Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Modernization of Media Regulation Initiative	MB Docket No. 17-105
Revisions to Cable Television Rate Regulations	MB Docket No. 02-144
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	MM Docket No. 92-266 MM Docket No. 93-215
Adoption of Uniform Accounting System for the Provision of Regulated Cable Service	CS Docket No. 94-28
Cable Pricing Flexibility	CS Docket No. 96-157

COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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I. INTRODUCTION AND SUMMARY

The Massachusetts Department of Telecommunications and Cable ("MDTC")[1] respectfully submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Federal Communications Commission ("Commission") on October 23, 2018, in the above-captioned proceedings.[2] The Commission adopted the FNPRM as part of its Modernization of Media Regulation Initiative in response to parties' request for elimination of

[1] The MDTC "is the certified 'franchising authority' for regulating basic service tier rates and associated equipment costs in Massachusetts." 207 C.M.R. § 6.02; *see also* MASS. GEN. LAWS ch. 166A, §§ 2A, 15 (establishing the MDTC's authority to oversee cable rates). In addition, the MDTC is charged with representing the Commonwealth before the Commission. MASS. GEN. LAWS ch. 166A, § 16.

[2] *In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148 (Oct. 23, 2018).

cable rate regulations.[3] Given the time that has passed since the Commission adopted its rate regulations, as well as the deregulation of the cable programming service tier ("CPST"), the MDTC agrees that a review of the regulations and forms is warranted. Indeed, the MDTC agrees with and supports many of the Commission's proposals in the FNPRM.

The MDTC believes, however, that rate oversight itself is not outdated or obsolete. The price of cable television service continues to be the most frequent complaint the MDTC receives as cable rates are rising as much as eight times faster than inflation.[4] Further, despite the market changes that have occurred since 1993, the Commission still has a statutory duty to ensure that basic service tier ("BST") rates are reasonable.[5] As Forms 1205 and 1240 continue to satisfy these statutory charges, and cable operators and local franchising authorities ("LFAs") are familiar with the forms, the MDTC supports their continued use.[6] That being said, these forms are not the only means by which the Commission can ensure reasonable rates. Any fundamental changes to the existing framework, however, must continue to protect BST subscribers. For example, the MDTC supports the Commission's proposal to direct LFAs to set reasonable rates based on statutory factors.[7] This proposal will, by its own terms, ensure that rates are reasonable. To the contrary, NCTA's proposal to institute a regional or national benchmark rate would be

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3 FNPRM, ¶ 1.

4 Elec. Delivery of MVPD Commc'ns, Statement of Comm'r Clyburn, 32 FCC Rcd. 10,755, 10,782, (Dec. 14, 2017).

5 *E.g.*, 47 U.S.C. § 543(b)(1).

6 Massachusetts cable operators no longer use Forms 1210, 1211, 1215, 1225, 1230, and 1235, so the MDTC does not oppose their elimination. The MDTC uses Forms 328, 1200, 1205, and 1240, although Form 1200 is sufficiently obsolete that the MDTC has resorted to alternatives for setting initial regulated rates, as discussed *infra*.

7 *See* FNPRM, ¶¶ 11-12.

inconsistent with statute, including by failing to ensure reasonable rates.[8] The MDTC also offers comment on certain other topics the FNPRM raises.[9]

II. DISCUSSION

A. The MDTC Supports the Commission's Proposal to Retain and Update Certain Existing Forms

While some forms related to cable rate setting have fallen out of use due to statutory and logistical changes, the Commission's Forms 1205 and 1240 continue to facilitate the setting of reasonable rates for the BST in rate-regulated communities in Massachusetts as required by statute.[10] Operators and LFAs are familiar with these forms, so the process and substance of rate setting proceedings based upon these forms is now fairly predictable and uncontroversial. Very few rate proceedings are appealed to the Commission,[11] because operators and LFAs are able to arrive at reasonable rates in the first instance using these forms and procedures.[12] The Commission has thus been relieved of much of the burden of involvement in cable rate setting, and the costs of rate setting process and compliance are now at an all-time low for LFAs and operators alike.

At the same time, the MDTC recognizes that certain forms and regulations are in need of update or elimination given changes that have occurred over the past two decades. Completing

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8 *See id.*, ¶¶ 13-14; *In re Revisions to Cable Rate Regulation*, MB Docket No. 02-144, NCTA Ex Parte (July 3, 2018) ("NCTA Ex Parte").

