FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 96–46; FCC 96–249]

Open Video Systems

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Second Report and Order describes rules and policies concerning open video systems. The Second Report and Order amends our regulations to reflect the provisions regarding open video systems in the Telecommunications Act of 1996 (the ''1996 Act''). The Second Report and Order fulfills Congress' mandate in adopting the 1996 Act and will provide guidance to open video system operators, video programming providers, and consumers concerning open video systems.

DATES: *Effective date:* July 5, 1996, except for § 76.1502 which is not effective until approval by OMB of the new information requirements. The Commission will publish a document at a later date notifying the public as to the effective date of § 76.1502.

Written comments by the public on the proposed and/or modified information collections are due on or before July 5, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the Second Report and Order in theFederal Register.

ADDRESSES: A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, N.W., Washington, D.C., 20503 or via the Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION, CONTACT: Rick Chessen, Cable Services Bureau, (202) 418–7200. For additional information concerning the information collections contained herein, contact Dorothy Conway at 202–418–0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order in CS Docket No. 96–46, FCC No. 96–249, adopted May 31, 1996 and released June 3, 1996. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW, Washington, D.C. 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1919 M Street, NW, Washington, D.C. 20554.

The Second Report and Order contains proposed and/or modified information collections. It has been submitted to the OMB for review, as required by the Paperwork Reduction Act of 1995. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in the Second Report and Order. Comments should address: (a) whether the proposed collections of information are necessary to the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

*OMB Approval Number:*3060–0700.

*Title:*Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems.

*Type of Review:*Revision of a currently approved collection.

*Respondents:*640. (10 OVS operators, 250 video programming providers that may request additional Notice of Intent information, file rate complaints, or initiate dispute cases, 60 broadcast stations that may elect type of carriage or make network non-duplication notifications, 300 must-carry list requesters, 20 oppositions to OVS operator certifications.)

*Number of Responses:*3750. (10 Notices of Intent, 250 requests for additional Notice of Intent information, 250 responses to requests for additional Notice of Intent information, 50 rate complaints, 50 rate justifications, 60 carriage elections, 10 must-carry recordkeepers, 300 must-carry list requests, 300 provisions of must-carry lists, 1200 notifications of network non-duplication rights to OVS operators, 1200 OVS operator notifications of network non-duplication rights to programming providers, 10 certifications of compliance, 20 oppositions to certifications of compliance, 20 dispute case complainants, and 20 dispute case defendants.)

Estimated Burden to Respondents: Notice of Intent requirements: 10 prospective OVS operators are estimated to be in existence within the next year. Average number of entities that prospective OVS operators must notify with each Notice of Intent: 45. Average burden to each OVS operator to complete a Notice of Intent and to provide copies to all applicable entities: 8 hours apiece; therefore $10 \times 8 = 80$ hours. Estimated number of written requests for additional information that will be received subsequent to Notices of Intent: 25 per Notice of Intent $\times$ 10 Notices = 250. Average burden to prospective video programming providers to make each written request: 2 hours apiece; therefore $10 \times 25 \times 2 = 500$ hours. Average burden to each OVS operator to provide the additional information to all prospective video programming providers: 8 hours apiece; therefore $10 \times 8 = 80$ hours. Total burden for all respondents = 80 + 500 + 80 = 660 hours. Rate Justification requirements: Estimated number of rate complaints that video programming providers will file: 5 per OVS operator; therefore $10 \times 5 = 50$. Estimated number of rate justifications filed by OVS operators in response to rate complaints: 50. Burden to video programming providers for filing complaints: 1 hour per complaint; therefore $50 \times 1 = 50$ hours. Burden to OVS operators for filing rate justifications: 20 hours per justification; therefore $10 \times 5 \times 20 = 1{,}000$ hours. Total burden for all respondents: 50 + 1,000 = 1050 hours.

Must-Carry and Retransmission Consent requirements: Number of OVS operators: 10. Average number of broadcast stations in each OVS operator's area of carriage: 6. Average burden to broadcast stations for each election for must-carry or retransmission consent: 2 hours per election; therefore $10 \times 6 \times 2$ hours = 120 hours. Annual recordkeeping burden for OVS operators to maintain list of its broadcast stations carried in fulfillment of must-carry requirements: 4 hours per OVS operator; therefore $10 \times 4 = 40$ hours. Estimated annual number of written requests received by OVS operators: 30 per OVS operator; therefore $10 \times 30 = 300$. Burden for completing written requests: .25 hours per request; therefore $10 \times 30 \times .25 = 75$ hours. Burden to OVS operators to respond to requests: .25 hours per request; therefore $10 \times 30 \times .25 = 75$ hours. Total burden for all respondents: 120 + 40 + 75 + 75 = 310 hours.

Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity requirements: Estimated number of occurrences where television broadcast stations must notify OVS operators of exclusive or non-duplication rights

being exercised: 6 stations in each OVS operator's area of carriage × 20 annual notifications × 10 OVS operators = 1200. Burden to television stations to make notifications: .5 hours per notification; therefore 12400 × .5 = 600 hours. Burden for each OVS operator to make notifications available to all programming providers on their systems: 1 hour per notification × 1200 occurrences = 1200 hours. Total burden for all respondents: 600 + 1200 = 1800 hours.

Certification Process requirements: Annual burden to OVS operators to complete certifications: 1 hour apiece; therefore 10 × 1= 10 hours. Number of oppositions estimated to be filed with the Commission: 2 per certification; therefore 2 × 10 = 20. Average burden for completing oppositions: 4 hours per opposition; therefore 20 × 4 = 80 hours. Total burden for all respondents: 10 + 80 = 90 hours.

Dispute Resolution requirements: Estimated number of notices filed by complainant: 20. Estimated number of defendants' responses to notices filed: 20. Average burden for each notice and response to notice: 4 hours apiece; therefore 40 × 4 = 160 hours. We estimate that the 20 notices will result in the initiation of 10 dispute cases. The average burden for complainants and defendants for undergoing all aspects of the dispute case: 25 hours per case; therefore 20 (10 complainants + 10 defendants) × 25 = 500 hours. Total burden to all respondents: 160 + 500 = 660 hours.

Total Annual Burden to Respondents: 4570 hours. (660 + 1050 + 310 + 18600 + 90 + 660)

Estimated Cost to Respondents: Notices of Intent costs of stationery and postage at $2 apiece for (10 Notices of Intent × 45 entities) + 250 requests for additional information + 250 responses to requests for additional information = $1900.

Rate Justifications costs of stationery and postage at $2 apiece for 50 rate complaints + 50 rate justifications = $200.

Must-Carry and Retransmission Consent costs of stationery and postage at $2 apiece for 60 carriage elections + 300 requests for lists + 300 provisions of lists = $1320.

Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity costs of stationery and postage at $2 apiece for 1200 notifications to OVS operators + 1200 OVS operator notifications to programming providers = $4800.

Certification Process costs of stationery, diskettes, and postage at $5 for 10 certifications = $50. Costs of stationery and postage at $2 apiece for 20 opposition filings = $40. $50 + $40 = $90.

Dispute Resolutions costs of stationery and postage at $2 apiece for 20 notices + 20 responses to notices = $80. Costs of stationery and postage at $10 apiece for 10 complainants in dispute cases + 10 defendants in dispute cases = $200. $80 + $200 = $280.

Total Estimated Costs to Respondents: $8590. ($1900 + $200 + $1320 + $4800 + $90 + $280).

Needs and Uses: The information collections contained herein are necessary to implement the statutory provisions for Open Video Systems contained in the Telecommunications Act of 1996.

Second Report and Order—Open Video Systems

1. New Section 653 of the Communications Act establishes a new framework for entry into the video programming delivery marketplace—the ''open video system.'' *See* Sections 651 and 653 of the Communications Act of 1934, 47 U.S.C. § 151 (''Communications Act''). As designed by Congress, the open video framework provides an option, particularly to a local exchange carrier, for the distribution of video programming other than as a ''cable system'' governed by all of the provisions of Title VI of the Communications Act. If a telephone company agrees to comply with certain non-discrimination and other requirements it can be certified as an operator of an ''open video system'' and subjected to streamlined regulation under Title VI.

2. In establishing this structure, we believe that Congress intended to advance competition in two areas of the video marketplace. First, Congress sought to encourage telephone companies to enter the video programming distribution market and to deploy open video systems in order to ''introduce vigorous competition in entertainment and information markets'' by providing a competitive alternative to the incumbent cable operator. Telecommunications Act of 1996 Conference Report, S. Rep. 104–230 at 178 (February 1, 1996) (''Conference Report''). The incentive provided by Congress to encourage such entry was not only exemption from particular requirements of Title VI, but that streamlined Title VI obligations would apply in lieu of, and not in addition to, any requirements under Title II. Second, by requiring open video system operators to provide carriage opportunities for video programming providers on terms that are just and reasonable, and not unjustly or unreasonably discriminatory, Congress sought to foster competition by encouraging multiple programming sources on open video systems.

3. The open video system model can provide the competitive benefits that Congress hoped to achieve: market entry by new providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice. We believe that the best way to achieve Congress' goals is to give open video system operators the flexibility to enter and compete based on the demands of the marketplace. Our approach reflects the reduced regulatory burdens clearly envisioned by Congress for open video systems. Where necessary, the Commission has provided a level of guidance to parties in order to comply with Congress' particular directives under Section 653 and to give certainty to the parties.

4. On March 11, 1996, the Commission released a Report and Order and Notice of Proposed Rulemaking, seeking comment on how to implement the requirements of Section 653. *See Report and Order and Notice of Proposed Rulemaking* in CS Docket No. 96–46 and CC Docket No. 87–266 (terminated), released March 11, 1996, 61 FR 10496 (March 14, 1996) (the *''NPRM''*). We received 61comments and 79 replies in response to the NPRM. After consideration of the comments and reply comments, we hereby adopt the Second Report and Order herein.

A. Qualifications To Be an Open Video System Operator

5. We conclude that Section 653(a)(1) authorizes the Commission to allow non-local exchange (''non-LECs'') to operate open video systems, and to allow LECs to operate open video systems outside of their telephone service areas, when the public interest, convenience, and necessity are served. We further conclude that it would serve the public interest, convenience and necessity to permit: (1) non-LECs that are not cable operators; (2) LECs outside of their telephone service areas; and (3) cable operators outside of their cable franchise areas, to own or operate open video systems. With respect to cable operators within their cable franchise areas, we conclude that it would serve the public interest, convenience, and necessity to allow a cable operator to operate an open video system in its cable franchise area if it is subject to ''effective competition'' in its cable franchise area under Section 623(l)(1) of the Communications Act, 47 U.S.C.

