

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

RECEIVED

JUL 2 1996

In the Matter of)

Implementation of Section 302 of)
the Telecommunications Act of 1996)

Open Video Systems)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CS Docket No. 96-46

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for the National Cable
Television Association, Inc.

Philip L. Verveer
Sue D. Blumenfeld
Thomas Jones
WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ITS ATTORNEYS

July 2, 1996

JH

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	OVS CERTIFICATION SHOULD BE CONTINGENT UPON AN AFFIRMATIVE DEMONSTRATION OF COMPLIANCE WITH OVS REQUIREMENTS	2
A.	The Commission Should Articulate Clear Cost Allocation Rules And Affirmatively Review And Approve OVS Operators' Plans Before Granting Certification	3
B.	The Short Review Period Does Not Relieve the Commission of its Obligation To Affirmatively Find Compliance	5
III.	THE COMMISSION HAS IMPERMISSIBLY PRECLUDED CABLE OPERATORS FROM OFFERING OVS	6
IV.	THE <u>REPORT AND ORDER</u> IMPERMISSIBLY EXTENDS THE PROGRAM ACCESS REQUIREMENTS AND PRECLUDES PRO-COMPETITIVE TRANSACTIONS THAT WOULD BEST SERVE CONSUMERS.....	10
V.	OVS OPERATORS AND PROGRAMMERS MUST COMPLY WITH MUST- CARRY AND PEG ACCESS RULES	14
VI.	THE <u>REPORT AND ORDER</u> AUTHORIZES DISCRIMINATORY ACCESS, AND UNJUST AND UNREASONABLE DISCRIMINATION WITH RESPECT TO RATES, TERMS AND CONDITIONS OF CARRIAGE IN VIOLATION OF THE ACT	17
A.	Rates Charged To Unaffiliated Programmers.....	18
B.	Channel Sharing.....	19
VI.	SAFEGUARDS SHOULD BE STRENGTHENED FOR THE PROVISION OF OVS BY INCUMBENT LECS.....	21
	CONCLUSION	24

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

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

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules,¹ the National Cable Television Association, Inc. ("NCTA") hereby files this petition for reconsideration of the Commission's Second Report and Order in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

NCTA supports the Commission's effort to establish rules for open video systems ("OVS") in compliance with the deadlines set forth in the statute. But those rules must comply with the requirements of the statute and sound policy. Accordingly, NCTA seeks reconsideration of those aspects of the Report and Order that run contrary to the terms of Section 653 or established public policy.

NCTA specifically seeks reconsideration of the following:

- The Commission's decision to leave substantive review of OVS certification applications to the complaint process and in particular, its failure to link the

¹ 47 C.F.R. §1.429.

² See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46 (released June 3, 1996) ("Report and Order").

Commission's current cost allocation proceeding to the establishment of cost and pricing rules in OVS;

- The decision to preclude cable operators from offering OVS in certain instances;
- The Commission's disallowance of a number of exclusive arrangements that would in fact promote competition among video distributors and programmers;
- The failure of the Commission to establish a specific solution for requiring OVS operators and programmers to comply with the Commission's must-carry and PEG rules;
- The failure of the Commission to establish rules to ensure non-discriminatory access for programmers that are unaffiliated with OVS providers or to ensure that the rates, terms and conditions of carriage are just and reasonable; and
- The Commission's rejection of necessary regulations on joint marketing and cross-subsidy for incumbent LECs.

II. OVS CERTIFICATION SHOULD BE CONTINGENT UPON AN AFFIRMATIVE DEMONSTRATION OF COMPLIANCE WITH OVS REQUIREMENTS

In order to meet the certification requirements established in the Report and Order, a prospective OVS provider must essentially only submit a statement that it believes it is in compliance with, and will continue to comply with, the requirements under Section 653(b).³ The lack of pre-certification review in this scheme offers too many opportunities for prospective OVS operators to avoid complying with the spirit or even the letter of the law without detection. Such abuses might eventually be brought to the Commission's attention in complaint proceedings, but not without considerable and needless expense to injured parties. The Commission could -- and

³ See id. at ¶31.

should -- avoid this problem by conditioning OVS certification approval upon an affirmative demonstration of compliance with clearly articulated OVS requirements.

