

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

DOCKET FILE COPY ORIGINAL

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

Aug 15 9 59 AM '96
FCC MAIL SECTION

THIRD REPORT AND ORDER AND
SECOND ORDER ON RECONSIDERATION

Adopted: August 7, 1996

Released: August 8, 1996

By the Commission: Commissioner Quello issuing a separate statement.

Table of Contents

Table with 2 columns: Section/Paragraph and Paragraph number. Includes sections I, II, III, A-F and sub-sections 1-3.

4.	Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity	175
5.	Local Franchising Requirements	185
G.	Information Provided to Subscribers	198
H.	Dispute Resolution	207
I.	Joint Marketing, Bundling and Structural Separation	212
IV.	Regulatory Flexibility Act Analysis	223
V.	Paperwork Reduction Act of 1995 Analysis	242
VI.	Ordering Clauses	244
Appendix A: List of Parties Filing Petitions for Reconsideration and Oppositions to Petitions for Reconsideration		
Appendix B: Rule Changes		
Appendix C: FCC Form 1275 -- Open Video System Certification of Compliance		

I. INTRODUCTION

1. The Telecommunications Act of 1996¹ added Section 653 to the Communications Act, establishing open video systems as a new framework for entry into the video programming marketplace.² Section 653 required that the Commission, within six months after the date of enactment of the 1996 Act, "complete all actions necessary (including any reconsideration) to prescribe regulations" to govern the operation of open video systems.³ Accordingly, on March 11, 1996, the Commission issued a *Notice of Proposed Rulemaking* regarding open video systems.⁴ Based on the extensive record submitted in response to the *Notice*, on May 31, 1996, the Commission adopted a *Second Report and Order* in which we prescribed rules and policies

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

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

³47 U.S.C. § 573(b), (c).

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

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

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

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

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

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

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

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

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

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

A. Background

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

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

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

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

¹⁰*Id.*

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

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

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

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

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

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

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

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

¹⁶*Id.* at 4.

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

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

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

²⁰*Id.*

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

²²*Id.*

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

²⁴*Id.*

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

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

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

²⁶*Id.*

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

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

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

³⁰*Id.* at 31-32.

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

the cable service provider and another entity.³²

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

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

³²*Id.*

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

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

³⁵*Id.* at 12.

³⁶*Id.*

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

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

³⁹*Id.* at 3.

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

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

B. Discussion

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

⁴⁰*Id.*

⁴¹*Id.*

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

⁴³*Id.*

⁴⁴*Id.*

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

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

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

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

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

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

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

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

⁵¹See 47 C.F.R. § 76.1000(b).

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

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

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

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

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

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

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

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

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

III. SECOND ORDER ON RECONSIDERATION

A. Qualifications to be an Open Video System Operator

1. Background

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

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

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

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

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

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

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

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

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

⁶¹*Id.* at para. 24.

⁶²*Id.* at para. 12.

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

⁶⁴Michigan Cities, et al. Petition at 7.

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

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

⁶⁷*Id.* at 6-7.

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

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

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

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

⁶⁹*Id.*

⁷⁰*Id.* at 17.

⁷¹U S West Petition at 3-4.

⁷²*Id.*

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

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

⁷⁵NCTA Petition at 7-8.

⁷⁶*Id.* at 7.

⁷⁷Cox Petition at 9-10.

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

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

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

⁷⁸*Id.*

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

⁸⁰Comcast Petition at 5.

⁸¹*Id.*

⁸²*Id.* at 6.

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

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

⁸⁵NATOA Opposition at 8.

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

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

2. Discussion

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

⁸⁷Cox Petition at 4.

⁸⁸*Id.*

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

⁹⁰Sprint Opposition at 3-4.

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

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

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

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

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

⁹³*Id.*

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

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

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

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

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

B. Certification Process

1. Background

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

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

⁹⁸See Sprint Opposition at 3-4.

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

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

¹⁰¹*Id.*

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

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

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

¹⁰³*Id.* at para. 33.

¹⁰⁴*Id.* at para. 35.

¹⁰⁵*Id.*

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

¹⁰⁷*Id.*

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

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

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

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

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

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

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

2. Discussion

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

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

¹¹³Telephone Joint Petitioners Petition at 10.

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

¹¹⁵*Id.*

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

¹¹⁷*Id.* at 12-13 n.32.

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

¹¹⁹MFS Communications Opposition at 5.

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

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

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

¹²⁰Second Report and Order at paras. 28-30.

¹²¹See *Id.* at para. 34.

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

C. Carriage of Video Programming Providers

1. Notification and Enrollment of Video Programming Providers

a. Background

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

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

b. Discussion

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

¹²³*Id.* at paras. 45-46.

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

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

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

a. *Background*

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

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

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

¹²⁶*Id.* at para. 52.

¹²⁷*Id.* at para. 56.

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

¹²⁹*Id.*

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

process.¹³¹

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

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

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

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

¹³¹*Id.*

¹³²*Id.* at 6-7.

¹³³NCTA Petition at 9-10.

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

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

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

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

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

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

¹³⁷Tele-TV Opposition at 8-9.

¹³⁸*Id.* at 10.

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

¹⁴⁰*Id.* at 6-8.

¹⁴¹*Id.* at 8.

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

b. *Discussion*

48. We find that the *Second Report and Order* fully considered most of the arguments and evidence raised on reconsideration by NCTA and Cox, as described above. We explained in the *Second Report and Order* that Section 653(a)(1) specifically permits the Commission, "consistent with the public interest, convenience and necessity" to determine when a cable operator may provide programming through an open video system.¹⁴³ We also fully explained our construction of Section 653(b)(1)(A), which gives the Commission the discretion to determine when it is in the public interest, convenience and necessity for a cable operator either to become an open video system operator¹⁴⁴ or to provide video programming over another entity's open video system.¹⁴⁵ In the latter context, we determined that, because Section 653(a)(1) specifically addresses a cable operator's provision of video programming, the provision allows the Commission to determine when to permit a cable operator to provide such programming, notwithstanding the 1996 Act's general non-discrimination requirements contained in Section 653(b)(1)(A).¹⁴⁶ We therefore deny the petitions of NCTA and Cox to the extent they raise these particular contentions.

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

¹⁴²Telephone Joint Petitioners Petition at 11-12.

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

¹⁴⁴*Id.* at paras. 13-22.

¹⁴⁵*Id.* at paras. 51-56.

¹⁴⁶*Id.* at para. 51.

¹⁴⁷*Id.* at para. 52.