§ 543(l)(1). This condition shall apply even if a cable operator also provides local exchange services within its cable franchise area. In certain circumstances, particularly where the entry of a facilities-based competitor into a market served by an incumbent cable operator would likely be infeasible, we believe that it would be consistent with the public interest to allow the incumbent cable operator to convert its cable system to an open video system even if it is not subject to ''effective competition'' in its cable franchise area under Section 623(l)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). We will consider petitions from cable operators seeking such a public interest finding. Our decision to allow cable operators to become open video system operators under these circumstances shall not be construed to affect the terms of any existing franchising agreements or other contractual agreements.

B. Certification Process

6. In light of the brief period (ten days) allowed for Commission review of certification filings, we conclude that Congress intended the certification process to be streamlined. We will require that certifications be verified by an officer or director of the applicant, stating that, to the best of his or her information and belief, the representations made therein are accurate. The certification must contain particular facts and representations about the system, including: (1) the applicant's name, address and telephone number; (2) a statement of ownership, including all affiliated entities; (3) if the applicant is a cable operator applying for certification within its cable franchise area, a statement that the applicant is qualified to operate an open video system under Section 76.1501 of the Commission's rules; (4) a statement that the applicant agrees to comply and to remain in compliance with each of the Commission's regulations under Section 653(b); (5) if the applicant is required under 47 CFR § 64.903(a) to file a cost allocation manual, a statement that the applicant will file changes to its manual at least 60 days prior to commencement of service; (6) a general description of the anticipated communities or areas to be served upon completion of the system; (7) the anticipated amount and type (i.e., analog or digital) of capacity (for switched digital systems, the anticipated number of available channel input ports); and (8) a statement that the applicant will comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers. Applicants will be required to file for certification using FCC Form 1275 (OMB approval pending).

7. Open video system operators may apply for certification at any point prior to the commencement of service, subject to conditions. If construction of new physical plant is required, the applicant must obtain Commission approval of its certification prior to the commencement of construction. If no new construction is required, Commission approval of certification may be obtained at any point prior to the commencement of service that would allow the applicant sufficient time to comply with the Commission's notification requirements herein.

8. We will consider comments or oppositions to a certification that are filed within five days of the Commission's receipt of the certification. Disapproval of a certification will not preclude the applicant from filing a revised certification or from refiling its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties. Any certification filing that the Commission does not disapprove within ten days will be deemed approved. If the representations contained in a certification filing prove to be materially false or materially inaccurate, the Commission retains the authority to revoke an open video system operator's certification or to impose such other penalties it deems appropriate, including forfeitures.

C. Carriage of Video Programming Providers

9. We affirm our tentative conclusion that the 1996 Act does not require that the open video system operator be prohibited from participating in the allocation of channel capacity. We believe that the statute and implementing rules will prevent an open video system operator from discriminating against unaffiliated video programming providers, notwithstanding the operator's involvement in the allocation process.

10. These rules and policies are designed to implement Sections 653(b)(1)(A) and 653(b)(1)(B) of the Communications Act. An open video system operator will file a ''Notice of Intent'' (''Notice'') with the Commission. The Commission will release the Notice to the public. The Notice will contain certain information that a video programming provider reasonably would need in order to assess whether to seek carriage on the system. The Notice must include: a heading clearly indicating that the document is a Notice of Intent; the open video system operator's name, address and telephone number; a description of the system's projected service area; a description of the system's projected channel capacity, in terms of analog, digital, and other type(s) of capacity, upon activation of the system; a description of the steps a prospective video programming provider must follow to seek carriage on the system, including the name, address and telephone number of a person to contact for further information; the starting and ending dates of the initial enrollment period; and a certification that the system operator has complied with all relevant notification requirements under our open video system regulations concerning must-carry and retransmission consent, including a list of all local commercial and non-commercial television stations served, and a certificate of service showing that the Notice of Intent has been served on all local franchising authorities entitled to establish requirements under Section 611 of the Communications Act.

11. In addition to the information in the Notice, the open video system operator will be required to provide within five business days of receiving a written request from a potential video programming provider certain information, including: the projected activation date of the system (if a system is to be activated in stages, an operator should describe each stage and the projected dates on which each stage will be activated; a preliminary rate estimate; the information a video programming provider will be required to provide to qualify as a commercially *bona fide* video programming provider; technical information that is reasonably necessary to prospective video providers to assess whether to seek capacity on the system; any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system; and the equipment available to facilitate the carriage of unaffiliated video programming and the electronic forms that will be accepted for processing and subsequent transmission through the system.

12. The open video system operator may establish terms and conditions of carriage for video programming providers that are just and reasonable, and are not unreasonably or unjustly discriminatory. For instance, an open video system operator may: (1) take reasonable steps to ensure that a prospective video programming provider's request for capacity is *bona fide;* (2) generally exclude an

incumbent, competing in-region cable operator from obtaining capacity on its system when such carriage would siginificantly impede facilities-based competition; (3) require video programming providers to obtain capacity in increments of no less than one full-time channel, however, the operator may not require video programming provider to obtain capacity only in amounts greater than one full-time channel; (4) preclude unaffiliated video programming providers from selecting the programming on more capacity than the operator itself and its affiliates; (5) negotiate co-packaging agreements with unaffiliated video programming providers; and (6) require assurances that a video programming provider will deliver video programming over the open video system within some reasonable time after the system is activated.

13. At the conclusion of the open enrollment or notice period, the open video system operator will determine whether demand for carriage, including its own demand, exceeds the system's channel capacity. For this purpose, analog and digital capacity must be treated separately. Specifically, if the system contains both analog and digital capacity, the open video system operator must separately assess whether analog demand exceeds analog capacity and whether digital demand exceeds digital capacity. Analog capacity shall be measured in 6 MHz channel increments, and digital capacity shall be measured in bandwidth.

14. Further, we anticipate that concerns regarding the methods for soliciting carriage demand and allocating system capacity will be alleviated with capacity significantly higher than carriage demand. Therefore, when an open video system operator can demonstrate that, due to technology, the system's capacity is plentiful as compared to demand, we will consider waiving the rules adopted in this Order.

15. If demand for carriage does not exceed system capacity, the open video system operator may fill all video programming providers' demands for capacity, including its own. If demand for carriage exceeds capacity, the open video system operator may select the programming services on no more than one-third of the system's activated channel capacity. Public, educational, and governmental (''PEG'') and must-carry channels carried pursuant to Sections 611, 614 and 615 of the Communications Act will count in the system's total activated channel capacity for purposes of calculating the operator's one-third limit, but will not count against the operator's one-third limit. Channels carrying ''shared'' programming will count against the operator's one-third limit on a pro-rata basis, e.g., if the operator shares the channel with one other video programming provider, it will count as half of a channel against the operator's limit. The remaining two-thirds of capacity, other than PEG and must-carry channels, must be allocated to unaffiliated video programming providers on an open, fair, non-discriminatory basis. The Commission does not require a specific allocation methodology.

16. After service commencement, an open video system operator will be required to allocate open capacity, if any is available, at least every three years beginning three years after the system is activated, through an open, fair, non-discriminatory process. Such open capacity will include capacity that becomes available during the year, e.g., due to a system upgrade or the expiration of carriage contracts, and any capacity on which the open video system operator is selecting the video programming beyond one-third of activated channel capacity. Changes in an operator's PEG and must-carry obligations which cause changes in the level of available open video system capacity must be accommodated in accordance with the rules adopted in this Order. An operator must keep a list of qualified video programming providers that have sought carriage or additional carriage during the previous three year period.

17. In addition, we find that channel positioning is an important part of allocating channel capacity to video programming providers, and therefore will require an open video system operator to assign channel positions in a non-discriminatory manner. We also find that, given Section 653(b)(1)(A)'s specific exemption of must-carry and PEG from its general non-discrimination requirements, an open video system operator must comply with the channel positioning requirements contained in those rules. Finally, we find that the statute leaves to an open video system operator's discretion whether to create shared channels for some or all of the duplicative programming on its system. However, we disagree with telephone companies who argue that the statutory reference to ''*any* video programming service'' means that an open video system operator may select—in advance of any actual duplication—which program services to place on shared channels. We also note that certain cable operators and programmers argue that the placement of a program service on a shared channel must be conditioned on the approval of the program service. We take this to mean simply that each video programming provider using the shared channel has reached its own agreement with the programming service. We also find that the statutory provision requiring subscribers have ''ready and immediate'' access to programming carried on shared channels means that channel sharing must be transparent to subscribers.

18. An open video system operator may not discriminate among video programming providers with respect to technology or technical information necessary to access the system.

D. Rates, Terms, and Conditions of Service

19. We will accord a strong presumption that carriage rates are just and reasonable for open video system operators 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 capacity or that occupied by the open video system operator and its affiliates, and where any rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator.

20. We adopt our tentative conclusion that some level of rate differentiation is permissible, provided that the bases for the differences are not unjust or unreasonable. We therefore agree with those commenters that argue that open video system operators should be given flexibility to offer different carriage rates.

21. We conclude that it is unnecessary and undesirable to require open video system operators to disclose publicly its carriage contracts. In general, we agree with those telephone companies that argue that making carriage contracts public would stifle competition by forcing them to divulge sensitive information. In order to protect video programming providers from discriminatory conduct, we will require all open video system operators to make preliminary rate estimates available to potential video programming providers. If, however, a complaint is filed, regardless of which party bears the burden of proof, the open video system operator's contracts with video programming providers will be subject to discovery.

E. Applicability of Title VI Provisions

1. Public, Educational and Governmental Access Channels

22. The first issue we must address with respect to PEG use is how PEG access obligations should be established for open video systems, including the extent and amount of channel capacity and other resources that open video system operators should be required to devote to PEG use. We conclude that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority. These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.

23. We are unaware of any cable operator that charges PEG programmers for access to the PEG channels on its cable system. Therefore, because the PEG access obligations of open video system operators are to the extent possible to be no greater or lesser than those imposed on cable operators, we do not foresee open video system operators charging PEG programmers for PEG use. We recognize that certain costs will be associated with providing PEG channels. These costs may be recovered as an element of the carriage rate.

