

programming provider clearly constitutes such an MVPD.

172. Third, we reject NCTA's argument that intra-system competition would be harmed by applying the program access rules to cable-affiliated video programming providers on an open video system. As we stated in the *Second Report and Order*, our concern is the same as in the cable context -- that a cable operator would use its control over programming to keep that programming from other competing MVPDs. Specifically, as we stated in the *Second Report and Order*, we are concerned that exclusive arrangements among cable-affiliated open video system programming providers and cable-affiliated satellite programmers may serve to impede development of open video systems as a viable competitor to cable to the extent that popular programming services are denied to open video system operators or unaffiliated open video system programming providers that seek to package such programming for distribution to subscribers.

173. We reiterate that the prohibition, absent a Commission public interest finding, on exclusive contracts applies only to contracts between cable-affiliated satellite programmers and cable-affiliated open video system programming providers and contracts between satellite programmers affiliated with an open video system operator and open video system programming providers affiliated with an open video system operator.⁴¹⁷ We note that, consistent with the *DBS Order*, a vertically integrated satellite programmer is not generally restricted from entering into an exclusive contract with an MVPD that is not affiliated with a cable operator, although such a contract is subject to challenge under Section 628(b) of the Communications Act and Section 76.1001 of the Commission's rules.⁴¹⁸

174. Finally, we disagree with NCTA's contention that by applying the program access rules to open video system video programming providers, the Commission has deemed retailing directly to customers to be patently unreasonable or anticompetitive. The open video system rules do not prohibit any open video system video programming provider from selling directly to customers. Rather, the open video system rules address dealings between satellite programmers (in particular, those affiliated with cable operators and open video system operators) and open video system programming providers.

⁴¹⁷Rainbow's comments misleadingly fail to make the distinction between cable-affiliated video programming providers and non-affiliated video programming providers.

⁴¹⁸See *Second Report and Order* at paras. 184-85. See also MPAA Opposition at 3 (under the principles of the *DBS Order*, the program access rules do not preclude an exclusive arrangement by a cable-affiliated satellite programming vendor and a non-cable MVPD (including an open video system MVPD)).

4. *Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity*

a. *Background*

175. In the *Second Report and Order*, the Commission prescribed regulations pursuant to Section 653(b)(1)(D) that "extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network non-duplication (47 C.F.R. 76.92 *et seq.*), and syndicated exclusivity (47 C.F.R. 76.151 *et seq.*).⁴¹⁹ These regulations allow the holders of certain exclusive rights to prohibit cable systems from carrying various sports, network and syndicated programming within specified geographic zones.⁴²⁰

176. In the *Second Report and Order*, we generally found that our exclusivity and non-duplication rules should be applied to open video systems in the same manner as they apply to cable systems.⁴²¹ Specifically, the Commission found that open video system operators should be responsible for compliance with our exclusivity and non-duplication rules.⁴²² In order to account for the administrative differences between open video systems and cable systems, the Commission provided that all notices of exclusive or non-duplication rights must be received by the open video system operator. We further required that the open video system operator make all such notices immediately available to all appropriate video programming providers so that they have the opportunity to either delete or substitute signals where possible.⁴²³ The Commission recognized that some systems would be configured to allow individual programmers to substitute or delete the necessary signals. Therefore, we decided that an operator would not be subject to our sanctions when that operator provided proper notices to the necessary programming providers and took prompt steps to stop distribution of the infringing program once it was notified of a violation.⁴²⁴

177. The Joint Sports Petitioners request that the Commission reconsider its findings regarding sports exclusivity because the current rules give sports teams and leagues holding exclusive rights less protection than they receive in the cable context.⁴²⁵ The Joint Sports Petitioners argue that our rules improperly permit open video system operators to escape liability

⁴¹⁹*Second Report and Order* at paras. 199-204.

⁴²⁰47 C.F.R. §§ 76.67, 76.92-97 and 76.151, .153-.159, .163.

⁴²¹*Second Report and Order* at para. 201.

⁴²²*Id.* at para. 202.

⁴²³*Id.* at para. 204.

⁴²⁴*Id.*

⁴²⁵Joint Sports Petitioners Petition at 2.

if they notify the appropriate unaffiliated programming providers of the request for deletion and take steps to stop the distribution of infringing programs once they are notified of a violation.⁴²⁶ The Joint Sports Petitioners argue that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be re-couped once missed.⁴²⁷ The Joint Sports Petitioners suggest that the Commission require that the open video system operator always be responsible for compliance even after notifying programming providers and taking steps after a violation occurs.⁴²⁸ The Joint Sports Petitioners suggest that open video system operators be allowed to require indemnification as a condition of carriage, for any monetary sanctions it may receive.⁴²⁹

178. Further, the Joint Sports Petitioners ask the Commission to clarify that it is not necessary for a sports team or league to notify both the individual programming providers and the open video system operator.⁴³⁰ They also ask that the Commission make clear when such notifications will be deemed to have been made "immediately available" to a programmer and suggest that the Commission require open video system operators to transmit such notices to the necessary program providers on the same day that they are received.⁴³¹

179. In its opposition, MFS urges the Commission not to alter the open video system rules regarding sports exclusivity.⁴³² It argues that open video system operators will be unnecessarily burdened if they are required to do anything more than notify individual programming providers of any notifications they receive.⁴³³ For instance, the Joint Telephone Petitioners argue that operators should not be placed in the middle of such disputes because they risk liability from either the party claiming exclusive rights or the programmer depending on who's directions they follow.⁴³⁴

180. In its petition for reconsideration, U S West asks the Commission to provide guidance as to the necessary "prompt steps" that must be taken by an open video system operator

⁴²⁶*Id.* at 2-3.

⁴²⁷*Id.* at 3.

⁴²⁸*Id.*

⁴²⁹*Id.* at 3 n.4.

⁴³⁰*Id.* at 4.

⁴³¹*Id.*

⁴³²MFS Communications Opposition at 8.

⁴³³*Id.* at 8-9.

⁴³⁴Joint Telephone Petitioners Opposition at 12.

in order to avoid being subject to sanctions for any violation of our non-duplication and exclusivity rules.⁴³⁵ U S West suggests that the Commission avoid the complication of involving the operator by placing the compliance burden on the alleged violator, the video programming provider.⁴³⁶ Alternatively, U S West suggests that the Commission find that sanctions will not be imposed on open video system operators if proper notice has been given to the programming providers that have allegedly violated the rules.⁴³⁷ In its opposition, NYNEX argues that open video system operators cannot ensure compliance.⁴³⁸ It submits that the individual video programmers on an open video system should be responsible for blocking distribution of necessary signals or negotiating over the validity of any claims of exclusive or non-duplication rights.⁴³⁹

b. *Discussion*

181. Upon reconsideration, we grant the petition filed by the Joint Sports Petitioners regarding our current rule governing sports exclusivity. We find merit in their position that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be recouped once missed. We believe that our rule that extends the Commission's regulations concerning sports exclusivity to open video systems must be amended in order to preserve the same level of protection received by sports teams and leagues in the cable context.⁴⁴⁰ While we hold open video system operators responsible for compliance with our rules, we also recognize that they are forced by the structure of an open video system to rely, to a degree, on individual programming providers who may dispute a claim of exclusivity or may attempt to substitute a signal for the signal that is to be deleted.

