

FTC and DOJ Antitrust Division argue, cable operators possess substantial market power, and because these markets have been protected by high entry barriers, cable operators have been able to maintain prices above the level that would prevail if the market were competitive.¹⁴⁸ Because of this market power, cable operators may have different incentives for seeking open video system capacity than would MVPDs that do not have such market power, such as DBS and wireless cable providers. For instance, a cable operator may have an incentive to see that the open video system is not successful, and thus may seek to obtain capacity merely to protect and continue to exploit its market power.

50. As the Staff of the FTC and DOJ Antitrust Division also point out, enabling a cable operator to obtain open video system capacity means that less capacity will be available for use by the system operator and for other entities.¹⁴⁹ The open video system therefore could become a less attractive alternative for consumers, which would help preserve the cable operator's market power. We believe that these rationales currently do not apply to DBS or wireless cable providers because these MVPDs do not enjoy substantial market power. We therefore reaffirm our conclusion in the *Second Report and Order*. However, at such time that DBS or wireless cable providers possess sufficient market power to raise concerns similar to those associated with existing in-region, competing cable operators, we will reexamine this conclusion.

51. We also disagree with NCTA's argument that the Commission impermissibly delegated to open video system operators the discretion to preclude cable operators from obtaining capacity on the system. In determining that Section 653(a)(1) allows the Commission to determine when a cable operator may access an open video system, we merely interpreted the statute to allow the Commission to prescribe regulations to govern this situation. As aptly characterized by Tele-TV, we adopted regulations that set forth the parameters for where a competing, in-region cable operator's access to an open video system may be limited, and for where access may not be limited. In any case, we will modify our regulations to emphasize our decision that, pursuant to the second sentence of Section 653(a)(1), the public interest, convenience and necessity is served by generally prohibiting a competing, in-region cable operator from obtaining capacity on an open video system. As described in the *Second Report and Order*, we believe that this approach will foster facilities-based competition and encourage competing, in-region cable operators to develop its own system rather than occupy open video system capacity that could be used by another entity.

52. We clarify that there are two exceptions to this general rule. First, a competing, in-region cable operator may access an open video system when the open video system operator determines that it is in its interests to grant access. For example, as the Staff of the FTC and

¹⁴⁸FTC and DOJ Antitrust Division Opposition at 5 (citing *First Report and Order in the Matter of Annual Assessment of the Status of Competition in Video Programming*, 9 FCC Rcd 7442, 7545 (1994)).

¹⁴⁹*Id.* at 8.

Antitrust Division state, an open video system operator may have less incentive to exclude a cable operator that is the most efficient provider of programming in part of the open video system's service area.¹⁵⁰ Moreover, an open video system operator may determine that the viability of its system is enhanced by carriage of video programming that is offered by the competing, in-region cable operator. We believe that it is not appropriate for the Commission to deny an open video system operator the independent business discretion to decide that a cable operator's presence on its system may be beneficial. This business discretion may prove critical to the success of the open video system, and we believe that because such success will foster competition in the video delivery marketplace, this exception will serve the public interest. Second, a competing, in-region cable operator will be granted access to an open video system when such access will not significantly impede facilities-based competition. As previously determined, one situation in which facilities-based competition will be deemed not to be significantly impeded is 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. We believe that this slightly modified approach continues to provide broad flexibility to administer the open video system and to allow market forces to emerge as determinatives, thereby encouraging entities to deploy open video systems.

53. Finally, in response to the Telephone Joint Petitioners' petition, we clarify the specific exception under which a competing, in-region cable operator may access an open video system. These parties argue that the exception may require an open video system operator whose system overlaps with a small portion of a cable system to allow that cable system to obtain capacity on the open video system even though the cable system might be owned by a large MSO that also operates the cable system covering a majority of the open video system's service area. We believe that the Telephone Joint Petitioners misunderstand when the exception will apply. We reiterate that, in order for a competing, in-region cable operator to fit within the exception, such a cable operator and its affiliated systems must serve a total of less than 17,000 subscribers within the open video system's service area, regardless of whether the systems are owned by or affiliated with one of the 50 largest MSOs. Under the scenario posited by the Telephone Joint Petitioners, the cable system that overlaps the open video system service area only to a small degree would not have to be granted carriage on the open video system because that cable operator's subscribership, when combined with the subscribership of the affiliated cable system serving a majority of the open video system's service area, presumably would exceed 17,000.

¹⁵⁰*Id.*

3. *Allocation of Open Video System Channel Capacity to Unaffiliated Video Programming Providers*

a. *General Approach*

(1) Background

54. In the *Second Report and Order*, we permitted an open video system operator to implement its own method for allocating channel capacity to unaffiliated video programming providers, so long as capacity is allocated in an open, fair, non-discriminatory manner. We stated that the process must be verifiable and insulated from any bias by the system operator.¹⁵¹

55. On reconsideration, NCTA reiterates arguments contained in its earlier comments that the Commission should adopt uniform rules for the allocation of open video system capacity because this approach will allow video programming providers to avoid an increase in their costs of doing business by having to learn the allocation procedures in each jurisdiction where they seek access.¹⁵² NCTA adds that uniform rules also will relieve aggrieved programmers of the "dual burdens" of initiating the complaint process and suffering any competitive imbalance while such a complaint is pending.¹⁵³

56. NYNEX rejects NCTA's approach as unsupported by any evidence that it would benefit any party. NYNEX states that, even under NCTA's approach, parties still would have many issues to discuss, and that a "real and substantial loss" would result from the delay required for the Commission to determine national standards. NYNEX believes that NCTA would have the Commission stifle creativity among new entrants.¹⁵⁴

57. The Telephone Joint Petitioners also refute NCTA's argument that uniform allocation rules will decrease video programming providers' costs of doing business. They argue that the existing primary outlet for video programming are cable systems, all of which have varying practices for obtaining programming. The Telephone Joint Petitioners thus assert that programming vendors already incur the costs of accommodating multiplicity in pursuing access to multichannel video programming distribution systems, and that there is no reason to believe that dealing with open video system operators will be any more costly than dealing with cable

¹⁵¹*Id.* at para. 72.

¹⁵²NCTA Petition at 17 (*citing* NCTA Comments (filed April 1, 1996) at 13-14).

¹⁵³*Id.* at 18.

