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

REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Commonwealth of Massachusetts
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REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

The Massachusetts Department of Telecommunications and Cable ("MDTC")[1] respectfully submits these reply comments to the initial comments filed in response to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Federal Communications Commission ("Commission") in the above-captioned proceedings.[2] The comments filed in this proceeding support and confirm the MDTC's position that a regulatory cleanup is needed in Part 76 but that protection of basic-service-tier ("BST") cable subscribers remains paramount, and

[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 regulate 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).

any change to the Commission's regulatory framework must comply with the Commission's statutory directives.

I. INTRODUCTION

In addition to being required by federal statute, meaningful oversight of BST rates serves the public interest. Through this proceeding, the Commission seeks to modernize its regulations and reduce unnecessary requirements that no longer serve the public interest.[3] As Hawaii and the National Association of Telecommunications Officers and Advisors ("NATOA") ably explain, meaningful rate regulation continues to serve the public interest.[4] For example, the MDTC continues to encounter instances in which cable operators incorrectly charge subscribers. In a recent rate case, one operator charged rates for several services that were higher than the rates reported to the MDTC.[5] In that same case, the operator filed documents listing an effective date that was different than the date on which the rates were actually implemented.[6] Another cable operator recently charged certain Massachusetts subscribers a state Universal Service Fund ("USF") fee.[7] Massachusetts does not have a state USF. In these cases, the companies acknowledged and corrected the errors. Without meaningful review of a cable operator's rates, however, it is unlikely that all of these errors would have been detected and corrected.[8] The

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3 *Id.*, ¶ 2.

4 Hawaii Comments at 3, 6, 20; NATOA Reply Comments at 2.

5 *See* D.T.C. 17-7, *Rate Order* at 8 (Dec. 21, 2018).

6 *See id.* at 2 n.4.

7 *See* E-mail from William Wesselman to Joslyn Day (Oct. 19, 2018) (on file with author). Although a state USF charge is not part of a local franchising authority's rate review under Part 76, the incident nonetheless illustrates the benefits of and need for oversight of cable operators' rates.

8 *See id.* (thanking the MDTC for bringing the error to the company's attention). In yet another recent example, an operator inadvertently deleted certain channels from the BST but continued to charge subscribers for the channels because the deletion was not properly communicated within the company. *See* D.T.C. 17-5, *Rate Order* at 8-18 (Nov. 1, 2018). Although the operator disputed the proper way to account for the deletions, it acknowledged the miscommunication that led to the error. *See id.*

above examples, merely a sampling from the past year, negate the American Cable Association's ("ACA") claim that rate regulation does not provide any benefit.[9] The substance of the Commission's current regulations for rate increases enables a true check on operators' provision of services that, by definition, are not subject to competition.[10] The record reflects that the Commission should retain its Forms 1205 and 1240.[11]

II. DISCUSSION

Most commenters agree, or at least are not in opposition, on most of the issues the Commission raises in the FNPRM.[12] There is a consensus that a review of the Commission's rate regulations is appropriate.[13] There is also a consensus that the Commission has certain statutory mandates regarding its regulations that it may not eschew.[14] The majority of commenters seem to agree that the Commission should continue to protect the interests of BST cable subscribers.[15] Further, most commenters agree that to balance the needs of all

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9 *See* ACA Comments at 2. Notably, ACA ties this claim to a supposedly highly competitive market. *Id.*; *see also* NCTA Comments at 5 (claiming competition as a basis for adoption of the cable industry's unregulated rate comparison proposal). Competition, however, is a puzzling justification given that the only communities under discussion are those that have been affirmatively found to be not effectively competitive. *See Findings of Competing Provider Effective Competition Following Dec. 8, 2015 Filing Deadline for Existing Franchise Authority Recertification*, *Pub. Notice*, 30 FCC Rcd. 14,293 (Dec. 17, 2015).

10 *See* 47 U.S.C. § 543(a)(2) (providing for regulation of rates of cable systems that are not subject to effective competition).