9 The MDTC's silence on any matter not addressed in these comments does not connote agreement or opposition by the MDTC.

10 *E.g.*, 47 U.S.C. § 543(b)(1).

11 *See* FNPRM, ¶ 6 & n. 26.

12 Furthermore, in the most recent instance of an operator filing a rate appeal with the Commission, the operator and the MDTC reached a negotiated settlement prior to the Commission issuing a ruling. *See Time Warner Cable, Inc. Appeal of Local Rate Order of the Dep't of Telecomms. & Cable, Commonwealth of Mass.*, 31 FCC Rcd. 12,661, *Order* (2016) (dismissing Time Warner's appeal).

those updates will be helpful for the LFAs that now oversee BST rates and cable operators, as well as any LFAs that might begin regulating cable rates in the future.

The Commission's Forms 1205 and 1240 serve their purpose as they currently exist, but would benefit from simplification of language and clarification of instructions. The forms are frequently submitted with small errors that might be avoided if the language in the form and instructions were made plainer. For instance, by removing worksheets that pertain to the CPST, the Commission would assist LFAs and operators to avoid situations where the operators may erroneously use those worksheets and thus miscalculate their Maximum Permitted Rates ("MPRs"). The Commission might also update form instructions with interactive features or add infographics to simplify completion of the forms.[13]

B. Alternatively, the MDTC Supports the Commission's Proposal to Delegate the Rate Setting Process to Local Franchising Authorities

In the alternative, the Commission has proposed that it eliminate all rate forms and scale back its regulations and direct LFAs to set reasonable BST rates based on the statutory factors required under the 1992 Cable Act.[14] This would leave it to the LFAs to maintain their own procedures for rate setting, reducing the burden on the Commission and potentially on LFAs and operators, as contemplated by the Cable Act.[15]

The Commission can meet its statutory obligation under § 543 using this approach, by mandating that LFAs take into account the seven statutory factors to be considered in setting rates for the BST. The Commission's obligation to assure that these factors are taken into

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13 *See also infra* Section II.E.d.

14 47 U.S.C. § 543(b)(1), (2)(C); FNPRM, ¶ 11.

15 47 U.S.C. § 543(b)(2)(A) (The Commission "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission").

account would be satisfied by requiring LFAs to apply the factors while retaining appeal authority for any case in which a party questions whether the factors have been appropriately applied. Given that there have been very few appeals to the Commission in recent years, and given the fact that only two LFAs currently oversee cable rates, retaining appellate jurisdiction would likely not be a significant burden. The Commission could also elect to amend its regulations to permit operators to appeal directly to the judiciary.[16]

While the MDTC, as one of the two LFAs nationwide that oversee BST rates, is equipped for a transition to take over this process for the 116 communities whose rates it regulates, there would need to be a bridge period during which the Commission's existing forms would still be used to set rates for the BST. However, this would relieve the Commission of any need to update its forms at this time; an LFA could simply continue using the forms as they currently exist until the LFA has established its own forms and process. The MDTC would be committed to working with Massachusetts cable operators and municipalities to seek a mutually agreeable framework.

C. NCTA's Uniform Benchmark Proposal Would Violate Federal Law

In its July 3, 2018 ex parte disclosure, NCTA describes its proposal to eliminate cable rate regulation in favor of permitting operators to use a standardized benchmark rate that would be "deemed" reasonable for communities whose rates are now regulated.[17] This benchmark, under NCTA's proposal, would be based upon an aggregation of deregulated rates either across a region or nationwide. Multiple erroneous assumptions underlie this proposal, most notably the

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16 *See* 47 C.F.R. § 76.944. Federal law requires that the Commission promulgate regulations to establish "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of [Commission] regulations," and does not require that the Commission resolve such disputes itself. 47 U.S.C. § 543(b)(5)(B).