A. The Commission Should Articulate Clear Cost Allocation Rules And Affirmatively Review And Approve OVS Operators' Plans Before Granting Certification

The OVS certification process must enable the Commission to fulfill its statutory duty to determine affirmatively that each OVS operator's specific plan for offering OVS capacity to non-affiliates is nondiscriminatory, and contains rates, terms, and conditions that are not unjustly or unreasonably discriminatory.⁴ But the approval process must involve more than mere receipt of certification and rubber-stamping the Commission's approval thereon.

To avoid arbitrary and capricious decision-making, the Commission must approve or disapprove the prospective OVS operator's plan according to specific standards requiring compliance with the Commission's revised cost allocation rules and non-discrimination requirements. Only after the Commission affirmatively finds that these conditions have been satisfied can it approve the certification with reasonable assurance that such approval is in the public interest.

First, the articulation of clear cost allocation rules, and thereafter, enforcement of compliance with those rules, is imperative to the adequate protection of the public interest. NCTA appreciates that the FCC is currently engaged in a proceeding that will produce

⁴ See 47 U.S.C. §573(b)(1)(A). Before an OVS operator qualifies for reduced regulatory burdens, it must certify that it complies with the Commission's regulations and the Commission must approve such certification. 47 U.S.C. §573(a)(1).

unambiguous rules. It is critical, however, that the Commission complete that rulemaking prior to commencement of the certification process. Ratepayer harm can be avoided only by enforcing compliance with its new cost allocation rules before certifying any OVS operators (rather than engaging in post facto proceedings and remedies). Only upon a thorough review of an OVS operator's cost allocation manual to determine compliance can the Commission ensure that it is adequately protecting ratepayers against unlawful cross-subsidization.

Additionally, prospective OVS providers must be required to demonstrate compliance with specific rules governing the channel allocation and carriage rates. The specific nature of those rules is discussed in greater detail later in this Petition.⁵ But regardless of their terms, such rules will be far more effective if prospective OVS providers are required to demonstrate compliance with them prior to certification.

Accordingly, the Report and Order should be revised to require prospective OVS providers to file with their applications for certification specific plans for compliance with the Commission's rules. Such a requirement would offer both the Commission and unaffiliated programmers the opportunity to review those plans and possibly to avoid the need for future complaint proceedings. Further, the simple act of placing such detailed terms of compliance on the record will likely deter some prospective OVS providers from violating the rules.

⁵ See Section VI infra.

B. The Short Review Period Does not Relieve the Commission of its Obligation to Affirmatively Find Compliance

NCTA appreciates that the Act's deadline for disapproval of an OVS operator's certification is quite short. Nevertheless, the certification process must constitute something more than a mere "rubber stamp." The Commission must be able to conduct a meaningful review of the certification provided.⁶ Indeed, the Commission recognized this much in the Report and Order.⁷

In particular, the short review period does not justify the mere acceptance of an officer's or director's statement "to the best of his or her information and belief" of compliance with the Commission's rules. The Report and Order's "streamlined" process transforms regulation into self-policing and is dangerously close to an abdication of the Commission's responsibility to protect the public interest. Even absent a clear intent on the part of OVS operators to circumvent the Act's requirements, there will be judgments and evaluations that only the Commission can and should resolve.

Congress could have deregulated the provision of OVS. It did not. Thus, the Commission retains a responsibility to ensure that OVS operators comply with the Act's requirements. In order to adequately fulfill its public interest obligations, the Commission

⁶ See 47 U.S.C. §573(a)(1).

⁷ Report and Order at ¶31 ("A streamlined certification process does not mean, however, that the Commission may not request and review necessary information. We intend the certification process to provide purposeful representations regarding the responsibilities of the open video system operator.").

should revisit its certification rules to enable meaningful review and affirmative findings of compliance within the statutory period.

III. THE COMMISSION HAS IMPERMISSIBLY PRECLUDED CABLE OPERATORS FROM OFFERING OVS

In the Report and Order, the Commission concludes that cable operators -- even those that are also local exchange carriers -- may not provide OVS in their service areas absent the presence of "effective competition" in the local market or a showing by a cable operator that the provision of OVS by another source is unlikely.⁸ This conclusion is contrary to the plain meaning of the statute and unsound as a matter of public policy.