182. In the *Second Report and Order*, we stated that the open video system operator would be responsible for compliance with these rules and would be liable if it failed to delete signals once it was made aware that a violation had occurred.⁴⁴¹ We amend our rule to provide that open video system operators will be subject to sanctions for any violation of our sports

⁴³⁵U S West Petition at 5.

⁴³⁶*Id.* See also Joint Telephone Petitioners Opposition at 11-12.

⁴³⁷U S West Petition at 5.

⁴³⁸NYNEX Opposition at 14.

⁴³⁹*Id.* at 14-15. See also Joint Telephone Petitioners Opposition at 11-12.

⁴⁴⁰We are also not persuaded by the arguments raised in the oppositions filed by MFS Communications and NYNEX. In the *Second Report and Order*, the Commission considered and rejected proposals similar to those made by NYNEX that we hold the individual programming providers on the system responsible for compliance with our sports exclusivity rules. *Second Report and Order* at paras. 202-203.

⁴⁴¹*Second Report and Order* at paras. 202-204.

exclusivity rules. Operators generally may effect the deletion of signals for which they receive deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. If a programmer challenges the validity of claimed exclusive or non-duplication rights, the open video system operator shall not delete the signal. However, we agree with the Joint Sports Petitioners that an open video system operator should be allowed to require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.⁴⁴²

183. Contrary to the further concerns mentioned by the Joint Sports Petitioners, our current rules do not require a sports team or league to provide notifications to individual video programming providers in addition to the open video system operator. The holder of exclusive or non-duplication rights is, of course, free to notify individual programming providers when it notifies the open video system operator as required by our rules. In addition, our rules require an open video system operator to make the notices it receives "immediately available" to the appropriate programming providers on its system.⁴⁴³ Given the different types of systems and different circumstances in which notice will be provided, we do not believe at this time that a specific time requirement is necessary or appropriate.

184. We also deny U S West's petition for reconsideration which suggests that the Commission hold individual programming providers responsible for compliance with our exclusivity and non-duplication rules, and asks the Commission to further define the "prompt steps" that must be taken by an operator in order to avoid liability after a violation of our rules has occurred.⁴⁴⁴ In the *Second Report and Order*, the Commission responded to the issues raised in U S West's petition.⁴⁴⁵ U S West does not present any further evidence to support the adoption of different rules. We also recognize that the procedures necessary to stop the distribution of infringing programs may vary from system to system. Therefore, we decline to state the specific steps that an open video system operator will be required to take in order to promptly stop the further distribution of infringing programs.

5. *Local Franchising Requirements*

a. *Background*

185. In the *Second Report and Order*, we found that Congress' open video system framework permits state and local authorities to impose conditions on an open video system

⁴⁴²Joint Sports Petitioners Petition at 3 n.4.

⁴⁴³See 47 C.F.R. §§ 76.1506(m)(2), 76.1508(c), 76.1509(c).

⁴⁴⁴U S West Petition at 5.

⁴⁴⁵*Second Report and Order* at paras. 202-204.

operator for use of the rights-of-way, so long as such conditions are applied equally to all users of the rights-of-way (i.e., are non-discriminatory and competitively neutral).⁴⁴⁶ We also found that, in light of Congress' stated intent, state and local governments cannot require any open video system operator to obtain a Title VI franchise from a state or local authority for use of public rights-of-way necessary to operate its open video system. We therefore concluded that a state or local government requirement that directs an open video system operator to obtain a Title VI franchise, or seeks to impose Title VI "franchise-like" requirements, directly conflicts with Section 653 of the Communications Act and is preempted.⁴⁴⁷ In addition, we disagreed in the *Second Report and Order* that this narrow preemption necessarily constitutes a "taking" under the Fifth Amendment, specifically finding that Congress has provided "just compensation" to local authorities for use of the public rights-of-way.⁴⁴⁸

186. Several parties representing state and local interests have requested reconsideration of the *Second Report and Order*. The National League of Cities, et al. state that, at times, the *Order's* language regarding preemption is too broad and the Commission should clarify that its intent was only to preempt local franchising authority under Title VI.⁴⁴⁹ In the absence of a specific directive from Congress, the National League of Cities, et al. argue that the Commission has no authority to preempt any non-Title VI local franchising requirement.⁴⁵⁰

187. The National League of Cities, et al. also reiterate its claim that any preemption of non-Title VI franchises would violate the Fifth Amendment.⁴⁵¹ In particular, the National League of Cities, et al. argue that the *Second Report and Order* grossly underestimates the compensation due to local franchising authorities, which in the cable context goes far beyond a monetary franchise fee.⁴⁵² Since the *Second Report and Order's* rules fall short of requiring that the open video system operator's compensation will match the cable operator's obligations (i.e., the market value of the public rights-of-way), the Commission has deprived the community of just compensation.⁴⁵³ Finally, the National League of Cities, et al. assert that open video systems

⁴⁴⁶*See Id.* at paras. 207-222.

⁴⁴⁷*Id.* at paras. 208-212.

⁴⁴⁸*Id.* at paras. 217-222.

⁴⁴⁹National League of Cities, et al. Petition at 2.

⁴⁵⁰*Id.* at 3.

⁴⁵¹*Id.* at 4-12.

⁴⁵²*Id.* at 5-8 (noting that local governments receive compensation from cable operators that include franchise fees, in-kind compensation such as PEG facilities, and other community benefits such as build-out requirements, system design parameters and customer service standards).