17 NCTA Ex Parte, Attachment.

assumption that rates in all deregulated communities are market-based rates set by a competitive market. This is not the case.

a. Rate-Setting by Reference to a Regional or National Benchmark Does Not Necessarily Produce a Reasonable BST Rate

The overwhelming majority of communities nationwide are now considered subject to effective competition under the statutory definition. However, "effectively competitive" communities are not necessarily truly competitive in a traditional market sense, rendering the rates therein not necessarily market-based or reasonable.[18] Many communities have been deemed effectively competitive due solely to the presence of direct broadcast satellite providers.[19] Because wireline phone and data services – which are not provided as widely or at an equivalent level of quality by satellite providers – are increasingly important to subscribers, cable operators in communities with no wireline competitor are able to bundle services and collect rates from subscribers that exceed the rates that would be determined by a truly competitive marketplace for BST services. Further, because non-cable providers of television programming are not required to provide the BST, even if higher tiers of programming are competitively priced in a community, the BST may not be.

Historically, in communities where rates are no longer regulated because they are deemed subject to effective competition, operators have typically charged rates that are several dollars higher than in substantially similar regulated communities. For instance, in Massachusetts, two

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[18] *See In re Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, Report on Cable Indus. Prices*, DA 18-128, ¶ 1 & n.4 (2018) ("A finding of effective competition under more generally applicable competition analysis would not necessarily reach the same conclusions as one under the Cable Act's statutory standard.").

[19] *See, e.g.*, *In re Charter Commc'ns Petition for Determination of Effective Competition in Three Cmtys. in Mass.*, 28 FCC Rcd. 15,795, *Memorandum Opinion & Order* (2013).

neighboring cities, Somerville and Cambridge, pay very different rates for BST service with Comcast, the region's incumbent cable operator. In Somerville, where rates are not regulated, Comcast BST subscribers pay 86% more than similarly situated Comcast customers in rate-regulated Cambridge.[20] The BST packages in the cities have nearly identical channel lineups.[21]

Given that Massachusetts operators charge rates that are, on average, only 74% of the MPR in regulated communities,[22] it is clear that the regulated rates are not unreasonably low. If the regulated rates were unreasonably or unsustainably low, operators would always choose to charge the MPR, rather than leaving a high percentage of permitted rate revenue on the table. Thus, it cannot be the case that regulated rates are unreasonably low due to artificial deflation.

To the contrary, it appears that unregulated rates are unreasonably high. For example, in 10 Massachusetts communities that became reregulated in 2015 after a period of deregulation, the MDTC found that, during the deregulated period, the cable provider had assessed a "Broadcast TV Fee" on top of the regulated BST rate that the provider had charged previously.[23] This Broadcast TV Fee had not been assessed in these 10 communities prior to deregulation and was not assessed to subscribers in similarly situated regulated communities. Of course, cable

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20 *See* App. 1.

21 *Id.*

22 In 2017 in Massachusetts, the average regulated community's BST rate was only 74% of the MPR for the community. *See Petition of Comcast Cable Commc'ns, LLC to establish & adjust basic serv. tier programming, equip., & installation rates for cmtys. in Mass. served by Comcast Cable Commc'ns, LLC that are currently subject to rate reg.*, D.T.C. 16-3, *Rate Order* (Sept. 29, 2017); *Petition of Charter Commc'ns to establish & adjust basic serv. tier programming, equip., & installation rates for cmtys. in Mass. served by Charter Commc'ns that are subject to rate reg.*, D.T.C. 16-4, *Rate Order* (Oct. 31, 2017); *Petition of CoxCom, Inc. d/b/a Cox Commc'ns to establish & adjust basic serv. tier programming, equip., & installation rates for the Town of Holland*, D.T.C. 17-2, *Rate Order* (Jan. 26, 2018).

23 *See* Mass. Dep't of Telecomms. & Cable, Comments on Proposed Amendment to the Commission's Rules Concerning Effective Competition, MB Docket No. 15-53 (Apr. 9, 2015) ("2015 Comments") at Apps. 2-3. In addition, in other regulated communities where a cable operator embeds the Broadcast TV Fee in its BST rate, the fee is subject to review and the amount assessed is subject to the maximum permitted rate for those communities. *See In re Comcast Cable Commc'ns, LLC*, D.T.C. 13-5, *Rate Order* (Mar. 13, 2014).

operators already fully recover retransmission consent fees in regulated rates.[24] As a result, subscribers in the 10 communities that were, at the time, deemed subject to effective competition incurred a large rate increase wholly unrelated to the operator's costs.[25] This is the definition of an unreasonable rate.

