List of Subjects in 47 CFR Part 64

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Accordingly, 47 CFR part 64 is corrected by making the following correcting amendments:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228, unless otherwise noted.

§ 64.1402 [Amended]

2. In § 64.1402(c), the phrase ''until that local exchange carrier's tariffs implementing expanded interconnection for switched transport have become effective'' is added to the end of the sentence.

Federal Communications Commission

William F. Caton,

Acting Secretary.

[FR Doc. 96–21227 Filed 8–20–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 76

[CS Docket No. 96–46; FCC 96–334]

Open Video Systems

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Third Report and Order and Second Order on Reconsideration adopts and modifies rules and policies concerning open video systems. The Third Report and Order amends our regulations to reflect the provisions regarding open video systems of the Telecommunications Act of 1996 (the ''1996 Act'') with respect to the definition of ''affiliate.'' The Second Order on Reconsideration amends or adopts regulations with respect to open video systems in response to petitions for reconsideration regarding the Second Report and Order in this proceeding. This item further 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:* The requirements and regulations established in this decision shall become effective upon approval by OMB of the new information requirements adopted herein, but no sooner than September 20, 1996. The Commission will publish a document at a later date notifying the public as to the effective date.

Comments: Written comments by the public on the proposed and/or modified information collections are due on or before September 20, 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 October 21, 1996.

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, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, NW., Washington, DC 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 Third Report and Order and Second Order on Reconsideration in CS Docket No. 96–46, FCC No. 96–334, adopted August 7, 1996 and released August 8, 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, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1919 M Street, NW., Washington, DC 20554.

The Second Order on Reconsideration 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 Order on Reconsideration. 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.

Form Number: FCC Form 1275.

Type of Review: Revision of a currently approved collection.

Respondents: 740. (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, 100 programming providers that may make notification of invalid rights claimed, 300 must-carry list requesters, 20 oppositions to OVS operator certifications.)

Number of Responses: 3754. (10 Notices of Intent, 14 certifications of compliance filings and refilings, 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, 100 programming provider notifications of invalid rights claimed, 1100 OVS operator notifications of network non-duplication rights to programming providers, 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 10×8=80 hours. Estimated number of written requests for additional information that will be received subsequent to Notices of Intent: 25 per Notice of Intent×10 Notices=250. Average burden to prospective video programming providers to make each written request: 2 hours apiece; therefore 10×25×2=500 hours. Average burden to each OVS operator to provide the additional information to all prospective video programming providers: 8 hours apiece; therefore 10×8=80 hours. Total burden for all respondents=80+500+80=660 hours. Form 1275 Certification Process

requirements: We estimate that 14 certification filings and refilings will result in 10 certified OVS operators. Annual burden to OVS operators to complete certifications and serve on applicable local communities and opposition filers: 2 hours apiece; therefore 14×2=28 hours. Number of oppositions estimated to be filed with the Commission: 2 per certification; therefore 2×14=28. Average burden for completing oppositions: 4 hours per opposition; therefore 28×4=112 hours. Total burden for all respondents: 28+112=140 hours.

Rate Justification requirements: Estimated number of rate complaints that video programming providers will file: 5 per OVS operator; therefore 10×5=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 50×1=50 hours. Burden to OVS operators for filing rate justifications: 20 hours per justification; therefore 10×5×20=1000 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 10×6×2 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 10×4=40 hours. Estimated annual number of written requests received by OVS operators: 30 per OVS operator; therefore 10×30=300. Burden for completing written requests: .25 hours per request; therefore 10×30×.25=75 hours. Burden to OVS operators to respond to requests: .25 hours per request; therefore 10×30×.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 notifications filed by television broadcast stations to 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 1200×.5=600 hours. Estimated number of notifications filed by programming providers to notify OVS operators of invalid exclusivity rights claimed: 100. Burden to programming providers to make notifications: .5 hours per notification; therefore 100×.5 hours=50 hours. Burden for OVS operator to make notifications to delete signals available to all programming providers on their systems: 1 hour per notification×1100 occurrences=1100 hours. Total burden for all respondents: 600+150+100=1750 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+140+1050+ 310+1750+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.

Form 1275 Certification Process costs of stationery, diskettes, and postage at $10 for 14 filings and refilings sent to the Commission and all applicable local communities=$140. Costs of stationery and postage at $2 apiece for 28 opposition filings=$48. $140+$48=$188.

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+100 notifications of invalid rights claimed+1100 OVS operator notifications to programming providers=$4800.

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: $8688. ($1900+ $188+$200+$1320+ $4800+ $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.

I. Introduction

1. The Telecommunications Act of 1996 added Section 653 to the Communications Act, establishing open video systems as a new framework for entry into the video programming marketplace. Section 653 required that the Commission, within six months after the date of enactment of the 1996 Act, ''complete all actions necessary (including any reconsideration) to prescribe regulations'' to govern the operation of open video systems. Accordingly, on March 11, 1996, the Commission issued a *Notice of Proposed Rulemaking* regarding open video systems. *Report and Order and Notice of Proposed Rulemaking* in CS Docket No. 96–46 and CC Docket No. 87–266 (terminated), 61 FR 10496 (March 14, 1996), FCC 96–99, released March 11, 1996 (''*NPRM*''). Based on the record submitted in response to the *NPRM*, on May 31, 1996, the Commission adopted a *Second Report and Order* in which we prescribed rules and policies for governing the establishment and operation of open video systems. *Second Report and Order* in CS Docket No. 96–46, 61 FR 28698 (June 5, 1996), FCC 96–249, released June 3, 1996 (''*Second Report and Order*'').

2. In this *Second Order on Reconsideration*, we address issues raised in these filings, and modify or clarify our regulations accordingly. In addition, in the *Order and Notice of Proposed Rulemaking* in CS Docket No. 96–85 (''*Cable Reform Proceeding*''), we sought comment on the definition of ''affiliate'' in the context of open video systems. *Order and Notice of Proposed Rulemaking* in CS Docket No. 96–85 (Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996) (''*Cable Reform Proceeding*''), 61 FR 19013 (April 30, 1996) 11 FCC Rcd 5937 (1996). In light of the six-month deadline set by Congress for the Commission to establish final open video system regulations, we address the affiliate issue in this *Third Report and Order.*

II. Third Report and Order—Definition of ''Affiliate''

3. *Background*. In the *Cable Reform Proceeding,* we specifically sought comment regarding the definition of ''affiliate'' in the context of the new statutory provisions governing open video systems. We subsequently received comments in the *Cable Reform Proceeding* addressing this issue. For purposes of our decision in this *Third Report and Order,* we incorporate those comments to the extent they specifically address the definition of affiliation in the context of the statutory provisions for open video systems. We noted that Congress added a new definition of ''affiliate'' in Section 3 of Title I of the Communications Act. This new provision defined ''affiliate'' for purposes of the Act, unless the context otherwise requires, as: a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term ''own'' means to ''own an equity interest (or the equivalent thereof) of more than 10 percent. We noted also, however, that Congress did not alter the separate definition of ''affiliate'' set forth under Title VI. Under Title VI, the term ''affiliate'' is defined, when used in relation to any person, to mean ''another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.'' We sought comment regarding the definition of the term ''affiliate'' in the context of the new statutory provisions for open video systems. We will address the affiliation definition for these provisions in the *Cable Reform Proceeding.*

4. *Discussion*. We agree with those commenters that argue that the new definition of ''affiliate'' in Title I does not apply to matters under Title VI since Title VI contains a separate definition of that term that does not set a percentage threshold as to what constitutes ownership. For our purposes, therefore, we must determine the point at which an open video system operator's ownership or control of another entity, or another entity's ownership or control of the open video system operator, makes that entity an affiliate for purposes of Section 653. In defining ''affiliate'' for purposes of Section 653, we will adopt the attribution standard that we use in the program access context. Thus, as we do in the program access context, we will apply the definitions contained in the notes to 47 CFR § 76.501 (which reflect the broadcast attribution rules contained in the notes to 47 CFR § 73.3555), with certain modifications. For instance, in contrast to the broadcast attribution rules: (a) We will consider an entity to be an open video system operator's ''affiliate'' if the open video system operator holds 5% or more of the entity's stock, whether voting or non-voting; (b) we will not adopt a single majority shareholder exception; and (c) all limited partnership interests of 5% or greater will qualify, regardless of insulation. Under the single majority shareholder exception, where there is a single holder of more than 50% of a corporation's outstanding voting stock, minority voting stock interests in the corporation are not attributable to shareholders irrespective of whether they exceed the 5% benchmark. *See* 47 CFR § 73.3555 note 2. In addition, as with both the program access standard and the broadcast attribution rules, actual working control, in whatever manner exercised, will also be deemed a cognizable interest.