First, Section 653(a)(1) clearly provides that a cable operator that also serves as a local exchange carrier is legally assured of the right to provide OVS in its telephone service area. Any other reading of this provision would undermine Congress' repeal of the cable-telephone cross-ownership prohibition by substituting a new one in its place. While the Report and Order discusses at length the legal ability of a variety of firms to provide OVS, including incumbent LECs in their telephone service areas, incumbent LECs out of region, and non-LECs, it summarily disposes of these rights in the context of cable operators that are also LECs. Even minimal scrutiny of the statute discloses the legal error in the Report and Order.

Specifically, Section 653(a)(1) speaks in terms of the ability of a "local exchange carrier" to provide OVS. It does not qualify this right to limit its application to incumbent LECs. Indeed,

⁸ Id. at ¶24.

where Congress intended such a distinction, it so provided in no uncertain terms.⁹ Given the unequivocal right of a "local exchange carrier" to provide OVS, this right extends to any entity falling within the definition of that statutory term -- regardless of whether such firms may also fit into other legal categories.

But even if the statute permitted some other reading of Section 653(a)(1), the Report and Order fails to set forth any coherent rationale for the exclusion of cable operators -- regardless of whether they also serve as LECs. The Report and Order merely recites -- without citation -- that "Congress exempted [OVS] operators from most Title VI regulations because, in the vast majority of cases, they will be competing with incumbent cable operators for subscribers."¹⁰ This particular motivation ascribed to Congress, however, is at best incomplete. Congress did not limit OVS service to areas that already are served by franchised cable operators. Plainly, though, if it had been Congress' concern that some video provider be a franchised cable operator, it would have limited OVS to areas already served by a cable operator.

Finally, Congress plainly intended that OVS itself would promote the competitive supply of programming, even if the programming were distributed exclusively over the OVS system. In such a case, the anticipated competition that warrants reduced regulatory oversight comes not necessarily from the OVS system being the second entrant into the market, but from the inherent

⁹ See Section 251, 47 U.S.C. §251 (setting out distinct obligations for carriers, local exchange carriers and incumbent local exchange carriers).

¹⁰ Report and Order at ¶23.

design of OVS itself (i.e., multiple program packagers competing for subscribers). Thus, if Congress deemed it acceptable for an incumbent LEC to be the sole wireline distributor of programming over an OVS system in a service area, there is no rationale for not allowing a "converted" cable system operator to serve subscribers in the identical role in another locale.

NCTA fully appreciates the implications of this statutory interpretation: the local franchising authority interests have made plain their opposition to losing their control over the cable industry through Section 653. But the localities' self-interest cannot justify allowing one type of firm the option of proceeding by way of Title VI or OVS, and precluding another type of firm from the very same choice. This is not only bad public policy, it is directly inconsistent with the 1996 Act and is constitutionally infirm as well.¹¹

Second, the Report and Order similarly commits error in failing to assure cable operators access to capacity on OVS systems. The statute mandates unqualified non-discriminatory treatment of packagers seeking access to the system. Yet the FCC has given the OVS provider the precise ability to discriminate against one particular class of entity seeking access: cable operators.

The Report and Order first reasons that the second sentence of Section 653(a)(1) grants the FCC the authority to decide whether or not cable operators can access OVS capacity. But having claimed ownership to this discretion, the FCC then turns around and delegates the

¹¹ See, e.g., Chesapeake & Potomac Tel. Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994), cert. granted, 115 S.Ct. 608 (1995), vacated and remanded, 134 L.Ed. 2d 46 (1996).

decision to the OVS operator. It is hornbook administrative law that a governmental agency cannot delegate its statutory authority to private parties absent express authority to do so.¹²

Further, the discretion of the OVS operator to accept or refuse such requests in effect gives the operator editorial control over such channels -- potentially in excess of the 33% limit imposed by Congress itself.¹³ This fact is underscored by the Report and Order's express logic, *i.e.*, that OVS operators may wish to grant such requests if the programming offered is sufficiently attractive.¹⁴