¹⁵⁴NYNEX Opposition at 5.

operators.¹⁵⁵

(2) Discussion

58. NCTA's arguments were fully considered and addressed in the *Second Report and Order*. NCTA offers no additional facts or arguments to support their position. Accordingly, we decline to reconsider our previous conclusion.

b. *Reallocation of Channel Capacity*

(1) Background

59. In the *Second Report and Order*, we required open video system operators to allocate open capacity, if any is available, at least once every three years.¹⁵⁶ On reconsideration, the Joint Telephone Petitioners urge the Commission to increase this period to at least once every five years. They state that it typically takes at least five years for a new programming service to become viable, and that such new services thus have sought carriage arrangements on cable systems of between five and ten years in duration. The Joint Telephone Petitioners state that, if an open video system operator knows it may have to reduce the number of channels it controls on its system in three years in order to accommodate additional demand for carriage from other video programming providers, it will be unlikely to offer these new, independent channels a carriage agreement of longer than three years.¹⁵⁷

(2) Discussion

60. Other parties urged the Commission to adopt a five-year period in the record for the *Second Report and Order*.¹⁵⁸ In requiring that an open video system operator reallocate open capacity at least every three years, we stated that requiring reallocation every three years will permit an open video system operator to sufficiently accommodate subsequent requests for carriage by video programming providers, while not causing unreasonable disruption to the

¹⁵⁵Telephone Joint Petitioners Opposition at 2-3. On July 16, 1996, the Telephone Joint Petitioners filed a Motion to Accept Late-Filed Opposition, stating that despite a good faith effort, they were unable to file their opposition to petitions for reconsideration filed in response to the *Second Report and Order* by the July 15, 1996 deadline. Pursuant to 47 C.F.R. §§ 1.3 and 1.45, we hereby grant the Telephone Joint Petitioners' motion and will consider their opposition herein. We find good cause for accepting the pleading and that the public interest is served because accepting the pleading will allow the Commission to consider the issues raised on reconsideration on a more complete record.

¹⁵⁶*Second Report and Order* at para. 92.

¹⁵⁷Joint Telephone Petitioners Petition at 12.

¹⁵⁸See HBO Comments (in CS Docket No. 96-46) at 7-8; NYNEX Comments (same) at 8-9.

system.¹⁵⁹ The Telephone Joint Petitioners do not provide evidence that would compel the Commission to reconsider that conclusion. We note in this regard that no new programming service, which the Telephone Joint Petitioners assert would favor a longer reallocation period, have filed for reconsideration in this proceeding.

c. Channel Positioning

(1) Background

61. In the *Second Report and Order*, we permitted an open video system operator to assign channel positions, subject to Section 653's non-discrimination requirements.¹⁶⁰ On reconsideration, the Alliance for Community Media, et al. state that an open video system operator still may discriminate against an unaffiliated video programming provider by offering a provider an unattractive channel or block of channels. They urge the Commission to reconsider its decision to allow an open video system operator to assign channel positions and require the involvement of an independent office or board to impartially assign channel positions.¹⁶¹

(2) Discussion

62. In the *Second Report and Order* we determined that the statute and our implementing regulations will prevent discrimination against unaffiliated video programming providers, notwithstanding an open video system operator's participation in the channel allocation process. We specifically rejected the assertions of commenters that an open video system operator should be required to delegate responsibility for channel capacity allocation to an independent entity.¹⁶² The Alliance for Community Media, et al. do not present new facts or arguments to support the mandatory involvement of an independent entity. Accordingly, we decline the Alliance for Community Media's request for reconsideration.

4. Channel Sharing

a. Background

63. In the *Second Report and Order*, we found that the statute permits an open video system operator to administer channel sharing on its system, and to determine whether to create shared channels for some or all of the duplicative programming on the system. We further clarified that each video programming provider offering a programming service that is placed on

¹⁵⁹*Second Report and Order* at paras. 96-97.

¹⁶⁰*Id.* at para. 99.

¹⁶¹Alliance for Community Media, et al. Petition at 20.

¹⁶²*Second Report and Order* at para. 41.

a shared channel must reach its own agreement with the programming service to offer that service to subscribers. We stated that, once the programming service has reached agreements with all of the relevant providers, additional consent of the programming service is not necessary for the open video system operator to place the programming service on a shared channel.¹⁶³

64. On reconsideration, Alliance for Community Media, et al. argue that our channel sharing rules, taken in combination with our regulations governing carriage rates charged by an open video system operator, will allow an open video system operator to exercise unreasonable control over the programming on the platform. They assert that our rules will permit a system operator to refuse to place a programming service carried by an unaffiliated video programming provider on a shared channel, thereby requiring that provider to lease a full channel instead of only a pro-rata share of a channel if the programming was placed on a shared channel. The Alliance for Community Media, et al. believe that this could make it impossible for unaffiliated video programming providers to compete, and urges the Commission to modify its rules to ensure that an unaffiliated provider can avail itself of the benefits of channel sharing at its own request.¹⁶⁴

65. ESPN argues on reconsideration that the Commission erred in not conditioning the placement of a programming service on a shared channel upon the consent of the programming service. ESPN believes that all video programming providers must have the explicit permission of a programming service in order to participate in a channel sharing arrangement with an open video system operator. If each provider has obtained such consent from the programming service, ESPN states that it would be unnecessary for the system operator to obtain additional consent from the programming service in order to place the service on a shared channel.¹⁶⁵

66. NCTA urges the Commission to state that any advertising availabilities ("ad avails") be shared on a proportional basis among all video programming providers carrying that programming service.¹⁶⁶ NCTA states that the revenue from the sale of these time slots is an increasingly important source of income for cable operators, and that if an open video system operator or its affiliates are able to receive all such revenues they will have a significant financial advantage over other video programming providers offering that programming service.¹⁶⁷

67. Both USTA and the Telephone Joint Petitioners reject ESPN's argument that

¹⁶³*Id.* at paras. 102-104.

¹⁶⁴Alliance for Community Media, et al. Petition at 19.

¹⁶⁵ESPN Petition at 2-3.

¹⁶⁶NCTA Petition at 19-20. By "ad avails," we mean the time slots to be made available by a programming service carried on a shared channel to video programming providers offering that service for local advertising.

¹⁶⁷*Id.*

programming services should be allowed to approve channel sharing arrangements. While USTA believes that a video programming vendor should have the protections provided for in law, USTA believes that an open video system operator would not be the appropriate party "to become enmeshed in any potential dispute" between a programming vendor and a video programming provider. USTA states, that in practice, an open video system operator will need to be able to rely on the representations of a video programming provider that it may enter into channel sharing arrangements.¹⁶⁸ The Telephone Joint Petitioners state that ESPN's approach would give programming services veto power over an open video system operator's decision to use shared channels, which would contravene the plain language of Section 653(b)(1)(C).¹⁶⁹

b. Discussion

68. In response to the Alliance for Community Media, et al.'s petition, we first clarify that there is no requirement that a system operator charge a video programming provider a pro-rata fee because a programming service carried by that provider is placed on a shared channel.¹⁷⁰ Thus, even if a video programming provider's programming service is placed on a shared channel, the video programming provider may be required to pay the same rate as if the programming service was placed on a non-shared channel. We think this clarification addresses the Alliance for Community Media, et al.'s concern that an open video system operator will engage in rate discrimination by placing favored video programming providers' programming services on shared channels. We decline the Alliance for Community Media's request for reconsideration on this issue.

69. Second, ESPN argued that channel sharing should be conditioned on the approval of programming services in its reply comments to the *Notice*. We fully considered those views in the *Second Report and Order*, where we stated that so long as each video programming provider has the contractual right to offer a particular program service to subscribers, it is unnecessary for the open video system operator to obtain the consent of the programming service in order to place that service on a shared channel.¹⁷¹ In addition, we note that a programming service will be placed on a shared channel only if more than one video programming provider secures the rights to offer the particular programming service to subscribers as part of their package of programming. We reiterate that channel sharing is merely a technical method by which an open video system operator may enhance the efficiency of its system by using only one channel to carry programming offered by multiple video programming providers, and again decline to adopt ESPN's proposal.

