibited from participating in the allocation of channel capacity. To the contrary, we believe that Section 653 clearly contemplates that open video system operators will play an active role in structuring and managing the platform, subject to clear non-discrimination requirements.¹⁰⁹ Indeed, since it is the open video system operator that certifies it will comply with Section 653's non-discrimination requirements, and will be held responsible for any violation, it is unlikely that Congress intended to require the operator to delegate its

¹⁰⁸*Notice* at para. 11.

¹⁰⁹*See, e.g.,* Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A) (prohibiting an open video system operator from discriminating among video programming providers regarding carriage on the system, except with respect to its PEG and must-carry obligations); § 653(b)(1)(C) (permitting an open video system operator to require channel sharing). *See also* NYNEX Comments at 7 (arguing that the statutory scheme bars the Commission from regulating open video systems like "passive common carrier systems, with the operator having no control over its service offerings"); Telephone Joint Commenters Comments at 14; Access 2000 Comments at 5-6; ABC Comments at 12; Viacom Comments at 8-10

authority to an independent entity.¹¹⁰

42. We disagree with cable operators' and local governments' contentions that any participation by the open video system operator in the channel allocation process would be tantamount to the editorial control exercised by cable operators and result in impermissible discrimination against unaffiliated¹¹¹ programming providers.¹¹² We believe that the statute and implementing rules will prevent an open video system operator from discriminating against unaffiliated video programming providers, notwithstanding the operator's involvement in the allocation process. We also believe that allowing an open video system operator to allocate channel capacity will provide certain efficiencies that will enhance the overall system. With adequate protections in place, we believe it unnecessary and unduly restrictive to require the open video system operator to retain an independent entity to allocate system capacity. In the event that an operator acts discriminatorily in allocating channels, the Commission's dispute resolution process provides a mechanism for rectifying any individual harm without resorting to an absolute ban on the open video system operators' participation in the allocation process.¹¹³

c. Notification and Enrollment of Video Programming Providers

(1) Notice

43. In the *Notice*, we sought comment on what procedures the Commission should adopt for an open video system operator to notify potential video programming providers that the operator intends to establish an open video system. We also sought comment on the proper form and scope of such notice, including what sort of information about the system a potential video programming provider may need to assess its interest in seeking carriage. Additionally, we solicited comment on the appropriate length of an enrollment period during which video programming providers could apply for capacity.¹¹⁴

¹¹⁰See Communications Act § 653(a)(1)-(2), 47 U.S.C. § 573(a)(1)-(2).

¹¹¹We sought comment on the appropriate standard for determining when a video programming provider is "affiliated" with an open video system operator in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85. (Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996), FCC 96-154 (released April 9, 1996) ("*Cable Reform Proceeding*"). We invite parties to comment with respect to the definition of affiliation in the *Cable Reform Proceeding*, and we will consider those comments and all relevant comments filed in the instant proceeding in addressing this issue at a later stage of the instant proceeding.

¹¹²American Cable, et al. Comments at 9-10; National League of Cities, et al. Comments at 22-23; NCTA Reply Comments at 8 (arguing that only the employment of an independent administrator will sufficiently protect programmers from unfair treatment).

¹¹³See discussion of dispute resolution process, *infra* Section III.G.

¹¹⁴*Notice* at para. 14.

(2) Discussion

44. We note that the notification and enrollment process is part of the capacity allocation process, and is therefore subject to Section 653's prohibition on discrimination.¹¹⁵ Given the importance of the notification and enrollment process in allocating capacity, we believe that ensuring an open, fair and non-discriminatory process is essential to comply with our mandate under Section 653(b)(1)(A). The process that the open video system operator follows is fundamental to demonstrating fairness, openness, and non-discrimination. For instance, if a video programming provider fails to receive adequate notice and files a complaint after system capacity has been allocated, it would be difficult, if not impossible, to provide an adequate remedy to the provider without significant disruption of the system, e.g., transferring capacity from one video programming provider to another. We believe that the approach suggested by most telephone commenters, which would allow an open video system operator to notify and enroll prospective video providers as it desired, subject only to the dispute resolution process may be inadequate to fulfill the statutory mandate of non-discrimination.¹¹⁶ Under our guidelines, video programming providers, including small, independent programming providers with limited resources,¹¹⁷ will be afforded a reasonable opportunity to obtain timely information,¹¹⁸ and the open video system operator will be given the stability and certainty of knowing that its notice and enrollment procedures satisfy the statute's non-discrimination requirements.¹¹⁹

45. Accordingly, we conclude that an open video system operator must take reasonable steps to inform prospective video programming providers of its intention to establish an open video system. First, we will require an open video system operator to file a "Notice of Intent" to establish an open video system with the Office of the Secretary, Federal Communications Commission. The Notice of Intent may be filed at any time, so long as the operator can provide the information detailed below to unaffiliated video programming providers. The Commission will issue a Public Notice announcing receipt of the operator's Notice of Intent and will attach to the Public Notice a copy of the Notice of Intent. As with all Public Notices, these Public

¹¹⁵Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A). We disagree with USTA's argument that Commission rules governing notice, publication procedures, the length of enrollment periods and applications for carriage by programmers simply are not contemplated in the statute and thus may not be addressed by the Commission. USTA Comments at 22.

¹¹⁶See, e.g., U S West Comments at 21; Telephone Joint Commenters Comments at 14-15.

¹¹⁷See generally Community Broadcasters Assn. Comments at 2-3.

¹¹⁸Community Broadcasters Assn. Comments at 2-3; NBC Comments at 9-10; NAB Comments at 8; Michigan Cities Reply Comments at 7 (urging the Commission to prevent obstacles to competition like those that arose in other telephone areas, including interconnection, co-location, access charges, and number portability); Indep. Cable Assn. Reply Comments at 3; NCTA Reply Comments at 11-12 (asserting that the telephone companies seek flexibility in order to preserve their ability to hinder access to their open video systems).

¹¹⁹See, e.g., Rainbow Comments at 10-13; Cablevision/CCTA Comments at 9; HBO Comments at 4.

Notices will be listed in the Commission's Daily Digest.¹²⁰ For convenience, and to ensure maximum access by unaffiliated video programming providers, the Commission will place the Notice of Intent on our Internet site and make it available for inspection in the Cable Service Bureau's Reference Room. We also reject some commenters' suggestions that notice be disseminated to cable programming providers, community information providers, local newspapers, publications and magazines, trade publications, the local media,¹²¹ and state public utilities commissions.¹²² We will not require such dissemination of the Notice of Intent because any benefits of this additional distribution are outweighed by the costs involved, and the Commission's Public Notice process affords an expeditious means for this information to be sufficiently disseminated. An open video system operator may distribute the Notice of Intent or solicit demand for carriage as it sees fit in addition to the requirements described herein.