24. Although we believe that negotiation is the best way to establish the appropriate PEG access obligations for each open video system operator, we recognize that the parties may be unable to reach agreement. We therefore believe it is necessary to have a default mechanism for establishing PEG access obligations. If the open video system operator and the local franchising authority are unable to come to an agreement, we will require the open video system operator to satisfy the same PEG access obligations as the local cable operator. We believe this can be accomplished by connection to the cable operator's PEG access channel feeds and by sharing the costs directly related to supporting PEG access, including costs of PEG equipment and facilities, and equipment necessary to achieve the connection. We also determine that, under these circumstances, in order to comply with the statutory directive that to the extent possible the obligations be no greater or lesser than those imposed on cable operators, the open video system operator must provide the same amount of channel capacity for PEG access as the local cable operator is required to provide.

25. If an open video system operator builds an institutional network, the local franchising authority may require that educational and govermental access channels be designated on that network to the extent such channels are designated on the institutional network of the local cable operator.

26. In addition, absent an agreement to the contrary, the open video system operator will be subject to the same rules and procedures as those imposed on the local cable operator regarding the use of PEG channels for other programming when such channels are not being used for PEG.

27. We will require cable operators to permit open video system operators to connect with their PEG feeds. We will leave how this connection is accomplished to the discretion of the parties, allowing them to take into consideration the exact physical and technical circumstances of the cable and open video systsms involved. If the cable and open video system operators cannot agree on how this connection can best be accomplished, the local franchising authority may decide. In this context, the local franchising authority may require that the connection take place on government property or on public rights of way.

28. With regard to cost sharing, the costs of connection and maintaining PEG facilities and equipment shall be divided equitably between the cable operator and the open video system operator. This shall include captial contributions and any other costs or investments directly relating to or supporting PEG access and required by the cable operator's franchise agreement. Capital expenses incurred prior to the open video system operator's connection shall be subject to cost sharing on a pro rata basis to the extent such investments have not been fully amortized by the cable operator.

29. Where the open video system operator and the local franchising authority cannot negotiate an agreement regarding PEG access, and the open video system operator is instead satisfying its PEG access obligations by connection and cost sharing with the cable operator's PEG facilities, the open video system operator's PEG access obligations should change to the extent that the cable operator's PEG access obligations change with the franchise renewal. Accordingly, open video system operators should be prepared to adjust their systems to comply with new PEG access obligations as necessary. An open video system operator will not, however, be required to displace other programmers to accommodate PEG channels until channel capacity becomes available, whether it be due to increased channel capacity or decreased demand for channel capacity. Because PEG access channels are expressly exempt from Section 653(b)(1)(A)'s non-discrimination requirement, an open video system operator need not and should not wait until the next three-year reallocation to comply with new PEG access obligations, but should comply with such obligations whenever additional capacity is or becomes available.

30. Where there is no local cable operator and the open video system operator and the local franchising authority cannot agree on appropriate PEG access obligations, we believe that the open video system operator should make a reasonable amount of channel capacity available for PEG access, as well as provide reasonable support of PEG, services, facilities and equipment. First, the open video system operator's PEG access obligations shall depend on whether there used to be a cable franchise agreement in that franchise area. If there was, the open video system operator shall follow the PEG terms of the previously existing franchise agreement. Absent a previous cable franchise agreement, the open video system operator's PEG access obligations shall be determined by comparison to the franchise agreement(s) for the nearest operating cable system with a commitment to provide PEG access.

31. We believe that PEG access channels should be provided to all subscribers to the open video system. The provision of PEG channels to all open video system subscribers is important to ensure that the PEG access obligations imposed on open video system operators are ''no greater or lesser'' than those imposed on cable operators.

32. We also conclude that open video system operators should be subject to PEG access requirements for every franchise area with which its system overlaps. We believe that, despite open video system operators not being subject to franchise requirements, pursuant to Section 653(c)(1)(C), it is appropriate to require open video system operators to comply with these franchise by franchise requirements so that the obligations imposed on the open video system operator with respect to PEG access are ''no greater or lesser'' than those imposed on cable operators, as required by Section 653(c)(2)(A) of the Communications Act.

2. Must-Carry and Retransmission Consent

33. We find that at this time the public interest will best be served by application of the cable must-carry and

retransmission consent rules to open video systems, even though future system configurations may require modification of our regulations. If our regulations later become inadequate for open video system operators, we intend to address promptly the problem. For now, we are guided by Congress' directive that we impose obligations that are ''no greater or lesser'' than the obligations currently imposed on cable operators.

(1) Must-Carry

34. Pursuant to Section 614(b)(7) and 615(h), the operator of a cable system is required to ensure that signals carried in fulfillment of the must-carry requirements are provided to every subscriber of the system. Sections 614 and 615 also generally state the number of must-carry stations that a cable operator is required to provide. We believe that in order to apply obligations that are no greater or lesser than those imposed on cable operators, we must also apply these requirements to open video system operators. Consequently, we find that the operator of an open video system must ensure that every subscriber on the open video system receives all appropriate must-carry channels carried in accordance with our rules. An open video system operator will be required to fulfill this obligation regardless of whether or not individual subscribers on its system subscribe to the open video system operator's programming package. We do not find it necessary to prescribe a specific method to be used by an open video system operator to comply with these requirements, such as a requirement that an open video system operator must use a basic tier. We recognize that certain costs will be associated with providing must-carry channels. These costs may be recovered as an element of the carriage rate.

35. As a related matter, we leave the decision of how to offer any necessary customer premises equipment to the open video system operator, including whether the open video system operator will offer it directly or require video programming providers to provide the equipment. In addition, an open video system operator will be required to implement the channel positioning requirements contained in the must-carry rules in a manner as similar as possible to that of a cable operator, including, for example, identifying broadcast stations on the same channels as their over-the-air channel numbers, or on a channel mutually agreed upon by the station and the operator. Consistent with the statutory requirement of comparable treatment, open video systems that span multiple television markets will be subject to the same must-carry and retransmission consent rules as cable systems that span multiple markets.

(2) Retransmission Consent

36. We find that our existing retransmission consent rules should also be applied to the distribution of programming over open video systems. These rules generally prohibit multichannel video programming providers from retransmitting the signal of a commercial broadcasting station without the station's express authority. Our retransmission consent rules will apply to any video programming provider on an open video system that provides more than one channel of video programming. Given the inherent differences between cable systems and open video systems, we believe that the application of our retransmission consent rules in this fashion will impose obligations that are no greater or lesser than those imposed on cable operators. The open video system operator is charged with the responsibility for assuring that its system meets the requirements of our must-carry rules. We believe that it is also appropriate as a matter of administrative efficiency that open video system operators receive all must-carry/retransmission consent election statements that broadcast stations are required to send under our retransmission consent rules. However, open video system operators will not be responsible for making retransmission consent arrangements for all programming carried on the system. Once retransmission consent has been elected, broadcast stations will have to negotiate agreements with individual video programming providers on the open video system. Television broadcast stations are not required to make the same elections for open video systems and cable systems in the same geographic area.

3. Program Access

37. We believe that four general issues arise in the context of applying the program access rules to open video systems. The first concerns the extent to which the program access regime restricts the activities of open video system operators. The second pertains to how the program access regime restricts the conduct of open video system video programming providers. The third issue concerns the extent to which the benefits of the program access statute and rules apply to open video system video programming providers. The fourth issue raised by commenters involves certain expansions of our program access rules.

38. Section 653(c)(1)(A) applies the program access provisions to open video system operators. Given this statutory language, we conclude that the program access restrictions shall apply to the conduct of open video system operators in the same manner as they are currently applied to cable operators and common carriers or their affiliates that provide video programming directly to subscribers. Specifically, the conduct of an open video system operator shall be subject to Section 628(b), which prohibits unfair methods of competition and unfair or deceptive acts or practices. In addition, the program access provisions which preclude certain specific conduct, including undue or improper influence, and discrimination in prices, terms, or conditions, shall apply to open video system operators as well. Similarly, the limitations on exclusive contracts contained in Sections 628(c)(2) (C) and (D) shall apply to open video system operators so that open video system operators will generally be restricted from entering into exclusive contracts with satellite programmers in which an open video system operator has an attributable interest, but not in which a cable operator has an attributable interest. Thus, any practice, understanding, arrangement or activity, including exclusive contracts, between an open video system operator and a satellite programmer vertically integrated with an open video system operator that prevents an MVPD from obtaining satellite programming in an area unserved by a cable operator as of the date of enactment of the 1992 Cable Act is *per se* unlawful. Exclusive contracts between an open video system operator and a satellite programmer vertically integrated with an open video system operator which relate to an area served by cable as of the date of enactment of the 1992 Cable Act are prohibited unless the Commission first determines that such a contract is in the public interest in accordance with the factors set forth in Section 628(c)(2)(D). Moreover, Section 628 and or program access rules shall apply to any affiliate established by an open video system operator to distribute programming on its system. We also believe it is reasonable to, and will therefore insert a note in Section 76.1000(h) of our rules indicating that satellite open video system programming is included within the definition of satellite cable programming.

39. The programming relationships that are likely to occur with respect to open video systems raise additional

program access issues that are not raised by the programming relationships on cable systems. In the cable context, an agreement to carry programming is generally between a programmer and a cable operator. Restricting the activities of cable operators and satellite programmers vertically integrated with cable operators therefore addresses Congress' concern over cable operator control over video programming. In the open video system context, however, there may be many programmers providing packages of programming directly to subscribers. An agreement to carry programming may be between a programmer and an open video system operator or between a programmer who produces programming and one who will distribute it directly to subscribers. Moreover, a video programmer may provide its own programming directly to subscribers by purchasing channel capacity on an open video system platform.

40. We believe that, in order to effectuate the purposes of the program access statute in the open video context, open video system programming providers should be subject to the program access restrictions to the extent described below. In the open video system context, a vertically integrated satellite programmer will not be *per se* precluded from selling its programming exclusively to one MVPD on an open video system, as long as that MVPD is not affiliated with the same type of operator as the vertically integrated satellite programmer. Similarly, cable operators, common carrriers or their affiliates providing video programming directly to subscribers and open video system operators are not generally restricted from entering into exclusive contracts with non-vertically integrated programmers. We do not intend to foreclose challenges to exclusive contracts between vertically integrated satellite programmers and MVPDs, including unaffiliated MVPDs, on open video systems under Section 628(b) or Section 628(c)(2)(B), which prohibits, with limited exceptions, discrimination among competing MVPDs by a vertically integrated satellite programmer.