¹⁶⁸USTA Opposition at 12-13.

¹⁶⁹Telephone Joint Petitioners Opposition at 14.

¹⁷⁰See Section III.D., below.

¹⁷¹*Second Report and Order* at para. 103.

70. We agree with NCTA that ad avails associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner. Examples of acceptable methods of sharing ad avails include apportioning the revenues from such ad avails on a per subscriber basis or apportioning the rights to sell the avails themselves. We will clarify that arrangements with regard to ad avails will be considered a term or condition of carriage, and an open video system operator must comply with Section 653(b)(1)(A) in negotiating their apportionment.¹⁷²

5. *Open Video System Operator Co-Packaging of Video Programming Selected by Unaffiliated Video Programming Providers*

a. Background

71. In the *Second Report and Order* we concluded that Section 653(b)(1)(B), which states that nothing in that section should be construed to limit "the number of channels that the carrier and its affiliates may offer to provide directly to subscribers," permits an open video system operator to enter into agreements to co-package the video programming selected by unaffiliated video programming providers with the operator's selected programming, and market the combined offerings as one package to subscribers.¹⁷³ In addition, we determined that an unaffiliated video programming provider may enter into such agreements with other unaffiliated providers.¹⁷⁴ We also noted that Congress applied Section 616 of the Communications Act governing the regulation of carriage agreements to open video system operators, and that under this section, an open video system operator may not generally engage in anti-competitive behavior with respect to unaffiliated video programming providers and programming services.¹⁷⁵

72. ESPN argues on reconsideration that the Commission should require that co-packaging arrangements be conditioned on the consent of any programming services involved. ESPN states that program license agreements frequently contain negotiated terms related to the marketing of a programming service, including packaging parameters and trademark use guidelines. In addition, programming services themselves often are under contractual restraints as to the use of program vendor trademarks and the names or likenesses of persons appearing in programs. ESPN therefore argues that programming services must be able to approve co-packaging arrangements in order to comply with their license agreements.¹⁷⁶

¹⁷²Communications Act § 653(b)(1)(A).

¹⁷³*Second Report and Order* at para. 108.

¹⁷⁴*Id.*

¹⁷⁵*Id.* at para. 109.

¹⁷⁶ESPN Petition at 3-4.

73. The Joint Telephone Petitioners respond that the Commission's rules do not, and could not, alter the copyright laws. They argue merely that any programmer wishing to enter into a co-packaging arrangement will have an obligation to ensure that any copyright or trademark restrictions to which it is subject are not violated, regardless of whether the Commission takes action as ESPN requests.¹⁷⁷

b. Discussion

74. We decline to adopt ESPN's proposal to require the consent of any programming services involved before a video programming provider may enter into a co-packaging agreement. We recognize ESPN's legitimate concerns that its program license agreements frequently contain negotiated terms related to the marketing of a programming service, including packaging parameters and trademark use guidelines. However, these are contractual matters that we believe are best left to the individual negotiations between the parties involved. If a video programming provider enters into a co-packaging arrangement that breaches its contractual obligations, we believe that ESPN and other such programming services already possess adequate remedies at law. Nothing in our rules should be construed to infringe upon the rights of programming services with respect to their program license obligations.

D. Rates, Terms, and Conditions of Carriage

1. Just and Reasonable Carriage Rates

a. Background

75. Section 653 (b)(1)(A) requires that rates for carriage on open video systems be just and reasonable and not unjustly or unreasonably discriminatory. In the *Second Report and Order* we noted that this provision reflects the goal of affording unaffiliated video programming providers access to, and fair treatment on, open video systems, while at the same time preserving for open video system operators the ability to realize a return on the economic value of their investment.¹⁷⁸ Our rules in this area are intended to preserve the incentive of open video system operators to enter and compete with existing video programming distributors. Consistent with this goal, we eschewed traditional common carrier-style rate regulation approaches in favor of a two-step approach intended to balance the public interest in promoting competition for the provision of video programming services against the statutory requirement that we ensure just and reasonable open video system carriage rates. In general, the approach provides that rates are presumed reasonable where specified conditions are met; and, upon the filing of a complaint where the presumption conditions are not present, the burden is on the open video system operator to demonstrate that the contested carriage rate is no greater than a carriage rate imputed

¹⁷⁷Telephone Joint Petitioners Opposition at 13-14.

¹⁷⁸*Second Report and Order* at paras. 112, 119-120.

to the operator's affiliated video programming provider under a specified formula.

76. The just and reasonable presumption attaches to open video system carriage rates where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where the rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator. We further concluded that the mathematical average rate may be adjusted to account for legitimate variances in rates, such as discounts given for volume, contract length, creditworthiness, or the number of subscribers reached. These elements were not intended to be exclusive.

77. Once the open video system operator demonstrates that the presumption conditions are present, the burden shifts to the complainant to demonstrate that the rate is not just and reasonable. This presumption of reasonableness permits the open video system operator to implement its carriage rates and provide service without prior regulatory rate filings or review. We further concluded that this structure would provide the open video system operator with flexibility and an incentive to attract unaffiliated programming providers to the system, and would reduce litigation and administrative expenses associated with prior rate review processes. In addition, the *Second Report and Order* found that these conclusions also apply when a group of unaffiliated programming providers negotiate and obtain capacity equal to that of the open video system operator and its affiliates, if the operator or affiliate occupies less than one-third capacity.¹⁷⁹

78. Where the presumption conditions are not met, and a potential video programming provider files a complaint with the Commission, the *Second Report and Order* placed the burden on the open video system operator to demonstrate that the contested carriage rate is no greater than a carriage rate that could be imputed to the operator's affiliated video programming. The *Second Report and Order* required the operator to show that it charges the unaffiliated programmer no more for carriage than it earns from carrying its own affiliates' programming, and treated analog and digital channel capacity separately for this purpose.¹⁸⁰ It stated that the imputed rate approach provides a legitimate basis to fulfill the law's requirement that the rate be just and reasonable, and explains that, in principle, the method chosen to arrive at the imputed carriage rate was an application of the efficient component pricing rule ("ECPR") to open video systems.¹⁸¹

¹⁷⁹*Id.* at para. 123.

¹⁸⁰*Id.* at paras. 114, 125-128.

¹⁸¹William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. Reg. 171 (1994); Alfred E. Kahn & William E. Taylor, *The Pricing of Inputs Sold to Competitors: A Comment*, 11 Yale J. Reg. 225 (1994).