11 In the alternative, the MDTC continues to support the Commission's proposal to direct local franchising authorities to enact their own procedures to set BST rates.

12 Although commenters disagree on the Commission's proposal to direct local franchising authorities to set reasonable BST rates based on the statutory factors, the MDTC maintains that this proposal can be an effective and efficient way to ease administrative burdens and discharge the Commission's statutory duties. *See* FNPRM, ¶ 11; MDTC Comments at 4-5.

13 *See* Hawaii Comments at 1-2; ACA Comments at 2; NCTA Comments at 2; NATOA Reply Comments at 2.

14 *See* Hawaii Comments at 1-2; ACA Comments at 12; NCTA Comments at 5; NATOA Reply Comments at 2-3.

15 *See* Hawaii Comments at 3, 6, 11, 20; NCTA Comments at 5, 10; NATOA Reply Comments at 2-3.

stakeholders, the Commission should retain some version of FCC Forms 1205 and 1240.[16] Finally, most commenters agree that the cable industry's proposal to match regulated rates to unregulated rates is bad policy contrary to the public interest, and would violate federal law.

A. As Commenters Agree that the Commission Should Retain FCC Forms 1205 and 1240, These Forms Should Remain the Exclusive Framework for Rate Oversight

Most commenters, including the cable industry, agree that the Commission should retain FCC Forms 1205 and 1240.[17] Although NCTA limits its support of the forms to that of an option for cable operators under its unregulated rate comparison proposal, there is no reason why such forms should not continue to be used exclusively, without any need for alternatives.[18]

Under NCTA's unregulated rate comparison proposal, cable operators would have an option of how to set rates: either matching regulated rates to an average of unregulated rates, or using a modified Form 1205 and 1240.[19] Under this proposal, operators presumably would annually fill out a model Form 1205 and 1240 for each community in order to choose which rate-setting method would maximize profit. Given this, the industry's administrative-burden argument about the current regulatory regime rings hollow.[20] If cable operators expect to be filling out Forms 1205 and 1240 regardless, there is no reason to add confusion and complexity to the rate-setting process by adopting an unregulated rate comparison alternative, particularly

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16 *See* Hawaii Comments at 1-2; NCTA Comments at 12, 14.

17 *See* Hawaii Comments at 1-2; NCTA Comments at 12, 14.

18 *See* NCTA Comments at 3; *infra* Section II.B.

19 NCTA Comments at 10; *see also infra* Section II.B.

20 Additionally, as NCTA points out, much of the length of the Commission's current regulations is attributable to cable programming services tier ("CPST") regulations that sunset 20 years ago and the process for setting an initial rate for a newly regulated community. NCTA Comments at 3 n.10, 11; *see also* ACA Comments at 7. If the Commission repeals the obsolete CPST regulations and modifies the manner by which initial rates are set—actions that the MDTC supports in principle—any remaining claim of a heavy administrative burden imposed by the remaining regulations loses any persuasiveness.

given that proposal's legal and policy flaws identified below. The record is clear that some form of the current Forms 1205 and 1240 would be a workable solution that would continue to discharge the Commission's statutory directives while protecting vulnerable subscribers.[21] Consequently, the Commission should not eliminate its entire framework but should retain these forms as the exclusive method for rate oversight.

B. NCTA's Deregulation Proposal Would Violate Federal Law

The record in this proceeding makes clear that federal law does not permit the Commission to adopt NCTA's unregulated rate comparison proposal as a means of rate regulation.[22] NCTA proposes to permit cable operators to match regulated rates to an average of unregulated rates.[23] The MDTC agrees with Hawaii and NATOA that NCTA's proposal does not consider all of the factors in 47 U.S.C. § 543(b)(2)(C).[24] The statute asserts that in adopting its regulations to ensure that BST rates are reasonable, the Commission *shall* take into account the following factors:

> (i) the rates for cable systems, if any, that are subject to effective competition;
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> (ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;
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> (iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

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21 While the MDTC is not opposed to a slightly modified Form 1240, any form must include some method of accounting for removed channels, negative inflation, and decreased external costs. *See* NCTA Comments at 12.