⁴⁵³*Id.* at 8-9.

will impose massive costs on local governments for the repair and maintenance of the rights-of-way, including costs attributable to street cuts, paving and repaving.⁴⁵⁴

188. In addition, the National League of Cities, et al. and the City of Indianapolis argue that the *Second Report and Order* mistakenly equates the 1996 Act's "non-discriminatory and competitively neutral" standard for local management of the public rights-of-way with "equal" treatment, which is a far more inflexible standard.⁴⁵⁵ The Village of Schaumburg, while it concurs with the Commission's statement that local authorities may ensure the public safety in the use of rights-of-way by "gas, telephone, electric, cable and similar companies," requests that the Commission clarify that "similar companies" includes open video system operators.⁴⁵⁶ The Village of Schaumburg also states that the *Second Report and Order* does not outline mechanisms for local governments to impose terms and conditions on the use of the rights-of-way, and requests the Commission to require open video system operators to enter into contractual agreements with local authorities regarding such use.⁴⁵⁷

189. Municipal Services, et al. contend that municipalities in a majority of states have existing franchises with their LECs, pursuant to state laws that require the telephone company to obtain local authorization prior to using the public rights-of-way. Municipal Services, et al. request the Commission to state that LECs using the public rights-of-way for open video service remain subject to pre-existing and otherwise valid telephone franchise requirements.⁴⁵⁸

190. In response, NYNEX argues that the arguments of the National League of Cities, et al. are based on a "fundamentally flawed misunderstanding."⁴⁵⁹ The source of local governments' cable franchising authority, according to NYNEX, is Part III of Title VI of the Communications Act, and Congress clearly stated in the 1996 Act that local governments did not have similar franchising authority over open video operators.⁴⁶⁰ NYNEX asserts that the National League of Cities, et al. compounds their error by reciting a litany of mechanisms by which local governments obtain in-kind compensation and services from cable operators in excess of the maximum permissible 5% franchise fee.⁴⁶¹ According to NYNEX, such attempts to evade the

⁴⁵⁴*Id.* at 9-12.

⁴⁵⁵*Id.* at 13; City of Indianapolis Petition at 1.

⁴⁵⁶Village of Schaumburg Petition at 1.

⁴⁵⁷*Id.* at 2.

⁴⁵⁸Municipal Services, et al. Petition at 2-6.

⁴⁵⁹NYNEX Opposition at 18.

⁴⁶⁰*Id.* at 18-19.

⁴⁶¹*Id.* at 19.

5% limit through the franchise process was precisely the concern that led Congress to establish the 5% cap in the first place -- a concern that Congress may have had in mind when it exempted open video system operators from local franchise requirements and provided instead for a payment in lieu of franchise fee.⁴⁶²

191. U S West also disagrees with the National League of Cities, et al. that the Commission does not have the authority to preempt non-Title VI state and local franchise requirements.⁴⁶³ U S West argues that, contrary to the claim of the National League of Cities, et al., the key is not how such requirements are labeled, but their effect. If the local requirements are Title VI-like requirements that would frustrate Congress' intent in adopting the 1996 Act's open video provisions, the Commission has sufficient authority to preempt any such requirements; whereas if the local requirements are non-discriminatory and competitively neutral, the Commission would have no grounds for preemption.⁴⁶⁴

192. In their response, the Telephone Joint Petitioners object to the suggestion that local authorities should have the same degree of regulatory control over open video that Congress has permitted them to exercise over cable service.⁴⁶⁵ The Telephone Joint Petitioners argue that both open video and cable are activities in interstate commerce, over which Congress is supreme.⁴⁶⁶ According to the Telephone Joint Petitioners, the Commission therefore must follow Congress' direction limiting local regulation of open video to non-discriminatory and competitively neutral management of public rights-of-way, and prescribing the "compensation" that local authorities may receive for use of the rights-of-way.⁴⁶⁷

b. Discussion

193. We thoroughly explained the bases of our findings in the *Second Report and Order* on these issues.⁴⁶⁸ No parties on reconsideration raise any arguments that lead us to revisit our conclusions therein. We continue to believe that the general distinction we adopted reflects Congress' stated intent: state and local authorities may manage the public rights-of-way in a non-discriminatory and competitively neutral manner, but may not impose Title VI franchise or Title

⁴⁶²*Id.* at 20 (quoting *Memorandum Opinion and Order in the Matter of United Artists Cable of Baltimore*, FCC 96-188 (released April 26, 1996) at para. 17).

⁴⁶³U S West Opposition at 5-6.

⁴⁶⁴*Id.*

⁴⁶⁵Telephone Joint Petitioners Opposition at 6.

⁴⁶⁶*Id.*

⁴⁶⁷*Id.*

⁴⁶⁸See *Second Report and Order* at paras. 207-222.

VI "franchise-like" requirements on open video system operators.

194. We do, however, clarify our decision in several respects. First, we clarify that the preemption is limited to Title VI or Title VI "franchise-like" requirements, and does not extend to all types of potential franchises. If, for example, a state or local government characterizes permission to use the public rights-of-way as a "franchise," such franchises are not preempted so long as they are issued in a non-discriminatory and competitively neutral manner. We agree with U S West that the key in this regard is not how such requirements are labeled, but their effect. If the local requirements are Title VI-like requirements that would frustrate Congress' intent in adopting the 1996 Act's open video provisions, we continue to believe they are preempted.

195. Second, we clarify that "non-discriminatory and competitively neutral" treatment does not necessarily mean "equal" treatment. For instance, it could be a non-discriminatory and competitively neutral regulation for a state or local authority to impose higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities "equally." Third, we clarify that when the *Second Report and Order* stated that local authorities may ensure the public safety in the use of rights-of-way by "gas, telephone, electric, cable and similar companies," an open video system would qualify as a "similar company."

196. In addition, we continue to disagree with the National League of Cities, et al. that the narrow preemption in the *Second Report and Order* violates the Fifth Amendment. First, although the National League of Cities, et al. assert that the *Second Report and Order* "grossly underestimates" the compensation due to local authorities, they fail to address the Commission's finding that the "before and after" test -- in which the measure of compensation is the difference in the value of the property before a partial taking and the value of the property after the partial taking -- is the proper test to apply.⁴⁶⁹ Second, we do not agree with the National League of Cities, et al. that the local community has not received just compensation unless an open video system operator matches the franchise and other obligations imposed upon the incumbent cable operator. Such a requirement would obviously render meaningless Congress' exemption of open video from Section 621 franchising requirements, since an open video system operator would be forced to comply with each of the incumbent cable operator's franchise terms or be subject to a Fifth Amendment "takings" claim. Third, the *Second Report and Order* specifically permits the recovery of normal fees associated with the construction of an open video system: "[A] state or local government could impose normal fees associated with zoning and construction of an open video system, so long as such fees [are] applied in a non-discriminatory and competitively neutral manner."⁴⁷⁰ We clarify, however, that these "normal fees associated with zoning and construction" should not duplicate the compensation provided by the gross revenues fee. As we

⁴⁶⁹ See *Second Report and Order* at para. 221 (citing *United States v. 8.41 Acres of Land*, 680 F.2d 388, 391 (5th Cir. 1982)).