79. A number of parties filed petitions for reconsideration or clarification of these open video system carriage rate requirements.¹⁸² In general, incumbent LECs supported the overall approach, but challenged the use of the imputed rate formula, where the presumption conditions are not met, as too regulatory.¹⁸³ In contrast, cable companies, local authorities, and other competitors argue that the procedures established are too cumbersome from a procedural perspective, and fail to protect adequately both unaffiliated programmers and LEC telephone rate payers.¹⁸⁴

80. National League of Cities, et al. critique the pricing rules as inadequate to fulfill the statutory requirements of ensuring open access, nondiscrimination, and reasonable rates. It argues that the presumption approach places an undue financial and regulatory burden on the unaffiliated programmer to determine whether the LEC's terms are fair; that the Commission's rules will encourage the routine filing of carriage complaints by all video programmers that will "flood" the Commission; and that the presumption's conditions fail to protect unaffiliated programming providers. National League of Cities, et al. maintain that the criteria related to average rates is largely meaningless since only the LEC has the necessary information to make such a determination and the average may be adjusted in a variety of ways left totally indeterminate under the Commission's rules.¹⁸⁵

81. MCI contends that the rules fail to establish a mechanism that prevents incumbent LECs from pricing open video system carriage rates below incremental cost due to the transfer, by means of improper cost allocation, of video-related costs to their telephone customers.¹⁸⁶ MCI argues further that the Commission has recognized that incumbent LECs have an incentive and opportunity to shift costs from unregulated to regulated services. MCI submits that the likelihood that open video system carriage rates will be set below incremental costs nearly guarantees that one-third of open video system capacity will be occupied by parties not affiliated with the incumbent LECs that are unlikely to complain about the carriage rates, for they will share in the cross-subsidy provided by the incumbent LEC's telephone customers.¹⁸⁷ National League of Cities, et al. also argue that the presumption approach permits a LEC to control effectively two-thirds of the capacity directly, and one-third indirectly, by finding and favoring a single

¹⁸²See Alliance for Community Media, et al. Petition at 19; Telephone Joint Petitioners Petition at 5-10; City of Indianapolis Petition at 3; National League of Cities, et al. Petition at 20-24; MCI Petition at 2-5; NCTA Petition at 18-19.

¹⁸³See Telephone Joint Petitioners Petition at 5-10.

¹⁸⁴See NCTA Petition at 20-24; City of Indianapolis Petition at 3; National League of Cities, et al. Petition at 20-24; MCI Petition at 2-6.

¹⁸⁵National League of Cities, et al. Petition at 20-23.

¹⁸⁶MCI Petition at 2-3.

¹⁸⁷*Id.* at 3-4.

"unaffiliated" programmer so as to meet the presumption conditions.¹⁸⁸

82. MCI also contends that the open video system pricing rules will permit incumbent LECs to charge discriminatory rates once one-third of their open video system capacity is occupied by non-affiliates. MCI argues that the large amount of common telephone and open video system costs will result in a gap between the below-incremental cost rate (resulting from cross-subsidies) offered to existing non-affiliated programmers and a rate equal to incremental cost plus common costs. MCI contends that the Commission has compounded this problem by unilaterally excluding the parties harmed by the possibility of this cross-subsidization from challenging open video system carriage rates by bringing complaints against the presumptive reasonableness of the rates.¹⁸⁹ MCI argues, therefore, that the Commission should: (a) permit any party potentially affected by an open video system carriage rate to file a complaint with the Commission; and (b) require telephone companies seeking open video system status to publicly file incremental and stand alone telephone and video cost studies, along with appropriate subscriber and usage data as part of their open video system applications.¹⁹⁰

83. In response, LECs generally urge the Commission to reject requests to reconsider the open video system pricing rules based on allegations of the potential for discriminatory pricing.¹⁹¹ They state that MCI's request that the Commission reverse many of the key determinations made in crafting a rate regulation scheme suited to open video systems as new entrants without any market share or power, is simply a rehash of MCI's earlier unsuccessful advocacy of Title II-like regulation for open video systems, which should be rejected by the Commission on reconsideration.¹⁹² USTA contends that competition would be disserved by requiring LECs to file incremental and stand-alone telephone and video cost studies with the Commission along with subscriber and usage data as MCI requests. USTA claims that the only result of such requirements would be to hamper LEC market entry, delay competition and increase costs for the LECs.¹⁹³ Similarly, RCN supports the Commission's goal of avoiding the imposition of barriers to entry similar to those that have hindered the development of competition in the multichannel video distribution market thus far. RCN notes that the Commission has long recognized, with respect to the non-dominant new entrants in the long distance and local telephone market, and in other telecommunications markets where competition exists, that Title II-type rate and entry regulation is (a) not necessary to protect consumers or to assure just and

¹⁸⁸National League of Cities, et al. Petition at 22-23.

¹⁸⁹MCI Petition at 3-4.

¹⁹⁰*Id.* at 4-6.

¹⁹¹*See, e.g.*, USTA Opposition at 5.

¹⁹²Telephone Joint Petitioners Opposition at 13; NYNEX Opposition at 11; USTA Opposition at 3-4.

¹⁹³USTA Opposition at 6.

reasonable rates, and (b) likely to impair the ability of open video system operators to compete effectively in the market by "stifl[ing] price competition and service and marketing innovation."¹⁹⁴

84. The Telephone Joint Petitioners also respond that there is no possibility that an open video system operator who charges one group of programmers below cost rates, and then seeks to charge another programmer a discriminatorily high rate, will escape detection by the Commission when it compares the latter programmer's rate to the weighted average rate of the first group. They strongly disagree with MCI's request that third-parties be permitted to bring complaints regarding open video system carriage rates, as well as MCI's request that open video system operators be required to produce stand alone cost studies for telephony and video.¹⁹⁵ The Telephone Joint Petitioners also urge the Commission to reject MCI's requests on grounds that such requirements would recreate the type of tariff proceedings that the Commission conducted under the video dialtone regime.¹⁹⁶ NYNEX argues that permitting third-party complaints would lead to the same results that the Commission obtained in the video dialtone process, where most, if not all, challenges against video dialtone were raised by incumbent cable interests and their affiliated programmers, rather than by unaffiliated programmers. NYNEX states that the Commission's open video system rate scheme properly focuses on that latter, rather than the former, group, and that the Commission should not countenance the regulatory tactics of competitors seeking to impede open video system.¹⁹⁷

85. In their petition, the Telephone Joint Petitioners request that the Commission modify the requirements for applying the presumption. They argue that the Commission's threshold capacity requirement is unrelated to whether carriage rates are just and reasonable and will penalize open video system operators using advanced technologies. For example, the Telephone Joint Petitioners assert, operators of switched-digital open video systems will be unable to show that unaffiliated video programming providers occupy a threshold amount of capacity and will be unable to meet the presumption conditions.¹⁹⁸ The Telephone Joint Petitioners suggest that the Commission remove the minimum capacity requirement and instead find that the presumption applies when two unaffiliated programmers purchase any level of capacity on an open video system.¹⁹⁹ USTA supports the Commission's commitment to flexibility, and urges that it be extended further to permit and encourage the introduction of new technologies by

¹⁹⁴RCN Opposition at 11 (citing *Policy and Rules of Competitive Common Carrier Service and Facilities Authorizations* in CC Docket No. 79-252 (*Competitive Carrier Proceedings*), Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*) (subsequent history omitted).

¹⁹⁵Telephone Joint Petitioners Opposition at 12-13.

¹⁹⁶*Id.* at 13.