III. Second Order on Reconsideration

A. Qualifications to be an Open Video System Operator

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

6. While we believe that cable operators should be allowed to operate open video systems, we also decline to alter our decision that cable operators may do so in their existing cable franchise areas only if they are subject to ''effective competition.'' The underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator. We believe that Congress exempted open video system operators from much of Title VI regulation because, in the vast majority of cases, they will be competing with incumbent cable operators for subscribers. Our effective competition restriction implements Congress' intent by ensuring that, where it is the incumbent cable operator itself that seeks to enter the marketplace as an open video system operator, there is at least one other multichannel video programming provider competing in the market.

7. We are not convinced, as NCTA argues, that the potential presence of multiple video programming providers on open video systems obviates the need for an effective competition requirement. There is no assurance that any particular system will generate sufficient competition between providers of ''comparable'' video programming services to qualify as a meaningful stand-in for effective facilities-based competition. While we agree with U S West that the expiration of a franchise agreement may remove a contractual impediment to a cable operator's conversion to an open video system, the public interest rationale that gave rise to the effective competition restriction remains. So long as a cable operator has the ability to exercise market power—i.e., is not subject to effective competition—it has not met the necessary pre-condition for operating an open video system.

8. We also continue to disagree with Cox's argument that the Commission has no authority to determine whether cable operators that are also LECs may operate open video systems. The second sentence of Section 653(a)(1) authorizes the Commission to determine whether any cable operator may convert to open video, regardless of other services it may also provide, including local exchange service. The Commission retains its authority over cable operators that also become LECs because, as Sprint notes, a cable operator does not lose its identity as a cable operator simply by offering additional types of services.

B. Certification Process

9. The *Second Report and Order* fully explains our reasons for not imposing pre-certification requirements regarding public rights-of-way, PEG obligations, revisions to cost allocation manuals, or separate subsidiaries. Petitioners have presented no new evidence or

arguments that would cause us to change our earlier conclusion.

10. In addition, we will maintain our rule that certification filings will be deemed approved unless disapproved by the Commission within ten days. Petitioners have not demonstrated that affirmative approval is necessary to provide notice to outside parties or to assure adequate Commission review. Also, because certification precedes the operator's actual implementation of the Commission's rules, we disagree with NCTA that the Commission is required, at this stage of the process, to do more than obtain adequate representations that the applicant will comply with the Commission's requirements. Further, we believe that any conflicts that arise regarding the operator's conduct can be addressed more fully in the 180-day dispute resolution process than in the ten-day certification process. Finally, we will not modify our rule that, if new physical plant is required, open video system operators must obtain Commission approval of their certification prior to the commencement of construction.

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

C. Carriage of Video Programming Providers

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

13. *Open Video System Operator Discretion Regarding Video Programming Providers.* We find that the *Second Report and Order* fully considered most of the arguments and evidence raised on reconsideration by NCTA and Cox, as described above. We explained in the *Second Report and Order* that Section 653(a)(1) specifically permits the Commission, ''consistent with the public interest, convenience and necessity'' to determine when a cable operator may provide programming through an open video system. We also fully explained our construction of Section 653(b)(1)(A), which gives the Commission the discretion to determine when it is in the public interest, convenience and necessity for a cable operator either to become an open video system operator or to provide video programming over another entity's open video system. We therefore deny the petitions of NCTA and Cox to the extent they raise these particular contentions.

14. We also reject the cable operators' argument concerning access to open video systems by DBS and wireless service providers. The 1996 Act expressed a clear preference for facilities-based competition between cable operators and telephone companies, and allowing an open video system operator generally to limit the ability of a competing, in-region cable operator to obtain capacity on its system would encourage cable operators to develop and upgrade their own wireline systems. Cable operators possess substantial market power, and because these markets have been protected by high entry barriers, cable operators have been able to maintain prices above the level that would prevail if the market were competitive. Because of this market power, cable operators may have different incentives for seeking open video system capacity than would MVPDs that do not have such market power, such as DBS and wireless cable providers. Enabling a cable operator to obtain open video system capacity means that less capacity will be available for use by the system operator and for other entities. The open video system therefore could become a less attractive alternative for consumers, which would help preserve the cable operator's market power. We believe that these rationales currently do not apply to DBS or wireless cable providers because these MVPDs do not enjoy substantial market power. We therefore reaffirm our conclusion in the *Second Report and Order.* However, at such time that DBS or wireless cable providers possess sufficient market power to raise concerns similar to those associated with existing in-region, competing cable operators, we will reexamine this conclusion.

15. We also disagree with NCTA's argument that the Commission impermissibly delegated to open video system operators the discretion to preclude cable operators from obtaining capacity on the system. In determining that Section 653(a)(1) allows the Commission to determine when a cable operator may access an open video system, we merely interpreted the statute to allow the Commission to prescribe regulations to govern this situation. We adopted regulations that set forth the parameters for where a competing, in-region cable operator's access to an open video system may be limited, and for where access may not be limited. In any case, we will modify our regulations to emphasize our decision that, pursuant to the second sentence of Section 653(a)(1), the public interest, convenience and necessity is served by generally prohibiting a competing, in-region cable operator from obtaining capacity on an open video system.

16. There are two exceptions to this general rule. First, a competing, in-region cable operator may access an open video system when the open video system operator determines that it is in its interests to grant access. Second, a competing, in-region cable operator will be granted access to an open video system when such access will not significantly impede facilities-based competition. As previously determined, one situation in which facilities-based competition will be deemed not to be significantly impeded is where: (a) the competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and (b) the competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

17. *Allocation of Open Video System Channel Capacity.* In the *Second Report and Order,* we permitted an open video system operator to implement its own method for allocating channel capacity to unaffiliated video programming providers, so long as capacity is allocated in an open, fair, non-discriminatory manner. We stated that

the process must be verifiable and insulated from any bias by the system operator. NCTA's arguments were fully considered and addressed in the *Second Report and Order.* NCTA offers no additional facts or arguments to support their position. Accordingly, we decline to reconsider our previous conclusion.

18. *Reallocation of Channel Capacity.* In the *Second Report and Order,* we required open video system operators to allocate open capacity, if any is available, at least once every three years, stating that requiring reallocation every three years will permit an open video system operator to sufficiently accommodate subsequent requests for carriage by video programming providers, while not causing unreasonable disruption to the system. The Telephone Joint Petitioners do not provide evidence that would compel the Commission to reconsider that conclusion. We note in this regard that no new programming service, which the Telephone Joint Petitioners assert would favor a longer reallocation period, have filed for reconsideration in this proceeding.

19. *Channel Positioning.* In the *Second Report and Order,* we permitted an open video system operator to assign channel positions, subject to Section 653's non-discrimination requirements. In the *Second Report and Order* we determined that the statute and our implementing regulations will prevent discrimination against unaffiliated video programming providers, notwithstanding an open video system operator's participation in the channel allocation process. The Alliance for Community Media, et al. do not present new facts or arguments to support the mandatory involvement of an independent entity. Accordingly, we decline the Alliance for Community Media's request for reconsideration.

20. *Channel Sharing.* In response to the Alliance for Community Media, et al.'s petition, we clarify that there is no requirement that a system operator charge a video programming provider a pro-rata fee because a programming service carried by that provider is placed on a shared channel. Thus, even if a video programming provider's programming service is placed on a shared channel, the video programming provider may be required to pay the same rate as if the programming service was placed on a non-shared channel. We think this clarification addresses the Alliance for Community Media, et al.'s concern that an open video system operator will engage in rate discrimination by placing favored video programming providers' programming services on shared channels. Second, ESPN argued that channel sharing should be conditioned on the approval of programming services in its reply comments to the *NPRM.* We fully considered those views in the *Second Report and Order,* where we stated that so long as each video programming provider has the contractual right to offer a particular program service to subscribers, it is unnecessary for the open video system operator to obtain the consent of the programming service in order to place that service on a shared channel. Third, we agree with NCTA that ad avails associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner. Examples of acceptable methods of sharing ad avails include apportioning the revenues from such ad avails on a per subscriber basis or apportioning the rights to sell the avails themselves. We will clarify that arrangements with regard to ad avails will be considered a term or condition of carriage, and an open video system operator must comply with Section 653(b)(1)(A) in negotiating their apportionment.