⁴⁷⁰ *Id.* at para. 209.

stated in the *Second Report and Order*, it is apparent that the gross revenue fee "in lieu of" a franchise fee was intended as compensation by open video system operators for use of the public rights-of-way.⁴⁷¹ The National League of Cities, et al. have not explained why the fees associated with the construction of open video systems would be any different than the fees associated with any other users of the rights-of-way, and why regulations applied in a non-discriminatory, competitively neutral manner on all users of the rights-of-way would be insufficient to deal with such matters.⁴⁷²

197. Finally, we find that a determination of whether LECs that use the rights-of-way for open video service remain subject to the same conditions contained in the pre-existing telephone franchise agreements can only be made on a case-by-case basis in light of the particular agreement between the parties. Thus, we make no general conclusions here. Similarly, we do not believe it necessary, as the Village of Schaumburg suggests, to require open video system operators to enter into contractual agreements with local authorities for use of the rights-of-way. Management of the rights-of-way is a traditional local government function. Local governments should be able to manage the rights-of-way in their usual fashion without the imposition of unique requirements for open video service.

G. Information Provided to Subscribers

1. Background

198. In the *Second Report and Order*, we stated that an open video system operator is not relieved of the non-discrimination provisions of Section 653(b)(1)(E)(i) if it offers a navigational device that works only with affiliated programming packages.⁴⁷³ Similarly, we found that an open video system operator should not be able to evade its non-discrimination obligations by having its affiliate nominally provide the navigational device, guide or menu.⁴⁷⁴

199. On reconsideration, the Joint Telephone Petitioners, Tele-TV, and NYNEX contend that Section 653(b)(1)(E) requires only that open video system operators, and not their affiliates, be prohibited from discriminating with respect to information provided for the selection of programming.⁴⁷⁵ According to the Joint Telephone Petitioners, applying this non-discrimination requirement to affiliated programmers effectively makes affiliates the servant of non-affiliates and

⁴⁷¹See *Second Report and Order* at paras. 219-222.

⁴⁷²See Joint Telephone Petitioners Opposition at 6 n.13.

⁴⁷³*Second Report and Order* at para. 231.

⁴⁷⁴*Id.*

⁴⁷⁵Joint Telephone Petitioners Petition at 2; Tele-TV Petition at 4; NYNEX Petition at 10-12.

subjects affiliates to substantial cost and competitive disadvantages.⁴⁷⁶ NYNEX states that the application of the requirement to affiliates should be limited to situations in which there is only one navigational device available on the system.⁴⁷⁷

200. The Joint Telephone Petitioners, Tele-TV, U S West and NYNEX also object to any implication that there will only be a single navigational device provided by the open video system operator or its affiliate.⁴⁷⁸ According to the Joint Telephone Petitioners, while consumers may only want a single navigational device, the device could be provided by any programming provider that has created its own navigational device.⁴⁷⁹ Tele-TV states that affiliated programmers will face a distinct disadvantage if they are unable to highlight their own programming while unaffiliated programmers are able to offer individualized navigational devices.⁴⁸⁰ The Joint Telephone Petitioners state that "the OVS operator may choose to allow programmers obtaining carriage on its system to provide such devices by making the necessary technical information available as part of the information provided in the open enrollment period."⁴⁸¹ Similarly, NYNEX states that it will provide all programming providers with the necessary technical specifications for development of independent program guides and navigational devices.⁴⁸²

201. The Joint Telephone Petitioners assert that if an OVS operator chooses to allow programming packagers to provide their own navigational devices, the operator should be permitted to offer a system-wide menu or guide (electronic or paper) to all subscribers to fulfill its obligations under Section 653(b)(1)(E)(i) and (v).⁴⁸³ The guide would provide a non-discriminatory listing of all programming providers on the system, along with instructions on how to subscribe to that provider's programming.⁴⁸⁴ If the menu or guide were electronic, it would be part of the mandatory package of PEG and must carry channels that the operator requires as

⁴⁷⁶Joint Telephone Petitioners Petition at 2

⁴⁷⁷NYNEX Petition at note 16.

⁴⁷⁸Joint Telephone Petitioners Petition at 2-3; NYNEX Petition at 12; Tele-TV Petition at 3-4; U S West Petition at 6-7.

⁴⁷⁹Joint Telephone Petitioners Petition at 3.

⁴⁸⁰Tele-TV Petition at 6.

⁴⁸¹Joint Telephone Petitioners Petition at 3.

⁴⁸²NYNEX Petition at 12.

⁴⁸³Joint Telephone Petitioners Petition at 3.

⁴⁸⁴*Id.*

a condition of carriage.⁴⁸⁵ Similarly, U S West states that the non-discrimination requirement should be satisfied if all programming providers on the system are displayed in a non-discriminatory manner in an introductory guide or menu and all programming is equally accessible at the initial navigational level, such as a cable-ready TV set.⁴⁸⁶ Sprint states that, rather than applying the requirement to affiliates, the Commission should instead prohibit operators from providing a navigational device that only works with its affiliate.⁴⁸⁷

202. In response, the Alliance for Community Media, et al. and MPAA agree with the Commission's finding that the non-discrimination provisions of Section 653(b)(1)(E) apply to an open video system's affiliate if the affiliate, and not the operator, provides a navigational device.⁴⁸⁸ According to the Alliance for Community Media, et al., applying the non-discrimination provisions of Section 653(b)(1)(E) only to an operator when its affiliate provides the navigational device renders the non-discrimination provisions meaningless.⁴⁸⁹ The Alliance for Community Media, et al., however, recommend that, because the precise configuration of navigational devices is currently unknown, the Commission should state that the rules in this area will be revisited by the Commission as systems develop.⁴⁹⁰

2. Discussion

203. On reconsideration, we agree that video programming providers, including those affiliated with the open video system operator, should be permitted to develop and use their own navigational devices. We agree with Tele-TV and NYNEX that individualized navigational devices could be a factor in subscribers' choice of programming providers, thereby fostering innovation and competition among providers. While for technical considerations we will not require open video system operators to permit programming providers to use their own navigational devices, we do not believe that the same limitation should be placed on a provider's right to develop and use their own individualized guides and menus. We believe that it would be an impermissible term or condition of carriage under Section 653(b)(1) for an open video system operator to restrict a video programming provider's ability to use part of its channel capacity to provide an individualized guide or menu to its subscribers.

204. In light of the above decision, we believe that several safeguards are necessary to

⁴⁸⁵*Id.*

⁴⁸⁶U S West Petition at 7.

⁴⁸⁷Sprint Opposition at 6.

⁴⁸⁸Alliance Opposition at 1-2; MPAA Opposition at 2.

⁴⁸⁹Alliance Opposition at 1-2.