¹⁹⁷NYNEX Opposition at 12-13.

¹⁹⁸Telephone Joint Petitioners Petition at 6; *see also* USTA Opposition at 5-6.

¹⁹⁹Telephone Joint Petitioners Petition at 7-8.

focusing on the presence of unaffiliated programmers, rather than the use of an arbitrary percentage of capacity utilization before allowing LECs the safe-harbor of the presumption of just and reasonable rates.²⁰⁰

86. The Telephone Joint Petitioners further argue that the phrase "unaffiliated programmers as a group" in our presumption conditions could be interpreted as a requirement that the unaffiliated programmers market their programming as a package in competition with the open video system operator and its affiliates to meet the presumption conditions.²⁰¹ The Telephone Joint Petitioners suggest that the Commission clarify that the presumption applies whether the unaffiliated programmers market their programming in competition or in cooperation with the open video system operator's programming.²⁰²

87. While the Telephone Joint Petitioners agree as a general matter that the Commission's imputed rate approach is preferable to more overtly regulatory prescriptions for setting prices, they argue that the Commission has not properly applied the ECPR methodology, and that computing an imputed rate is not necessary for the purpose of establishing just and reasonable open video system carriage rates.²⁰³ The Telephone Joint Petitioners include with their petition a "Declaration of William E. Taylor," one of the authors of an economics article on ECPR cited in the *Second Report and Order*.²⁰⁴ Taylor's declaration discusses several ways in which the *Second Report and Order* allegedly misstates and misapplies the ECPR, including the premise that open video system carriage is an essential input. It generally concludes that the circumstances of the evolving video programming marketplace will not warrant the search for ECPR-based pricing standards, and urges that the marketplace itself should be able to determine the proper rates for open video system carriage.²⁰⁵ The Telephone Joint Petitioners suggest that if the pricing methodology is retained, the Commission should clarify its use of the imputed rate approach and how ECPR is to apply to open video system carriage rates. The Telephone Joint Petitioners argue that the imputed rate will set an artificially low ceiling on carriage rates because it omits the incremental cost of carriage, and that a ceiling on carriage rates based on the ECPR is inappropriate because open video system operators are new entrants that will compete with incumbent cable operators and other video programming distributors.²⁰⁶ They also suggest

²⁰⁰USTA Opposition at 6 n.15.

²⁰¹Telephone Joint Petitioners Petition at 7.

²⁰²*Id.* at 8.

²⁰³*Id.* at 8-10.

²⁰⁴*Second Report and Order* at para. 126 n.295.

²⁰⁵Telephone Joint Petitioners Petition, Declaration of William E. Taylor at 4-8.

²⁰⁶Telephone Joint Petitioners Petition at 8-10, Declaration of William E. Taylor at 6-8; accord NYNEX Opposition at 12.

that the use of the terms "earn" and "profit allowance" require clarification.²⁰⁷

88. Other petitioners challenge the methodology as inadequate to protect unaffiliated programmers. The City of Indianapolis and the Alliance for Community Media, et al. object to the imputed rate formula on the ground that it improperly compensates the open video system operator for lost subscribers. They argue that unaffiliated programmers will pay higher carriage rates than affiliated programmers, and this will cause unaffiliated programming provision to be unprofitable.²⁰⁸ The National League of Cities, et al. interpret the imputed rate formula as improperly permitting open video system operators to charge unaffiliated programming providers a price for carriage equal to the price they charge subscribers for affiliated programming.²⁰⁹

89. MCI contends that the Commission may not use ECPR as a means of ensuring nondiscriminatory open video system carriage rates, because there is no practical method of determining whether an open video system carriage rate is greater than the rate that would be established by the ECPR. According to MCI, this is due in part to the Commission's inability to determine a carrier's actual opportunity cost.²¹⁰ MCI instead proposes that the incumbent LECs be required to charge video carriage rates in excess of the incremental cost of providing video services.²¹¹ In response, USTA urges the Commission to dismiss MCI's efforts to increase LEC regulatory burdens by urging that video carriage rates must be delivered in excess of incremental cost.²¹²

b. Discussion

90. In the *Second Report and Order* we specifically noted MCI's concerns as to the need for effective cost accounting and auditing procedures to ensure that incumbent LECs do not engage in the allocation of excessive costs to their regulated telephone services. We stated that the substantive cost allocation requirements are being addressed in a separate rulemaking.²¹³ In its petition, MCI has provided no new facts or arguments to justify reconsideration of these concerns in the instant proceeding.²¹⁴ We also decline to impose the other pre-certification and

²⁰⁷Declaration of William E. Taylor at 6-8.

²⁰⁸City of Indianapolis Petition at 3; Alliance for Community Media, et al. Petition at 19.

²⁰⁹National League of Cities, et al. Petition at 23.

²¹⁰MCI Petition at 5.

²¹¹*Id.* at 6.

²¹²USTA Opposition at 6.

²¹³*Second Report and Order* at para. 29 n.92.

²¹⁴*See generally*, 47 C.F.R. § 1.429(b) and (c).

reporting requirements MCI seeks. We believe that these requirements are inconsistent with our flexible regulatory approach to the provision of open video system, and are not necessary to protect either unaffiliated programmers or the public in general. In addition, we decline to require open video system operators to base their carriage rates on detailed studies of incremental and stand alone cost and estimates of actual opportunity cost, as suggested by MCI,²¹⁵ because of the 1996 Act's direction that Title II requirements not be applied to open video systems,²¹⁶ and the limited time allowed for the review of certifications and complaints.²¹⁷ Instead, as we discuss below, we reaffirm our imputed rate approach for determining whether carriage rates are just and reasonable where the presumption conditions are not present.

91. We also decline to adopt MCI's proposal to allow parties other than potential video programming providers seeking carriage on the open video system to file complaints with the Commission regarding the carriage rates offered by the system operator. We think that such a rule would inevitably result in the filing of numerous complaints by parties with no direct interest in providing programming over open video systems, and thus delay the initiation of open video system service. We therefore reaffirm our decision to allow only potential video programming providers to file complaints regarding open video system carriage rates. This decision does not leave other parties who claim to be adversely affected by an open video system operator's carriage rate without remedies. For example, a party seeking to challenge a rate it pays for common carrier services provided by that operator on the ground of improper cost-shifting from an open video system, retains its rights under section 208 of the Communications Act to file a complaint.²¹⁸ These statutory rights afford adequate protection in the event that third parties believe open video system operators are improperly shifting costs relating to video carriage at the expense of telephone customers.

92. We disagree with the general assertion by the National League of Cities, et al. that our presumption conditions will not provide adequate protection to unaffiliated video programming providers. As we noted in the *Second Report and Order*, where the presumption conditions are met, there is sufficient reason to conclude that the open video system is accessible and the negotiated carriage rates are just and reasonable.²¹⁹ The National League of Cities et al. have presented no new arguments or data to refute this conclusion. Moreover, we disagree with National League of Cities et al.'s contention that the presumption approach places a undue financial and regulatory burden on the unaffiliated programmer to determine whether the

²¹⁵MCI Petition at 5.