41. We believe that the purposes of the program access rules and statute are served by extending the current program access rules to apply to exclusive arrangements between satellite programmers in which a cable operator has an attributable interest and open video system programming providers in which a cable operator has an attributable interest. We believe that Section 628(b) authorizes the Commission to adopt additional rules to accomplish the program access statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming. We will apply the program access rules under Section 628 to exclusive contracts between a satellite programmer in which a cable operator has an attributable interest (''cable-affiliated satellite programmer'') and an open video system video programming provider in which a cable operator has an attributable interest (''cable-affiliated open video system programming provider''). Specifically, such exclusive contracts will be prohibited unless the contract pertains to an area served by a cable operator as of the date of the enactment of the 1992 Cable Act and the Commission first determines that the exclusive arrangement is in the public interest under the factors listed in Section 628(c)(4). Two types of cable-affiliated satellite programmer/cable-affiliated open video system programming provider relationships will be affected by this restriction on exclusive contracts. First, this rule will preclude a cable-affiliated satellite programmer from entering into an exclusive contract to provide its own programming to a cable-affiliated open video system programming provider with which the programmer is affiliated. Second, the new rule will preclude, absent prior Commission approval, a cable-affiliated satellite programmer from entering into an exclusive contract to provide its programming to an open video system programming provider that is affiliated with another cable operator.

42. We believe that subjecting these types of exclusive contracts to prior Commission review is necessary to fulfill the objectives of the program access rules in the open video system context. The program access requirements have at their heart the objective of releasing programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors. Our primary concern is that exclusive arrangements among cable-affiliated open video system programmers 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 programmers that seek to package such programming for distribution to subscribers. In adopting this rule, we recognize, as did Congress in enacting the program access provisions, that exclusive contracts can often have pro-competitive effects under certain market conditions. However, strategic vertical restraints can also deter entry into markets for the distribution of multichannel video programming. Accordingly, the Commission's program access policies seek to balance the likely competitive harm to consumers created by a particular vertical arrangement against its likely efficiency benefits. In the context of open video systems, unless the Commission first determines that exclusive arrangements for satellite programming which favor cable-affiliated video programming providers are in the public interest under Section 628(c)(4), the potential for competitive harm from such contracts requires their prohibition.

43. As stated above, a satellite programmer may also provide its own programming directly to subscribers by purchasing channel capacity on an open video system platform. It is therefore possible for a programmer vertically integrated with a cable operator to purchase channel capacity, to provide its own programming directly to subscribers and to refuse to sell the programming it owns to another MVPD on the open video system. Such a refusal to sell would appear to be unreasonable because it discriminates against a class of distributors, i.e., open video system programming providers. Furthermore, this type of refusal to sell would result in the same situation which we have deemed contrary to the purposes of Section 628 when achieved through an exclusive contract, i.e., restricting competitive access to vertically integrated satellite cable programming to a vertically integrated entity. We believe this would consequently be actionable under Section 628(c).

44. Open video system operators and video programming providers that provide more than one channel of programming on an open video system are MVPDs. We will not create an exception to our rules that would exclude open video system operators or open video system programming providers from the benefits of our program access rules. Accordingly, we will add a note to the definition of MVPD contained in Section 76.1000(e) of our rules to indicate that video programming providers on open video systems that provide more than one channel of programming to subscribers are MVPDs.

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

45. We believe that we can directly apply our existing cable regulations regarding sports exclusivity, syndicated exclusivity and network non-duplication to open video systems. We do not believe that open video systems that span multiple geographic zones or communities should be treated any differently than similar cable systems. The record evidence indicates that large cable systems are able to comply with these provisions, and no commenter has provided any reason why open video systems should not be required to comply with the same regulations. In addition, we find that open video system operators should be responsible for compliance with these rules.

46. In all cases, we find that television stations must notify the open video system operator of the exclusive or non-duplication rights being exercised. When the open video system operator receives such a notification, it will be required to give the appropriate video programming providers an opportunity to either substitute signals or delete signals where possible. Therefore, we require that open video system operators make all notices of exclusive or non-duplication rights received immediately available to the appropriate video programming providers on their systems. We would not expect to impose sanctions on an OVS operator for violations of the exclusivity rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and took prompt steps to stop the distribution of the infringing program once it was notified of the violation.

5. Other Title VI Provisions

47. The Commission will, as proposed in the NPRM, apply the following provisions of the Communications Act and the Commission's rules thereunder to open video systems: Section 613 (c) through (h) regarding ownership restrictions; Section 616 regarding regulation of carriage agreements; Section 623(f) regarding negative option billing; Section 631 regarding subscriber privacy; and Section 634 regarding equal employment opportunity.

6. Preemption of Local Franchising Requirements

48. Section 653 exempts an open video system operator from the requirement of obtaining a local franchise under Section 621, although the operator still must pay a gross revenue fee ''in lieu of'' a franchise fee and must satisfy obligations under Section 611. However, we believe that Congress did not intend to infringe upon local communities' prerogative to manage their rights-of-way in order to protect the public health and safety. State and local authorities may impose conditions on an open video system 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). Conversely, state and local authorities may not impose specific conditions on use of the rights-of-way that are unrelated to their management function or that apply to an open video system operator differently than they apply to other rights-of-way users.

49. Any state or local requirement that seeks to impose Title VI ''franchise-like'' requirements on an open video system operator would directly conflict with Congress' express direction that open video system operators need not obtain local franchises. Examples of such ''franchise-like'' requirements include constructing institutional networks, donating money to local educational or charitable institutions, or specifying the amount or type of capacity that the system must possess. Such requirements are preempted because they ''stand[ ] as an obstacle to the accomplishment of the full purposes and objectives of Congress.'' We believe the most natural reading of Section 653, in light of Congress's stated intent, is that 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.

50. The state or local government may, however, impose non-discriminatory and competitively conditions on an open video system 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 competitvely neutral). For instance, a state or local government could impose normal fees associated with zoning and construction of an open video system, so long as such fees were applied in a non-discriminatory and competitively neutral manner. Conversely, state and local authorities may not impose specific conditions on the use of the rights-of-way that are unrelated to their management function or that apply to an open video system operator differently than they apply to other users of the rights-of-way.

51. Local authorities will retain their ability to address the following valid local concerns: (1) coordination of construction schedules, (2) establishment of standards and procedures for constructing lines across private property, (3) determination of insurance and indemnity requirements, (4) establishment of rules for local building codes, (5) repairing and resurfacing construction-damaged streets, (6) ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable, and similar companies, and (7) keeping track of the various systems using the rights-of-way to prevent interference among facilities.

52. We will apply the fee to all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. Gross revenues will not include revenues collected by unaffiliated video programming providers from their subscribers or advertisers, etc.—gross revenues will only include fees paid to the OVS operator. We will also require any gross revenues fee that the open video system operator or its affiliate collects from subscribers to be excluded from gross revenues.

53. Thus, we conclude that a state or local government requirement that directs an open video system operator to obtain a Title VI franchise, or impose Title VI ''franchise like'' requirements, to operate an open video system directly conflicts with Section 653 of the Communications Act and is preempted.

F. Information Provided to Subscribers

54. We believe, as stated in the Notice, that Section 653(b)(1)(E)(i) is intended to be a specific application of the non-discrimination requirement contained in Section 653(b)(1)(A). Specifically, we believe that this provision is meant to ensure that an open video system operator does not favor itself or its affiliates in its interaction with the customer at the point of actual program selection (i.e., when the subscriber is choosing a particular channel to watch). The type of ''material or information'' that therefore would fall within the scope of Section 653(b)(1)(E)(i) includes navigational devices, guides (electronic or paper) and menus used by the subscriber to actively select programming.

55. An open video system operator may not discriminate in favor of affiliated programming by, for example, ''burying'' unaffiliated programmers in difficult to access portions of electronic guides, navigational devices or menus, or by otherwise placing affiliated programming in more prominent

positions on the electronic guides, navigational devices or menus. To the extent that an open video system operator uses billing inserts to advertise its service generally, rather than providing inserts as a guide to program selection, we believe that such inserts fall outside the scope of Section 653(b)(1)(E)(i). We believe that a paper programming guide that is intended to be used at the point of actual channel selection would be governed by Section 653(b)(1)(E)(i).

56. Section 653(b)(1)(E)(i) prohibits the open video system operator from unreasonably discriminating in favor of its affiliated programming by means of discriminatory use of on-system advertising, if that advertising is contained in any channel selection guide, aid or menu. Accordingly, an open video system operator may not use its position as controller of a navigational device or menu to advertise its programming on the navigational device or menu, while at the same time disallowing unaffiliated programming providers comparable opportunities to advertise on the navigational device or menu.

57. Menus offered by the OVS operator may inform the viewer that other services (that the consumer has not ordered) are available on the open video system, and direct the subscriber how to access a second screen with more complete information on those other services. In addition, for programming to which the consumer has actually subscribed, no programming service on the open video system operator's navigational device should be more difficult to select than any other programming service.

58. An open video system operator is not relieved of the non-discrimination provisions of Section 653(b)(1)(E)(i) if the operator offers a navigational device that works only with affiliated video programming packages. In addition, the open video system operator may not evade its obligation to ensure that other non-affiliated programming providers are represented on a navigational device, guide or menu simply by having the service nominally provided by its affiliate.

59. We find that the ''suitable and unique'' identification requirement of Section 653(b)(1)(E)(ii) would be satisfied if an open video system operator's navigational device included a provider's name (broadcast station call letters and network affiliation, for example), but not its logo or branding device. However, if the open video system operator chooses to prohibit unaffiliated providers' logos or branding information on its navigational device, guide or menu, it would similarly have to prohibit its own logo or branding information under Section 653(b)(1)(E)(i).

G. Dispute Resolution

60. Given the short 10-day period in which the Commission must approve or disapprove a certification request, we believe that the dispute resolution process will play a key role in ensuring the success of the open video framework. In order for the Commission's review to be as efficient and thorough as possible, we adopt our suggestion in the Notice to model our open video system dispute resolution process after our rules governing program access disputes (except for must-carry complaints and petitions for special relief).