⁴⁹⁰*Id.* at 2.

effectuate congressional intent and protect unaffiliated programming providers. First, we reaffirm our conclusion in the *Second Report and Order* that an open video system operator cannot evade its non-discrimination obligations under Section 653(b)(1)(E) simply by having its navigational devices, guides, or menus nominally provided by an affiliate.⁴⁹¹ By this statement, we meant that where an open video system operator provides no navigational device, guide or menu of its own, its affiliate's navigational device, guide or menu will be subject to the requirements of Section 653(b)(1)(E) even though such services are not formally provided by the open video system operator. We therefore will continue to apply the non-discrimination requirements of Section 653(b)(1)(E) to the open video system operator's affiliate where the affiliate provides a navigational device, guide or menu and the operator does not.

205. Second, if an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system. These menus or guides should also inform the viewer how to obtain additional information on each of the services listed. If an operator provides a system-wide menu or guide that meets these requirements, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E).

206. Third, an open video system operator may not require programming providers to develop and/or use their own navigational devices. Not all programming providers will have the desire or the resources to supply their own navigational devices. This may be especially true of smaller video programming providers seeking carriage on the open video system. Upon request, such programming providers must have access to the navigational device used by the open video system operator or its affiliate. Thus, for example, an open video system operator may not require a subscriber of its affiliated programming package to purchase a second set-top box in order to receive service from an unaffiliated programming provider that does not wish to use its own set-top box. An open video system operator need not physically integrate such programming providers into its affiliated programming package, or list such programming providers on its affiliate's guide or menu, so long as it meets the requirement set forth in the *Second Report and Order* that no programming service on its navigational device be more difficult to select than any other programming service.⁴⁹²

H. Dispute Resolution

1. Background

207. In the *Second Report and Order*, we adopted procedures for resolving disputes

⁴⁹¹*Second Report and Order* at para. 231.

⁴⁹²*Id.* at para. 230-31.

under Section 653 that are modeled after our rules governing program access disputes. Among other things, we decided that requiring open video system operators to disclose their carriage contracts with video programming providers was unnecessary and undesirable. In order to protect video programming providers from discrimination, we required open video system operators to make preliminary rate estimates available to potential video programming providers. In addition, we made carriage contracts subject to discovery if a complaint was filed.⁴⁹³ We determined that discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by Commission staff.⁴⁹⁴

208. On reconsideration, the National League of Cities, et al., argue that even where an unaffiliated programming provider has the financial resources to file a complaint challenging rates as discriminatory, it must, under the Commission's pleading rules, provide documentary evidence or an affidavit describing the differential of which it complains.⁴⁹⁵ Yet, under the open video system carriage pricing rules, open video system operators are not required to disclose their carriage arrangements. National League of Cities, et al., argue that these rules place the unaffiliated programming provider in a "Catch-22" situation: it cannot file a discrimination complaint without evidence of other parties' rates, but it can get no evidence of others' rates until it files a complaint, and then can get discovery only at the Commission's discretion.⁴⁹⁶

209. Similarly, the Alliance for Community Media, et al. argue that the Commission's decision not to require the disclosure of carriage contracts between the open video system operator and programming providers, whether affiliated or unaffiliated, will significantly undermine the Commission's ability to enforce the non-discriminatory access provisions of the 1996 Act.⁴⁹⁷ The Alliance for Community Media, et al. also argue that the Commission's decision not to require disclosure of open video system carriage contracts will result in economic inefficiency because some carriage rates will differ from the most efficient marginal price.⁴⁹⁸ The Alliance for Community Media, et al. urge that the Commission require the filing of such contracts with the Commission and require that any subsequent unaffiliated programming providers that wishes to obtain carriage be subject to the same price, terms and conditions as any contract already on file (with any pro rata adjustments and bulk discounts as may be necessary). At a minimum, the Alliance for Community Media, et al. argue, the Commission should require that open video system operators provide copies of contracts upon request to unaffiliated

⁴⁹³*Id.* at para. 132.

⁴⁹⁴*Id.* at paras. 237-238.

⁴⁹⁵*See* 47 C.F.R. § 76.1513(e)(1)(viii).

⁴⁹⁶National League of Cities, et al. Petition at 22-23 (*citing* 47 C.F.R. § 76.1513(i)).

⁴⁹⁷City of Indianapolis Petition at 3; Alliance for Community Media, et al. Petition at 13-15.

⁴⁹⁸Alliance for Community Media, et al. Petition at 13-14.

programmers if negotiations for carriage are unsuccessful. The Alliance for Community Media, et al. suggest that such pre-complaint disclosure will enable aggrieved parties to determine whether their allegations are justified before they approach the Commission with a complaint.⁴⁹⁹

2. Discussion

210. We disagree with the Alliance for Community Media, et al. that not mandating public disclosure and filing of carriage contracts will result in economic inefficiency. Economic efficiency is promoted by increased competition. In similar contexts, we have discussed the economic inefficiencies and disincentives that tariff filings have in competitive markets.⁵⁰⁰ Open video system operators generally will be new entrants into markets that, although characterized by a degree of competition, have relatively few sellers of channel capacity over which video programming may be offered to subscribers. In such markets, increased competition is promoted when sellers of capacity, such as open video system operators, can negotiate contracts privately with individual buyers (i.e., video programming providers), and rival sellers cannot immediately match the contracts' terms and conditions. Thus, our rules are designed to increase economic efficiency by promoting competition in video programming carriage markets.

211. In addition, we believe that the National League of Cities, et al. raise valid concerns that would-be complainants may lack sufficient information to file a complaint under our pleading rules. We believe it appropriate to give unaffiliated programming providers seeking carriage on open video systems some access to other programmer's carriage rates under certain circumstances. We first reiterate that the complaint process appropriately may be initiated when the unaffiliated programmer uses the preliminary rate estimates that open video system operators will be required to make available to potential video programming providers. To ensure that the open video system operator provides useful information to the would-be complainant, we clarify that the preliminary rate estimates must include, upon request, all information needed to calculate the average rate paid by the unaffiliated programmers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.⁵⁰¹ This information may be made available subject to a reasonable non-disclosure agreement. In addition, we reiterate that the operator's carriage contracts may be subject to discovery as part of the complaint procedure. We believe that this approach will

⁴⁹⁹*Id.* at 14-15.

⁵⁰⁰See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended* in CC Docket No. 96-61, Notice of Proposed Rulemaking (1996), at paras. 21-39 (proposing the elimination of non-dominant carrier tariff filing requirements for domestic services, and discussing costs of requiring non-dominant common carrier to file tariffs, including removing carriers' ability to make rapid, efficient responses to changes in demand and cost; impeding and removing incentives for competitive pricing discounting; and imposing costs on carriers attempting to make new offerings).