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

D. Rates, Terms, and Conditions of Service

22. *Just and Reasonable Carriage Rates.* In its petition, MCI has provided no new facts or arguments to justify reconsideration of these concerns in the instant proceeding. We also decline to impose the other pre-certification and reporting requirements MCI seeks. We believe that these requirements are inconsistent with our flexible regulatory approach to the provision of open video system, and are not necessary to protect either unaffiliated programmers or the public in general. In addition, we decline to require open video system operators to base their carriage rates on detailed studies of incremental and stand alone cost and estimates of actual opportunity cost, as suggested by MCI, because of the 1996 Act's direction that Title II requirements not be applied to open video systems, and the limited time allowed for the review of certifications and complaints. Instead, we reaffirm our imputed rate approach for determining whether carriage rates are just and reasonable where the presumption conditions are not present. We also decline to adopt MCI's proposal to allow parties other than potential video programming providers seeking carriage on the open video system to file complaints with the Commission regarding the carriage rates offered by the system operator. This decision does not leave other parties who claim to be adversely affected by an open video system operator's carriage rate without remedies. For example, a party seeking to challenge a rate it pays for common carrier services provided by that operator on the ground of improper cost-shifting from an open video system, retains its rights under section 208 of the Communications Act to file a complaint.

23. We disagree with the general assertion by the National League of Cities, et al. that our presumption conditions will not provide adequate protection to unaffiliated video programming providers. The National League of Cities et al. have presented no new arguments or data to refute this conclusion. Moreover, we disagree with National League of Cities et al.'s contention that the presumption approach places an undue financial and regulatory burden on the unaffiliated programmer to determine whether the operators' rates are fair. Our presumption approach strikes an appropriate balance between the interests of the open video system operator in establishing service to end users quickly, without undue regulatory intervention by competitors, and the interests of unaffiliated programmers in obtaining just and reasonable carriage rates. The National League of Cities, et al. also expressed the specific concern that the presumption conditions will allow the average rate paid by the unaffiliated programming providers receiving carriage to be ''weighted'' or

adjusted, but that only the open video system operator will possess the information necessary to calculate the average or to ''weight'' the average. We clarify that, as part of its burden of showing that the presumption conditions are met, an open video system operator will be required to make available to a complainant all information needed to calculate the average rate paid by the unaffiliated programming providers receiving carriage on its system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate. The complainant may challenge the weighting methodology used by the open video system operator as part of its case.

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

25. We reaffirm our basic imputed rate approach for ensuring just and reasonable open video system carriage rates where the presumption conditions are not met, but clarify our use of certain terminology. We structured the imputed rate in the *Second Report and Order* to reflect what the open video system operator, or its affiliate, effectively ''pays'' for its own carriage of programming over the system by starting with the revenues received from the end user subscriber, and subtracting the costs avoided by the open video system operator by permitting another programming provider to serve that subscriber. No petitioner has convinced us that an imputed rate approach is not suitable to the circumstances of open video system carriage, where a new market entrant (the open video system operator) will, in the majority of areas, face competition from an established incumbent (the cable operator).

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

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

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

29. We believe that this result of the imputed rate approach should be achieved even under the competitive conditions assumed by the Telephone Joint Petitioners in their petition. Even assuming that, at the outset of open video system operations, competition lowered the retail price of video programming to subscribers to the point that the open video system operator incurred losses, this would not justify the operator's shifting the burden of such losses to unaffiliated video programming providers by charging them a higher carriage rate than the rate that it effectively ''charges'' itself. The unaffiliated programming providers would also face lower retail prices for their programming under the competitive conditions assumed by the Telephone Joint Petitioners. We disagree with the Telephone Joint Petitioners' assertion that unaffiliated programmers would be largely unaffected by retail price competition.

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

31. In addition, on reconsideration, we find that certain aspects of our explanation and use of terminology should be clarified. As we stated above, under our approach, the imputed price of carriage for an affiliated programming package equals the price of the package delivered to a subscriber minus the cost of creating the package. To clarify the terms identified by the Telephone Joint Petitioners, in the *Second Report and Order* we use the term ''earning'' to refer to the difference between the price of the package delivered to a subscriber and the cost of creating the package. We

use the term ''profit allowance'' to refer to one type of cost of creating the programming package, namely the cost of capital used to create the package. We also clarify Section 76.1504 of the rules to indicate more clearly the types of avoided costs that must be subtracted by an open video system operator in calculating the imputed rate.

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

33. *Open Video System Carriage Rates Must Not be Unjustly or Unreasonably Discriminatory.* The petitioners' concerns about whether open video system rates are nondiscriminatory ignores the wording of the 1996 Act, which prohibits rate differences only when unjust or unreasonable. As we noted in the *Second Report and Order*, we decided to permit carriage rate differentiation because requiring open video system operators to charge all programming providers the same carriage rate would exclude providers whose programming has a low market value. Neither NCTA nor MCI has offered new factual or legal arguments to refute this reasoning.

34. We disagree with the Alliance for Community Media, et al., that open video system operators should be required to charge reduced carriage rates to non-profit programming providers. In the *Second Report and Order*, we identified not-for-profit status as one of the legitimate, objective factors on which open video system operators could base reduced rates. Moreover, we are concerned about the impact of mandatory reduced carriage rates on a new entrant in the markets for video carriage and distribution. Our decision to allow preferred carriage rates for non-profit programmers on a voluntary basis reflects our goals of promoting open video system entry and competition with incumbent cable systems, while providing access to carriage by unaffiliated programming providers.

E. Gross Revenues Fee

35. We generally reaffirm our conclusions in the *Second Report and Order*. We continue to believe that our interpretation represents the best reading of Section 653(c)(2)(B). We will, however, clarify our rule to make clear our intent that local governments have the authority to charge and receive the gross revenue fee. In addition, consistent with Congress' intent of ensuring ''parity among video providers,'' we will clarify that any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming should be included in the fee calculation, where such revenues are included in the incumbent cable operator's franchise fee calculation.

36. We agree with NYNEX and U S West that the application of the gross revenues fee provision should not disadvantage any particular video programming provider. Like the costs of PEG and must-carry, we believe that the gross revenues fee is a cost of the platform—in this case, the cost of using the rights-of-way—that should be shared equitably among all users of the system. We therefore will permit open video system operators to recover the gross revenues fee from all video programming providers on a proportional basis as an element of the carriage rate.

F. Applicability of Title VI Provisions

37. *Public, Educational and Governmental Access Channels.* We continue to believe that open video system operators should in the first instance be permitted to negotiate their PEG access obligations with the relevant local franchising authority and, if the parties so desire, the local cable operator. Furthermore, we continue to believe that it is necessary to have a default mechanism in case the open video system operator and the local franchising authority are unable to agree. We disagree with Comcast that open video system operators should be required to negotiate with local franchising authorities. Providing a ''backstop'' is an appropriate balance between imposing Section 611's requirements and not imposing franchise requirements on open video systems. If the open video system operator matches the PEG access obligations of the cable operator, the actual PEG access obligations imposed on the open video system operator will be, as the statute requires, to the extent possible no greater or lesser than those imposed on the cable operator. This is true even if the open video system operator's obligations are established through our default mechanism and the cable operator's obligations are established through negotiation and the franchise process.

38. After considering the arguments made by the various petitioners, we believe, however, that some modification of our rule regarding how to establish open video system PEG access obligations is appropriate. We believe that imposing Section 611 obligations on open video system operators so that to the extent possible the obligations are ''no greater or lesser'' than those imposed on cable operators means that, in the absence of an agreement with the local franchising authority, an open video system operator must match, rather than share, the annual PEG access financial contributions of the local cable operator. Under our current rule, open video system operators are required to match the PEG access channel capacity provided by the local cable operator, but are required to share the contributions towards PEG access services, facilities and equipment. Our modified rule will apply the matching principle which we have applied to channel capacity also to PEG contributions that cable operators make, and that are actually used for PEG access services, facilities and equipment.

39. For in-kind contributions (e.g., cameras, production studios), we believe that precise duplication would often be unnecessary, wasteful and inappropriate. Instead, open video system operators may work out mutually agreeable terms with cable operators over in-kind equipment, studios and the like so that PEG service to the community is improved or increased and the open video system operator fulfills its statutory obligation. As a backstop, however, we will permit the open video system operator to pay the local franchising authority the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value. Any matching PEG access contributions provided by an open video system operator are to be used by the local franchising authority to fund activities arising under Section 611.