Finally, the delegation of discretion to the OVS operator fails to account for the section's prohibition against discrimination by the OVS operator.¹⁵ The FCC attempts to explain away this discriminatory treatment based upon a desire to promote intermodal competition. But if a policy of promoting each entrant to fully build its own facilities is the major objective here, the

¹² See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936). See also National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1143-44, (D.C. Cir. 1984), *cert. denied* 469 U.S. 1227 (1985); Sierra Club v. Sigler, 695 F.2d 957, 962 (5th Cir. 1983) ("an agency may not delegate its public duties to private entities"), *reh'g denied*, 704 F.2d 1251 (5th Cir. 1983).

¹³ The Report and Order at ¶¶88-89, permits the OVS operator to exceed the one-third capacity limitation if, otherwise, an unaffiliated programmer would control more channels than the OVS operator. The only circumstances provided for in the statute in which the one-third limit may be exceeded is where nonaffiliates do not seek the available two-thirds capacity.

¹⁴ Report and Order at ¶ 55.

¹⁵ The Report and Order also reasons that Congress elsewhere constrained joint ventures and acquisitions between incumbent LECs and cable operators, citing section 652. But there is clearly a more cohesive way of reading the two sections together, *i.e.*, that where Congress intended to limit the commercial relationships of these types of firms it did so expressly, leaving other transactions available to them.

Commission has failed to explain why it has carved out an exception for cable operators, but not for other video delivery system providers such as DBS, MMDS, etc.

NCTA thus requests the Commission to reconsider its cable "carve-out" for both the operation of OVS systems and access to such systems as program providers/packagegers. The very point of the section -- regulatory parity between two industries -- requires that cable operators be put on an equal footing in this instance.

IV. THE REPORT AND ORDER IMPERMISSIBLY EXTENDS THE PROGRAM ACCESS REQUIREMENTS AND PRECLUDES PRO-COMPETITIVE TRANSACTIONS THAT WOULD BEST SERVE CONSUMERS

In applying the program access requirements to OVS,¹⁶ the Report and Order disallows a number of exclusive arrangements that would in fact promote competition among video distributors and among programmers. As such, the Report and Order should be reconsidered to conform to the statutory mandates and sound public policy.

First, the Report and Order impermissibly extends the exclusivity provisions of Section 628 to OVS packagegers, contrary to the plain language of Section 653(c)(1)(C). Section 653(c)(1)(C) applies Section 628 "to any operator of an open video system for which the Commission has approved a certification...."¹⁷ Nothing in this language permits extending Section 628 requirements to the packagegers accessing capacity on certified OVS systems.

¹⁶ 47 U.S.C. §548.

¹⁷ 1996 Act, § 653(c)(1)(C) (emphasis added).

Significantly, the Commission offers no justification for such an extension other than its "belief" that "Congress intended us to do [so]...."¹⁸

However, this "belief" cannot overcome the plain language of Section 653(c)(1)(C).¹⁹ Moreover, permitting OVS packagers to negotiate for and establish exclusivity for their packages is pro-competitive and should be allowed. If OVS packagers are precluded from competing for subscribership by being able to offer unique and exclusive programming vis-à-vis one another, a fundamental benefit of OVS will be lost.²⁰ The effect of the Report and Order's prohibition on certain exclusive arrangements between programmers and OVS packagers will be to commoditize the offerings of competing OVS packagers on a common OVS system, thereby reducing competition among such packagers.

Second, the Commission erred in applying the exclusivity provisions of Section 628 to contracts between cable-affiliated satellite programmers and cable-affiliated OVS program packagers.²¹ The exclusivity prohibitions in Sections 628(c)(2)(C) and (D) apply solely to exclusive contracts between cable operators and cable-affiliated satellite programmers. The

¹⁸ See Report and Order at ¶182.

¹⁹ Since the plain language of the Act so clearly conveys congressional intent, the matter is at end, and the Commission is not at liberty to ignore this plain meaning. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Equally important, although the legislative history is not relevant here given the plain language of the Act, even if it were implicated, there is no indication that Congress intended to extend the program access rules to OVS packagers.