⁵⁰¹As discussed in Section III.D.1. above, the complainant also may challenge the weighting methodology used by the open video system operator as part of its case.

prevent the filing of pleadings whose sole purpose is to seek rate information, while avoiding unnecessary regulatory intervention in the contract negotiation process.

I. Joint Marketing, Bundling and Structural Separation

1. Joint Marketing

a. Background

212. In the *Second Report and Order*, we declined to impose joint marketing restrictions on open video system operators, noting that Congress chose not to adopt joint marketing restrictions in Section 653 even though it specifically applied joint marketing restrictions to other provisions of the 1996 Act, and restricted joint marketing in some provisions of the 1996 Act until the introduction of competition in the local telephone market.⁵⁰² We also noted, however, that any entity that offers any telecommunications service will be subject to both the customer proprietary network information ("CPNI") restrictions set forth in Section 222 of the Communications Act (and any regulations the Commission establishes pursuant to Section 222), and that any provider of cable or open video service will be subject to the cable privacy restrictions set forth in Section 631.⁵⁰³

213. On reconsideration, NCTA asserts that, until there is "workable competition for local telephone service," incumbent LECs stand in a unique position with regard to any other supplier of telecommunications or information services, since they are frequently the first company contacted by new residents in an area in order to start up essential telephone service.⁵⁰⁴ NCTA argues that the Commission should reconsider its rejection of NCTA's prior proposal to require incumbent LECs, in the case of inbound marketing, to advise consumers that other video offerings are available in their area.⁵⁰⁵ NCTA further argues that we should not infer from Congress' silence on joint marketing that it intended to foreclose this option, but that it left the issue to the Commission's discretion.⁵⁰⁶ In response, Sprint argues that NCTA's motion should be denied, because it has introduced no new evidence nor presented any persuasive argument that the Commission erred in its previous decision.⁵⁰⁷

⁵⁰²See *Second Report and Order* at paras. 246-47.

⁵⁰³*Id.* at para. 247.

⁵⁰⁴NCTA Petition at 21-22.

⁵⁰⁵*Id.*

⁵⁰⁶*Id.* at 22.

⁵⁰⁷Sprint Opposition at 2.

b. *Discussion*

214. We again decline to adopt NCTA's proposed restriction on joint marketing. While we agree that Congress' silence is not determinative, in light of Congress' silence on the issue, we believe that the burden is on those proposing joint marketing restrictions to demonstrate that such restrictions are necessary. NCTA requests that open video system operators be required to inform incoming callers that other video service providers exist in the area. To justify such a requirement, NCTA, at a minimum, would have to make some showing that consumers otherwise would likely be unaware of the existence of other video service options, such as cable service. NCTA made no such showing in its initial comments and has presented no new evidence here. In the absence of record evidence, the Commission declines to find that consumers would be unaware of the existence of other video providers such as cable, especially since cable currently accounts for 91% of multichannel video programming subscribers nationally, and passes 96% of all television households.⁵⁰⁸ NCTA's petition is denied.

2. *Bundling*

a. *Background*

215. The *Second Report and Order* declined to prohibit "bundling,"⁵⁰⁹ but imposed certain safeguards to protect consumers. First, the open video system operator, where it is the incumbent LEC, may not require that a subscriber purchase its video service in order to receive local exchange service. Second, while the open video system operator may offer subscribers a discount for purchasing the bundled package, the LEC must impute the unbundled tariff rate for the regulated service.⁵¹⁰

216. AT&T and NCTA request that the Commission reconsider its decision on bundling. AT&T argues that until incumbent LECs have met their obligations under Sections 251 and 252 of the 1996 Act, and effective competition for local exchange service has emerged, incumbent LECs will have the incentive and ability to leverage unfairly their monopoly status into the emerging video market.⁵¹¹ AT&T asserts that incumbent LECs can foreclose their potential competitors from the local market by "locking in" customers with bundled offers before those

⁵⁰⁸ See *Second Competition Report* in CS Docket No. 95-61, FCC 95-491 (released December 11, 1995) at paras. 5-7.

⁵⁰⁹ *Second Report and Order* at para. 248. By "bundling," we stated that we meant the offering of video service and local exchange service in a single package at a single price, or the situation in which an entity offers one service at a discount if the customer purchases another service. *Id.*

⁵¹⁰ *Id.*

⁵¹¹ AT&T Petition at 2-3. See also NCTA Opposition at 2-3.

new entrants have the ability to match those offers with competitive plans of their own.⁵¹² AT&T asserts that this concern is not addressed by the safeguards adopted by the Commission.⁵¹³ Similarly, NCTA asserts that its concern regarding cross-subsidization is not addressed by the Commission's safeguards.⁵¹⁴

217. In response, Sprint and NYNEX assert that AT&T has presented no new arguments or rationale for its position and that its petition should be denied.⁵¹⁵ USTA argues that the one-stop shopping attacked by AT&T in the open video context is of major convenience and benefit to consumers, and that the Commission's Part 64 cost allocation rules and the specific safeguards adopted in the *Second Report and Order* will adequately protect consumers.⁵¹⁶

b. Discussion

218. AT&T and NCTA's concerns were considered and addressed in the *Second Report and Order*. They adduce no new evidence here, nor have they explained why the safeguards adopted by the Commission are inadequate to protect consumers' interests. The petitions for reconsideration are denied.

219. On our own motion, we will correct a typographical error in our rule regarding the bundling of video and local exchange services. The current text provides, in part, that any local exchange carrier offering a bundled package must impute the unbundled tariff rate for the "unregulated service."⁵¹⁷ The rule will be corrected to be consistent with the text of the *Second Report and Order*, which states that a bundled package must impute the unbundled tariff rate for the "regulated service."⁵¹⁸

3. Structural Separation

a. Background

220. In the *Second Report and Order*, we declined to impose a separate affiliate requirement on LECs providing open video service, concluding that Congress did not intend to

⁵¹²AT&T Petition at 3.

⁵¹³*Id.* at 3.

⁵¹⁴NCTA Petition at 22.

⁵¹⁵Sprint Opposition at 4; NYNEX Opposition at 9-10.

⁵¹⁶USTA Opposition at 8-9.

⁵¹⁷47 C.F.R. § 76.1514.