61. We will seek to dispose of as many cases as possible on the basis of a complaint, answer and reply. Parties should include all relevant evidence, including documentary evidence, in the complaint and answer to support their claims. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint. Any complaint filed pursuant to Section 653(a)(2) must be filed within one year of the date on which the open video system operator's actions allegedly violated Commission rules.

62. Finally, while we encourage parties to use ADR techniques to attempt to resolve their dispute without the Commission's direct involvement, we believe that a clause in a carriage agreement requiring ADR before a dispute could be brought to the Commission would not be a ''just and reasonable'' term or condition of carriage. Such a requirement could delay an aggrieved party's right to redress significantly beyond the 180-day period mandated by Congress. In addition, permitting operators to require as a condition of carriage that all disputes be resolved through ADR, may lead operators to mandate ADR practices that give them an unfair advantage over complainants.

H. Joint Marketing, Bundling and Structural Separation

63. Section 653 is silent on the issue of joint marketing. The Act does, however, expressly impose joint marketing restrictions on telephone companies in other contexts. Given that these Sections were all enacted as part of the 1996 Act, we find it a significant indication of Congress' intent that Sections 271(e), 272(g) and 274(c) contain express joint marketing restrictions while Section 653 does not. Section 272(g)(2) specifically sets a similar competitive condition on the lifting of the joint marketing restrictions between telephone exchange and interLATA services: a BOC's authorization under Section 271(d) to provide interLATA services in an in-region State. Again, no such condition was established in Section 653.

64. Since Congress chose not to adopt joint marketing restrictions in Section 653 even though (1) it specifically applied joint marketing restrictions to other provisions of the 1996 Act, and (2) it restricted joint marketing in some provisions of the 1996 Act until the introduction of competition in the local telephone market, we decline to adopt joint marketing restrictions here. We note, 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. Similarly, any provider of cable or open video service will be subject to the cable privacy restrictions set forth in Section 631.

b. Bundling

65. Section 653 also does not address the issue of ''bundling,'' which we define in this context to mean the offering of video service and local exchange service in a single package at a single price. We would also treat as bundling the situation in which an entity offers one service at a discount if the customer purchases another service. We disagree that the bundling of telephone and video services will be anti-competitive, and increase the risk of cross-subsidization of the competitive service by the monopoly service. We believe that the Commission's Part 64 cost allocation rules and any amendments thereto will protect adequately regulated telephone ratepayers from a misallocation of costs that could lead to excessive telephony rates. However, we will impose certain safeguards to protect consumers in these circumstances. 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.

c. Structural Separation

66. We disagree with those commenters that argue that a separate affiliate requirement nevertheless should be imposed pursuant to Section 272. We believe that Congress did not intend to impose a separate affiliate requirement on LECs providing open video service. First, Section 653 is silent on whether LECs and others must provide open video service through a separate affiliate. In fact, Congress expressly directed that Title II requirements not be applied to ''the establishment and operation of an open video system'' under Section 653. In addition, Section 272 exempts ''incidental interLATA services'' from the separate affiliate requirement, and includes certain video programming services within the definition of ''incidental interLATA services'' described in Section 271(g). Since we conclude that Congress did not intend to apply a separate affiliate requirement in this context, we need not address whether the provision of video programming would qualify as an ''information service'' under Section 272(a)(2)(C), or exercise our authority under Section 272(f)(3). Rather, we will adhere to Congress' intent and decline to impose a separate affiliate requirement here.

I. Advanced Telecommunications Incentives

67. In order to promote the development of advanced telecommunications to consumers, the Commission will consider proposals for actions to encourage open video system deployment of advanced telecommunications services as defined in Section 706 of the 1996 Act. This approach will be available on a case-by-case basis for open video system operators that can demonstrate a need for additional deregulatory measures to successfully deploy advanced telecommunications to all consumers.

Final Regulatory Flexibility Analysis

68. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601–12, the Commission's final analysis with respect to the *Second Report and Order* is as follows:

69. *Need and purpose of this action:* The Commission, in compliance with Section 302(a) of the Telecommunications Act of 1996 pertaining to open video systems, is required to adopt rules and procedures necessary to implement this section of the Telecommunications Act of 1996.

70. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis:* Collectively, the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, CA; the City of Chillicothe, OH; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, MO; the City of Santa Clara, CA; and the City of Tallahassee, FL filed reply comments in response to the Initial Regulatory Flexibility Analysis. These reply comments assert that a significant number of small governmental entities will be burdened by the proposals of the Commission and commenters. The Commission has considered these reply comments and has attempted to structure the open video system rules set forth in this *Second Report and Order* so as to minimize the administrative burden upon small governmental entities.

71. *Significant alternatives considered:* Petitioners representing cable interests, telephone interests, programming interests, consumer interests and local government interests submitted several alternatives aimed at minimizing administrative burdens. In this proceeding, the Commission has considered these alternatives and has attempted both to accommodate the concerns raised by the parties and to minimize the administrative burdens upon the parties in accordance with Congress' desire for the Commission to develop a streamlined regulatory model for open video service operators.

Paperwork Reduction Act of 1995 Analysis

72. The requirements adopted in the *Second Report and Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the ''1995 Act'') and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget (''OMB'') as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Second Report and Order* as required by the 1995 Act, Public Law No. 104–13. OMB comments are due on or before August 5, 1996. Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

73. Written comments by the public on the modified information collections are due on or before June 20, 1996, and reply comments are due on or before July 1, 1996. Written comments must be submitted by OMB on modified information collections on or before August 5, 1996. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov. For additional information concerning the information collections contained herein contact Dorothy Conway at 202–418–0217, or via the Internet at dconway@fcc.gov.

Ordering Clauses

74. Accordingly, *it is ordered* that, pursuant to Sections 4(i), 4(j), 303(r), and 653 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 573, the rules, requirements and policies discussed in this *Second Report and Order* ARE *adopted* and Sections 76.1000 and 76.1500 through 76.1515 of the Commission's rules, 47 CFR §§ 1000, 76.1000 and 76.1500 through 76.1515 ARE AMENDED as set forth below.

75. *It is further ordered* that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than July 5, 1996.

76. *It is further ordered* that the Secretary shall send a copy of this *Second Report and Order* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. §§ 601 through 699 (1981).

Federal Communications Commission.
LaVera F. Marshall,
Acting Secretary.

List of Subjects in 47 CFR Part 76

Cable television.

Appendix B

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76—CABLE TELEVISION SERVICE

1. The authority citation for Part 76 is revised to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1000 is amended by adding notes to paragraphs (e) and (h) to read as follows:

§ 76.1000 Definitions.

* * * * *

(e) * * *

Note to paragraph (e): A video programming provider that provides more than one channel of video programming on an open video system is a multichannel video programming distributor for purposes of this subpart O and Section 76.1507.

* * * * *

(h) * * *

Note to paragraph (h): Satellite programming which is primarily intended for the direct receipt by open video system operators for their retransmission to open video system subscribers shall be included within the definition of satellite cable programming.

* * * * *

3. Section 76.1004 is amended by designating the existing text as paragraph (a), and adding paragraph (b) to read as follows:

§ 76.1004 Applicability of program access rules to common carriers and affiliates.

* * * * *

(b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers in such a way that such common carrier or its affiliate shall be generally restricted from entering into an exclusive arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a common carrier or its affiliate has an attributable interest or a satellite broadcast programming vendor in which a common carrier or its affiliate has an attributable interest, unless the arrangement pertains to an area served by a cable system as of October 5, 1992, and the Commission determines in accordance with Section § 76.1002(c)(4) that such arrangment is in the public interest.

4. A new Subpart S is added to Part 76 to read as follows:

Subpart S—Open Video Systems

Sec.

76.1500 Definitions.
76.1501 Qualifications to be an open video system operator.
76.1502 Certification.
76.1503 Carriage of video programming providers on open video systems.
76.1504 Rates, terms and conditions for carriage on open video systems.
76.1505 Public, educational and governmental access.
76.1506 Carriage of television broadcast signals.
76.1507 Competitive access to satellite cable programming.
76.1508 Network non-duplication.
76.1509 Syndicated program exclusivity.
76.1510 Application of certain Title VI provisions.
76.1511 Fees.
76.1512 Programming information.
76.1513 Dispute resolution.
76.1514 Bundling of video and local exchange services.

Subpart S—Open Video Systems

§ 76.1500 Definitions.

(a) *Open video system.* A facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part.

(b) *Open video system operator* (''operator''). Any person or group of persons who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, or otherwise controls or is responsible for the management and operation of such an open video system.

(c) *Video programming provider.* Any person or group of persons who has the right under the copyright laws to select and contract for carriage of specific video programming on an open video system.

(d) *Activated channels.* This term shall have the same meaning as provided in the cable television rules, 47 CFR 76.5(nn).

(e) *Shared channel.* Any channel that carries video programming that is selected by more than one video programming provider and offered to subscribers.

(f) *Cable service.* This term shall have the same meaning as provided in the cable television rules, 47 CFR 76.5(ff).

(g) *Other terms.* Unless otherwise expressly stated, words not defined in this part shall be given their meaning as used in Title 47 of the United States Code, as amended, and, if not defined therein, their meaning as used in Part 47 of the Code of Federal Regulations.

§ 76.1501 Qualifications to be an open video system operator.

Any person may obtain a certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act, 47 U.S.C. 573(a)(1), except that an operator of a cable system, regardless of any other service that the cable operator may provide, may not obtain such a certification within its cable service area unless it is subject to ''effective competition,'' as defined in Section 623(l)(1) of the Communications Act, 47 U.S.C. 543(l)(1). A cable operator that is not subject to effective competition within its cable service area may file a petition with the Commission, seeking a finding that particular circumstances exist that make it consistent with the public interest, convenience, and necessity to allow the operator to convert its cable system to an open video system. Nothing herein shall be construed to affect the terms of any franchising agreement or other contractual agreement.

Note to § 76.1501: An example of a circumstance in which the public interest, convenience and necessity would be served by permitting a cable operator not subject to effective competition to become an open video system operator within its cable service area is where the entry of a facilities-based competitor into its cable service area would likely be infeasible.

§ 76.1502 Certification.

(a) An operator of an open video system must certify to the Commission that it will comply with the Commission's regulations in 47 CFR 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513. If construction of new physical plant is required, the Commission must approve such certification prior to the commencement of construction. If no new construction is required, the Commission must approve such certification prior to the commencement of service at such a point in time that would allow the applicant sufficient time to comply with the Commission's notification requirements.