²¹⁶See Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3); Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 178 (February 1, 1996) ("Conference Report").

²¹⁷*Second Report and Order* at para. 120.

²¹⁸See 47 U.S.C. § 208.

²¹⁹*Second Report and Order* at para. 122.

operators' rates are fair.²²⁰ Our presumption approach strikes an appropriate balance between the interests of the open video system operator in establishing service to end users quickly, without undue regulatory intervention by competitors, and the interests of unaffiliated programmers in obtaining just and reasonable carriage rates. To the extent National League of Cities, et al.'s argument is directed at the pre-complaint rate disclosure process, we further clarify the rights of unaffiliated programmers to obtain preliminary rate estimates, and the information these estimates must contain, *infra* in Section III.H., Dispute Resolution.

93. The National League of Cities, et al. also expressed the specific concern that the presumption conditions will allow the average rate paid by the unaffiliated programming providers receiving carriage to be "weighted" or adjusted, but that only the open video system operator will possess the information necessary to calculate the average or to "weight" the average.²²¹ We clarify that, as part of its burden of showing that the presumption conditions are met, an open video system operator will be required to make available to a complainant all information needed to calculate the average rate paid by the unaffiliated programming providers receiving carriage on its system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate. The complainant may challenge the weighting methodology used by the open video system operator as part of its case. Requests for confidential treatment of particular information shall be addressed consistent with our rules concerning proprietary information.²²²

94. The Telephone Joint Petitioners have reiterated their original request that carriage rates be presumed just and reasonable even if a small number of unaffiliated video programming providers occupied only one channel each.²²³ We again reject their suggestion on the grounds, stated in the *Second Report and Order*, that the presence of one or more unaffiliated programmers on a diminutive portion of an open video system's channel capacity is not sufficient to show that its carriage rates are just and reasonable.²²⁴ We agree with the Telephone Joint Petitioners that the one-third threshold capacity requirement may not be appropriate in the future when advanced technologies that are under development, such as switched digital video, may be deployed. Because these technologies have not yet been deployed, however, we will not now modify the requirement. We will consider requests to waive or otherwise modify the threshold capacity requirement to reflect the special circumstances of such advanced systems.

²²⁰National League of Cities, et al. Petition at 21.

²²¹*Id.* at 22.

²²²See 47 C.F.R. § 76.1513(j).

²²³Telephone Joint Petitioners Petition at 7-8; see NCTA Opposition at 7-9 (disagreeing).

²²⁴*Second Report and Order* at para. 124.

95. Moreover, the presumption requirement is met not only when unaffiliated programmers occupy one-third of capacity, but also when unaffiliated programmers occupy the same amount of capacity as the open video system operator or its affiliate. Take, for example, the case of a system that has a theoretical capacity of 1,000 channels, and assume that the open video system operator and its affiliate choose to occupy 100 of these channels. Under these conditions, it will not be necessary for unaffiliated programmers to occupy 333 channels (one-third of system capacity) to meet the presumption requirements. Rather, the open video system operator will meet the presumption requirements if unaffiliated programmers occupy 100 channels. This factor may eliminate the problems that the Telephone Joint Petitioners foresee.

96. In response to the Telephone Joint Petitioners' request, we clarify that in the *Second Report and Order*, the phrase "unaffiliated programmers as a group" does not impose a requirement that the programmers market their programming in competition with the operator.²²⁵ Rather, the phrase is used to give open video system operators greater flexibility in meeting the presumption conditions. It allows operators to meet the requirement by providing carriage to several unaffiliated programmers that in total occupy the threshold capacity requirement.

97. We reaffirm our basic imputed rate approach for ensuring just and reasonable open video system carriage rates where the presumption conditions are not met, but clarify our use of certain terminology. We structured the imputed rate in the *Second Report and Order* to reflect what the open video system operator, or its affiliate, effectively "pays" for its own carriage of programming over the system by starting with the revenues received from the end user subscriber, and subtracting the costs avoided by the open video system operator by permitting another programming provider to serve that subscriber.²²⁶ No petitioner has convinced us that an imputed rate approach is not suitable to the circumstances of open video system carriage, where a new market entrant (the open video system operator) will, in the majority of areas, face competition from an established incumbent (the cable operator). We continue to believe that, under these circumstances, the imputed rate approach will produce carriage rates that encourage market entry and therefore result in greater competitive choices for video programming customers.²²⁷ Therefore, we reaffirm that the imputed carriage rate established in the *Second Report and Order*, which equals the revenues received from subscribers for the open video system operator's programming package, minus the cost to the operator of creating the package, provides a sound basis for comparison to the challenged carriage rate offered the unaffiliated programmer.

98. Telephone Joint Petitioners have instead urged us to let the market set the rates for carriage. We do not, however, find that market conditions alone are sufficiently competitive to produce just and reasonable carriage rates for unaffiliated programmers. One of the premises of the open video system is that it will be providing independent programmers an alternative video

²²⁵*Id.* at para. 122.

²²⁶*Id.* at para. 127.

²²⁷*Second Report and Order* at para. 127.

carriage outlet that will encourage multiple programming sources. Today, independent programmers have limited ability to obtain carriage on cable systems on an open basis. Other alternatives to the open video system, e.g., DBS and wireless cable, currently serve approximately 9% of the market.²²⁸ Accordingly, these alternatives similarly appear to offer limited opportunities for carriage on an open basis for unaffiliated programmers. We therefore reject the position of the Joint Telephone Petitioners that the market alone will ensure just and reasonable carriage rates. We believe that the imputed rate approach will encourage entry by open video systems, while ensuring that video carriage rates are just and reasonable for unaffiliated programmers.

99. As we noted in the *Second Report and Order*, open video systems are essentially a combination of: (a) the creative development and production of programming, (b) the packaging of various programs for the open video system operator's offering, and (c) the creation and maintenance of infrastructure for the carriage of both the operator's affiliated programming and unaffiliated programming.²²⁹ Our rules are intended to ensure that unaffiliated programming providers pay a rate for carriage that is no more than the carriage price that can be fairly imputed for the carriage of the operator's affiliated programming packages. In so doing we seek to attain an important result of the ECPR, which is that the price the operator charges unaffiliated programming providers for carriage must be no higher than the sum of its incremental cost of carriage and the contribution to fixed infrastructure costs in its retail price of programming.²³⁰

100. We disagree with the assertion by the Telephone Joint Petitioners that the Commission errs by using an ECPR methodology to establish carriage pricing on open video systems, where it is not appropriate, while declining to use ECPR to establish LEC interconnection pricing in situations where they assert it is appropriate.²³¹ Like ECPR, our imputed rate approach will provide the open video system operator the same return when it carries unaffiliated programming as when it carries its own programming. We believe that in the case of open video systems, application of an ECPR methodology provides full economic incentives for LEC entry into video in competition with incumbent cable providers.

101. By contrast, in the case of interconnection to the local telephone network, application of ECPR would reduce the incentives for entry into local exchange services by enabling incumbent LECs to charge higher rates for interconnection than would result from a forward-looking economic cost model. In this latter case, application of the ECPR for network

²²⁸See *Second Competition Report*, 11 FCC Rcd at 2063.