40. We decline to modify our rule that requires the local cable operator to permit the open video system operator to connect with the cable operator's PEG access channel feed. We clarify, however, that any costs associated with the open video system operator's connection to the cable operator's PEG access channel feed shall be borne by the open video system operator. These costs shall be counted towards the open video system operator's matching obligation described above. We are not requiring the local cable operator to

permit others to interconnect with and use their cable system to reach consumers. Rather, we are simply requiring the local cable operator to provide its PEG access channel feed to a particular competitor that shares a similar PEG access obligation in order to avoid an unnecessary duplication of facilities and promote Congress' goal of competitive entry.

41. In response to the request of Municipal Services, et al., we clarify that the negotiated PEG access obligations of an open video system operator may be enforced regardless of where and when the agreement is made. Regarding City of Indianapolis's assertion that channel alignment should not be at the discretion of the open video system, we affirm our decision in the *Second Report and Order* that there is insufficient evidence to support mandating that PEG access channels be carried at the same channel location on the open video system operator as on the cable system. City of Indianapolis has presented no new evidence or argument not presented to the Commission before.

42. *Establishing Open Video System PEG Access Obligations Where No Local Cable Operator Exists.* Our discussion in the *Second Report and Order* regarding the establishment of open video system PEG access obligations where no local cable operator exists was not intended to foreclose a local franchising authority from negotiating with the open video system operator. The discussion was intended to explain how to establish open video system PEG access obligations where no local cable operator exists and the local franchising authority and the open video system operator cannot agree. The parties are therefore free to negotiate PEG access obligations as Alliance for Community, et al. request. However, if the open video system operator and the local franchising authority cannot agree, the operator must make a reasonable amount of channel capacity available for PEG use. In the *Second Report and Order,* we found that where a cable franchise previously existed, such as where a cable system is able to convert to an open video system, what constitutes a reasonable amount of channel capacity is to be governed by the previously existing franchise agreement with respect to PEG access obligations.

43. While we do not believe that Congress intended open video system PEG access obligations to correct deficiencies in what the local franchising authority negotiated for cable operator PEG access obligations, we also recognize the concern that PEG access requirements should not be frozen in time in perpetuity. We will therefore modify our approach for a situation in which there was a previously existing cable franchise, such as where a cable system converts to an open video system, and provide that, when the open video system operator and the local franchising authority cannot agree on PEG access obligations, the local franchising authority may either keep the previously existing PEG access obligations or may elect to have the open video system operator's PEG access obligations determined by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter.

44. *Open Video System PEG Obligations Where System Overlaps with More than One Franchise Area.* While we do not disagree with Telephone Joint Petitioners that open video systems may be configured differently from cable systems, as Alliance for Community Media, et al. point out, Telephone Joint Petitioners provide insufficient support for why open video systems will not be able to be configured to comply with the PEG access obligations for each franchise area with which each system overlaps. In fact, Michigan Cities, et al. demonstrate that, in at least one situation, it is indeed possible. We therefore deny Telephone Joint Petitioners' petition with respect to this matter.

45. *Institutional Networks.* We affirm our decision to preclude local franchising authorities from requiring open video system operators to build institutional networks because the cable operator is required to do so under the terms of its franchise agreement. Because there is confusion over our interpretation of Section 611 as it applies to institutional networks, however, we make the following clarifications. Contrary to the understanding of certain petitioners, we agree that institutional networks may be required of a cable operator, but we do not agree that this requirement is found in Section 611. Section 611 only provides that a local franchising authority may require that channel capacity on institutional networks be designated for educational or governmental use and does not authorize local franchising authorities to require cable operators to build institutional networks. The building of an institutional network is a requirement negotiated in the franchise agreement. Section 621(b)(3)(D), as added by the 1996 Act, makes clear that a local franchising authority may require a cable operator to provide institutional networks as a condition of the initial grant, renewal or transfer of a franchise. Pursuant to Section 653(c)(1)(C), open video system operators are not subject to franchise requirements, so we cannot apply an institutional network requirement to open video systems.

46. While institutional networks may or may not function like PEG access as National League of Cities, et al. assert, the statutory definition is broader than merely PEG use. We do not agree that precluding the local franchising authority from requiring an open video system operator to build an institutional network, but permitting the local franchising authority to require channel capacity on a network if an open video system operator does build one, is inconsistent, as Michigan Cities, et al. suggest. Rather, once an open video system operator decides to build an institutional network, the 1996 Act's mandate that an open video system operator's PEG access obligations be no greater or lesser than those of the cable operator become operative.

47. *Must-Carry and Retransmission Consent.* In the *Second Report and Order,* the Commission considered and rejected suggestions similar to NCTA's that we specifically require the use of a basic tier-type arrangement in order to provide all subscribers on a system with the signals carried in fulfillment of the must-carry requirements. As we noted in the *Second Report and Order,* the basic tier requirement is contained in Section 623 of the Communications Act, which does not apply to open video systems. NCTA has presented no new evidence in support of a basic tier requirement. We therefore decline to adopt NCTA's request. We agree with NCTA, however, that video programming providers should not be required to duplicate must-carry programming already provided to subscribers from another source.

48. The Commission recognizes ALTV's valid concern that stations electing must-carry status will have to reimburse open video system operators for extensive copyright fees that may result from carriage beyond their local market areas. As ALTV notes, these dangers may be avoided if open video system operators tailor the distribution of must-carry signals to the parts of their system that are located within a station's local market. We believe that our rules provide open video system operators with an incentive to design

and construct their systems with this capability. Where an open video system has such a capability, we will require open video system operators to limit the distribution of must-carry signals to the appropriate local markets, unless a local broadcast station consents otherwise. If an open video system operator cannot limit its distribution of must-carry signals in this manner, the open video system operator will be responsible for any increase in copyright fees and may not pass through such increases to the local station electing must-carry treatment.

49. Finally, we agree with Tele-TV and U S West that we should amend our current rule that allows broadcasters to make different elections among open video systems and cable systems serving the same geographic area. The ''common election'' requirement is contained in Section 325(b)(3)(B): ''If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.'' In Section 653(c), Congress provided that Section 325 should apply to open video system operators, to the extent possible, no greater or lesser than it applies to cable operators. By directing equal treatment under Section 325, we believe that Congress intended to remove Section 325 as a distinguishing factor between those entering the video marketplace as a cable operator and those entering as an open video operator. In the *Second Report and Order,* however, we found that as a practical matter the potential size differences between open video systems and cable systems could make common election on overlapping cable and open video systems infeasible. We agree with Tele-TV that our concern in the *Second Report and Order* may no longer apply to the extent that an open video system can tailor the distribution of local broadcast stations to the appropriate communities. We will therefore amend our rules to require that broadcasters make the same election for open video systems and cable systems serving the same geographic area unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

50. *Program Access.* We believe that our initial interpretation applying the provisions of Section 628 to open video system programming providers is reasonable and should stand. Rainbow and NCTA's argument that Congress limited the applicability of the program access rules to open video system operators was expressly considered and rejected in the *Second Report and Order.*

51. As we stated in the *Second Report and Order,* an exclusive contract between a cable-affiliated video programming provider on an open video system and a cable-affiliated programmer presents many of the same concerns as an exclusive contract between a cable operator and a vertically integrated satellite programming vendor. A primary objective of the program access requirements is the release of programming to existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors. Exclusive arrangements among cable-affiliated open video system programming providers and cable-affiliated satellite programmers may impede the development of open video systems as a viable competitor to cable. NCTA and Rainbow fail to challenge or address these concerns.

52. Second, we believe that the benefits of the program access provisions apply to open video system providers. Contrary to Rainbow's arguments, open video system programming providers fall within the definition of MVPDs, which Section 628 identified as the intended beneficiaries of the program access regime. We believe that Section 602(13)'s list of entities enumerated in that section is expressly a non-exclusive list. Section 602(13) states that the term MVPD ''means a person such as, *but not limited to,* a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service. * * * '' We also agree with those commenters that asserted that open video system video programming providers fit the definition of MVPD because they make ''available for purchase, by subscribers or customers, multiple channels of video programming.

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

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

55. *Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity.* Upon reconsideration, we grant the petition filed by the Joint Sports Petitioners regarding our current rule governing sports exclusivity. We find merit in their position that, unlike network non-duplication and syndicated exclusivity, sports exclusivity requires infrequent deletions that cannot be recouped once missed. We believe that our rule that extends the Commission's regulations concerning sports exclusivity to open video systems must be amended in order to preserve the same level of protection received by sports teams and leagues in the cable context. While we hold open video system operators responsible for compliance with our rules, we also recognize that they are forced by the structure of an open video system to rely, to a degree, on individual programming providers who may dispute a claim of exclusivity or may attempt to substitute a signal for the signal that is to be deleted. We amend our rule to provide that open video system operators will be subject to sanctions for any violation of our sports exclusivity rules. Operators generally may effect the deletion of signals for which they receive deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. If a programmer challenges the validity of claimed exclusive or non-duplication rights, the open video system operator shall not delete the signal. However, an open video system operator should be allowed to require indemnification as a

condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.