(b) Certifications must be verified by an officer or director of the applicant, stating that, to the best of his or her information and belief, the

representations made therein are accurate.

(c) Certifications must be filed on FCC Form 1275 and must include:

(1) The applicant's name, address and telephone number;

(2) A statement of ownership, including all affiliated entities;

(3) If the applicant is a cable operator applying for certification in its cable franchise area, a statement that the applicant is qualified to operate an open video system under Section 76.1501.

(4) A statement that the applicant agrees to comply and to remain in compliance with each of the Commission's regulations in §§ 76.1503, 76.1504, 76.1506(m), 76.1508, 76.1509, and 76.1513;

(5) If the applicant is required under 47 CFR 64.903(a) of this chapter to file a cost allocation manual, a statement that the applicant will file changes to its manual at least 60 days before the commencement of service;

(6) A general description of the anticipated communities or areas to be served upon completion of the system;

(7) The anticipated amount and type (i.e., analog or digital) of capacity (for switched digital systems, the anticipated number of available channel input ports); and

(8) A statement that the applicant will comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers.

(d) Comments or oppositions to a certification must be filed within five days of the Commission's receipt of the certification and must be served on the party that filed the certification. If the Commission does not disapprove certification within ten days after receipt of an applicant's request, the certification will be deemed approved. If disapproved, the applicant may file a revised certification or refile its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties.

§ 76.1503 Carriage of video programming providers on open video systems.

(a) *Non-discrimination principle.* Except as otherwise permitted in applicable law or in this part, an operator of an open video system shall not discriminate among video programming providers with regard to carriage on its open video system, and its rates, terms and conditions for such carriage shall be just and reasonable and not unjustly or unreasonably discriminatory.

(b) *Demand for carriage.* An operator of an open video system shall solicit and determine the level of demand for carriage on the system among potential video programming providers in a non-discriminatory manner.

(1) *Notification.* An open video system operator shall file with the Secretary of the Federal Communications Commission a ''Notice of Intent'' to establish an open video system, which the Commission will release in a Public Notice. The Notice of Intent shall include the following information:

(i) A heading clearly indicating that the document is a Notice of Intent to establish an open video system;

(ii) The name, address and telephone number of the open video system operator;

(iii) A description of the system's projected service area;

(iv) A description of the system's projected channel capacity, in terms of analog, digital and other type(s) of capacity upon activation of the system;

(v) A description of the steps a potential video programming provider must follow to seek carriage on the open video system, including the name, address and telephone number of a person to contact for further information;

(vi) The starting and ending dates of the initial enrollment period for video programming providers;

(vii) The process for allocating the system's channel capacity, in the event that demand for carriage on the system exceeds the system's capacity; and

(viii) A certification that the operator has complied with all relevant notification requirements under the Commission's open video system regulations concerning must-carry and retransmission consent (§ 76.1506), including a list of all local commercial and non-commercial television stations served, and a certificate of service showing that the Notice of Intent has been served on all local cable franchising authorities entitled to establish requirements concerning the designation of channels for public, educational and governmental use.

(2) *Information.* An open video system operator shall provide the following information to a video programming provider within five business days of receiving a written request from the provider, unless otherwise included in the Notice of Intent:

(i) The projected activation date of the open video system. If a system is to be activated in stages, the operator should describe the respective stages and the projected dates on which each stage will be activated;

(ii) A preliminary carriage rate estimate;

(iii) The information a video programming provider will be required to provide to qualify as a video programming provider, e.g., creditworthiness;

(iv) Technical information that is reasonably necessary for potential video programming providers to assess whether to seek capacity on the open video system, including what type of customer premises equipment subscribers will need to receive service;

(v) Any transmission or reception equipment needed by a video programming provider to interface successfully with the open video system; and

(vi) The equipment available to facilitate the carriage of unaffiliated video programming and the electronic form(s) that will be accepted for processing and subsequent transmission through the system.

(3) *Qualifications of video programming providers.* An open video system operator may impose reasonable, non-discriminatory requirements to assure that a potential video programming provider is qualified to obtain capacity on the open video system.

(c) *One-third limit.* If carriage demand by video programming providers exceeds the activated channel capacity of the open video system, the operator of the open video system and its affiliated video programming providers may not select the video programming services for carriage on more than one-third of the activated channel capacity on such system.

(1) *Measuring capacity.* For purposes of this section:

(i) If an open video system carries both analog and digital signals, an open video system operator shall measure analog and digital activated channel capacity independently;

(ii) Channels that an open video system is required to carry pursuant to the Commission's regulations concerning public, educational and governmental channels and must-carry channels shall be included in ''activated channel capacity'' for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall not be included in the one-third of capacity on which the open video system operator is permitted to select programming where demand for carriage exceeds system capacity;

(iii) Channels that an open video system operator carries pursuant to the

Commission's regulations concerning retransmission consent shall be included in ''activated channel capacity'' for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent that the channels are carried as part of the programming service of the operator or its affiliate, subject to paragraph (c)(1)(iv); and

(iv) Any channel on which shared programming is carried shall be included in ''activated channel capacity'' for purposes of calculating the one-third of such capacity on which the open video system operator and its affiliates are allowed to select the video programming for carriage. Such channels shall be included in the one-third of capacity on which the open video system operator is permitted to select programming, where demand for carriage exceeds system capacity, to the extent the open video system operator or its affiliate is one of the video programming providers sharing such channel.

Note to paragraph (c)(1)(iv): For example, if the open video system operator and two unaffiliated video programming providers each carry a programming service that is placed on a shared channel, the shared channel shall count as 0.33 channels against the one-third amount of capacity allocable to the open video system operator, where demand for carriage exceeds system capacity.

(2) *Allocating capacity.* An operator of an open video system shall allocate activated channel capacity through a fair, open and non-discriminatory process; the process must be insulated from any bias of the open video system operator and verifiable.

(i) If an open video system carries both analog and digital signals, an open video system operator shall treat analog and digital capacity separately in allocating system capacity.

(ii) *Subsequent changes in capacity or demand.* An open video system operator must allocate open capacity, if any, at least once every three years, beginning three years from the date of service commencement. Open capacity shall be allocated in accordance with this section. Open capacity shall include all capacity that becomes available during the course of the three-year period, as well as capacity in excess of one-third of the system's activated channel capacity on which the operator of the open video system or its affiliate selects programming. An operator shall maintain a file of qualified video programming providers who have requested carriage or additional carriage since the previous allocation of capacity. Information regarding how a video programming provider should apply for carriage must be made available upon request.

Note 1 to paragraph (c)(2)(ii): An open video system operator will not be required to comply with the regulations contained in this section if there is no open capacity to be allocated at the end of the three year period.

Note 2 to paragraph (c)(2)(ii): An open video system operator shall be required to accommodate changes in obligations concerning public, educational or governmental channels or must-carry channels in accordance with Sections 611, 614 and 615 of the Communications Act and the regulations contained in this part.

(iii) *Channel sharing.* An open video system operator may carry on only one channel any video programming service that is offered by more than one video programming provider (including the operator's video programming affiliate), provided that subscribers have ready and immediate access to any such programming service. Nothing in this section shall be construed to impair the rights of programming services.

Note 1 to paragraph (c)(2)(iii): An open video system operator may implement channel sharing only after it becomes apparent that one or more video programming services will be offered by multiple video programming providers. An open video system operator may not select, in advance of any duplication among video programming providers, which programming services shall be placed on shared channels.

Note 2 to paragraph (c)(2)(iii): Each video programming provider offering a programming service that is carried on a shared channel must have the contractual permission of the video programming service to offer the service to subscribers. The placement of a programming service on a shared channel, however, is not subject to the approval of the video programming service or vendor.

Note 3 to paragraph (c)(2)(iii): Ready and immediate access in this context means that the channel sharing is ''transparent'' to subscribers.

(iv) *Open video system operator discretion.* Notwithstanding the foregoing, an operator of an open video system may:

(A) Require video programming providers to request and obtain system capacity in increments of no less than one full-time channel; however, an operator of an open video system may not require video programming providers to obtain capacity in increments of more than one full-time channel;

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage; and

(C) Refuse carriage on its open video system to a competing, in-region cable operator or its affiliates that offers cable service to subscribers located in the service area of the open video system, except where the allocation of open video system capacity to a competing cable operator is consistent with the public interest, convenience, and necessity.

Note to paragraph (c)(2)(iv)(C): The Commission will except situations where it is determined that facilities-based competition will not be significantly impeded. We will provide a specific exception in a situation in which: 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 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.

(3) Nothing in this paragraph shall be construed to limit the number of channels that the open video system operator and its affiliates, or another video programming provider, may offer to provide directly to subscribers. Co-packaging is permissible among video programming providers, but may not be a condition of carriage. Video programming providers may freely elect whether to enter into co-packaging arrangements.

Note to paragraph (c)(3): Any video programming provider on an open video system may co-package video programming that is selected by itself, an affiliated video programming provider and/or unaffiliated video programming providers on the system.

§ 76.1504 Rates, terms and conditions for carriage on open video systems.

(a) *Reasonable rate principle.* An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory.

(b) *Differences in rates.*

(1) An open video system operator may charge different rates to different classes of video programming providers, provided that the bases for such differences are not unjust or unreasonably discriminatory.

(2) An open video system operator shall not impose different rates, terms, or conditions based on the content of the programming to be offered by any unaffiliated video programming provider.

(c) *Just and reasonable rate presumption.* A strong presumption will apply that carriage rates are just and reasonable for open video system operators 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 any rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator.

(d) *Examination of rates.* Complaints regarding rates shall be limited to video programming providers that have sought carriage on the open video system. If a video programming provider files a complaint against an open video system operator meeting the above just and reasonable rate presumption, the burden of proof will rest with the complainant. If a complaint is filed against an open video system operator that does not meet the just and reasonable rate presumption, the open video system operator will bear the burden of proof to demonstrate, using the principles set forth below, that the carriage rates subject to the complaint are just and reasonable.

(e) *Determining just and reasonable rates subject to complaints.* Carriage rates subject to complaint shall be presumed just and reasonable if they are no greater than an imputed carriage rate based on the following. The imputed rate will reflect what the open video system operator, or its affiliate, ''pays'' for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

§ 76.1505 Public, educational and governmental access.

(a) An open video system operator shall be subject to public, educational and governmental access requirements for every cable franchise area with which its system overlaps.