46. Second, we will require that the Notice of Intent include a certification that the open video system operator has complied with all relevant notification requirements under our open video system must-carry and retransmission consent regulations (47 C.F.R. § 76.1506), including a list of all local commercial and non-commercial televisions stations entitled to must-carry treatment.¹²³ The Notice also must include a certificate of service showing that it has been provided to all local cable franchising authorities¹²⁴ located in the anticipated service area of the open video system. This is necessary to ensure that open video system operators meet any obligations under Sections 611, 614 and 615.¹²⁵ We believe that this approach is consistent with new Section 653(c), which provides that the Commission shall, to the extent possible, impose obligations on open video system operators that are "no greater or lesser" than the obligations imposed on cable operators concerning PEG and must-carry program services.¹²⁶ Providing a copy of the Notice to broadcast stations will also inform them of an open video system operator's belief that they may qualify for must-carry treatment on the open video system. With regard to PEG channels, the above requirement is consistent with a local cable franchising authority's

¹²⁰See U S West Comments at 22 (notice should be in Daily Digest).

¹²¹State of California Comments at 9; NCTA Comments at 13

¹²²State of New Jersey Ratepayer Advocate Comments at 6 (urging that notice should be served on local regulatory bodies in case tariff or other review is necessary to ensure that capacity has been allocated in a non-discriminatory manner).

¹²³See *infra* Section III.E.2. See also Assn. of Local Television Stations Comments at 16; NAB Comments at 8-9; Assn. of Public Television Stations Comments at 20

¹²⁴Alliance for Community Media, et al. Comments at 24. State of New Jersey Ratepayer Advocate Comments at 6.

¹²⁵Communications Act §§ 611, 614, 615, 47 U.S.C. §§ 531, 534, 535.

¹²⁶Communications Act §§ 653(c)(2)(A), (c)(1)(B); 47 U.S.C. §§ 573(c)(2)(A), (c)(1)(B).

ability under the Communications Act to designate channel capacity for PEG use.¹²⁷

47. We believe that including the following information in the Notice of Intent will be sufficient to notify potential video programming providers of an operator's intent to establish an open video system:

- A heading clearly indicating that the document is a Notice of Intent to establish an open video system.
- The open video system operator's name, address and telephone number.¹²⁸
- A description of the open video system's anticipated service area.
- A description of the system's projected channel capacity, in terms of analog, digital and other type(s) of capacity, upon activation of the system.
- A description of the steps a prospective video programming provider must follow to seek carriage on the system, including the name, address, and telephone number of a person to contact for further information.
- The starting and ending dates of the initial enrollment period for video programming providers.
- A certification that the open video system operator has complied with all relevant notification requirements under our open video system must-carry and retransmission consent regulations (47 C.F.R. § 76.1506), including a list of all local commercial and non-commercial televisions stations served. The Notice of Intent also must include a certificate of service showing that the Notice has been served on all local franchising authorities entitled to establish requirements under Section 611 regarding the designation or use of channel capacity for public, educational and governmental programming.
- The process for allocating the channel capacity, in the event that demand for carriage exceeds the system's capacity.¹²⁹

¹²⁷Communications Act § 611(a), 47 U.S.C. § 531(a).

¹²⁸U S West argues that this information alone should be sufficient, and that it becomes a video programming provider's responsibility to then request additional information from the system operator. U S West Comments at 21. We disagree. We believe that ensuring access to open video systems on a non-discriminatory basis includes distributing the other information described above.

¹²⁹See *infra* Section III.C.1.f.(2)

We believe that this basic information is necessary and not unduly burdensome and will allow a prospective video programming provider to make an initial assessment as to whether it wishes to seek carriage on a particular system.

48. In addition, we believe that a prospective video programming provider can reasonably be expected to need additional information concerning the system to assess whether to seek carriage on the system. We also recognize that the competitive position of an open video system operator should not be compromised by the required release of information unnecessary to make an informed enrollment decision. In this regard, we will require that an open video system operator provide the following information to all prospective video programming providers within five business days of the open video system operator's receipt of a written request from such a provider:

- The projected activation date of the system. If a system is to be activated in stages, an operator should describe the respective stages and the projected dates on which each stage will be activated.¹³⁰
- A preliminary carriage rate estimate.¹³¹
- The information a video programming provider will be required to provide to qualify as a commercially *bona fide* potential video programming provider, e.g., creditworthiness.
- Technical information that is reasonably necessary for prospective video programming providers to assess whether to seek capacity on the system, including what type of customer premises equipment subscribers will need to receive service.
- Any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system (e.g., scrambling, signal and audio quality, processing or security).
- The equipment available to facilitate the carriage of unaffiliated video programming and the electronic forms (e.g., baseband signal) that will be accepted for processing and subsequent transmission through the system.

¹³⁰Rainbow suggests that system operators also be required to disclose their construction plans. We believe this could unnecessarily risk the disclosure of confidential business plans and that the projected activation date should be sufficient for the purposes of video programming providers. Rainbow Comments at 23.

¹³¹See generally *infra* Section III.D.3. (Disclosure of Programming Contracts). Other parties would require a showing of compliance with all procedures established to protect customers of regulated telephone service from excessive charges. Alliance for Community Media, et al. Comments at 24. We do not believe that such a showing is appropriate as part of the notification process, and we discuss these issues in Section III.B., above (Certification Process).

49. Video programming providers must receive adequate notice and opportunity to participate in the allocation of system channel capacity. An enrollment period therefore may not expire fewer than 90 days after the Commission's release of the Public Notice of the Notice of Intent.¹³² In order to provide video programming providers with sufficient time to prepare for offering their programming to subscribers, an enrollment period must expire prior to activation of the system. Aside from these minimal time limitations, an open video system operator will be accorded substantial discretion to design and implement its enrollment process.¹³³ An operator will be able to confirm that a prospective video programming provider's request for capacity is *bona fide*. For example, a system operator could require a video programming provider to provide (1) a reasonable deposit on the lease of capacity (e.g., one or two months of carriage),¹³⁴ (2) reasonable evidence of the video programming provider's capability to offer video programming at the time the system is activated,¹³⁵ or (3) assurances that the provider will actually deliver video programming over its allotted capacity within some reasonable period of time after system activation. We believe this approach enhances the stability of an open video system by helping to prevent the need to reallocate system capacity of a video programming provider that is ultimately unable to utilize the capacity which it has obtained.¹³⁶ At the same time, however, an open video system operator shall be prohibited from deterring video programming providers from seeking carriage through the imposition of unreasonable qualification requirements (e.g., unreasonable technical carriage requirements).