²⁰ In this regard, we note the Commission's recognition of congressional intent to promote intra-system competition among OVS programmers/packagers. See Report and Order at ¶2.

²¹ See id. at ¶¶186-187.

Commission recognized this fact in its DBS Order.²² The Report and Order casts the plain meaning of Sections 628(c)(2)(C) and (D) aside by attempting to prohibit any exclusive arrangements between cable-affiliated satellite programmers and cable-affiliated distributors. This it cannot do. Sections 628(c)(2)(C) and (D) do not say "cable operator or its affiliate." Moreover, the definition of "cable operator" in 47 U.S.C. § 522(5) specifically requires the distribution of "cable service" over a "cable system." Since neither the "cable service" nor the "cable system" component is present with respect to an OVS packager, Section 628(c)(2)(C) and (D) cannot be extended to exclusive contracts between a cable-affiliated satellite programmer and a cable-affiliated OVS packager.

Nor is the Commission authorized to reach such exclusive arrangements under any other provision of Section 628, including the one cited by the Commission in the Report and Order, namely Section 628(b).²³ Since Section 628(b) is specifically limited by its plain language to the unfair or deceptive acts or practices of a cable operator, for the same reasons discussed above, it cannot be used to justify an extension of the exclusivity provisions of Section 628 to cable-affiliated OVS packagers.

Finally, the Report and Order impermissibly precludes individual vertically integrated satellite programmers from marketing directly to OVS subscribers unless they accept a "duty to

²² See DBS Order, 10 FCC Rcd. 3105, at ¶42 (1994).

²³ See Report and Order at ¶186.

deal" with OVS packagers on the system.²⁴ It is fundamental that there is nothing per se unreasonable or anticompetitive about a supplier choosing to integrate forward and perform its own retailing to subscribers.²⁵ Notwithstanding this jurisprudence, the Commission surmises that such arrangements in the context of vertically integrated satellite programmers "would appear to be unreasonable."²⁶ But clearly such arrangements can be pro-competitive, by promoting different programming options and by reducing transactions costs. There is simply no way for the Commission to know ab initio that the decision of a programmer to sell directly to subscribers without dealing with some or all other retailers will hurt rather than promote consumer interests.

Equally important, the Commission's sole rationale for imposing this duty to deal requirement -- namely, that the decision of a programmer to sell directly to OVS subscribers discriminates against a class of distributors (i.e., OVS packagers) -- is unjustified. By offering its service directly to subscribers over an OVS system, a programmer is, by definition, dealing with the OVS class of distributors. As such, it has satisfied its obligation under Section 628 and the Commission's rules, which require only that vertically integrated satellite programmers deal with MVPDs on a technology neutral and non-discriminatory basis.²⁷ If a programmer is carried on

²⁴ See id. at ¶194.

²⁵ Areeda & Turner, Antitrust Law, Vol. III, pp. 194-220 (1989).

²⁶ See id.

²⁷ See, e.g., Program Access Order, 8 FCC Rcd. 3359, at ¶108 (1993)(volume discounts may justify price difference between competing MVPDs as long as discounts applied "across technologies").

an OVS system, it cannot be accused of unreasonably refusing to deal with the OVS class of distributors. The Commission cannot avoid this conclusion by artificially creating a sub-class of the OVS technology (i.e., OVS packagers). Moreover, to preclude such individual programmer arrangements out of a general desire to make cable programming more available undercuts the general competitive process by homogenizing all video distribution media, by imposing artificial costs on programmers' choice of distribution means, and by diminishing the incentives of programmers to invest in new programming in the first instance.

V. OVS OPERATORS AND PROGRAMMERS MUST COMPLY WITH MUST-CARRY AND PEG ACCESS RULES

As the Commission recognized in the Report and Order, Section 653(c)(1)(B) requires that the must-carry²⁸ as well as the PEG provisions²⁹ of the Communications Act shall apply to OVS operators. Moreover, Section 653(c)(2)(A) requires that, in applying those provisions, the Commission "shall, to the extent possible, impose obligations that are no greater or lesser" than those imposed on cable operators. This requirement means that every subscriber of an OVS service must receive and pay for broadcast and, where localities so request, PEG channels.³⁰

In its Comments, NCTA recommended that the Commission require that all OVS subscribers "buy-through" a broadcast tier as a condition to purchasing other programming

²⁸ See Sections 614 and 615, 47 U.S.C. §§534, 535.