(b) An open video system operator must ensure that all subscribers receive any public, educational and governmental access channels within the subscribers' franchise area.

(c) An open video system operator may negotiate with the local cable franchising authority of the jurisdiction(s) which the open video system serves to establish the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment. These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.

(d) If an open video system operator and a local franchising authority are unable to reach an agreement regarding the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment within the local franchising authority's jurisdiction:

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by connecting with the cable operator's public, educational and governmental access channel feeds and by sharing the costs directly related to supporting public, educational and governmental access, including costs of public, educational and governmental access services, facilities and equipment, and equipment necessary to achieve the connection. The open video system operator must provide the same amount of public, educational and governmental access as the local cable operator is required to carry.

(2) The local franchising authority shall impose the same rules and procedures on an open video system operator as it imposes on the local cable operator with regard to the open video system operator's use of channel capacity designated for public, educational and governmental access use when such capacity is not being used for such purposes.

(3) The local cable operator is required to permit the open video system operator to connect with its public, educational and governmental access channel feeds. The open video system operator and the cable operator may decide how to accomplish this connection, taking into consideration the exact physical and technical circumstances of the cable and open video systems involved. If the cable and open video system operator cannot agree on how to accomplish the connection, the local franchising authority may decide. The local franchising authority may require that the connection occur on government property or on public rights of way.

(4) The costs of connection and maintaining public, educational and governmental access channel capacity, services, facilities and equipment shall be divided equitably between the cable operator and the open video system operator. Shared costs shall include capital contributions and any other costs or investments directly relating to or supporting public, educational and governmental access and required by the cable operator's franchise agreement. Capital expenses incurred prior to the open video system operator's connection shall be subject to cost sharing on a pro-rata basis to the extent such investments have not been fully amortized by the cable operator.

(5) The local franchising authority may not impose public, educational and governmental access obligations on the open video system operator that would exceed those imposed on the local cable operator.

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and

equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the open video system operator shall be required to maintain the previously existing public, educational and governmental access terms of that franchise agreement. Absent a previous cable franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable system with a commitment to provide public, educational and governmental access.

Note to paragraph (d)(6): If a cable system converts to an open video system, the operator will be required to maintain the previously existing terms of its public, educational and governmental access obligations.

(7) The open video system operator must adjust its system(s) to comply with new public, educational and governmental access obligations imposed by a cable franchise renewal; provided, however, that an open video system operator will not be required to displace other programmers using its open video system to accommodate public, educational and governmental access channels. The open video system operator shall comply with such public, educational and governmental access obligations whenever additional capacity is or becomes available, whether it is due to increased channel capacity or decreased demand for channel capacity.

(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in § 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's connection and/or cost sharing obligations under this section.

(e) If an open video system operator maintains an institutional network, as defined in Section 611(f) of the Communications Act, the local franchising authority may require that educational and governmental access channels be designated on that institutional network to the extent such channels are designated on the institutional network of the local cable operator.

(f) An open video system operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this subsection, provided, however, that any open video system operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental facility for any programming which contains nudity, obscene material, indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, ''material soliciting or promoting unlawful conduct'' shall mean material that is otherwise proscribed by law. An open video system operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

§ 76.1506 Carriage of television broadcast signals.

(a) The provisions of Subpart D shall apply to open video systems in accordance with the provisions contained in this subpart.

(b) For the purposes of this Subpart S, television stations are significantly viewed when they are viewed in households that do not receive television signals from multichannel video programming distributors as follows:

(1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and

(2) For an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. See § 76.1506(c).

Note to paragraph (b): As used in this paragraph, ''share of viewing hours'' means the total hours that households that do not receive television signals from multichannel video programming distributors viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and ''net weekly circulation'' means the number of households that do not receive television signals from multichannel video programming distributors that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from multichannel video programming distributors in the survey area.

(c) *Significantly viewed signals; method to be followed for special showings.* Any provision of § 76.54 that refers to a ''cable television community'' or ''cable community or communities'' shall apply to an open video system community or communities. Any provision of § 76.54 that refers to ''non-cable television homes'' shall apply to households that do not receive television signals from multichannel video programming distributors. Any provision of § 76.54 that refers to a ''cable television system'' shall apply to an open video system.

(d) *Definitions applicable to the must-carry rules.* Section 76.55 shall apply to all open video systems in accordance with the provisions contained in this section. Any provision of § 76.55 that refers to a ''cable system'' shall apply to an open video system. Any provision of § 76.55 that refers to a ''cable operator'' shall apply to an open video system operator. Any provision of § 76.55 that refers to the ''principal headend'' of a cable system as defined in § 76.5(pp) shall apply to the equivalent of the principal headend of an open video system. Any provision of § 76.55 that refers to a ''franchise area'' shall apply to the service area of an open video system.

(e) *Signal carriage obligations.* Any provision of § 76.56 that refers to a ''cable television system'' or ''cable system'' shall apply to an open video system. Any provision of § 76.56 that refers to a ''cable operator'' shall apply to an open video system operator. Section 76.56(d)(2) shall apply to open video systems as follows: An open video system operator shall make available to every subscriber of the open video system all qualified local commercial television stations and all qualified non-commercial educational television stations carried in fulfillment of its carriage obligations under this section.

(f) *Channel positioning.* Open video system operators shall comply with the provisions of § 76.57 to the closest extent possible. Any provision of § 76.57 that refers to a ''cable operator'' shall apply to an open video system operator. Any provision of § 76.57 that refers to a ''cable system'' shall apply to an open video system, except the references to ''cable system'' in § 76.57(d) which shall apply to an open video system operator.

(g) *Notification.* Any provision of § 76.58 that refers to a ''cable operator'' shall apply to an open video system operator. Any provision of § 76.58 that refers to a ''cable system'' shall apply to an open video system. Any provision of § 76.58 that refers to a ''principal headend'' shall apply to the equivalent of the principal headend for an open video system.

(h) *Modification of television markets.* Any provision of § 76.59 that refers to a

''cable system'' shall apply to an open video system. Any provision of § 76.59 that refers to a ''cable operator'' shall apply to an open video system operator.

(i) *Compensation for carriage.* Any provision of § 76.60 that refers to a ''cable operator'' shall apply to an open video system operator. Any provision of § 76.60 that refers to a ''cable system'' shall apply to an open video system. Any provision of § 76.60 that refers to a ''principal headend'' shall apply to the equivalent of the principal headend for an open video system.

(j) *Disputes concerning carriage.* Any provision of § 76.61 that refers to a ''cable operator'' shall apply to an open video system operator. Any provision of § 76.61 that refers to a ''cable system'' shall apply to an open video system. Any provision of § 76.61 that refers to a ''principal headend'' shall apply to the equivalent of the principal headend for an open video system.

(k) *Manner of carriage.* Any provision of § 76.62 that refers to a ''cable operator'' shall apply to an open video system operator.

(l) *Retransmission consent.* Section 76.64 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provision of § 76.64 that refers to a ''cable system'' shall apply to an open video system. Any provision of § 76.64 that refers to a ''cable operator'' shall apply to an open video system operator.

(2) Must-carry/retransmission consent election notifications shall be sent to the open video system operator. An open video system operator shall make all must-carry/retransmission consent election notifications received available to the appropriate programming providers on its system.

(3) Television broadcast stations are not required to make the same election for open video systems and cable systems in the same geographic area.

(4) An open video system commencing new operations shall notify all local commercial and noncommercial broadcast stations as required under paragraph (l) of this section on or before the date on which it files with the Commission its Notice of Intent to establish an open video system.

(m) *Sports broadcast.* Section 76.67 shall apply to open video systems in accordance with the provisions contained in this paragraph.

(1) Any provisions of § 76.67 that refers to a ''community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

(2) Notification of programming to be deleted pursuant to this section shall be served on the open video system operator. The open video system operator shall make all notifications immediately available to the appropriate video programming providers on its open video system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(n) *Exemption from input selector switch rules.* Any provision of § 76.70 that refers to a ''cable system'' or ''cable systems'' shall apply to an open video system or open video systems.

(o) *Special relief and must-carry complaint procedures.* The procedures set forth in § 76.7 shall apply to special relief and must-carry complaints relating to open video systems, and not the procedures set forth in § 76.1514 (Dispute resolution). Any provision of § 76.7 that refers to a ''cable television system operator'' or ''cable operator'' shall apply to an open video system operator. Any provision of § 76.7 that refers to a ''cable television system'' shall apply to an open video system. Any provision of § 76.7 that refers to a ''system community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

§ 76.1507 Competitive access to satellite cable programming.

(a) Any provision that applies to a cable operator under §§ 76.1000 through 76.1003 shall also apply to an operator of an open video system and its affiliate which provides video programming on its open video system, except as limited by paragraph (a) (1)–(3) of this section. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall also apply to any satellite cable programming vendor in which an open video system operator has an attributable interest, except as limited by paragraph (a) (1)–(3) of this section.

(1) Section 76.1002(c)(1) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which an open video system operator has an attributable interest, or any satellite broadcasting vendor in which an open video system operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) Section 76.1002(c)(2) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows: No open video system operator or its affiliate that provides video programming on its open video system shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with § 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

(3) Section 76.1002(c)(3) (i) through (ii) shall only restrict the conduct of an open video system operator, its affiliate that provides video programming on its open video system and a satellite cable programming vendor in which an open video system operator has an attributable interest, as follows:

(i) *Unserved areas.* No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in

which an open video system operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(ii) *Served areas.* No open video system operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which an open video system operator has an attributable interest or a satellite broadcast programming vendor in which an open video system operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in § 76.1002(c)(3)(iii).

(b) No open video system programming provider in which a cable operator has an attributable interest shall:

(1) engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcasting vendor in which a cable operator has an attributable interest for distribution to person in areas not served by a cable operator as of October 5, 1992.

(2) enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor, unless the Commission determines in accordance with Section 76.1002(c)(4) that such a contract, practice, activity or arrangement is in the public interest.

§ 76.1508 Network non-duplication.

(a) Sections 76.92 through 76.97 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of § 76.92 that refers to a ''cable community unit'' or ''community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of § 76.92 that refers to a ''cable television community'' shall apply to an open video system community. Any provision of § 76.92 that refers to a ''cable television system's mandatory signal carriage obligations'' shall apply to an open video system's mandatory signal carriage obligations.