¹³²We agree with NAB that prospective video programming providers will need a reasonable period of time to become aware of the opportunity for carriage and to assess their interest. NAB Comments at 8-9. While other commenters suggest periods of only one month, NCTA Comments at 13, we agree with the Alliance for Community Media that a 90-day period is reasonable. Alliance for Community Media, et al. Comments at 24-25. This will give video programming providers adequate time, for instance, to seek financing and negotiate programming contracts.

¹³³See Section III.C.1.f.(2) for a discussion of the methods an open video system operator may use to actually allocate system capacity to qualified video programming providers. The enrollment process employed by an open video system operator should be reasonable in light of the method selected by the operator for allocating system capacity to video programming providers.

¹³⁴National League of Cities, et al. Comments at 27 (Commission should specify a maximum financial commitment that would not form a barrier to independent programmers' access to an open video system); Alliance for Community Media, et al. Comments at 25-26 (urging the Commission to require that a video programming provider file a good faith bond of \$100,000 to go to the Commission if the provider is unable to use its allotted capacity); MFS Communications Comments at 20-21.

¹³⁵*Id.*

¹³⁶See *infra* Section III.C.1.f.(5).

d. Open Video System Operator Discretion Regarding Video Programming Providers

(1) Notice

50. Pursuant to Section 653(a)(1), we determined that it was consistent with the public interest, convenience and necessity to allow entities other than local exchange carriers to operate an open video system. In this section, we address whether, under the public interest standard, an open video system operator may preclude access to its open video system by other MVPDs. In the *Notice*, we sought comment on the extent to which open video system operators should have discretion regarding video programming providers entitled to carriage on the system, in light of the 1996 Act's general prohibition of discrimination by system operators among video programming providers.¹³⁷ In particular, we asked whether an open video system operator should be permitted to limit or preclude, in the absence of Commission regulations, a competing, in-region cable operator from obtaining capacity on the system.¹³⁸

(2) Discussion

51. We recognize that Section 653(b)(1)(A) generally prohibits discrimination by an open video system operator among video programming providers.¹³⁹ Thus, we find that an open video system operator generally may not discriminate among video programming providers based on their identities. We disagree, however, with the cable operators' assertion that Section 653(b)(1)(A) ensures them unrestricted access to open video systems.¹⁴⁰ As noted above, Section 653(a)(1) specifically addresses the conditions under which a cable operator may provide video programming over an open video system, whether the system is owned by the cable operator itself or another entity:

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.¹⁴¹

¹³⁷*Notice* at para. 15 (citing Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A)).

¹³⁸*Id.* (citing Conference Report at 177).

¹³⁹Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A).

¹⁴⁰American Cable, et al. Comments at 13-14; Cablevision Systems/CCTA Comments at 35-37; Cox Comments at 4-5; Continental Comments at 10; Comcast, et al. Comments at 5-6; NCTA Comments at 30-31; TCI Comments at 24-25; Adelphia/Suburban Cable Reply Comments at 6; Cox Reply Comments at 7-8. See also Tandy Comments at 4-5; Viacom Comments at 10 (stating that, at a minimum, such a rule is needed where analog capacity is oversubscribed and digital capacity cannot provide comparable access to subscribers).

¹⁴¹Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

We believe that this provision, because it specifically addresses the provision of video programming by a cable operator, allows the Commission discretion to determine when to permit a cable operator to provide video programming over an open video system, consistent with the "public interest, convenience and necessity" notwithstanding the 1996 Act's general non-discrimination requirements.¹⁴²

52. In general, we believe 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 to select programming on the open video system where facilities-based competition would be impeded.¹⁴³ We thus will permit an open video system operator to limit the ability of the competing, in-region cable operator, or a video programming provider affiliated with such a cable operator, to select programming on the open video system. This approach serves the public interest because, as some commenters note, a competing, in-region cable operator should generally be encouraged to develop and upgrade its own system, rather than to occupy capacity on a competitor's system that could be used by another video programming provider.¹⁴⁴ We note that the Commission made a similar determination in the context of cellular telephone systems, where we adopted an exception to the general prohibition on resale restrictions. This exception permits a carrier to deny access to its facilities where the competitor's system is fully operational.¹⁴⁵ As MFS Communications notes, the Commission stated that this exception promotes competition "by encouraging each licensee to build out its network."¹⁴⁶

53. Moreover, this approach is consistent with Congress' intent to "encourage common

¹⁴²*Muniz v. Hoffman*, 422 U.S. 454, 459 (1975) (a provision that specifically addresses a certain situation or issue typically overrides a more general, though relevant, provision contained in the same enactment); *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961) (same). See Telephone Joint Commenters Comments at 15-16; MFS Communications Comments at 24-26; NYNEX Comments at 11-12; U S West Comments at 13; Tele-TV Reply Comments at 15; City of Seattle Comments at 2; National League of Cities, et al. Comments at 51 (urging, however, that under no circumstances should determination of this question be left to the discretion of the open video system operator, because that would allow open video system operators and cable operators to collude to avoid the 1996 Act's prohibition on mergers between cable operators and local exchange carriers in some areas).

¹⁴³By "facilities-based" competition, in this context of video programming provision, we mean competition between at least two wire-line service providers. See MFS Communications Comments at 24-5; Telephone Joint Commenters Comments at 15 (citing Conference Report at 178); NYNEX Comments at 11 (same); Tele-TV Reply Comments at 16-17; City of Seattle Comments at 3; U S West Comments at 13.

¹⁴⁴MFS Communications Comments at 24-26; Viacom Reply Comments at 6.

¹⁴⁵See NYNEX Comments at 12 (citing Report and Order in CC Docket No. 91-33, (Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies), 7 FCC Rcd 4006, 4008 (1992); 47 C.F.R. § 22.914(a)); MFS Communications Comments at 25-6 (same; *Second Notice of Proposed Rulemaking* in CC Docket No. 94-54, (Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services), 10 FCC Rcd 10666, 10696 (1995) ("CMRS Order")); Tele-TV Reply Comments at 16 (same).