²⁹ See Section 611, 47 U.S.C. §531.

³⁰ See 47 U.S.C. §§531 and 534 (requiring cable operators to carry PEG and local broadcast channels).

delivered over the OVS network.³¹ Such an approach seemed to offer the simplest way of applying must-carry and PEG requirements to OVS. In the Report and Order, however, the Commission declined to require that all OVS subscribers purchase a "basic tier" of broadcast channels.³² Rather, the Commission left to the OVS operator's discretion the manner in which it will fulfill the requirement that all subscribers receive channels eligible for carriage under Sections 611, 614 and 615.

While NCTA would have preferred the adoption of a basic tier requirement, it is more concerned that the Commission adopt some mechanism for the enforcement of must-carry and PEG in this context. NCTA therefore seeks reconsideration of the Commission's decision to leave the details of such implementation to the OVS operator. Implementation will be more certain and enforcement more likely if the Commission institutes a national approach to the application of must carry to OVS.

Moreover, regardless of the manner in which the Commission fulfills its obligations under Section 653(c)(2)(A), individual programmers and packagers should not be held responsible for providing must-carry or PEG channels to subscribers, so long as subscribers purchase those channels from some source. Any other requirement would impose unnecessary costs on programmers and packagers as well as subscribers.

³¹ See Comments of NCTA at 32.

³² See Report and Order at ¶¶153, 163.

Specifically with respect to PEG access channels, NCTA also takes issue with the Commission's requirement for cable operators to permit OVS operators to interconnect with cable's PEG feeds.³³ Such a requirement violates Section 653(c)(2)(A), which mandates the imposition of PEG access obligations on OVS operators that are "no greater or no lesser than the obligations" contained in Section 611.³⁴ Absent a voluntary agreement with a cable operator to share PEG facilities, an OVS operator must meet PEG obligations independently.

Requiring a cable operator to interconnect its network with the facilities of an OVS operator is also inconsistent with the statutory proscription against regulating cable systems as a common carrier or utility.³⁵ Interconnection requirements are a fundamental aspect of common carrier regulation;³⁶ they are foreign to the regulation of cable systems.³⁷ Nonetheless, the Commission's mandatory interconnection requirement treats cable operators as PEG utilities that must supply access programming to another video programming distributor. Such a result cannot be justified by the language or the policy underlying the statute.

³³ Second Report and Order at ¶145.

³⁴ 47 U.S.C. §573(c)(2)(A).

³⁵ 47 U.S.C. §541(c).

³⁶ See 47 U.S.C. §§201(a), 251(c)(2).

³⁷ Cf. 47 U.S.C. §572(d)(2) (local exchange carrier may obtain the use of a cable operator's subscriber drops, but only "with the concurrence of the cable operator on the rates, terms, and conditions").

VI. THE REPORT AND ORDER AUTHORIZES DISCRIMINATORY ACCESS, AND UNJUST AND UNREASONABLE DISCRIMINATION WITH RESPECT TO RATES, TERMS AND CONDITIONS OF CARRIAGE IN VIOLATION OF THE ACT

A. OVS Operator Control Over Access To Channel Capacity

In the Report and Order, the Commission decided to permit each individual OVS operator to determine the manner in which it will allocate capacity among unaffiliated programmers.³⁸ Instead of establishing national rules for capacity allocation, OVS operators need only comply with the requirement that such allocation be accomplished in an "open, fair, non-discriminatory manner" and that the process "be verifiable as well as insulated from any bias of the [OVS] operator."³⁹ NCTA respectfully seeks reconsideration of this approach because it will likely raise unaffiliated programmers' costs of doing business.

First, as NCTA pointed out in its Comments, a patchwork of OVS rules across the country will require unaffiliated programmers to learn and comply with each OVS operator's rules.⁴⁰ This is likely to be an unnecessarily costly process which uniform national rules would obviate.

³⁸ See id. at ¶70.

³⁹ Id. at ¶72.