In addition, in communities with unregulated BST rates, operators are free to set artificially high rates for the BST in order to incentivize customers to select a higher tier of service. In other words, an operator may set the BST rate unreasonably above cost in order to reduce the difference between the BST rate and the expanded tier rate, in order to entice a subscriber to choose expanded tier products.[26] If an operator were to employ such a practice, there is no modicum of assurance that the BST rate would be reasonable.

Moreover, even if cable subscribers electing higher tiers of service in unregulated communities may benefit from competitive pricing, BST-only subscribers may not. The standard for effective competition for cable services overall does not establish that there is a competitive market for the BST specifically.[27] The legal standard for effective competition considers the market shares of all video providers, including satellite providers and telecommunications providers that now provide television programming. But satellite providers are not subject to the requirement to offer BST service as cable operators are.[28] As a result, even if overall cable

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24 47 C.F.R. § 76.922(f)(iv).

25 *See* 2015 Comments at Apps. 2-3.

26 Further, in unregulated communities, operators that offer data services in addition to cable have the ability to cross-subsidize cable rates with data plans. *See In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Prot. & Competition Act of 1992, Report & Order & Further Notice of Proposed Rulemaking*, FCC 06-180, ¶ 51 (2007) (finding that broadband and video are "inextricably linked").

27 *See* 47 U.S.C. § 543(*l*)(1).

28 *See id.* § 543(b)(7)(A); 47 C.F.R. § 76.66.

service in a community is deemed "effectively competitive," this has no bearing on whether the market for the BST, specifically, in that community is competitive.[29] And absent a competitive market for the BST, cable operators are free to charge unreasonable BST rates.

In sum, while the MDTC is open to new methods of producing reasonable rates, NCTA's proposal would not produce reasonable rates, in part because effectively competitive communities are not necessarily truly competitive.

b. A Regional Benchmark Rate Does Not Take into Account the Seven Required Factors in § 543(b)(2)(C)

If cable operators were permitted to set rates in regulated communities by reference to rates charged in communities with "effective competition," this would only address the first of the seven statutory factors which the Commission must consider.[30] The remaining six factors relate to actual costs and revenue for each regulated community, and thus cannot be gleaned by reference to NCTA's one-size-fits-all rate benchmark.[31]

The Cable Act requires that rate setting must take into account (i) rates for cable systems that are subject to effective competition, (ii) direct costs of obtaining and providing signals carried on the BST, (iii) the portion of overall operator costs that can be allocated to the BST, (iv) revenues from advertising or other income streams related to programming in the BST, (v) the portion of taxes, fees, and assessments paid by the operator that can be allocated to the BST,

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29 The same holds true for the market for public, educational, and governmental access channel capacity, facilities, or financial support, responsibilities that are not required of satellite providers. *See* 47 U.S.C. § 541(a)(4)(B).

30 *Id.* § 543(b)(2)(C).

31 *Id.* § 543(b)(2)(C)(ii)-(vii).

(vi) the cost of supporting required public, educational, and governmental (PEG) channels, and (vii) a reasonable profit after accounting for costs.[32]

NCTA's standardized benchmark proposal addresses (imperfectly) only the first of these factors. A rate setting mechanism that addresses just one out of seven required factors simply does not comply with the statutory mandate.

Rates must also address the actual costs of providing signals carried on the BST, and changes in such costs. Depending on the number and lineup of channels offered in a given community, these costs may vary widely across a region or across the country. As channel lineups change or as channels make changes to their programming or technology, costs may change considerably year over year. The current rate forms specifically address these costs, allowing cable operators to justify rate increases when costs go up and to indicate that a rate decrease is in order when costs go down. NCTA's proposed rate setting mechanism does not address any of these factors.

While these cost and revenue factors could be addressed by a simpler rate setting process than the one currently in place, such as charging a flat per-channel rate, resorting to charging the same, non-cost-based rate across regions or nationwide does not address them.[33]

c. Equipment Rates Must Be Based on "Actual Cost"

Setting rates using NCTA's aggregated benchmark also fails to meet statutory mandates because lease rates for equipment used to receive the BST must be established "on the basis of actual cost."[34] In order to set equipment rates on the basis of actual cost, operators must account

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32 *Id.* § 543(b)(2)(C).