¹⁴⁶MFS Communications Comments at 25-6 (citing *CMRS Order*, 10 FCC Rcd at 10696).

carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets."¹⁴⁷ By promoting facilities-based competition in this manner, we recognize in most cases that an open video system will be a new entrant into video markets where a dominant, incumbent cable operator will be present. Additionally, we note that the 1996 Act generally prohibits acquisitions and joint ventures between local exchange carriers and cable operators that operate in the same market.¹⁴⁸ We believe that Congress expressed a clear preference, where possible, for facilities-based competition in the video marketplace from both cable operators and telephone companies.¹⁴⁹

54. Thus, an open video system operator will be permitted to limit access to the open video system by the competing, in-region cable operator, and any video programming provider that is affiliated with that cable operator, whether the competing, in-region cable operator or video programming provider is a packager of multiple programming services or an individual programming service. We clarify, however, that a programming service affiliated with a competing, in-region cable operator may not be precluded from being carried on the system as part of the package of any video programming provider that is not affiliated with the competing, in-region cable operator. We also clarify that an open video system operator may not limit the ability of any video programming provider that is unaffiliated with the competing, in-region cable operator to obtain capacity on the open video system, except as consistent with the 1996 Act and the rules adopted herein.

55. We are giving the open video system operator discretion in this regard because we believe that, at least in some instances, the open video system operator will find it in its interest to allow the competing, in-region cable operator to obtain capacity on the open video system (e.g., where the operator believes that the programming offered by the competing, in-region cable system or programming affiliate is necessary to the success of the open video system

¹⁴⁷Conference Report at 178

¹⁴⁸Communications Act § 652, 47 U.S.C. § 572. Congress provided for waivers of these general prohibitions where, *inter alia*, the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Communications Act § 652(d)(6)(A)(iii), 47 U.S.C. § 572(d)(6)(A)(iii)

¹⁴⁹Conference Report at 178. Because we allow an open video system operator generally to limit a competing cable operator's access to the open video system, we do not reach the following contentions of certain local exchange carriers. First, they assert that allowing the competing cable operator to obtain access on the system would disrupt the organization and operation of the open video system. MFS Communications Comments at 24-5; Telephone Joint Commenters Comments at 15-16. Second, they argue that Congress, if it had intended open video systems as a vehicle for competing cable operators rather than independent video programmers, would have used the well-defined term "multichannel video programming providers" rather than "video programming providers" in Section 653, Telephone Joint Commenters Comments at 12 and n.19; *but see* American Cable, et al. Comments at 10, stating that "MVPDs are video programming providers [that] simply provide multiple channels of video programming."

operation).¹⁵⁰ Thus, allowing the open video system operator to exercise this discretion will advance Congress' goal of facilities-based competition because, in some instances, it may impact on the open video system operator's decision to build, or further deploy, its open video system.

56. Contrary to the arguments of some cable operators, we do not believe that promoting the goal of facilities-based competition in the manner adopted herein constitutes a "complete ban on access to channel capacity" implicating First Amendment concerns.¹⁵¹ First, alternative avenues for speech by competing, in-region cable operators will exist, i.e., their own cable system, or open video systems, as set forth herein.¹⁵² Second, open video system operators may not limit access to their systems by out-of-region cable operators or video programming providers affiliated with such cable operators. Third, we will consider petitions from competing, in-region cable operators showing that facilities-based competition will not be significantly impeded in their particular circumstances. We will provide a specific exception in a situation in which: (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.¹⁵³ We believe that considering such petitions sufficiently addresses the concerns of some cable commenters that restrictions on access to an open video system based on the identity of a video programming provider would "fundamentally undermine" Congress' intent in repealing the cable-telephone company cross-ownership restriction or impair competition.¹⁵⁴

¹⁵⁰Of course, any arrangement between a cable operator and a LEC is subject to the restrictions contained in Section 652.

¹⁵¹TCI Comments at 24-25 (citing *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3d 181, 201-202 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 608 (1995), *vacated, remanded, sub nom. United States v Chesapeake & Potomac Tel. Co.*, 134 L.Ed. 2d 46, 64 U.S.L.W. 4115 (1996) ("*C&P Telephone*").

¹⁵²*C&P Telephone*, 42 F.2d at 202.

¹⁵³This figure is consistent with the statutory exceptions to Section 652's general prohibition on a telephone company's buy out of a competing cable operator, under which a local exchange carrier may acquire more than a 10% interest in a competing cable system if the cable system, *inter alia*, serves no more than 17,000 cable subscribers. Communications Act § 652(d)(4), 47 U.S.C. § 572(d)(4).

¹⁵⁴*See, e.g.*, Cablevision Systems/CCTA Comments at 35-36; NCTA Comments at 31; Cox Comments at 4. *See also* State of New York Comments at 7.

e. Measurement of Capacity

(1) Analog, Digital and Switched Digital Video

(a) Notice

57. As described above, new Section 653(b)(1)(B) provides that, if demand for carriage exceeds the channel capacity of the open video system, the Commission's rules must prohibit an open video system operator and its affiliates from "selecting the video programming service for carriage on more than one-third of the activated channel capacity on such system" ¹⁵⁵ This requires the Commission to address how channel capacity should be measured, recognizing that technology continues to evolve. In the *Notice*, we sought comment on these issues. ¹⁵⁶ We sought comment on whether it would be appropriate to measure the activated channel capacity based on a system's total bandwidth, or on the number of channels on the system's analog portion and on the bandwidth of the system's digital portion. ¹⁵⁷ Second, we sought comment on how capacity should be measured on open video systems that employ "switched digital" video technology, and tentatively concluded that capacity on such systems may be presumed to be unlimited. ¹⁵⁸

(b) Discussion

58. The appropriate measure of analog capacity is relatively straightforward because the National Television System Committee ("NTSC") standard, which occupies a 6 MHz bandwidth, has been the broadcast television standard in the United States for close to four decades. Further, with very few exceptions, television sets currently in use in the United States are designed to receive 6 MHz NTSC channels. No alternative as well known and accepted exists. Therefore, we will require that analog capacity on an open video system be measured in 6 MHz channel increments.

59. The measurement of digital channel capacity on an open video system is more complex. As HBO states, "[t]he measurement of analog and digital capacity is different in that only one service at a time can be transmitted over a 6 MHz analog channel regardless of the service's underlying content, whereas the number of simultaneous services that can be transmitted over the same 6 MHz in digital format will vary depending on the type of information delivered

¹⁵⁵Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

¹⁵⁶ *Notice* at para. 16. For a discussion of allocating specific types of capacity to video programming providers, and in particular the allocation of analog and digital capacity, see *infra* Section III.C.1.f.(3).

¹⁵⁷*Id.* at paras. 16-17.