⁴⁰ In its Comments, NCTA outlined a specific scheme for national capacity allocation in which the OVS operator would advertise the availability of capacity at publicly-filed rates and then hold an open enrollment period. If demand exceeds capacity, the NCTA proposal includes a specific scheme for allocation of channels on a shared and exclusive-use basis. See Comments of NCTA at 13-14.

Second, as mentioned above, it is not enough to rely, as the Commission proposes to do, on a piecemeal complaint process to ensure compliance with the general non-discrimination requirement. OVS operators have a clear incentive to establish rules that discriminate in favor of their affiliated programmers in the first instance. Such a strategy will force programmers to bear the dual burdens of initiating the complaint process and suffering any competitive imbalance while the complaint is pending. Clear national rules, on the other hand, would reduce opportunities for anticompetitive behavior and reduce the need to rely on the costly complaint process.

A. Rates Charged To Unaffiliated Programmers

The Report and Order establishes a presumption that rates charged by an OVS operator to unaffiliated programmers are just, reasonable and nondiscriminatory if two conditions are met: (1) at least one unaffiliated programmer, or unaffiliated programmers as a group, "occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the [OVS] operator and its affiliates," and (2) the rate complained of "is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the [OVS] operator."⁴¹ If these conditions are met, an unaffiliated programmer will bear the burden of demonstrating that the charge in question is unjust, unreasonable or unjustly or unreasonably discriminatory. This standard is insufficient to protect unaffiliated programmers from discrimination and should be changed.

⁴¹ Report and Order at ¶114.

This scheme leaves opportunities for OVS operators to game the system to discriminate against selected programmers. Moreover, the simplest and most effective means of preventing such discrimination is to require, unless the OVS operator can justify the difference, that each programmer be charged the same carriage fee.

It follows that the Commission should not, under any circumstances, place the burden of proof on programmers alleging a violation of the Section 653(b)(1)(A) standard. Rather, an OVS operator should always bear the burden of demonstrating that any difference in rates charged to different programmers is justified by the circumstances.

B. Channel Sharing

In the Report and Order, the Commission decided to permit OVS operators to administer channel sharing. This is not the arrangement that best ensures the fair administration of these arrangements.⁴² Nevertheless, to the extent OVS operators do perform administrative functions for channel sharing, the Report and Order should be revised to require that OVS providers do so subject to rules that minimize their opportunities to act in a discriminatory fashion.

For example, as Continental Cablevision pointed out in its comments in this proceeding, it is critical that the Commission ensure the fair allocation of "ad availabilities," the time slots

⁴² In its Comments, NCTA argued that "all programmers taking capacity on the system should agree upon an administrator, or share in the administration" of shared channels. See Comments of NCTA at 10. The Commission, however, specifically rejected this proposal and decided to permit OVS operators to administer shared channels so that they will have "the flexibility to address technical and other factors that may affect channel sharing." Report and Order at ¶102. As implied in the comments above, NCTA remains opposed to this position for the reasons described in its comments. See Comments of NCTA at 10.

made available by cable networks to cable operators for local advertising.⁴³ The revenue from the sale of these time slots⁴⁴ is an increasingly important source of income for cable operators. If the OVS operators' programmers or affiliated programmers are able to receive all such revenues, they will enjoy a significant advantage over other OVS packagers.

Accordingly, the Commission should implement rules requiring OVS operators responsible for administering shared network channels to share the ad availabilities for such channels on a proportional basis with all other entities carrying those channels.⁴⁵ It is important to emphasize that simply requiring OVS operators to compensate unaffiliated programmers for lost advertising revenues is not enough. As Continental has pointed out, if an LEC were left in control of the local advertising time, it could retain its portion of the ad revenues and in addition use the time to advertise its own OVS service package. This potential competitive advantage can be avoided only if the ad availabilities themselves are equitably shared among all programmers carrying the channel in question.

⁴³ See Comments of Continental Cablevision at 13-14.

⁴⁴ Cable networks normally grant cable operators two to three minutes of time per hour in 30 second intervals. See id. at 13.