22 *See* FNPRM, ¶ 13.

23 *See id.*

24 *See* Hawaii Comments at 5-6; NATOA Reply Comments at 3.

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).[25]

NCTA's proposal considers only the first of these seven factors. There is no claim and no evidence in the record that the proposal considers the other six factors.[26] In fact, even the ACA, which generally supports the deregulation of cable rates, alludes to the fact that the Commission does not have unfettered authority to eliminate its current rate regulations.[27] In short, the record does not support the Commission's authority to implement in any form NCTA's unregulated rate comparison proposal.

In addition to the legal barrier, the MDTC agrees with Hawaii that NCTA's proposal suffers from fatal policy flaws as well.[28] NCTA makes a number of conclusory

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25 47 U.S.C. § 543(b)(2)(C).

26 NCTA claims that its proposal is "entirely consistent" with the statute but goes on to discuss only one subsection of the statute, and ignores section 543(b)(2)(C) and the six factors therein that its proposal does not consider. *See* NCTA Comments at 7-8.

27 *See* ACA Comments at 11-12. ACA affirmatively argues that the Commission possesses legal authority to exempt small cable operators from rate regulation; it does not make the same claim of NCTA's unregulated rate comparison proposal. *See id.*

28 *See* Hawaii Comments at 5-6.

claims about the purported benefits of its unregulated rate comparison proposal.[29] But there is so little actual detail provided about the proposal that none of the claimed benefits can be properly verified.[30] In fact, as Hawaii points out, from the little detail that is provided, it seems likely that the proposal would spur significant disputes about undefined terms, thus burdening local regulators, operators, and the Commission with uncertainty and appeals.[31] This is in addition to the growing pains inherent in any new regulatory framework.[32] Rather, by maintaining Forms 1205 and 1240 under the existing framework, the FCC can maintain the "uniformity and certainty" NCTA describes.[33]

Finally, the MDTC disagrees with NCTA's assertion that state and local regulators would benefit from a reduction in administrative burdens that its proposal would produce.[34] Of course regulators such as the MDTC seek to minimize administrative burdens where feasible.[35] But there is a cost-benefit analysis that must be employed when doing so. The MDTC's primary goal, and the Commission's primary mandate under federal law, is to minimize administrative burdens *while protecting the*

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29 *See* NCTA Comments at 6-7.

30 NCTA states that "Congress intended for 'substantive and procedural rules to govern regulation of basic rates . . . to be adopted by the Commission, which is also to serve as an appellate body to review local rate decisions.'" *Id.* at 4 n.15. NCTA's proposal is neither substantive, nor adequately procedural.

31 Hawaii Comments at 5-6; *see also* NCTA Comments at 9 & nn.30-31.

32 *See* Hawaii Comments at 3-4.

33 NCTA Comments at 5; *see also supra* Section II.A. For a further discussion of the policy flaws inherent in NCTA's proposal, in particular the basic-economics-based concept that "effectively competitive" communities are not necessarily competitive in a traditional market sense, and thus do not necessarily benefit from market-based or reasonable rates, see MDTC Comments at 6-9 and NATOA Reply Comments at 2.

34 *See* NCTA Comments at 6.

35 *See, e.g.*, MDTC Comments at 14-15; D.T.C. 17-5, *Rate Order* at 7 (Nov. 1, 2018); D.T.C. 16-4, *Rate Order* at 11-12 (Oct. 31, 2017); D.T.C. 10-8, *Order on Reconsideration* at 5 (Apr. 23, 2012); Office of the Governor, Commonwealth of Massachusetts, Executive Order No. 562: To Reduce Unnecessary Regulatory Burden (Mar. 31, 2015).

interests of cable subscribers by ensuring that regulated rates are reasonable.[36] Even if the unregulated rate comparison proposal accomplished the former, it simply would not accomplish the latter.