(c) Any provision of § 76.94 that refers to a ''cable system operator'' or ''cable television system operator'' shall apply to an open video system operator. Any provision of § 76.94 that refers to a ''cable system'' or ''cable television system'' shall apply to an open video system except § 76.94 (e) and (f) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding the exercise of network non-duplication rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of § 76.95 that refers to a ''cable system'' or a ''cable community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).

§ 76.1509 Syndicated program exclusivity.

(a) Sections 76.151 through 76.163 shall apply to open video systems in accordance with the provisions contained in this section.

(b) Any provision of § 76.151 that refers to a ''cable community unit'' shall apply to an open video system.

(c) Any provision of § 76.155 that refers to a ''cable system operator'' or ''cable television system operator'' shall apply to an open video system operator. Any provision of § 76.155 that refers to a ''cable system'' or ''cable television system'' shall apply to an open video system except § 76.155(c) which shall apply to an open video system operator. Open video system operators shall make all notifications and information regarding exercise of syndicated program exclusivity rights immediately available to all appropriate video programming provider on the system. An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and subsequently took prompt steps to stop the distribution of the infringing program once it was notified of a violation.

(d) Any provision of § 76.156 that refers to a ''cable community'' shall apply to an open video system community. Any provision of § 76.156 that refers to a ''cable community unit'' or ''community unit'' shall apply to an open video system or that portion of an open video system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas). Any provision of §§ 76.156 through 76.158, and 76.163 that refers to a ''cable system'' shall apply to an open video system.

(e) Any provision of § 76.159 that refers to ''cable television'' or a ''cable system'' shall apply to an open video system.

(f) Any provision of § 76.161 that refers to a ''community unit'' shall apply to an open video system or that portion of an open video system that is affected by this rule.

§ 76.1510 Application of certain Title VI provisions.

The following sections within Part 76 shall also apply to open video systems: §§ 76.71, 76.73, 76.75, 76.77 and 76.79 (Equal Employment Opportunity Requirements); §§ 76.503 and 76.504 (ownership restrictions); § 76.981 (negative option billing); and §§ 76,1300, 76.1301 and 76.1302 (regulation of carriage agreements); provided, however, that these sections shall apply to open video systems only to the extent that they do not conflict with this subpart S. Section 631 of the Communications Act (subscriber privacy) shall also apply to open video systems.

§ 76.1511 Fees.

An open video system operator 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 entity, in lieu of the franchise fees permitted under Section 622 of the Communications Act. Gross revenues under this paragraph means all gross revenues received by an open video system operator or its affiliates,

including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. Gross revenues does not include revenues collected by unaffiliated video programming providers from their subscribers. Any gross revenues fee that the open video system operator or its affiliate collects from subscribers shall be excluded from gross revenues. An operator of an open video system may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill.

§ 76.1512 Programming information.

(a) An open video system operator shall not unreasonably discriminate in favor of itself or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purpose of selecting programming on the open video system, or in the way such material or information is provided to subscribers.

Note to paragraph (a): ''Material or information'' as used in paragraph (a) of this section means material or information that a subscriber uses to actively select programming at the point of program selection.

(b) In accordance with paragraph (a) of this section:

(1) An open video system operator shall not discriminate in favor of itself or its affiliate on any navigational device, guide or menu;

(2) An open video system operator shall not omit television broadcast stations or other unaffiliated video programming services carried on the open video system from any navigational device, guide (electronic or paper) or menu. For programming services that an open video system subscriber has not ordered, menus provided by an open video system operator shall, at a minimum, inform the subscriber how to access an additional screen that lists the unordered programming services.

(c) An open video system operator shall ensure that video programming providers or copyright holders (or both) are able to suitably and uniquely identify their programming services to subscribers.

(d) An open video system operator shall transmit programming identification without change or alteration if such identification is transmitted as part of the programming signal.

§ 76.1513 Dispute resolution.

(a) *Complaints.* Any party aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this part or in Section 653 of the Communications Act (47 U.S.C. 573) may commence an adjudicatory proceeding at the Commission. The Commission shall resolve any such dispute within 180 days after the filing of a complaint.

(b) *Alternate dispute resolution.* An open video system operator may not provide in its carriage contracts with programming providers that any dispute must be submitted to arbitration, mediation, or any other alternative method for dispute resolution prior to submission of a complaint to the Commission.

(c) *Notice required prior to filing of complaint.* Any aggrieved party intending to file a complaint under this section must first notify the potential defendant open video system operator that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in this part or in Section 653 of the Communications Act. The notice must be in writing and must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(d) *General pleading requirements.* Complaint proceedings under this part are generally resolved on a written record consisting of a complaint, answer, and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standard:

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, should be pleaded fully and with specificity;

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Communications Act or of a Commission regulation or order, or a defense to such alleged violation;

(3) Facts must be supported by relevant documentation or affidavit;

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority;

(5) Opposing authorities must be distinguished;

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies; and

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(e) *Complaint.*

(1) A complaint filed under this part shall contain:

(i) The name of the complainant and each defendant;

(ii) The type of entity that describes complainant (e.g., individual, private association, partnership, or corporation), the address and telephone number of the complainant, and the address and telephone number of each defendant;

(iii) The name, address and telephone number of complainant's attorney, if complainant is represented by counsel;

(iv) Citation to the section of the Communications Act and/or the Commission regulation or order alleged to have been violated;

(v) A complete statement of facts, which, if proven true, would constitute such a violation;

(vi) Any evidence that supports the truth or accuracy of the alleged facts;

(vii) Evidence that the open video system operator's conduct at issue violated a section of the Communications Act and/or Commission regulation or order.

(viii) If discrimination in rates, terms, and conditions of carriage is alleged, documentary evidence shall be submitted such as a preliminary carriage rate estimate or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing video programming provider or, if no programming contract or preliminary carriage rate estimate is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(ix) If a programming contract or a preliminary carriage rate estimate is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein; and

(x) The specific relief sought.

(2) Every complaint alleging a violation of the open video system requirements shall be accompanied by a sworn affidavit signed by an authorized

officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted under Commission regulations and policies, or is a good faith argument for the extension, modification or reversal of such regulations or policies, and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative, shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before The Federal Communications Commission, Washington, D.C. 20554
In the Matter of Complainant
File No. (To be inserted by the Commission) v. Defendant.

[Insert Subject or Nature of Issue: Unjust or Unreasonable Discrimination in Rates, Terms, and Conditions; Discriminatory Denial of Carriage]

Open Video System Complaint
To: The Commission.

The complainant (here insert full name of complainant and type of entity of such complainant):

1. (Here state the complainant's post office address and telephone number).

2. (Here insert the name, address and telephone number of each defendant).

3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date) _____

(Name of complainant) _____

_____

(Name, address, and telephone number of attorney, if any)

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (c) of this section has been made.

(f) *Answer.*

(1) Any open video system operator upon which a complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification relied upon in support of the differential. Any documents or contracts submitted pursuant to this paragraph (f)(5) may be protected as proprietary pursuant to paragraph (j) of this section.

(g) *Reply.* Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (j) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked ''Not for Public Inspection.'' An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

(h) *Motions.* Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(i) *Discovery.*

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested. Such discovery requests may include answers to written interrogatories, document production or depositions. The Commission staff will then hold a status conference with the parties, pursuant to paragraph (l) of this section, to determine the scope of discovery. If the Commission staff determines that extensive discovery is required or that depositions are warranted, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (o) of this section.

(j) *Confidentiality of proprietary information.*

(1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under paragraph (c) of this section and in the course of adjudicating a complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly

involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The persons designated in paragraph (j)(2) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(4) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (j)(2) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(5) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(k) *Other required written submissions.*

(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (j) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter, and shall be clearly marked ''Not for Public Inspection.'' An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(l) *Status conference.*

(1) In any complaint proceeding under this part, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(i) Simplification or narrowing of the issues;

(ii) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(iii) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(iv) Settlement of the matters in controversy by agreement of the parties;

(v) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(vi) The need and schedule for filing briefs, and the date for any further conferences; and

(vii) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of the complaint proceeding including, *inter alia,* procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such rulings require a party to take affirmative action not subject to deadlines established by another provision of this part, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(m) *Specifications as to pleadings, briefs, and other documents; subscriptions.*

(1) All papers filed in a complaint proceeding under this part must be drawn in conformity with the requirements of Sections 1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of Sections 1.52 and 1.24 of this chapter shall also apply.

(n) *Copies; service.*

(1) The complainant shall file an original plus three copies of the complaint with the Commission.

However, if the complaint is addressed against multiple defendants, complainant shall provide three additional copies of the complaint for each additional defendant.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the complaint on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of § 1.47 of this chapter.

(5) The parties to any complaint proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(o) *Referral to administrative law judge.*

(1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any complaint proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Cable Services Bureau Chief, the Cable Services Bureau Chief shall not be deemed to be a party to a complaint proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(p) *Petitions for reconsideration.* Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with §§ 1.104 through 1.106 of this chapter.

(q) *Interlocutory review.*

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits:

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling:

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right; and/or

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(r) *Expedited review.*

(1) Any party to a complaint proceeding under this part aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with Section 1.115 of this chapter.

(2) Any party to a complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with § 1.276(a) and §§ 1.277 (a) through (c) of this chapter, except that unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(s) *Frivolous complaints.* It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this part. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(t) *Statute of limitations.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which the following acts or conduct occur which form the basis of the complaint:

(1) The open video system operator enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this part; or

(2) The open video system operator offers to carry programming for the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this part; or

(3) The complainant has notified an open video system operator that it intends to file a complaint with the Commission based on a request for such operator to carry the complainant's programming on its open video system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this part.

(u) *Remedies for violations.*

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the requiring carriage, awarding damages to any person denied carriage, or any combination of such sanctions. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) Additional sanctions. The remedies provided in paragraph (u)(1) of this section are in addition to and not in lieu of the sanctions available under Title VI or any other provision of the Communications Act.

§ 76.1514 Bundling of video and local exchange services.

An open video system operator may offer video and local exchange services for sale in a single package at a single price, *provided that:*

(a) the open video system operator, where it is the incumbent local exchange carrier, may not require that a subscriber purchase its video service in order to receive local exchange service; and

(b) Any local exchange carrier offering such a package must impute the unbundled tariff rate for the unregulated service.

[FR Doc. 96–14238 Filed 6–4–96; 8:45 am]

BILLING CODE 6712–01–P