¹⁵⁸*Id.* at para. 18.

and the picture quality the programmer desires."¹⁵⁹ For example, transmitting a live sports event (e.g., 5-6 MHz) generally will require more bandwidth than transmitting a live interview show (e.g., 2-3 MHz). The determination is further complicated by the rapidly evolving nature of digital technologies, combined with the current lack of uniform standards in digital video delivery methods. We reject the telephone companies' argument that the continuing development of digital technologies makes it impossible to prescribe a specific way to measure capacity that will be appropriate for all systems, such as bandwidth. The approach we adopt is not inconsistent with these commenters' contention that open video system operators be given the discretion to determine how to measure system capacity consistent with the statutory non-discrimination requirements and the technical characteristics of their system.¹⁶⁰

60. We conclude that capacity on an open video system that is available for the distribution of digital communications should also be measured in bandwidth. An open video system will determine whether carriage demand exceeds the system's capacity in terms of bandwidth on the digital portion of the system.¹⁶¹ While the number of communication pathways in this bandwidth may vary greatly depending on the equipment and transmission systems involved, measuring "capacity" in terms of bandwidth will carry out the objectives of the one-third occupancy allocation in Section 653(b)(1)(B). We are unpersuaded by the Telephone Joint Commenters' assertion that measuring the capacity of an open video system based on bandwidth is impermissible because Section 653(b)(1)(B) refers to "channel capacity," "activated channel capacity," and "number of channels."¹⁶² Because there is no meaningful definition of a "channel" in a digital world,¹⁶³ bandwidth remains the only reasonable measure of capacity on the digital portion of an open video system.

61. A switched video system design generally allows the operator to deliver only the programming and services requested by its subscribers from a local switching or control center. In comparison, broadband cable systems deliver practically all of their video programming and services to subscribers continuously. With regard to switched video, Broadband Technologies states that its switching technology will eliminate the importance of a system's bandwidth,

¹⁵⁹HBO Comments at 5.

¹⁶⁰Telephone Joint Commenters Comments at 16. *See also* Fujitsu Ex Parte Comments at 2 (urging the Commission to craft capacity measurement rules that do not discourage the development of advanced broadband technologies).

¹⁶¹*See supra* Section III.C.1.c

¹⁶²Telephone Joint Commenters Comments at 16.

¹⁶³TCI suggests that digital capacity be measured in increments of 6 MHz of bandwidth because it would ease comparison with the analog portion, as well as coincide with the definitions of "cable channel" and "television channel" in the Commission's rules. TCI Comments at 12 (*citing* 47 U.S.C. § 522(4) and 47 C.F.R. § 73.681, respectively). *See also* NCTA Reply Comments at 13.

referring to it as "essentially unlimited."¹⁶⁴ The National League of Cities, however, cautions the Commission that infinite expansion of capacity may not be "economically reasonable or technologically feasible" due to the cost and physical limits of connecting additional switches and input ports, and therefore that no basis exists for relieving a switched digital open video system operator from the two-thirds capacity set-aside requirement.¹⁶⁵ Moreover, General Instruments contends, and we agree, that a variety of technologies may be employed to provide switched digital video, some of which may have greater restraints than others. General Instruments points out that even the most serviceable of such technologies can be subject to severe interference or blocking during peak periods and other limitations. We thus determine that it is premature to make any broad findings with respect to switched digital video.¹⁶⁶ We will therefore reexamine the impact of switched digital technology on the measurement of open video system capacity on a case-by-case basis.

62. We anticipate that concerns regarding appropriate methods for soliciting carriage demand, calculating system capacity, and allocating channel capacity to video programming providers will be alleviated on open video systems with capacity significantly higher than carriage demand. Therefore, when an open video system operator can demonstrate that, due to the technology employed in its system, the system's capacity is plentiful as compared to demand, we will consider waiving our rules concerning enrollment periods and allocation methods.¹⁶⁷

(2) Counting the System Operator's One-Third Limit

(a) Notice

63. In the *Notice*, we sought comment regarding the calculation of the one-third of capacity on which the open video system operator may select programming if carriage demand exceeds capacity. First, we tentatively concluded that channels devoted to PEG and must-carry should not count against a system operator's one-third cap.¹⁶⁸ We reasoned that neither the system operator nor its affiliates would "select" this programming, as that term is used in section 653(b)(1)(B) of the 1996 Act, because these obligations are established as a matter of law or through negotiations with local franchising authorities.¹⁶⁹ In addition, we sought comment on

¹⁶⁴Broadband Technologies Reply Comments at 12-13

¹⁶⁵National League of Cities, et al. Comments at 24

¹⁶⁶General Instruments Reply Comments at 4

¹⁶⁷U S West apparently would agree because it urges the Commission to adopt channel allocation regulations that contain a sunset provision that will become effective once such regulations are "no longer necessary." U S West Comments at 10.

¹⁶⁸*Notice* at para. 19.

¹⁶⁹*Id.* See Communications Act §§ 611, 614, 615, 47 U.S.C. §§ 531, 534, 535.

whether a system operator should be deemed to "select" the video programming that is placed on shared channels when: (1) the system operator or its affiliated video programming provider is one of the video programming providers carrying such programming; or (2) the system operator has delegated responsibility for implementing channel sharing to an independent entity.¹⁷⁰

(b) Discussion

64. We adopt our proposal to exclude PEG and must-carry channels from the one-third of system capacity on which an open video system operator or its affiliates may select programming (when demand for capacity exceeds system capacity).¹⁷¹ In adopting this approach, we endorse our reasoning in the *Notice* that an open video system operator does not select PEG and must-carry channels because their carriage is mandated by law or established through negotiations with local franchising authorities.¹⁷² Broadcast television stations electing retransmission consent, however, as well as any program services granted carriage in connection with such consent, will count against an open video system operator's one-third limit, in accordance with the rules adopted herein. This approach recognizes that a television station, electing retransmission consent rather than must-carry status, is essentially electing to be treated as any other non-broadcast video programming service, and negotiates with the open video system operator over carriage on the open video system.

65. Section 653(b)(1)(B) limits the open video system operator to one-third of the "activated channel capacity" when demand exceeds capacity.¹⁷³ We agree with telephone companies that the PEG and must-carry channels should be included in total system capacity when calculating the open video system operator's one-third limit.¹⁷⁴ Our rules define "activated channels" on a cable system as: "[t]hose channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for

¹⁷⁰*Notice* at para. 38.