33 For alternatives, see *infra* Section II.D.

34 47 U.S.C. § 543(b)(3).

for and report these costs. In unregulated communities, operators do not perform this accounting and reporting, and thus the rates are not necessarily set based on actual costs. A similar lack of oversight cannot be applied in regulated communities. In order to align with statutory obligations, the Commission must require operators to at least provide an accounting of their equipment costs for BST service, and show that their equipment lease rates do not outpace these costs. NCTA's proposal would not satisfy this obligation.

d. Cursory Statements by NCTA Are Unsupported by Facts

NCTA claims that establishing a regional or national benchmark rate would incentivize operators to "offer competitive rates" in regulated markets, implying that these would be more consumer-friendly than existing, regulated rates.[35] As discussed *supra*, rates in regulated communities are typically lower than rates in unregulated communities, and rates in unregulated communities are not necessarily market-driven. Thus it is likely that rates for currently-regulated communities would rise to unreasonable levels if operators were permitted to apply a standardized rate based solely on unregulated rates. NCTA provides no evidence to support its specious assertion. In fact, NCTA in its disclosure also suggests that if operators are able to justify a higher rate in a regulated community than its standardized benchmark rate using the Commission's existing forms or other rate justification support, they ought to be permitted to charge that higher rate.[36]

NCTA's arguments in favor of its benchmark proposal hinge on the unsupported extrapolation that in communities where cable operators have been deemed subject to effective

35 NCTA Ex Parte, Attachment at 1.

36 *Id.*

competition under the legal definition of that term, the rates charged by those operators are competitive and market-based. As discussed *supra*, the legal fact does not prove the economic one.

D. Alternatives

The MDTC is not opposed to other forms of simplified rate setting that do comply with statutory requirements. The Commission could, for example, permit LFAs to set a per-channel rate for the BST that would be updated from time to time in accordance with inflation or other changes in costs. This per-channel rate would be based on multichannel video programming distributor rates at a given time, divided by the number of channels provided. This framework would lessen the burden on LFAs, operators, and the Commission, because it would eliminate the need for the LFA to conduct multiple annual proceedings for the various operators and communities whose rates are at issue. The same uniform rate would be applicable across the LFA's jurisdiction, tailored to the level of service being provided by each operator. Operators would be able to make their case to the LFA if they found the standard rate to be unreasonable or unsustainable, but otherwise they would be freed of the burden of justifying their service rates.

Rates could also be set using a benchmark based upon a region's prevailing unregulated rates less the region's historical average difference between unregulated and regulated rates. Under this framework, the historical average difference would be frozen, and would be applied to a region's prevailing unregulated rate to arrive at the region's regulated rate. This would incorporate the concerns (explained *supra*) with a benchmark based on unregulated rates, by mitigating the substantially higher rates that currently prevail in unregulated communities. It

would also simplify the rate setting process, reducing burdens on all parties. Further, by taking into account historical rates, this benchmark would satisfy the Commission's statutory charge.[37]

E. Additional Issues

a. Proposal to Deregulate Equipment Rates

The Telecommunications Act of 1996 allowed operators to aggregate their equipment costs into broad categories, regardless of the varying levels of functionality of the equipment, on a franchise, system, regional, or company level.[38] However, the Act specifically provided that "[s]uch aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier."[39] Accordingly, the Commission's rate regulations provide that the costs of customer equipment used by basic-only subscribers may not be aggregated with the costs of equipment used by non-basic-only subscribers.[40] The MDTC notes that the Commission's proposal[41] might permit operators to charge higher equipment rates to subscribers to higher service tiers than the BST, where the equipment provided is identical to that provided to BST-only subscribers.

b. Proposal to Deregulate Commercial Cable Services

The MDTC does not object to the Commission's proposal to make clear that rates for cable services to commercial subscribers including bars and restaurants are not regulated.[42] The MDTC understands the Commission's proposed definition of "commercial subscriber" as

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37 *See* 47 U.S.C. § 543(b)(2)(C); *supra* Section II.C.b.

38 47 U.S.C. § 543(a)(7)(A).

39 *Id.*

40 47 C.F.R. § 76.923(c)(2).