⁴⁵ Before a channel can be designated as shared, the parties must enter into an agreement establishing a fair and equitable policy with regard to the apportionment of ad avails for each of the channels. Under no circumstances should the OVS operator's packager operation be permitted to benefit from a denial of the unaffiliated packagers rights with respect to ad avails.

VI. SAFEGUARDS SHOULD BE STRENGTHENED FOR THE PROVISION OF OVS BY INCUMBENT LECs

NCTA also seeks Commission reconsideration of the Report and Order's rejection of certain necessary safeguards for incumbent LECs offering OVS. In its initial comments, NCTA argued that some constraint on joint marketing is necessary to account for the unique market power of incumbent LECs, especially with respect to new telephone subscribers.⁴⁶ In the Report and Order, however, the Commission rejected any constraint on joint marketing because of the desirability of one-stop shopping and because Congress did not expressly prohibit joint marketing by statute.

One-stop shopping is a recognized consumer benefit with which NCTA has no quarrel. The solution NCTA proposed in its comments would not in fact prohibit or inhibit joint marketing by any firm. Rather, NCTA proposed a narrowly tailored requirement that incumbent telephone carriers, in the limited case of inbound marketing, advise consumers that video offerings other than their own are available in the locality

Until there is workable competition for local telephone service, incumbent LECs stand in a unique position with regard to any other supplier of telecommunications or information services: the local telephone monopoly is frequently the first company contacted by new residents in an area in order to start up essential telephone service. If ILECs are allowed to exploit this window, they can substantially foreclose alternative suppliers of video services. The

⁴⁶ See Comments of NCTA at 25.

modest requirement proposed by NCTA has been previously employed by the FCC in the context of allowing the Bell Companies to jointly market customer premises equipment.⁴⁷ It should be employed here as well.

Moreover, Congress' decision not to impose this requirement by statute should not be read as a negative inference that it intended to foreclose this option to the Commission. The fact is that Congress did not resolve each and every issue, but rather left significant aspects of the regulatory scheme to its administrative agency to flesh out. It is the responsibility of the FCC to decide on a fully reasoned basis whether NCTA's proposal should be imposed; the Report and Order does not adequately address why the proposal has not been adopted.

Similarly, the decision to allow the incumbent LECs to bundle the offering of telephone and video services fails to address Congress' concern that cross-subsidization not occur. It is not at all clear that there will be any practical constraint on opportunities for cross-subsidy by requiring, as the Report and Order does, that telephone companies price their monopoly services at the tariffed rates. This problem is greatly exacerbated by the agency's failure to date to address the fundamental problem of cost allocation.⁴⁸ Indeed, a requirement to state the tariffed rate for telephone service based upon a faulty overallocation of costs to the telephone side could

⁴⁷ See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1143, at ¶67.

⁴⁸ See discussion at section II, supra.

lead to below cost pricing of video services, sending inefficient signals to the market and disrupting the very competitive process the section is designed to promote.

Finally, the Commission rejects the position that a separate subsidiary requirement should be imposed upon incumbent Tier I LECs to protect against cross-subsidization and discrimination. Finding that Congress did not intend to apply such a requirement by statute, the Report and Order takes the faulty leap of inferring that Congress intended that the FCC not apply such a safeguard by regulation. But again, the fact that Congress did not mandate a separate subsidiary cannot serve as a basis for concluding that it foreclosed this option to the FCC. Indeed, Congress did foreclose separations requirements in other provisions, where, for example, the safeguard is scheduled to sunset after a certain period of time.⁴⁹ The Commission has elsewhere discovered broad delegations of authority in sections 4(i) and 273(f)(3), but declines to "exercise [its] authority" with respect to structural safeguards.⁵⁰ Moreover, the Report and Order never addresses the extensive record evidence that structural separation is necessary to diminish the otherwise rampant opportunities for misconduct here.⁵¹ Given both the legal authority and the record evidence supporting the need for structural separation, the Report and Order should be reconsidered to impose this necessary safeguard.

⁴⁹ See Section 274(g)(2), 47 U.S.C. § 274(g)(2) (sunsetting separate subsidiary requirement for electronic publishing after 4 years).

⁵⁰ Report and Order at ¶249.

⁵¹ See, e.g., Declaration of Leland Johnson, Attachment to Comments of NCTA.