²²⁹*Id.* at para. 127.

²³⁰Declaration of William E. Taylor at 5.

²³¹Telephone Joint Petitioners Petition, Declaration of William E. Taylor at 5 n.15, *citing* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Notice of Proposed Rulemaking* (1996) (*Interconnection Notice*) at para. 148.

interconnection under sections 251 and 252 of the 1996 Act would be inappropriate, and we have therefore declined to use it.²³² More specifically, the Commission has concluded that the ECPR is not appropriate in the pricing of unbundled local telephone network elements for the purposes of interconnection.²³³ There are significant differences in the market circumstances open video systems will face, as compared to the pricing of unbundled local telephone network elements. As we have noted, open video systems, as the new market entrant, will face competition from the established incumbent cable operator. By contrast, existing end user rates in local telecommunications services are not competitively set. In the Commission's interconnection proceeding under section 251, we noted the ECPR's potential to permit higher rates than those established by a forward-looking economic cost model, to limit competitive entry, and to preserve pricing inefficiencies.

102. We disagree also with the assertion by the Telephone Joint Petitioners that the imputed price omits the incremental cost of carriage.²³⁴ Under normal market conditions, the imputed price of carriage will exceed the open video system operator's incremental cost of carriage (which is greater than zero) and make a contribution to the fixed infrastructure cost of the open video system. For this reason, we reject the Telephone Joint Petitioners' assertion that the imputed rate approach will produce a carriage rate of zero or less.²³⁵ The imputed rate is based in part on the price charged by the open video system operator or its affiliate to end-user subscribers. The price charged the subscriber will generally be greater than the incremental cost of carriage. In addition, the imputed rate subtracts out the costs of developing the programming and creating the package, which removes the costs avoided when unaffiliated programming is carried. After subtracting these costs, the imputed rate will correspond to the carriage rate that the open video system operator "pays" to carry its own programming. The imputed rate approach is designed to give the open video system operator the same economic return when it sells carriage to unaffiliated programming providers as when it "sells" carriage to its own programming. Consequently, we would expect the use of the ECPR approach to minimize any disincentives the open video system operator may have to carry unaffiliated programming.

103. We believe that this result of the imputed rate approach should be achieved even under the competitive conditions assumed by the Telephone Joint Petitioners in their petition.²³⁶ Even assuming that, at the outset of open video system operations, competition lowered the retail price of video programming to subscribers to the point that the open video system operator

²³²Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Report and Order*, (adopted August 1, 1996).

²³³*Id.*

²³⁴Declaration of William E. Taylor at 6.

²³⁵Telephone Joint Petitioners *Petition for Reconsideration* at 9.

²³⁶*Id.* at 9.

incurred losses, this would not justify the operator's shifting the burden of such losses to unaffiliated video programming providers by charging them a higher carriage rate than the rate that it effectively "charges" itself. The unaffiliated programming providers would also face lower retail prices for their programming under the competitive conditions assumed by the Telephone Joint Petitioners. We disagree with the Telephone Joint Petitioners' assertion that unaffiliated programmers would be largely unaffected by retail price competition.²³⁷ Unaffiliated programming providers would be offering services to subscribers in the same area as the open video system operator and would, as a result, face essentially the same competitive conditions faced by the operator.

104. The imputed rate approach was chosen as a flexible regulatory approach for determining what are just and reasonable carriage rates in an imperfectly competitive carriage market. However, it may not be the sole means of establishing just and reasonable carriage rates. There may be alternative, market-based approaches to demonstrating that a challenged rate is just and reasonable, that may also be useful in particular cases. We would consider such an argument in response to a complaint regarding a carriage rate. The open video system operator would be required to demonstrate that its carriage service is subject to sufficiently strong competitive forces to ensure that its carriage rates are just and reasonable, or that it has computed its rate using a methodology that aims to produce or replicate the working of a competitive carriage market.

105. In addition, on reconsideration, we find that certain aspects of our explanation and use of terminology should be clarified. As we stated above, under our approach, the imputed price of carriage for an affiliated programming package equals the price of the package delivered to a subscriber minus the cost of creating the package. To clarify the terms identified by the Telephone Joint Petitioners, in the *Second Report and Order* we use the term "earning" to refer to the difference between the price of the package delivered to a subscriber and the cost of creating the package.²³⁸ We use the term "profit allowance" to refer to one type of cost of creating the programming package, namely the cost of capital used to create the package. We also clarify Section 76.1504 of the rules to indicate more clearly the types of avoided costs that must be subtracted by an open video system operator in calculating the imputed rate.

106. We also clarify in response to the National League of Cities, et al. that the imputed rate formula will not allow open video system operators to charge unaffiliated programming providers a price for carriage equal to the price they charge subscribers for affiliated programming. The imputed rate formula, as we have discussed, requires open video system operators to subtract the cost of creating affiliated programming from the price of the programming. The carriage rate that unaffiliated programming providers pay will be less than the price subscribers pay for affiliated programming.

²³⁷Declaration of William E. Taylor at 6.

²³⁸See *supra* at para. 87.

107. The concerns of the City of Indianapolis and the Alliance for Community Media, et al. regarding how subscriber losses will affect the imputed carriage rate are overstated because they do not reflect the effects of subscriber gains. We wish to clarify that the imputed carriage rate will recognize both losses and gains in the number of subscribers to the open video system operator's programming package resulting from carrying unaffiliated programming. Increases in subscribers may occur because unaffiliated programming attracts subscribers to the open video system from cable or broadcast television. Decreases in subscribers may occur because unaffiliated programming attracts subscribers away from affiliated programming on the open video system. The average of these individual channel effects, which may be an increase or a decrease, is the one that will be recognized by the imputed carriage rate.

108. We also wish to clarify that, contrary to MCI's suggestion, our imputed rate approach does not require that we determine an open video system operator's actual opportunity cost. Because it is computed by averaging costs over all channels carrying affiliated programming, the imputed carriage rate will include an estimate of the average opportunity cost resulting from the carriage of unaffiliated programming. This average is adequate to achieve the goal of ensuring that the operator's carriage rates are just and reasonable, without determining the operator's actual opportunity cost.