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

57. We also deny U S West's petition for reconsideration which suggests that the Commission hold individual programming providers responsible for compliance with our exclusivity and non-duplication rules, and asks the Commission to further define the ''prompt steps'' that must be taken by an operator in order to avoid liability after a violation of our rules has occurred. In the *Second Report and Order,* the Commission responded to the issues raised in U S West's petition. U S West does not present any further evidence to support the adoption of different rules.

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

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

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

61. We continue to disagree with the National League of Cities, et al. that the narrow preemption in the *Second Report and Order* violates the Fifth Amendment. First, although the National League of Cities, et al. assert that the *Second Report and Order* ''grossly underestimates'' the compensation due to local authorities, they fail to address the Commission's finding that the ''before and after'' test—in which the measure of compensation is the difference in the value of the property before a partial taking and the value of the property after the partial taking—is the proper test to apply. Second, we do not agree with the National League of Cities, et al. that the local community has not received just compensation unless an open video system operator matches the franchise and other obligations imposed upon the incumbent cable operator. Such a requirement would obviously render meaningless Congress' exemption of open video from Section 621 franchising requirements, since an open video system operator would be forced to comply with each of the incumbent cable operator's franchise terms or be subject to a Fifth Amendment ''takings'' claim. Third, the *Second Report and Order* specifically permits the recovery of normal fees associated with the construction of an open video system: ''[A] state or local government could impose normal fees associated with zoning and construction of an open video system, so long as such fees [are] applied in a non-discriminatory and competitively neutral manner.'' We clarify, however, that these ''normal fees associated with zoning and construction'' should not duplicate the compensation provided by the gross revenues fee. As we stated in the *Second Report and Order,* it is apparent that the gross revenue fee ''in lieu of'' a franchise fee was intended as compensation by open video system operators for use of the public rights-of-way. The National League of Cities, et al. have not explained why the fees associated with the construction of open video systems would be any different than the fees associated with any other users of the rights-of-way, and why regulations applied in a non-discriminatory, competitively neutral manner on all users of the rights-of-way would be insufficient to deal with such matters.

62. Finally, we find that a determination of whether LECs that use the rights-of-way for open video service remain subject to the same conditions contained in the pre-existing telephone franchise agreements can only be made on a case-by-case basis in light of the particular agreement between the parties. Thus, we make no general conclusions here.

G. Information Provided to Subscriber

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

64. We believe that several safeguards are necessary to effectuate congressional intent and protect unaffiliated programming providers. First, we reaffirm our conclusion in the *Second Report and Order* that an open video system operator cannot evade its non-discrimination obligations under Section 653(b)(1)(E) simply by having its navigational devices, guides, or

menus nominally provided by an affiliate. By this statement, we meant that where an open video system operator provides no navigational device, guide or menu of its own, its affiliate's navigational device, guide or menu will be subject to the requirements of Section 653(b)(1)(E) even though such services are not formally provided by the open video system operator. We therefore will continue to apply the non-discrimination requirements of Section 653(b)(1)(E) to the open video system operator's affiliate where the affiliate provides a navigational device, guide or menu and the operator does not.

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

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

H. Dispute Resolution

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

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

I. Joint Marketing, Bundling and Structural Separation

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

70. *Bundling.* AT&T and NCTA's concerns were considered and addressed in the *Second Report and Order.* They adduce no new evidence here, nor have they explained why the safeguards adopted by the Commission are inadequate to protect consumers' interests. The petitions for reconsideration are denied. On our own motion, we will correct a typographical error in our rule regarding the bundling of video and local exchange services. The current text provides, in part, that any local exchange carrier offering a bundled package must impute the unbundled tariff rate for the ''unregulated service.'' The rule will be corrected to be consistent with the text of the *Second Report and Order,* which states that a bundled package must impute the unbundled tariff rate for the ''regulated service.''

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

IV. Regulatory Flexibility Act Analysis

72. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory

Flexibility Analysis (IRFA) was incorporated in the *Report and Order and Notice of Proposed Rulemaking* (''NPRM'') in CS Docket No. 96–46 and CC Docket No. 87–266 (terminated) (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996—Open Video Systems), FCC 96–99, 61 FR 10496 (March 14, 1996), released March 11, 1996. The Commission sought written public comments on the proposals in the *NPRM* including comments on the IRFA, and addressed these responses in the *Second Report and Order* in CS Docket No. 96–46 (In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996—Open Video Systems), FCC 96–249, 61 FR 28698 (June 5, 1996), released June 3, 1996. No IRFA was attached to the *Second Report and Order* because the *Second Report and Order* only adopted final regulations and did not propose regulations. This Final Regulatory Flexibility Analysis (FRFA) therefore addresses the impact of regulations on small entities only as adopted or modified in this *Third Report and Order and Second Order on Reconsideration* and not as adopted or modified in earlier stages of this rulemaking proceeding. The FRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Public Law No. 104–121, 110 Stat. 847.

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

74. *Summary and Assessment of Issues Raised by Petitioners in Response to the IRFA.* With respect to the *Third Report and Order,* several parties filed comments in the *Cable Reform Proceeding* and also filed petitions for reconsideration of the *Second Report and Order* regarding the definition of the term ''affiliate'' in the context of the new statutory provisions for open video systems. These comments and the Commission's report are summarized in Section III, above. As mentioned, no IRFA was attached to the *Second Report and Order.* In petitions for reconsideration of the *Second Report and Order,* however, some parties raised issues that generally could involve small entities. For example, local cities urge the Commission to: (1) further ensure that local governments receive notification of an operator's intent to establish an open video system, by requiring an operator to serve a copy of FCC Form 1275 on all affected local municipalities; and (3) require an open video system operator to match, rather than share, the local cable operator's PEG access obligations. We grant reconsideration of these issues. Other parties, including potentially small business video programming providers, urge the Commission to enhance programming providers' ability to access information necessary to pursue a rate complaint against an open video system operator. We also grant reconsideration on this issue. Local television stations urge the Commission to require that open video system operators tailor the distribution of must-carry signals to the parts of their system that are located within a station's local service area so that stations electing must-carry status do not have to reimburse the operators for extensive copyright fees that may result from carriage beyond their local service areas. We grant reconsideration on this point.

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

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

77. *Cable Systems:* SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,323 such cable and other pay television services generating less than $11 million in revenue that were in operation for at least one year at the end of 1992.

78. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company,'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers; thus, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by this Order.

79. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator. Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000,

we cannot estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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

81. *Television Stations:* The SBA defines small television broadcasting stations as television broadcasting stations with $10.5 million or less in annual receipts. 13 CFR § 121.201. According to the Census Bureau, in 1992, there were 1,155 out of 1,478 operating television stations reported revenues of less than $10 million for 1992. This represents 78% of all television stations, including non-commercial stations. The Census Bureau does not separate the revenue data by commercial and non-commercial stations in this report. Neither does it allow us to determine the number of stations with a maximum of 10.5 million dollars in annual receipts. Census data also indicates that 81 percent of operating firms (that owned at least one television station) had revenues of less than 10 million dollars.

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

83. *Video Programming Providers:* Open video systems are an entirely new framework for delivering video programming to consumers. No open video systems have yet been certified to operate. Therefore, it is not possible at this time to estimate the size or number of video programming providers that may seek capacity on open video systems. We anticipate that two types of video programming providers may arise: (1) video programming providers seeking to utilize an open video system to offer a package of individual programming services via open video systems to subscribers; and (2) providers seeking to offer only one programming service. It is not possible to estimate the impact on or the number of video programming providers in the first category because no such entities exist. With respect to the second category, however, we believe that small cable programming services may provide a reasonable substitute. The Census Bureau category most similar to cable programming services is ''motion picture and video tape production.'' SIC Code 7812. Under this category, entities with less than $21.5 million in annual receipts are defined as small motion picture and video tape production entities. There are a total of 7,265 motion picture and video tape production entities; of those, 7,002 have annual receipts of less than $24.5 million. The figures are not broken down further. We estimate that approximately 7,000 small cable programming services, or video programming providers, may be affected by the rules adopted in this Order. The Census Bureau data does not reflect a likely significant number of small, independent motion picture and video tape production companies. It is not possible at this time to estimate this number because no publicly available data is available that is specific to such entities. We therefore estimate that a minimum of 7,000 small cable programming services, or video programming providers, may be affected by this rule.