¹⁷¹Telephone Joint Commenters Comments at 17-18; Capital Cities/ABC Comments at 7-8; Golden Orange Broadcasting Comments at 2; NAB Comments at 3-4; NBC Comments at 9; NCTA Comments at 6; NYNEX Comments at 19; City of Seattle Comments at 1; U.S. West Comments at 17; USTA Comments at 18-19; Viacom Comments at 12.

¹⁷²*Notice* at para. 19. We do not reach some commenters' contentions that this approach will enhance the commercial feasibility of open video systems. *See, e.g.* ABC Comments at 7; City of Seattle Comments at 1.

¹⁷³Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

¹⁷⁴Telephone Joint Commenters Comments at 17-18; NYNEX Comments at 19. We also agree with broadcasters that counting must-carry channels against an open video system operator's one-third cap could create incentives for an operator to hinder a television station's election of must-carry over retransmission consent because this would preserve the operator's control over more channels. ABC Comments at 7-8; NAB Comments at 3-4; NBC Comments at 9.

public, educational or governmental use."¹⁷⁵ For example, on a system with 90 total channels, of which 15 are PEG and must-carry channels, the open video system operator may select the programming on 30 channels when demand exceeds system capacity. These parties contend, and we agree, that channels on which PEG and must-carry stations are carried qualify as "activated."¹⁷⁶

66. We disagree with NCTA that PEG and must-carry channels should be deducted from the total amount of system capacity in calculating the one-third cap. NCTA argues that excluding those channels would be more equitable to video programming providers because it would cause all providers, including those affiliated with the system operator, to share equally in the responsibility for these channels.¹⁷⁷ As we have already observed, where demand exceeds system capacity, the open video system operator is entitled to select the programming on one-third of the activated channel capacity; if the operator has not selected a particular programming service there is no statutory basis for counting the service against the operator's one-third limit. This approach is consistent with our cable "channel occupancy" (or "vertical ownership") rules, that permit PEG and must-carry channels to be included in total activated channel capacity for purposes of calculating the percentage of activated channels that a cable operator may devote to affiliated programming.¹⁷⁸

67. Viacom and U S West argue that channels on which shared programming is carried should not be counted against the one-third cap because such programming should not be deemed to be selected by the operator or its affiliate. They contend that, by definition, programming on shared channels would be carried on the system regardless of whether the operator or its affiliate elects to share the programming, because the program services would be delivered on behalf of another video programming provider.¹⁷⁹ While we agree with U S West that channel sharing promotes efficiency on the system, we disagree that the open video system operator has not "selected" the programming placed on shared channels. As long as the open video system operator or its affiliate has exercised the editorial discretion of deciding to include a program service in its package of offerings that are carried on its allocated channel capacity, the operator or its affiliate must be deemed to have selected the programming.¹⁸⁰

68. We do not believe that it is equitable to count a shared channel solely against the

¹⁷⁵47 C.F.R. §§ 76.5(nn), 76.1506.

¹⁷⁶Telephone Joint Commenters Comments at 17-18; NYNEX Comments at 19.

¹⁷⁷NCTA Reply Comments at 5

¹⁷⁸47 C.F.R. § 76.504.

¹⁷⁹Viacom Comments at 16. U S West Comments at 16. *See also* NBC Comments at 9.

¹⁸⁰NCTA Comments at 10

open video system operator's one-third limit, if one or more unaffiliated video programming providers has selected the programming service as well. Where a channel is shared by one or more unaffiliated video programming providers, we will assess a pro-rata share of the shared channel against the open video system operator. For instance, if the open video system operator shares a channel with one unaffiliated video programming provider, one-half of a channel will count against the capacity of the open video system operator's one-third limit; if the system operator shares a channel with three other video programming providers, it will be assessed only one-quarter of one channel. The approach we adopt for counting PEG, must-carry and shared channels will provide an open video system operator with maximum flexibility to create and offer a package of programming services that can viably compete with the incumbent cable operator.

f. Allocation of Capacity Among Video Programming Providers

(1) General Framework

(a) Notice

69. We sought comment in the *Notice* generally on how capacity on an open video system should be allocated among unaffiliated video programming providers. We asked whether the allocation of channel capacity on an open video system should be left to the discretion of the operator, and if so, how unaffiliated video programming providers could be protected from discrimination under such an approach.¹⁸¹

(b) Discussion

70. We believe that an open video system operator should be given the flexibility to implement its own method for allocating capacity to unaffiliated video programming providers, subject to minimal guidelines ensuring that unaffiliated providers are treated in a non-discriminatory fashion. The telephone companies legitimately note that open video system operators will need to adapt their allocation method to myriad factors that may arise,¹⁸² such as the particular technology employed¹⁸³ and the particular market to be served.¹⁸⁴ Pursuant to the statute, however, the Commission must ensure that video programming providers are provided

¹⁸¹*Notice* at para. 24

¹⁸²MFS Communications Comments at 23; NYNEX Comments at 8; USTA Comments at 16-17.

¹⁸³U S West Comments at 16. We note that when an open video system operator can demonstrate that, due to the technology employed in its open video system, the system's capacity is plentiful as compared to carriage demand, we will consider waiving our rules concerning enrollment of video programming providers and allocation of system capacity. See *infra* Section III.C.1.e.(1).

¹⁸⁴NYNEX Comments at 8

non-discriminatory access to open video systems.¹⁸⁵ In this regard, Rainbow calls for detailed regulations,¹⁸⁶ while the telephone companies urge the Commission to merely adopt a general rule prohibiting discrimination.¹⁸⁷ We think that extensive rules regarding the allocation of channels and the administration of the system by the open video system operator will impose inefficiencies on the operator without necessarily precluding discrimination. We believe that the approach we describe below strikes the appropriate balance between the two views.

(2) Allocation Methodology

(a) Notice

71. In the *Notice*, we sought comment on how an open video system operator should allocate the two-thirds of channel capacity that must contain programming selected by unaffiliated video programming providers (where carriage demand exceeds the system's capacity). We also sought comment on establishing a range of acceptable options for allocating capacity, including first-come first-served, lottery, and proportional allotment.¹⁸⁸

(b) Discussion

72. The allocation of channel capacity determines carriage on an open video system

¹⁸⁵American Cable, et al. Comments at 10; Cablevision Systems/CCTA Comments at 12-14; TCI Comments at 13-14; NCTA Comments at 13. See also Rainbow Comments at 14-17;

¹⁸⁶For example, Rainbow suggests that it will be necessary to allow all video programming providers to play a role in the process. Rainbow Comments at 14. Rainbow also urges the Commission to adopt regulations that recognize that an open video system operator may forge relationships with certain programming providers that technically fall outside the definition of "affiliation," but nevertheless create economic incentives for the operator to favor that programmer in the allocation of capacity. Rainbow describes alleged incidents where telephone companies intending to establish video dialtone systems hindered the ability of Rainbow to obtain capacity on their systems. *Id.* at 15-17. See also Cablevision Systems/CCTA Comments at 12-14. As note above, we sought comment on the appropriate standard for determining when a video programming provider is "affiliated" with an open video system operator in the *Cable Reform Proceeding*, and invite comments on that issue in that proceeding.