⁵¹⁸*Second Report and Order* at para. 248.

impose such a requirement.⁵¹⁹ NCTA and the Alliance for Community Media, et al. request that the Commission reconsider that decision.⁵²⁰ NCTA argues the Commission ignored the record evidence supporting the need for structural separation to protect against cross-subsidization and discrimination, and improperly took Congress' silence on the issue as limiting its discretion to impose such a requirement.⁵²¹ Similarly, the Alliance for Community Media, et al. asserts that the absence of a specific separate affiliate requirement in Section 653 does not relieve the Commission of its general duty to ensure competition and non-discrimination in the open video context.⁵²² The Alliance for Community Media, et al. further state that requiring a separate affiliate "is probably the simplest and most effective way of preventing cross-subsidization and securing full and fair competition."⁵²³ Although the Alliance for Community Media, et al. believe such a requirement should become a permanent safeguard, they urge the Commission to at least require separate affiliates until an order is adopted in the cost allocation docket, the rules it approves are tested in the marketplace, and effective cost allocation rules are in place.⁵²⁴

221. In response, Sprint asserts that NCTA's petition advances no new evidence or persuasive arguments on this issue that would warrant reconsideration.⁵²⁵ USTA states that the Commission correctly concluded that a separate affiliate requirement for open video is without basis in the 1996 Act, and, if imposed, could "decisively affect" the Commission's balance between a LEC's incentives to provide open video service and its regulatory burdens.⁵²⁶ NYNEX asserts that the Telephone Joint Petitioners' argument that the Commission has the power to impose a separate subsidiary requirement misses the mark, and that the Commission should not impose such regulatory constraints and operating inefficiencies without a compelling reason.⁵²⁷

b. *Discussion*

222. We deny the motions of NCTA and the Alliance for Community Media, et al. to reconsider our decision in the *Second Report and Order*, and accordingly decline to impose a

⁵¹⁹*Id.* at para. 249.

⁵²⁰See NCTA Petition at 23; Alliance for Community Media, et al. Petition at 2-4.

⁵²¹NCTA Petition at 23.

⁵²²Alliance for Community Media, et al. Petition at 3.

⁵²³*Id.* at 4.

⁵²⁴*Id.*

⁵²⁵Sprint Opposition at 2.

⁵²⁶USTA Opposition at 9-10.

⁵²⁷NYNEX Opposition at 10-11.

separate affiliate requirement. First, while both NCTA and the Alliance for Community Media, et al. point out that the Commission need not be restricted by congressional silence, they both fail to address the point raised in the *Second Report and Order* that Congress expressly directed in Section 653 that Title II requirements not be applied to "the establishment and operation of an open video system."⁵²⁸ In addition, as we stated in the *Second Report and Order*, we believe that the Commission's Part 64 cost allocation rules and any amendment thereto will adequately protect regulated telephone ratepayers from a misallocation of costs that could lead to excessive telephone rates.⁵²⁹ Neither NCTA nor the Alliance for Community Media, et al. has advanced any new evidence or substantive arguments that a separate affiliate requirement is a necessary additional safeguard to protect against cross-subsidization. We therefore do not believe that it is necessary, as the Alliance for Community Media, et al. suggest, to impose a separate affiliate requirement until new cost allocation rules are adopted and tested in the marketplace.

IV. REGULATORY FLEXIBILITY ACT ANALYSIS

223. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Report and Order and Notice of Proposed Rulemaking* ("Notice") in CS Docket No. 96-46 and CC Docket No. 87-266 (terminated) (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems), FCC 96-99, 61 FR 10496 (3/14/96), released March 11, 1996. The Commission sought written public comments on the proposals in the *Notice* including comments on the IRFA, and addressed these responses in the *Second Report and Order* in CS Docket No. 96-46 (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems), FCC 96-249, 61 FR 28698 (6/5/96), released June 3, 1996. In addition, in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96-85 ("*Cable Reform Proceeding*"), 11 FCC Rcd 5937 (1996), we sought comment regarding the definition of "affiliate" in the context of the new statutory provisions governing open video systems. The *Third Report and Order and Second Order on Reconsideration* adopts or modifies regulations only to the extent necessary to respond to comments filed with respect to the definition of affiliate in the context of the statutory provisions governing open video systems in the *Cable Reform Proceeding* and to petitions for reconsideration of the *Second Report and Order*. No IRFA was attached to the *Second Report and Order* because the *Second Report and Order* only adopted final regulations and did not propose regulations. This Final Regulatory Flexibility Analysis (FRFA) therefore addresses the impact of regulations on small entities only as adopted or modified in this *Third Report and Order and Second Order on Reconsideration* and not as adopted or modified in earlier stages of this rulemaking proceeding. The FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA),

⁵²⁸*Second Report and Order* at para. 249. See Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3).

⁵²⁹*Id.* at para. 248.

Pub. L. No. 104-121, 110 Stat. 847.⁵³⁰

224. *Need for Action and Objectives of the Rule.* The rulemaking implements Section 302 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Section 302 directs the Commission to promulgate regulations governing the establishment and operation of open video systems.⁵³¹ The purposes of this action are to establish a structure for open video systems that provides competitive benefits, including market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of video programming choices and increased consumer choice.⁵³²

225. *Summary and Assessment of Issues Raised by Petitioners in Response to the IRFA.* With respect to the *Third Report and Order*, several parties filed comments in the *Cable Reform Proceeding* and also filed petitions for reconsideration of the *Second Report and Order* regarding the definition of the term "affiliate" in the context of the new statutory provisions for open video systems. These comments and the Commission's report are summarized in Section III, above. As mentioned, no IRFA was attached to the *Second Report and Order*. In petitions for reconsideration of the *Second Report and Order*, however, some parties raised issues that generally could involve small entities. For example, local cities urge the Commission to: (1) require that open video system operators obtain approval from local franchising authorities ("LFAs") regarding the manner in which public, educational and governmental ("PEG") access obligations will be fulfilled as a precondition of certification; (2) further ensure that local governments receive notification of an operator's intent to establish an open video system, by requiring an operator to serve a copy of FCC Form 1275 on all affected local municipalities; (3) expand the base of open video system revenues on which gross revenue fees due the cities would be applied; and (4) require an open video system operator to match, rather than share, the local cable operator's PEG access obligations. As discussed in the *Second Order on Reconsideration*, we deny reconsideration of the first and third contentions, and grant reconsideration of the second and fourth. Other parties, including potentially small business video programming providers, urge the Commission to: (1) require an open video system operator to place the Notice of Intent in local newspapers and in telephone bill inserts to enhance the opportunities for non-profit video programming providers to become aware of the establishment of an open video system; (2) modify its regulations to further guard against an open video system operator's rate discrimination among unaffiliated video programming providers; and (3) modify its regulations to enhance programming providers' ability to access information necessary to pursue a rate complaint against an open video system operator. As discussed in the *Second Order on Reconsideration*, we deny reconsideration on the first two grounds and grant reconsideration on the third. Local television stations urge the Commission to require that open video system operators tailor the distribution

⁵³⁰Subtitle II of the CWAAA is The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), codified at 5 U.S.C. § 610 *et seq.* (1996).