41 FNPRM, ¶ 17.

42 *See id.*, ¶ 19.

excluding hotels, motels, and other residential arrangements that may properly be considered "locations that . . . consist of households that are temporary or permanent."[43] Any location that acts as a residence, even temporarily, should not be deemed a commercial subscriber for regulatory purposes, regardless of the ownership structure or management of the dwelling. To the extent the Commission's proposal is consistent with this understanding, the MDTC supports the proposal.

c. Process for Setting Initial Rates

Given the consolidation of the cable TV industry since 1994, the information necessary to complete the existing FCC Form 1200, which requires looking back to an operator's 1994 finances, is simply not available in many cases. Moreover, even if the information were available, operators may not be able to ensure its accuracy. Accordingly, an update to the process for setting initial rates is warranted. Even in situations where the same corporate entity has provided cable services in a given community since 1994, it is still likely that not all relevant records from that time would have been preserved in an unregulated community.

As an alternative to Form 1200, the MDTC offers its recent experiences with initial rate setting, which allowed operators flexibility or a shorter lookback period. Alternatively, the Commission could promulgate a regulation that directs LFAs to set reasonable initial rates.[44]

In 2006, the Town of Brimfield, Massachusetts, petitioned the MDTC to begin cable rate regulation in the town. At the time, Charter Communications informed the MDTC that it did not have the necessary data dating back to 1994, because it had acquired the franchise in 1995, and because it did not maintain the information necessary to complete Commission forms in

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43 *Id.*

44 *See supra* Section II.B.

communities where rates were not regulated. In that case, the MDTC permitted Charter to use the rate it had been charging in Brimfield for the prior six years as its initial MPR. Charter in turn agreed to freeze its rate for a period and to relinquish any claim to true-up calculated on the rate during that period.

More recently, the MDTC filed FCC Form 328, recertifying its rate oversight authority in ten communities for which the Commission had previously granted Charter effective competition.[45] To effectuate this change, Charter used its last approved (2013) regulated rates in the recertified communities as a starting point.[46] Charter then prepared FCC Forms 1240 for each of the recertified communities, adjusting for inflation for the 2014, 2015, and 2016 rate years and completed the projected period for the 2017 rate year.[47] In preparing each of these FCC Forms 1240, Charter did not take any true-up, positive or negative, into account.[48] To the extent that a community's rates becomes re-regulated in the future, the Commission could consider this type of arrangement, which also would alleviate the need for FCC Forms 1200 and 1220.

d. The MDTC Supports the Commission's Proposal to Clarify its Rules for True-Up Interest

The MDTC supports the Commission's proposal to clarify the instructions for Form 1240 to make more explicit the principle that an operator may not accrue interest on costs that the operator opts not to pass through to subscribers when it is first entitled to do so. This is an issue

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45 Massachusetts Department of Telecommunications and Cable, Form 328 (filed Dec. 8, 2015), available at https://ecfsapi.fcc.gov/file/60001352672.pdf.

46 *Petition of Charter Commc'ns to establish and adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc'ns that are subject to rate regulation*, MDTC Docket No. 15-4, Charter Offer of Settlement at 2-3 (Nov. 14, 2016).

47 *Id.*

48 *Id.*

that is ripe for clarification, as it is an error that the MDTC encounters frequently in operators' Forms 1240, and as the Commission acknowledges in the FNPRM, decisions on this point have been inconsistent.[49] While operators are not required to pass all costs through to subscribers by charging the MPR, they are not permitted to artificially inflate the MPR by purporting to include excess true-up interest that is not in fact charged to subscribers as a part of the operator selected rate ("OSR"). Doing so would allow operators to accrue excess interest on the uncharged true-up amount in later years, over time driving up the MPR far beyond what the operator would ever conceivably charge for the BST.

The Commission ought to make clear that the amount of true-up an operator includes in a selected rate is limited to the difference between the base rate (line D8 in the current version of the Form 1240) and the OSR. Updating the Form 1240 instructions to clarify the true-up rules would assist in avoiding this problem.

e. CPST Sunset Issues

The MDTC notes that with regard to at least one provision addressed by the Commission, 47 C.F.R. § 76.980, there is no indication that Congress intended to sunset this provision in conjunction with sunset of certain regulations governing the CPST.[50] This rule requires that charges assessed to customers for changing service tiers shall not exceed actual costs, except that cable operators may establish higher charges for subscribers who change service tiers more than two times in twelve months.[51] There is a clear policy reason to retain this rule, in order to protect low-income or cost-conscious consumers who may wish to upgrade their service for limited

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49 FNPRM, ¶ 31 & n.105.