¹⁸⁷USTA Comments at 16; NYNEX Comments at 8; Broadband Technologies Reply Comments at 10; MFS Communications Reply Comments at ii. In particular, we disagree with arguments that the dispute resolution process alone can fully protect unaffiliated video programming providers from discrimination because: (1) some video programming providers may be unable to afford the costs associated with pursuing a complaint; and (2) delay resulting from the process could hamper an aggrieved video programming provider's ability to compete since its access to the system could be delayed for up to six months and possibly even longer if the open video system operator decides to appeal. See MFS Communications Comments at 23; NYNEX Comments at 7-8; U S West Comments at 15-17; USTA Comments at 16-17; NBC Comments at 9 (urging that system operators be permitted to determine this alone, subject to contractual obligations with program producers); UTC Comments at 4

¹⁸⁸*Notice* at para. 24

and is therefore subject to the statute's non-discrimination requirements.¹⁸⁹ We require that the two-thirds of total capacity that must be allocated to unaffiliated video programming providers, when demand exceeds system capacity, must be allocated in an open, fair, non-discriminatory manner. The allocation process must be verifiable as well as insulated from any bias of the open video system operator. In the event that an aggrieved video programming provider files a complaint with the Commission alleging discrimination in the allocation process, the burden of proving that the particular allocation method employed was not discriminatory will rest with the open video system operator. We believe that this burden of proof is reasonable, given that the open video system operator is responsible for ensuring a non-discriminatory allocation process and possesses the relevant information regarding the allocation method.¹⁹⁰

73. Other than any general limitations addressed in Section III.D. concerning rates, terms and conditions of carriage, we do not adopt any specific requirements governing the length of a video programming provider's lease of allocated capacity. We believe these matters are best left to the involved parties.

74. We disagree with NCTA that a federal standard detailing a specific manner in which open video system capacity must be allocated is necessary so video programming providers will not have to expend the resources necessary to learn the allocation procedures in each jurisdiction where they seek capacity.¹⁹¹ We believe that it is reasonable to expect video programming providers to find out about the enrollment and allocation procedures for a particular open video system operator. Moreover, we believe that adopting required enrollment procedures would unreasonably restrict flexibility and prevent open video system operators from responding to the particular conditions of their markets.

75. We reject Alliance for Community Media's suggestion that an open video system operator be required to hold back 20% of the channel capacity from its initial allocation and then award these channels on an a la carte basis to all unaffiliated video programming providers. The Alliance for Community Media argues that this approach would ensure that small video programming providers have an opportunity to obtain their desired capacity, thereby enhancing program diversity on the system.¹⁹² We believe that this approach unnecessarily restricts the ability of an open video system operator to allocate capacity in accordance with existing demand for carriage. In addition, while we seek to encourage small video programming providers to obtain access on open video systems, we believe that their interests are adequately protected under our rules set forth herein.

¹⁸⁹Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A).

¹⁹⁰See *supra* Section III.B. (Certification Process)

¹⁹¹NCTA Comments at 13

¹⁹²Alliance for Community Media, et al. Comments at 28-29

(3) Type of Capacity -- Analog/Digital

(a) Notice

76. In the *Notice*, we sought comment on whether the allocation of specific types of open video system capacity could constitute impermissible discrimination under Section 653(b)(1)(A). In particular, we asked whether it would be permissible for an operator to assign all of a system's analog capacity to itself or its affiliate. In this regard, we sought comment generally on the current availability of digital technology, and any differences that may exist between analog and digital capacity. If analog and digital capacity currently are not interchangeable "products," we sought comment on whether it would be appropriate to treat analog and digital channels independently for allocation purposes.¹⁹³

(b) Discussion

77. Based upon the record evidence, we find that analog and digital portions of an open video system must be treated independently for purposes of allocating system capacity to video programming providers.¹⁹⁴ We believe that this finding is justified by various technical and economic factors demonstrating that, for the foreseeable future, analog capacity and digital capacity are not interchangeable.¹⁹⁵

78. First, the embedded equipment base is analog -- both the equipment used by programmers and distributors to create, process, and transmit the signals, and the customer premises equipment ("CPE"), such as television sets and video cassette recorders ("VCRs") used by subscribers to receive and display the signals. Such analog equipment is widely and competitively available in the marketplace.

79. By contrast, digital signal delivery technologies are rapidly and continuously evolving. The cost and availability of digital equipment is much less certain than that of analog equipment. In addition, as noted by Viacom and numerous cable operators, specialized digital processing equipment is not currently available¹⁹⁶ For instance, it appears from the record that

¹⁹³*Notice* at para. 21.

¹⁹⁴Alliance for Community Media, et al. Comments at 29-30; Continental Comments at 14; HBO Comments at 6-7; NCTA Comments at 11-12; National League of Cities, et al. Comments at 14; TCI Comments at 12; Viacom Comments at 10 (all supporting treating analog and digital capacities separately).

¹⁹⁵See, e.g., CATA Comments at 4; Alliance for Community Media, et al. Reply Comments at 4 ("[P]erhaps for the next two decades, the primary mode of video programming delivery and receipt will be in analog format . . . [because] . . . both providers of programming and consumers do not, and for the foreseeable future will not, have the necessary equipment to provide and receive programming digitally").