⁵³¹1996 Act § 302.

⁵³²Conference Report at 172, 177-78.

of must-carry signals to the parts of their system that are located within a station's local service area so that stations electing must-carry status do not have to reimburse the operators for extensive copyright fees that may result from carriage beyond their local service areas. We grant reconsideration on this point.

226. The Commission also notes the positive economic impact that the new and modified rules will have on many small businesses. For example, the new rules will allow small businesses that use video programming delivery services to select from a broader range of service providers, which could result in significant economic benefits because providers will compete for customers, which, in turn, should result in improved service at lower prices. In addition, small business video programming providers will face fewer entry hurdles, and thus will be able to develop their markets and compete more effectively.

227. *Description and Estimate of the Number of Small Entities Impacted.* The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under Section 3 of the Small Business Act.⁵³³ A small concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵³⁴ The rules we adopt today apply to municipalities, television stations, and business video programming providers. The rules also apply to entities that are likely to become open video system operators, including local exchange carriers and cable systems.

228. *Local Exchange Carriers.* The rules we adopt or modify in the *Second Order on Reconsideration* may affect local exchange carriers (LECs), as LECs are permitted under the Telecommunications Act of 1996 to establish open video systems. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.⁵³⁵ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent

⁵³³RFA, 5 U.S.C. § 601(3) (1980).

⁵³⁴Small Business Act, 15 U.S.C. § 632 (1996).

⁵³⁵Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) (*TRS Worksheet*).

LECs that may be affected by the decisions and rules adopted in this Order.

229. *Cable Systems*: Under certain conditions explained in the *Second Order on Reconsideration*, cable operators may become open video system operators, and therefore, may be affected by the rules adopted or modified in this Order. SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.⁵³⁶

230. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.⁵³⁷ Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.⁵³⁸ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

231. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁵³⁹ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.⁵⁴⁰ Based on available data, we find that

⁵³⁶1992 Census, *supra*, at Firm Size 1-123.

⁵³⁷47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

⁵³⁸Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁵³⁹47 U.S.C. § 543(m)(2).

⁵⁴⁰47 C.F.R. § 76.1403(b).

the number of cable operators serving 617,000 subscribers or less totals 1,450.⁵⁴¹ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

232. *Municipalities:* The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than fifty thousand."⁵⁴² There are 85,006 governmental entities in the United States.⁵⁴³ This number includes such entities as states, counties, cities, utility districts and school districts. We note that any official actions with respect to open video systems will typically be undertaken by LFAs, which primarily consist of counties, cities and towns. Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states, which typically are not LFAs. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000. Thus, approximately 37,500 "small governmental jurisdictions" may be affected by the rules adopted in this *Third Report and Order and Second Order on Reconsideration*.

233. *Television Stations:* The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5 million or less in annual receipts. 13 C.F.R. § 121.201.

234. *Estimates Based on Census and BIA Data.* According to the Census Bureau, in 1992, there were 1,155 out of 1,478 operating television stations reported revenues of less than \$10 million for 1992. This represents 78% of all television stations, including non-commercial stations. See *1992 Census of Transportation, Communications, and Utilities, Establishment and Firm Size*, May 1995, at 1-25. The Census Bureau does not separate the revenue data by commercial and non-commercial stations in this report. Neither does it allow us to determine the number of stations with a maximum of 10.5 million dollars in annual receipts. Census data also indicates that 81 percent of operating firms (that owned at least one television station) had revenues of less than 10 million dollars.⁵⁴⁴

⁵⁴¹Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

⁵⁴²5 U.S.C. § 601(5).

⁵⁴³United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

⁵⁴⁴Alternative data supplied by the U.S. Small Business Administration Office of Advocacy indicate that 65 percent of TV owners (627 of 967) have less than \$10 million in annual revenue and that 39 percent of TV stations (627 of 1,591) have less than \$10 million in annual revenue. These data were prepared by the U.S. Census bureau under contract to the Small Business Administration. These data show a lower percentage of small businesses than the data supplied directly to us by the Census Bureau. Therefore, for purposes of our worst case analysis, we will use the data supplied directly to us by the Census Bureau.

235. We have also performed a separate study based on the data contained in the BIA Publications, Inc. Master Access Television Analyzer Database, which lists a total of 1,141 full-power commercial television stations.⁵⁴⁵ It should be noted that, using the SBA definition of small business concern, the percentage figures derived from the BIA data base may be underinclusive because the data base does not list revenue estimates for noncommercial educational stations, and these are therefore excluded from our calculations based on the data base.⁵⁴⁶ The BIA data indicate that, based on 1995 revenue estimates, 440 full-power commercial television stations had an estimated revenue of 10.5 million dollars or less. That represents 54 percent of commercial television stations with revenue estimates listed in the BIA program. The data base does not list estimated revenues for 331 stations. Using a worst case scenario, if those 331 stations for which no revenue is listed are counted as small stations, there would be a total of 771 stations with an estimated revenue of 10.5 million dollars or less, representing approximately 68 percent of the 1,141 commercial television stations listed in the BIA data base.

236. Alternatively, if we look at owners of commercial television stations as listed in the BIA data base, there are a total of 488 owners. The data base lists estimated revenues for 60 percent of these owners, or 295. Of these 295 owners, 156 or 53 percent had annual revenues of less than 10.5 million. Using a worst case scenario, if the 193 owners for which revenue is not listed are assumed to be small, the total of small entities would constitute 72 percent of owners.

237. In summary, based on the foregoing worst case analysis using census data, we estimate that our rules will apply to as many as 1,150 commercial and non-commercial television stations (78 percent of all stations) that could be classified as small entities. Using a worst case analysis based on the data in the BIA data base, we estimate that as many as approximately 771 commercial television stations (about 68 percent of all commercial television stations) could be classified as small entities. As we noted above, these estimates are based on a definition that we tentatively believe greatly overstates the number of television broadcasters that are small businesses. Further, it should be noted that under the SBA's definitions, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. The estimates overstate the number of small entities since the revenue figures on which they are based do not include or aggregate such revenues from non-television affiliated companies.

⁵⁴⁵We have excluded Low Power Television (LPTV) stations or translator stations from the calculations because such stations could be affected by our open video system must-carry and retransmission consent regulations only under extremely limited circumstances. As of May 31, 1996, there were 1,880 LPTV stations and 4,885 television translators in the United States. FCC News Release, *Broadcast Station Totals as of May 31, 1996*, Mimeo No. 63298, released June 6, 1996.

⁵⁴⁶In the Joint Comments of the Association of America's Public Television Stations and the Public Broadcasting Service (p. 6), it is reported that there are 38 public television stations (out of 197 public television licensees) with annual operating budgets of less than \$2 million.