84. *Reporting, Recordkeeping and Other Compliance Requirements.* The following addresses the requirements of regulations adopted, amended, modified or clarified on reconsideration in the *Third Report and Order and Second Order on Reconsideration*. We adopt a definition of ''affiliate'' that will impact open video system operators and their affiliates, including open video system operators that are small entities. A primary effect of this rule concerns situations where demand for carriage exceeds the open video system's channel capacity, where the open video system operator and its affiliates are prohibited from selecting the video programming services for carriage on more than one-third of the activated channel capacity on its system. We revise FCC Form 1275 to require that applicants to become open video system operators, including applicants that are small businesses, list the names of the local communities in which they intend to operate. Listing the names of the communities will neither require any specialized skills nor impose significant new burdens.

85. We modify our regulations to require that an open video system applicant, including those that are small entities, serve a copy of its FCC Form 1275 on all affected local communities on or before the date it is filed with the Commission. Merely serving the form on all affected local communities will not require any specialized skills. We modify our regulations to require that advertising availabilities (''ad avails'') associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider must be shared in an equitable manner. This may impose burdens on open video system operators, including those that are small entities, because an operator must now share the revenues or other benefits of such ad avails with unaffiliated entities, rather than keeping all such revenues. We find that implementing this approach requires no specialized skills.

86. We modify our regulations to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate. This approach may impose additional burdens on video programming providers, including those that are small entities, because the carriage rate may be increased to reflect the open video system operator's gross revenues fees. We find that implementing this approach requires no specialized skills. We modify our regulations to require open video system operators, in the absence of a negotiated agreement, to match, rather than share, all public, educational and governmental (''PEG'')

access financial contributions of the local cable operator. This matching requirement could result in additional financial burdens on open video system operators, including those that are small entities, because matching the cable operator's PEG access financial contributions will be more costly in many situations than merely sharing the cable operator's contributions towards PEG access services, facilities and equipment, as permitted under the previous approach. We find that implementing this approach requires no specialized skills.

87. We modify our regulations so that, in areas where a cable franchise previously existed, the local franchise authority will be permitted, absent a negotiated agreement, to elect either: (1) to maintain the previously existing PEG access requirements; or (2) to have the open video system operator's PEG access obligations determined by comparison to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. Every 15 years thereafter, the LFA is permitted to make a similar election. This requirement could impose new burdens on open video system operators, including those that are small entities, because an operator's PEG access obligations may be increased when compared to the nearest operating cable system that has a commitment to provide PEG access and that serves a franchise area with a similar population size. The order requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area. We estimate that this requirement will have an impact on some broadcast stations. We anticipate that this requirement will not require any more professional skills than are required to make such elections and notify operators in the context of cable systems.

88. The order requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local signal outside of its local service area. We estimate that this requirement may affect a limited number of large open video system operators. We anticipate that distribution of signals outside of a local market will most likely occur on large systems that overlap several markets. If additional copyright fees are incurred by an open video system operator, we do not anticipate that the operator will have to use any professional skills beyond those already used to comply with the copyright rules. The order holds an open video system operator responsible for any violation of our sports exclusivity rules. We estimate that this requirement will have an impact on open video system operators and programmers, but will not require the use of any additional professional skills.

89. We allow open video system operators to permit programming providers, including those affiliated with the open video system, to use their own navigational devices, subject to certain conditions. If the open video system operator permits programming providers to use their own navigational devices, the open video system operator must provide a nondiscriminatory guide or menu that all programming providers must carry, showing all programming available on the systems. We estimate that the requirement could result in additional burdens on open video system operators including small open video system operators. We find that implementing this approach requires no specialized skills. We clarify our regulations to require that the preliminary rate estimate provided by an open video system operator to video programming providers must include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate. This clarification may impose new burdens on open video system operators, including those that are small entities, because an open video system operator may have to prepare this information earlier than under the previous approach.

90. *Steps Taken to Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Rejected.* This section analyzes the impact on small entities in the contexts of regulations adopted, amended, modified or clarified in this *Third Report and Order and Second Order on Reconsideration.* With respect to the definition of affiliate, we adopt the attribution standard that applies in the cable program access context. The factual, legal and policy reasons are set forth in Section II, above. The definition of affiliate we adopt will create opportunities for unaffiliated programmers, many of which may be small entities, by promoting diversity of video programming sources. We rejected several alternatives to this definition of affiliate, as described in Section II, above. Requiring applicants to list the names of all local communities in which they intend to operate will not impose significant new burdens on applicants for the reasons stated above and will reduce burdens on the affected local communities, including those that are small entities. This approach will also reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system.

91. Requiring service of FCC Form 1275 on local communities, as described above, will impose only minimal new burdens on open video system operators, including those that are small entities. These burdens are outweighed by the benefits to local communities, such as ensuring that a local community without ready access to the Internet or the Commission's Public Notices will be made aware of the applicant's filing. The factual, legal and policy reasons are described in Section III.B. This approach will reduce the burdens on open video system operators by reducing the potential for confusion over which local communities will be served by the open video system. The primary significant alternative is not requiring such service, but as stated, we find that the benefits to local communities outweigh any minimal burdens of complying with this rule. Requiring that ad avails associated with a programming service carried by both the open video system operator or its affiliated video programming provider and an unaffiliated provider be shared in an equitable manner may impose burdens on open video system operators, including those that are small entities. Such burdens are described in the preceeding section of this FRFA. However, we find these burdens are outweighed by the benefits of this requirement, which include providing unaffiliated video programming providers with an equitable share of income from ad avails and preventing the open video system operator or its affiliate from having a significant financial advantage over unaffiliated video programming providers. The factual, legal and policy reasons are described in Section III.C. We reduce the burdens on open video system operators by specifying examples of acceptable methods of sharing ad avails, including apportioning the relevant revenues or apportioning the rights to sell the avails themselves. The primary significant alternative is maintaining our current rules which do not require such sharing; however, as stated, we find that the benefits to unaffiliated

video programming providers outweigh the burdens of complying with this rule.

92. Modifying our rules to permit an open video system operator to recover the gross revenues fee from all video programming providers using the platform on a proportional basis as an element of the carriage rate may impose additional burdens on video programming providers, including those that are small entities. However, we find that these burdens, as described above, are outweighed by the benefits to open video system operators and are in the interests of competition. Permitting this recoupment of the gross revenues fee should promote competition on the platform among video programming providers by not disadvantaging any particular video programming provider with respect to the payment of the gross revenues fee. The factual, legal and policy reasons for this approach are described above in Section III.E. This approach will reduce burdens on open video system operators by permitting them to recoup a proportion of these costs from video programming providers. The primary significant alternative we rejected is maintaining our current regulations which may have permitted unaffiliated video programming providers to avoid paying any share of the gross revenues fee; however, as stated, we find that the benefits to open video system operators outweigh the burdens of this approach on video programming providers. Requiring open video system operators to match, rather than share, all PEG access financial contributions of the local cable operator may impose burdens on open video system operators, including those that are small entities. These burdens are described in the preceeding section of this FRFA. We find that these burdens are outweighed by the benefits of this revised approach. The factual, policy and legal reasons for this approach are described in Section III.F. We believe that this approach may reduce burdens on open video system operators by providing further certainty as to their PEG access financial obligations. Significant alternatives we rejected include: (1) maintaining our current rules which permit an open video system operator to share the PEG access contributions. Generally, we rejected this alternative because we find that the matching principle more accurately fulfills the 1996 Act's mandate to impose PEG access obligations on open video system operators that are ''no greater or lesser'' than those imposed on cable operators.

93. Modifying a local franchise authority's ability to make an election concerning the PEG access obligations of an open video system operator, as described in the preceeding section of this FRFA, may impose additional burdens on open video system operators, including those that are small entities. These burdens are described above. However, we find that these burdens are outweighed by the benefits of this approach, which include preventing PEG access obligations from being frozen in perpetuity, thereby providing significant benefits to local franchise areas and communities. The factual, policy and legal reasons for this approach are described above in Section III.F. This approach may reduce burdens on local communities by permitting them to negotiate with open video system operators with respect to PEG access obligations, and on open video system operators by providing them certainty as to their PEG access obligations for a period of up to 15 years. The primary significant alternative we rejected is maintaining our current regulations which do not permit local franchise areas to make this election; however, as stated, we find that the benefits to local communities outweigh the burdens of this approach on open video system operators. The rule which requires a broadcast station to make the same election for open video systems and cable systems in the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area, may impose a burden on broadcast stations. The policy, factual and legal reasons for adopting this final rule are set forth in Section III.F.2.b. of this Order. The rule adopted in this order may reduce burdens on both open video system operators and television stations by providing further certainty with respect to the must-carry status of television stations.