¹⁹⁶Viacom Comments at 10; American Cable, et al. Comments at 18-19; CATA Comments at 4; NCTA Comments at 11-12; TCI Comments at 12.

the cost of digital set-top boxes is currently between \$300 to \$400, or approximately three times more than the cost of similar analog set-top boxes.¹⁹⁷ The record also demonstrates numerous uncertainties with respect to digital capacity: (1) when the cost of digital set-top boxes will decrease to affordable levels; and (2) when such boxes will become available on a large-scale basis.¹⁹⁸ As U S West states:

[V]ideo programmers do not view analog and digital capacity as substitutable given the present state of technology [citing its Omaha video dialtone trial, in which analog capacity was over-subscribed and had to be allocated while digital capacity was freely available and "barely used"]. At some point in the future, when digital standards are established and incorporated into set-tops and other peripheral devices, digital programming will most likely replace analog programming and there will be no need to distinguish between the two for capacity purposes.¹⁹⁹

80. Given these significant differences, we find that it would constitute impermissible discrimination under Section 653 for an open video system operator to treat its analog and digital capacities as fungible for allocation purposes. For instance, assuming a system with 100 analog channels and capacity for 200 digital channels, an open video system operator would be prohibited from taking the 100 analog channels as the one-third of capacity on which it may select programming (when carriage demand exceeds system capacity), and relegating all other video programming providers seeking analog capacity to the digital channels. Rather, the system operator must treat the analog and digital capacity separately. If analog demand exceeds analog capacity, the operator would be limited to selecting the programming on one-third of the analog channels; similarly, if the digital capacity were over-subscribed, the operator would be limited to selecting the programming on one-third of the digital capacity. We agree with U S West that the Commission should revisit this distinction if and when analog and digital capacities become relatively interchangeable.²⁰⁰

81. The Telephone Joint Commenters do not argue that analog and digital capacity are fungible.²⁰¹ Instead, the Telephone Joint Commenters contend that the 1996 Act makes no

¹⁹⁷Viacom Comments at 10; Michigan Cities Reply Comments at 11 (asserting a price range of between \$500 and \$1000 for digital converter boxes).

¹⁹⁸Cablevision Systems/CCTA Comments at 11-12; TCI Comments at 12; HBO Comments at 4-6; and Comcast, et al. Comments at 6. See also Alliance for Community Media, et al. Comments at 30 (urging that capacity measurement be based on the "least expansive method," in order to encourage system operators to expand capacity through infrastructure or technical developments); Michigan Cities Reply Comments at 9-10.

¹⁹⁹U S West Comments at 10.

²⁰⁰*Id.* at 15-16.

²⁰¹Indeed, if they were fungible, the Telephone Joint Commenters would not be harmed by our approach, since they would be entitled to select the programming on one-third of what would be interchangeable capacity.

distinction between analog and digital capacity,²⁰² and that "[open video system] operators must be given flexibility to select their channels from the total base of channels to the extent necessary to provide programming packages that can compete with those offered by incumbent cable operators."²⁰³ In making this argument, the Telephone Joint Commenters essentially acknowledge that analog and digital capacities are not fungible, or there would be no need for them to argue that they must occupy the analog channels in order to compete with the incumbent cable operator. We view our obligations under the statute to ensure non-discriminatory access to encompass affording actual access to subscribers by video programming providers, and not access that is not technologically possible. To do otherwise is to place the challenge of digital delivery unfairly, we believe, on those not affiliated with the open video system operator. While we recognize the telephone companies' concern, we believe that there are other ways to ensure that an open video system can assemble a competitive product that would not entail discriminatory conduct (e.g., not counting PEG and must-carry channels against the one-third limit; making use of channel sharing and joint marketing opportunities).

(4) Amounts of Capacity

(a) Notice

82. As noted, Section 653(b)(1)(B) of the Communications Act provides that, "if demand exceeds the channel capacity of the open video system," the Commission's regulations must prohibit 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 on such system" ²⁰⁴ In the *Notice*, we interpreted this provision to mean that, so long as carriage demand does not exceed system capacity (after video programming providers have been allowed a reasonable opportunity to seek carriage), there will be no limit on the amount of capacity on which an open video system operator and its affiliates may select programming.²⁰⁵

83. Further, we sought comment in the *Notice* on whether the Commission should allow an open video system operator to prescribe minimum or maximum amounts of capacity that an unaffiliated programming provider may obtain. For example, we sought comment on the situation where carriage demand exceeds the system's capacity, but only the open video system operator and one other video programming provider have acquired capacity on the system. We asked whether it would be appropriate to limit the open video system operator and its affiliates to selecting programming on one-third of the system while allowing the unaffiliated video

²⁰²Telephone Joint Commenters Comments at 18-19.

²⁰³*Id.* at 19.

²⁰⁴Communications Act § 653(b)(1)(B), 47 U.S.C. § 573(b)(1)(B).

²⁰⁵*Notice* at para. 16.

programming provider to select the programming on the remaining two-thirds of the system.²⁰⁶

(b) Discussion

84. As an initial matter, we affirm, and no commenter disputed, our conclusion that a system operator and its affiliates may select the programming on more than one-third of the system's capacity if carriage demand does not exceed system capacity.²⁰⁷ In these situations, the carriage requests of all unaffiliated video programming providers will be fulfilled, and the system operator will be permitted to select the programming on the remaining capacity, under the regulations adopted in this Order.²⁰⁸ This approach is consistent with the plain language of the statute and comports with Congress' intent to encourage investment in new technologies by not requiring usable capacity to lie fallow.²⁰⁹

(i) Minimum Channel Allocations

85. We believe it is reasonable for open video system operators to require video programming providers to request carriage in no less than one-channel increments. A system operator, therefore, could prohibit the purchase of "part-time" programming capacity.²¹⁰ We believe that such a restriction is just, reasonable, and not unjustly or unreasonably discriminatory under the statute because of the expense and administrative and technical burdens of accommodating part-time programming.²¹¹

86. We disagree with those commenters which contend that, since the Commission's cable leased access rules require that channels be made available in increments as short as 30 minutes,²¹² parity and program diversity concerns demand that open video system operators face

²⁰⁶*Id.* at para. 20.

²⁰⁷*See, e.g.*, National League of Cities, et al. Comments at 23-24; Alliance for Community Media, et al. Comments at 28-29; City of Seattle Comments at 3; NCTA Comments at 16; MFS Communications Comments at 20-21; HBO Comments at 7-8; NYNEX Comments at 8-9; USTA Comments at 18.

²⁰⁸*See infra* Section III.C.1.f.(5) (Subsequent Changes in Capacity or Carriage Demand).

²⁰⁹Conference Report at 172.

²¹⁰Telephone Joint Commenters Reply Comments at 15.

²¹¹Communications Act § 653(b)(1)(A), 47 U.S.C. § 573(b)(1)(A). We also note American Cable, et al.'s argument that, given the unavoidable costs and time involved in pursuing a complaint of discrimination at the Commission, a lack of Commission standards in this area could create a substantial if not "fatal" economic hardship for small programmers. However, we cannot make such a finding based upon the current record. American Cable, et al. Comments at 17-18.

²¹²47 C.F.R. § 76.971(g).