For these reasons as well as those outlined in the MDTC's initial comments, the Commission must decline to adopt NCTA's unregulated rate comparison proposal.

C. Equipment Rates Must Be Based on Actual Cost

As with programming rates, the Commission has certain statutory duties with respect to equipment rates, including the requirement to establish rates that are based on actual cost.[37] For this reason, NCTA's proposal to match regulated equipment rates to unregulated equipment rates would violate federal law because such rates would not be based on actual cost.[38]

Additionally, given the Commission's statutory requirements, the MDTC interprets the FNPRM as a proposal limiting equipment-rate regulation to equipment rates charged to BST-only subscribers.[39] In other words, all equipment rates charged to BST-only subscribers would be regulated, but equipment rates—potentially even for the same equipment—charged to expanded tier subscribers would be unregulated. However, Hawaii seems to interpret the FNPRM to be contemplating a regime under which any equipment that can be used for both the BST and expanded tiers would be unregulated.[40] The MDTC does not agree that this type of regime is contemplated by, or given its wholesale deregulatory approach, is a logical outgrowth of the FNPRM. In any event, it is clear that the Commission should clarify its proposal with

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36 47 U.S.C. § 543(b)(1), (2)(A).

37 *Id.* § 543(b)(3).

38 *See* NCTA Comments at 14; *cf. supra* Section II.B.

39 *See* FNPRM, ¶ 17; NCTA Comments at 13.

40 Hawaii Comments at 7.

respect to equipment rates before moving forward with any change to its equipment-rate regulations.[41]

D. Initial Rates Should Not Be Set Solely Based on the Unregulated Rate in Effect Prior to the Establishment of Regulation

The MDTC objects to NCTA's proposal to set an initial rate in a community based solely on the unregulated rate prior to the franchising authority's certification.[42] As the MDTC has repeatedly demonstrated, and as the Commission has referenced, the rates in unregulated communities are not necessarily market-based or reasonable.[43] As a result, relying solely on an unregulated rate to establish an initial regulated rate suffers from the same legal deficiencies as NCTA's unregulated rate comparison proposal.[44] However, although NCTA's proposal is not workable, the MDTC is not opposed to a modification to the initial-rate-setting framework, as discussed in its initial comments.[45]

E. No Commenters Object to the Commission's Proposal to Clarify its Rules for True-Up Interest

The MDTC and Hawaii support, and no commenters object to 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.[46] As a result, for reasons cited by Hawaii and those discussed in

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41 *See Ill. Commerce Comm'n v. ICC*, 776 F.2d 355, 361 (D.C. Cir. 1985) (implying that an agency's proposal that is not clear on its face does not afford the public a reasonable opportunity to participate in the rulemaking process).

42 *See* NCTA Comments at 10.

43 *See, e.g.*, MDTC Comments at 6-9 & n.18.

44 *See supra* Section II.B.

45 *See* MDTC Comments at 14-15.

46 *See* FNPRM, ¶ 31; Hawaii Comments at 14-15.

the MDTC's initial comments, the Commission should adopt its proposal and make clear that the amount of true-up an operator can include in an operator selected rate ("OSR") is limited to the difference between the base rate and the OSR.[47]

III. CONCLUSION

There is widespread agreement that a regulatory cleanup in Part 76 is due. However, given the Commission's statutory mandates, a regulatory cleanup does not, and cannot mean effective deregulation of BST programming, equipment, and installation rates. Consistent with the MDTC's initial comments, the Commission should modernize its rate regulations by eliminating those regulations no longer in effect and clarifying but maintaining its existing FCC Forms 1205 and 1240. If it does choose to make a fundamental change to its regulatory framework, the Commission should direct local franchising authorities to set reasonable BST rates based on the required statutory factors.

Respectfully submitted,

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[47] *See* Hawaii Comments at 14-15; MDTC Comments at 15-16.