94. The rule which requires an open video system operator to pay for any additional copyright fees incurred as a result of carrying a local station beyond its local market area may impose a burden on open video system operators. It has not been necessary to take significant steps to minimize the burden on small open video system operators because we do not believe that this rule is likely to affect many open video systems and especially not smaller open video systems, because it will only apply to open video systems capable of carrying broadcast signals beyond their local service areas. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.2.b. Any burden on open video system operators is outweighed by the benefit to broadcast stations, especially small stations that might not be able to elect must-carry status if they were subject to copyright fees in distant markets. The rule which holds an open video system operator responsible for any violation of our sports exclusivity rules may impose a burden on open video system operators. This burden is justified by the interest in protecting exclusive rights to sports programming. The factual policies and legal reasons for adopting this final rule are set forth in Section III.F.4.b. The rule adopted in this order applies our sports exclusivity rules to open video systems more fairly than the Commission's previous rule for the reasons cited in Section III.F.4.b.

95. Allowing open video system operators to permit programming providers, including those affiliated with the open video system operator, to use their own navigational devices subject to certain conditions may impact open video system operators and their affiliates, including those that are small entities. If an operator permits programming providers, including its affiliate, to develop their own navigational devices, the operator must create an electronic menu or guide containing a non-discriminatory listing of programming providers or programming services available on the system that every programming provider must carry. The factual and policy reasons for adopting the final rule are found in Section III.G., above. We believe that this rule minimizes burdens on open video system operators and their programming affiliates, by allowing the affiliated programmers the flexibility to develop and use their own navigational devices, guides and menus. However, under the rule adopted, programming providers cannot be required to use their own navigational devices. Such providers must, upon request, have access to the navigational device used by the open video system operator or its affiliate. This requirement can help minimize burdens on small programming providers by allowing them access to the navigational device used by the open video system operator or its affiliate. Requiring that the preliminary rate estimate provided by an open video system operator to video programming providers include, upon request, all information needed to calculate the average rate paid by unaffiliated programming providers receiving carriage on the system, including the information needed for any weighting of the individual carriage rates that the operator has included in

the average rate, may impose burdens on open video system operator, including those that are small entities. These burdens are described in the preceeding section of this FRFA. However, we find that these burdens are outweighed by the benefits of this clarification, which include providing an unaffiliated video programming provider with relevant information regarding whether to pursue a rate complaint against an open video system operator. The factual, policy and legal reasons are described above in Section III.H. The primary significant alternative rejected by the Commission is to maintain our current rules which do not require a system operator's provision of such information upon request but only in formal discovery; however, as stated, we find that the benefits to unaffiliated video programming providers outweigh the burdens of complying with this rule.

96. *Report to Congress.* The Commission shall send a copy of this FRFA, along with this *Third Report and Order and Second Order on Reconsideration,* in a report to Congress pursuant to the SBREFA, 5 U.S.C. § 801(a)910(A). A copy of this FRFA will also be published in the Federal Register.

V. Paperwork Reduction Act of 1995 Analysis

97. The requirements adopted in the *Third Report and Order and Second Order on Reconsideration* 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 *Third Report and Order and Second Order on Reconsideration* as required by the 1995 Act. OMB comments are due October 21, 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.

98. Written comments by the public on the proposed and/or modified information collections are due on or before September 20, 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 October 21, 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.

VI. Ordering Clauses

99. *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 *Third Report and Order and Second Order on Reconsideration* ARE ADOPTED and Sections 76.1000 and 76.1500 through 76.1515 of the Commission's rules, 47 CFR §§ 76.1000 and 76.1500 through 1515, ARE AMENDED as set forth below.

100. *It is further 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, the Petitions for Reconsideration set forth in Appendix A are *granted in part* and *denied in part,* as provided herein.

101. *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 October 21, 1996. The Commission will issue a document at such time to notify parties that the regulations established in this decision are effective.

102. *It is further ordered* that the Motion to Accept Late-Filed Opposition filed by the Telephone Joint Petitioners is *hereby granted.*

103. *It is further ordered* that the Secretary shall send a copy of this *Third Report and Order and Second Order on Reconsideration* 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 *et seq.* (1981).

List of Subjects 47 CFR Part 76

Cable television.

Federal Communications Commission
William F. Caton,
Acting Secretary.

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 continues 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 76.1500 is amended by redesignating paragraph (g) as paragraph (h) and adding new paragraph (g) to read as follows:

§ 76.1500 Definitions.

* * * * *

(g) *Affiliate.* For purposes of determining whether a party is an ''affiliate'' as used in this subpart, the definitions contained in the notes to § 76.501 shall be used, provided, however that:

(1) The single majority shareholder provisions of Note 2(b) to § 76.501 and the limited partner insulation provisions of Note 2(g) to § 76.501 shall not apply; and

(2) The provisions of Note 2(a) to § 76.501 regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

* * * * *

3. Section 76.1502 is amended by revising paragraphs (c)(6) and (d) and by adding paragraph (e) to read as follows:

§ 76.1502 Certification.

* * * * *

(c) * * *

(6) A list of the names of the anticipated local communities to be served upon completion of the system;

* * * * *

(d) On or before the date an FCC Form 1275 is filed with the Commission, the applicant must serve a copy of its filing

on all local communities identified pursuant to paragraph (c)(6) of this section and must include a statement informing the local communities of the Commission's requirements in paragraph (e) of this section for filing oppositions and comments. Service by mail is complete upon mailing, but if mailed, the served documents must be postmarked at least three days prior to the filing of the FCC Form 1275 with the Commission.

(e) 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 and on all local communities in which the applicant intends to operate.

4. Section 76.1503 is amended by removing paragraph (c)(2)(iv)(C) and adding new paragraph (c)(2)(v) to read as follows:

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

* * * * *

(c) * * *

(2) * * *

(v) Notwithstanding the general prohibition on an open video system operator's discrimination among video programming providers contained in paragraph (a) of this section, a competing, in-region cable operator or its affiliate(s) that offers cable service to subscribers located in the service area of an open video system shall not be entitled to obtain capacity on such an open video system, except:

(A) Where the operator of an open video system determines that granting access to the competing, in-region cable operator is in its interests; or

(B) Where a showing is made that facilities-based competition will not be significantly impeded.

Note to paragraph (c)(2)(v)(B): The Commission finds that facilities-based competition will not be significantly impeded, for example, where:

(1) 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

(2) 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.

* * * * *

5. Section 76.1504 is amended by revising paragraph (e) to read as follows:

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

* * * * *

(e) *Determining just and reasonable rates subject to complaints pursuant to the imputed rate approach or other market based approach.* Carriage rates subject to complaint shall be found just and reasonable if one of the two following tests are met:

(1) 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.

Note to paragraph (e)(1): Examples of specific ''avoided costs'' include:

(1) All amounts paid to studios, syndicators, networks or others, including but not limited to payments for programming and all related rights;

(2) Packaging, including marketing and other fees;

(3) Talent fees; and

(4) A reasonable overhead allowance for affiliated video service support.

(2) An open video system operator can demonstrate that its carriage service rates are just and reasonable through other market based approaches.

6. Section 76.1505 is amended by revising paragraphs (d)(1), (d)(4), (d)(6), the note to paragraph (d)(6), and (d)(8) to read as follows:

§ 76.1505 Public, educational and governmental access.

* * * * *

(d) * * *

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by providing the same amount of channel capacity for public, educational and governmental access and by matching the local cable operator's annual financial contributions towards public, educational and governmental access services, facilities and equipment that are actually used for public, educational and governmental access services, facilities and equipment. For in-kind contributions (e.g., cameras, production studios), the open video system operator may satisfy its statutory obligation by negotiating mutually agreeable terms with the local cable operator, so that public, educational and governmental access services to the community is improved or increased. If such terms cannot be agreed upon, the open video system operator must pay the local franchising authority the monetary equivalent of the local cable operator's depreciated in-kind contribution, or, in the case of facilities, the annual amortization value. Any matching contributions provided by the open video system operator must be used to fund activities arising under Section 611 of the Communications Act.