2. *Open Video System Carriage Rates Must Not be Unjustly or Unreasonably Discriminatory*

a. *Background*

109. In the *Second Report and Order*, we concluded that some level of open video system carriage rate differentiation is permissible, provided that the bases for the differences are not unjust or unreasonable. We suggested that some legitimate, objective factors on which rate differences could be based are volume discounts, differences in creditworthiness and financial stability, differences in the number of subscribers reached, and preferential rates for not-for-profit programming providers.²³⁹

110. NCTA challenges the sufficiency of the presumption approach to protect unaffiliated programmers from discrimination, and requests that it be changed. NCTA states that the scheme leaves opportunities for open video system operators to "game the system" to discriminate against selected programmers. NCTA submits that the simplest and most effective means of preventing such discrimination is to require, unless open video system operators can justify the difference, that each programmer be charged the same rate. NCTA contends that the Commission should not place the burden of proof on the programmer alleging a violation of section 653(b)(1)(A) standard; rather, open video system operators should always bear the burden

²³⁹*Second Report and Order* at para. 130.

of demonstrating that rate differences are justified by the circumstances.²⁴⁰

111. MCI argues that would be complainants will be unable to ensure that open video system carriage rates are nondiscriminatory because there is no practical method of determining whether a rate is greater than the rate that would be established by ECPR.²⁴¹ The Alliance for Community Media, et al. argues that the Commission should require open video system operators to charge non-profit video programming providers a reduced carriage rate.²⁴²

b. Discussion

112. The petitioners' concerns about whether open video system rates are nondiscriminatory ignores the wording of the 1996 Act, which prohibits rate differences only when unjust or unreasonable.²⁴³ As we noted in the *Second Report and Order*, we decided to permit carriage rate differentiation because requiring open video system operators to charge all programming providers the same carriage rate would exclude providers whose programming has a low market value.²⁴⁴ Neither NCTA nor MCI has offered new factual or legal arguments to refute this reasoning. We will continue to permit open video system operators to charge different rates based on objective factors.

113. MCI's rate discrimination concern arising from our use of an ECPR pricing model to compute an imputed rate is misplaced.²⁴⁵ In the *Second Report and Order*, we decided to rely on the complaint process to ensure that open video system carriage rates are not unjustly or unreasonably discriminatory. If a rate discrimination complaint is filed, the challenged rate difference will have to be justified by legitimate, objective factors.²⁴⁶ We have heard no new argument that demonstrates that the complaint process will fail to ensure that differences in open video system carriage rates have just and reasonable bases.

114. We disagree with the Alliance for Community Media, et al., that open video system operators should be required to charge reduced carriage rates to non-profit programming providers. In the *Second Report and Order*, we identified not-for-profit status as one of the legitimate, objective factors on which open video system operators could base reduced rates. We

²⁴⁰NCTA Petition at 18-19.

²⁴¹MCI Petition at 5.

²⁴²Alliance for Community Media, et al. Petition at 9-11.

²⁴³Notice at para. 32.

²⁴⁴*Second Report and Order* at para. 130.

²⁴⁵See our discussion of the imputed carriage rate, *supra* at paras. 97-108.

²⁴⁶*Second Report and Order* at para. 130.

also cited comments that identified PEG channels as a source of carriage for non-profit programmers.²⁴⁷ We note that the Alliance for Community Media, et al. recognize the significant contribution that PEG requirements will make.²⁴⁸ Moreover, we are concerned about the impact of mandatory reduced carriage rates on a new entrant in the markets for video carriage and distribution. Our decision to allow preferred carriage rates for non-profit programmers on a voluntary basis reflects our goals of promoting open video system entry and competition with incumbent cable systems, while providing access to carriage by unaffiliated programming providers. We will stand by our decision not to make reduced rates for non-profit programmers mandatory.

E. Gross Revenues Fee

1. Background

115. Section 653(c)(2)(B) provides that an open video system operator shall be subject to a fee on the gross revenues of its cable service, "in lieu of" the cable franchise fee under Section 622.²⁴⁹ In the *Second Report and Order*, we concluded that the gross revenues fee should be based on all revenues received by an open video system operator or its affiliate relating to its provision of video services (including all subscriber revenues and all carriage revenues received from unaffiliated programming providers), but should exclude the gross revenues of unaffiliated video programming providers.²⁵⁰

116. On reconsideration, some local governments argue that the gross revenues fee should be applied to a broader revenue base than that specified in the *Second Report and Order*. The Village of Schaumburg and Metropolitan Dade County argue that the fee should be applied to all revenues derived from the operation of open video systems, regardless of whether they are received by the open video system operator, the operator's affiliate, or an unaffiliated video programming provider.²⁵¹ These petitioners assert that the Commission's formulation of the gross

²⁴⁷*Id.* at para. 130 n.300.

²⁴⁸Alliance for Community Media, et al. Petition at 13 n.39.

²⁴⁹Specifically, Section 653(c)(2)(B) provides:

An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental agency, in lieu of the franchise fees permitted under Section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area.

²⁵⁰*Second Report and Order* at paras. 218-220.

²⁵¹Village of Schaumburg Petition at 2; Metropolitan Dade County Petition at 3. See also NCTA Opposition at 5-7; Michigan Cities, et al. Opposition at 3-4.

revenues fee will reduce the amount of fees collected by local authorities. Metropolitan Dade County speculates that this "could lead to claims of discrimination from existing cable operators to be released from cable franchises to the extent that OVS operators have lesser fiscal burdens."²⁵² The National League of Cities, et al. and NATOA argue that the Commission's gross revenues fee fails to adequately compensate local governments for the use of public rights-of-way.²⁵³ In addition, the National League of Cities, et al. and Municipal Services, et al. assert that the Commission has not made it clear that local governments have a positive authority to charge and receive the fee.²⁵⁴ Finally, NATOA requests that we clarify that advertising revenues received by an open video system operator or its affiliate should be included in the fee calculation.²⁵⁵

117. By contrast, telephone companies generally argue that the gross revenues fee should be applied to a narrower revenue base than the base specified in the *Second Report and Order*. In their petitions, the Telephone Joint Petitioners and NYNEX argue that, on its face, Section 653(c)(2)(B) applies only to the gross revenues of the open video system operator and not the operator's affiliate.²⁵⁶ These petitioners differ, however, regarding which operator revenues should be included in the fee calculation. The Telephone Joint Petitioners argue that the fee should be based only on the open video system operator's revenues from subscribers, and should exclude carriage revenues from unaffiliated video programming providers.²⁵⁷ NYNEX, on the other hand, argues that the fee should be based only on the operator's carriage revenues from affiliated and unaffiliated programming providers, and should exclude all subscriber revenues.²⁵⁸ Finally, NYNEX and U S West are concerned that collecting a fee solely from the open video system operator and its affiliates will discriminate in favor of unaffiliated programming providers, which will not be burdened by a similar fee.²⁵⁹ U S West proposes that open video system operators be permitted to include a portion of the gross revenues fee on the bills of all subscribers to an open video system -- not just those receiving programming directly

²⁵²Village of Schaumburg Petition at 2; Metropolitan Dade County Petition at 3.

²⁵³National League of Cities, et al. Petition at 5; NATOA Opposition at 2-5.

²⁵⁴National League of Cities, et al. Petition at 8; Municipal Services, et al. Petition at 3.

²⁵⁵NATOA Opposition at n.4 (responding to statement in NYNEX's Petition at n.5 indicating that NYNEX appeared to believe that advertising revenues were excluded).

²⁵⁶Telephone Joint Petitioners Petition at 4-5; NYNEX Petition at 3-9 and Opposition at 17-18.

²⁵⁷Telephone Joint Petitioners Petition at 4-5.

²⁵⁸NYNEX Petition at 3-9.

²⁵⁹NYNEX Petition at 7-8; U S West Petition at 7-8. NYNEX adds that unless some mechanism is established to relieve the affiliated provider of this unique burden, that the resulting scheme could violate the affiliated provider's constitutional right to equal protection. NYNEX Petition at n.11.