50 *See id.*, ¶ 37.

51 47 C.F.R. § 76.980(b), (d).

periods of time but who cannot afford a higher cost subscription at all times. If the Commission wishes to revise this section, the MDTC suggests that charges to subscribers for changing tiers could be considered a deposit, which would be refunded or applied to a subscriber's bill after the subscriber has retained the changed level of service for some period of time, like one month. This would protect operators from a particular type of subscriber churn where households might request a higher tier of service for just one day to watch a particular program, then downgrade the following day, and repeat that process regularly. But it would also protect subscribers who might wish to upgrade and then downgrade their service periodically in order to free up that marginal portion of their income for other expenses.

f. The Commission Should Reduce the Interest Rate for True-Up

The MDTC suggests that the Commission reduce the interest rate for true-up as the 11.25% interest rate in the Commission's regulations has become outdated.[52] The 11.25% interest rate used for one-time over or under estimation of projected costs on the Form 1240 has been in effect since 1993. Since that time, and in recent years in particular, interest rates have dropped to historically low levels. The current interest rate provided in the Form 1240 true-up mechanism may encourage operators to more conservatively project their costs in order to avail themselves of this favorable rate. For operators who routinely use an OSR that is lower than the MPR determined by the Form 1240, the 11.25% interest rate contributes to a situation in which the MPR could become so high that rate regulation does not serve Congress's intended purpose. The MDTC suggests that the Commission amend its regulation to use the interest rate that the

[52] *See id.* § 76.922(e)(3)(i).

Internal Revenue Service uses for tax refunds and additional tax payments.[53] Notably, this is already the interest rate the Commission uses for refunds by cable operators.[54]

g. The Commission Should Require Cable Operators to Offer the BST in the Same Manner as They Offer other Tiers

Congress requires the Commission to ensure that subscribers are aware of the availability of BST service.[55] Despite this, the MDTC has received consumer complaints from subscribers who had difficulty signing up for BST-only service or who the MDTC learned were not aware of the availability of BST-only service at the time when they requested service. As the Commission revisits its cable rate regulations, the MDTC would support requiring operators to make the availability of BST-only service more widely known, perhaps by requiring operators to advertise and offer the BST in the same manner in which they advertise and offer other, expanded tiers of service. For instance, the Commission should require cable operators to offer potential subscribers the same method of signing up online for a subscription to BST-only service as they do for higher tiers. If an operator's website allows subscribers to click to subscribe for higher tier service options, an equivalent button for subscription to BST-only service should be available adjacent to those for the higher tiers. As cable rates become more expensive over time, it is increasingly important for low-income and cost-conscious individuals to be aware of the BST as Congress intended.

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53 As of April 1, 2018, the IRS interest rate for under or over payments of taxes is 5%. IRS Revenue Ruling 18-07, https://www.irs.gov/pub/irs-drop/rr-18-07.pdf; 26 C.F.R. § 301.6621-1.

54 47 C.F.R. § 76.942(e).

55 47 U.S.C. § 543(b)(5)(D); *see also* 47 C.F.R. §§ 76.1602 (requiring cable operators to provide subscribers with information on their products and services offered at the time of installation of service, at least annually, and at any time upon request), 76.1618 (requiring operators to provide written notification to subscribers of the availability of BST service at the time of installation).

III. CONCLUSION

While some of the forms and procedures created in the 1990s to regulate cable rates may be outdated and in need of updating, there remains a role for meaningful oversight of cable rates to protect subscribers from unreasonable rates for the most basic service. Rates in regulated communities remain reasonable and significantly lower than those in unregulated communities, because of the work done by LFAs such as the MDTC in requiring operators to justify the rates they charge for the BST. The MDTC urges the Commission to reject NCTA's proposal to use a standardized benchmark BST rate based solely upon rates charged in unregulated communities, and instead to adopt the MDTC's proposals to update and retain its rate setting forms, or in the alternative, authorize LFAs to enact their own procedures to set BST rates.

Respectfully submitted,

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