* * * * *

(4) The costs of connection to the cable operator's public, educational and governmental access channel feed shall be borne by the open video system operator. Such costs shall be counted towards the open video system operator's matching financial contributions set forth in paragraph (d)(4) of this section.

* * * * *

(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 local franchising authority may elect either to impose the previously existing public, educational and governmental access obligations or determine the open video system operator's public, educational and governmental access obligations by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. Absent a previous 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 and that serves a franchise area with a similar population size.

Note to paragraph (d)(6): This paragraph shall apply, for example, if a cable operator converts its cable system to an open video system under § 76.1501.

* * * * *

(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 public, educational and governmental access obligations under paragraph (d) of this section.

* * * * *

7. Section 76.1506 is amended by revising paragraphs (d), (l)(3) and (m)(2) to read as follows:

§ 76.1506 Carriage of television broadcast signals.

* * * * *

(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. The provisions of § 76.55 that permit cable operators to refuse carriage of signals considered distant signals for copyright purposes shall not apply to open video system operators. If an open video system operator cannot limit its distribution of must-carry signals to the local service area of broadcast stations as used in 17 U.S.C. 111(d), it will be liable for any increase in copyright fees assessed for distant signal carriage under 17 U.S.C. 111.

* * * * *

(l) * * *

(3) Television broadcast stations are required to make the same election for open video systems and cable systems serving the same geographic area, unless the overlapping open video system is unable to deliver appropriate signals in conformance with the broadcast station's elections for all cable systems serving the same geographic area.

* * * * *

(m) * * *

(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. Operators may effect the deletion of signals for which they have received deletion notices unless they receive notice within a reasonable time from the appropriate programming provider that the rights claimed are invalid. The open video system operator shall not delete signals for which it has received notice from the programming provider that the rights claimed are invalid. An open video system operator shall be subject to sanctions for any violation of this subpart. An open video system operator may require indemnification as a condition of carriage for any sanctions it may incur in reliance on a programmer's claim that certain exclusive or non-duplication rights are invalid.

* * * * *

8. Section 76.1511 is revised to read as follows:

§ 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. Local governments shall have the authority to assess and receive the gross revenue fee. 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. In addition gross revenues under this paragraph includes any advertising revenues received by an open video system operator or its affiliates in connection with the provision of video programming, where such revenues are included in the calculation of the incumbent cable operator's cable franchise fee. Gross revenues does not include revenues collected by unaffiliated video programming providers, such as subscriber or advertising revenues. Any gross revenues fee that the open video system operator or its affiliate collects from subscribers or video programming providers shall be excluded from gross revenues. An operator of an open video system or any programming provider may designate that portion of a subscriber's bill attributable to the fee as a separate item on the bill. An operator of an open video system may recover the gross revenue fee from programming providers on a proportional basis as an element of the carriage rate.

9. Section 76.1512 is amended by revising paragraphs (b), (c) and (d) to read as follows:

§ 76.1512 Programming information.

* * * * *

(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;

(3) An open video system operator shall not restrict a video programming provider's ability to use part of the provider's channel capacity to provide an individualized guide or menu to the provider's subscribers;

(4) Where an open video system operator provides no navigational device, guide or menu, its affiliate's

navigational device, guide or menu shall be subject to the requirements of Section 653(b)(1)(E) of the Communications Act;

(5) An open video system operator may permit video programming providers, including its affiliate, to develop and use their own navigational devices. If an open video system operator permits video programming providers, including its affiliate, to develop and use their own navigational devices, the operator must create an electronic menu or guide that all video programming providers must carry containing a non-discriminatory listing of programming providers or programming services available on the system and informing the viewer how to obtain additional information on each of the services listed;

(6) An open video system operator must grant access, for programming providers that do not wish to use their own navigational device, to the navigational device used by the open video system operator or its affiliate; and

(7) If an operator provides an electronic guide or menu that complies with paragraph (b)(5) of this section, its programming affiliate may create its own menu or guide without being subject to the requirements of Section 653(b)(1)(E) of the Communications Act.

(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.

10. Section 76.1513 is amended by adding a note following paragraph (e)(1)(viii) to read as follows:

§ 76.1513 Dispute resolution.

* * * * *

(e) * * *

(1) * * *

(viii) * * *

Note to paragraph (e)(1)(viii): Upon request by a complainant, the preliminary carriage rate estimate shall include a calculation of the average of the carriage rates paid by the unaffiliated video programming providers receiving carriage from the open video system operator, including the information needed for any weighting of the individual carriage rates that the operator has included in the average rate.

* * * * *

11. Section 76.1514 is amended by revising paragraph (b) to read as follows:

§ 76.1514 Bundling of video and local exchange services.

* * * * *

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

[FR Doc. 96–21262 Filed 8–20–96; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB88

Endangered and Threatened Wildlife and Plants; Endangered Status for Three Plants From the Island of Nihoa, Hawaii

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) determines endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for three plants: *Amaranthus brownii* (no common name (NCN)), *Pritchardia remota* (loulu), and *Schiedea verticillata* (NCN). These three species are endemic to the island of Nihoa, Hawaiian Islands. Two of the species are threatened by competition with the one widespread alien plant that has established on the island. Two of the species grow in steep, rocky habitats which are easily disturbed. Because of the small numbers of existing individuals and populations and their narrow distributions, which are limited to the 0.25 square mile (sq mi) (0.65 sq kilometer (km)) island, these species are subject to a danger of extinction and/or reduced reproductive vigor. This final rule implements the Federal protection provisions provided by the Act.

EFFECTIVE DATE: September 20, 1996.

ADDRESSES: The complete file for this rule is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Pacific Islands Ecoregion, 300 Ala Moana Boulevard, Room 3108, P.O. Box 50088, Honolulu, Hawaii 96850.

FOR FURTHER INFORMATION CONTACT: Robert P. Smith, Pacific Islands Ecoregion Manager, at the above address (808/541–2749).

SUPPLEMENTARY INFORMATION:

Background

Amaranthus brownii, *Pritchardia remota*, and *Schiedea verticillata* are endemic to the island of Nihoa, Hawaii. Nihoa is the largest and highest of the uninhabited islands of Hawaii. The Hawaiian Archipelago is made up of 132 islands, reefs, and shoals forming an arch 1,600 statute mi (2,580 km) long in the middle of the Pacific Ocean. The eight major Hawaiian Islands occur in the southeast 400 mi (650 km) of the arch. Northwest of Niihau, small islands and atolls are widely scattered over the remaining 1,200 mi (1,930 km) of the arch and make up the Northwestern Hawaiian Islands (NWHI) (formerly called the Leeward Islands) (Department of Geography 1983, Macdonald *et al.* 1983, Walker 1990). Nihoa, the largest of the lava islands west of Niihau, is the closest to the main islands, situated 170 mi (275 km) northwest of Kauai. Over many years, waves driven by prevailing trade winds eroded the island into its current shape, which is the remnant southwest quadrant of the original huge volcanic cone. The east, west, and north sides of Nihoa are sheer cliffs, and the south coast comprises low cliffs with rock benches and one small beach (Cleghorn 1987, Gagne and Conant 1983, Macdonald *et al.* 1983). The island, formed about 7.5 million years ago by a single shield volcano, now measures only 0.85 mi (1.4 km) long, an average of 0.3 mi (0.5 km) wide, and 156 acres (ac) (63.1 hectares (ha)) in area (Macdonald *et al.* 1983, Walker 1990). The highest point, 896 feet (ft) (273 meters (m)) in elevation (Conant 1985), is located at one of the two peaks on Nihoa, which are separated by a depression dissected by six valleys (Macdonald *et al.* 1983). The elevation of the island is not sufficient to increase precipitation from that which would fall on a flat island, and the yearly rainfall of 20 to 30 inches (in) (508 to 762 millimeters (mm)) per year, usually concentrated in the winter months, is the result of unpredictable rain squalls passing over the island (Carlquist 1980, Cleghorn 1987). Valleys are deep and have little sediment, indicating that their streams were once powerful, but the only water on the island now is found in three freshwater seeps (Cleghorn 1987).

Nihoa, with the most diverse flora and fauna of any of the NWHI, presents a relatively intact low-elevation dryland ecosystem with a complement of native plants, arthropods, and birds (Gagne 1982). Such areas were probably common in the main Hawaiian Islands prior to their disturbance by Polynesian agricultural practices (Cuddihy and Stone 1990). Nihoa was first inhabited in the thirteenth century by a small group of Polynesian settlers who