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	)	MM Docket 92-266
Television Consumer Protection and Competition	)	MM Docket No. 93-215
Act of 1992: Rate Regulation	)	
	)	
Adoption of Uniform Accounting System for the	)	CS Docket No. 94-28
Provision of Regulated Cable Service	)	
	)	
Cable Pricing Flexibility	)	CS Docket No. 96-157

REPLY COMMENTS OF NCTA—THE INTERNET & TELEVISION ASSOCIATION

Seth A. Davidson
Alyssia J. Bryant
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7447
Counsel for NCTA – The Internet & Television Association

Rick Chessen
Diane B. Burstein
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001-1431
(202) 222-2445

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SUMMARY

The Commission is to be commended for including initiating this Further Notice of Rulemaking ("*Further Notice*") proceeding to update and streamline the quarter-century old rate regulatory regime as part of its regulatory "modernization" efforts. The record establishes that the time is right for a substantial overhaul of the Commission's rate rules.

As the Commission acknowledges in the *Further Notice*, the factual underpinning for cable rate regulation has dramatically changed since the Commission adopted its cable rate regulations decades ago. All but a relative handful of cable systems face effective competition in the communities where they operate. Not surprisingly, interest in cable rate regulation among local franchising authorities ("LFAs") has dissipated. The antiquated and unnecessarily burdensome regulatory regime established in the early 1990s is ripe for many of the proposed modernization efforts contemplated in the Further Notice.

The opposition to the modernization proposals comes primarily from state governmental entities in Massachusetts and Hawaii, the two jurisdictions where a few communities remain subject to cable rate regulation. The Massachusetts Department of Telecommunications and Cable ("MDTC") and the State of Hawaii ("Hawaii") acknowledge the burdens and complexity associated with the existing regulatory regime, but they resist meaningful reforms that would update, streamline, and simplify the task of regulating rates. Indeed, MDTC and Hawaii advance proposals that would in a number of instances exacerbate the existing burdens of the regime on consumers, operators, LFAs, and the Commission.

In particular, MDTC argues that LFAs should have the authority to adopt their own rate-setting procedures, but this proposal is prohibited by the Communications Act and would result in regulatory uncertainty and an increase in the number of rate appeals. Rather, the Commission should adopt NCTA's proposed updated competitive benchmark ("UCB") methodology, which

would reform the current rate regime by providing LFAs with a simple method to determine whether a system's basic service tier ("BST") rate meets the statutory test of reasonableness. The proposed UCB is fully consistent with Commission's past recognition that relying on a competitive benchmark based on rates charged by systems that are subject to effective competition is consistent with the Communications Act and the underlying objectives of cable rate regulation.

Adoption of the UCB does not require complete dismantling of the existing benchmark regime. There is consensus among NCTA, MDTC, and Hawaii that the Form 1240 rate-setting methodology should be updated and simplified, but disagreement regarding the steps that should be taken to achieve reform. MDTC and Hawaii contend that the "starting rate" for newly regulated (or re-regulated) Form 1240 filers should be the last-approved BST rate, but their proposal fails to address the central problem with the current Form 1240 methodology – the need for operators to build their current rate based on information that dates back years or even decades and often is simply unavailable to the current operator. The Commission should instead reform Form 1240 as proposed by NCTA by using as the starting rate the competitive BST rate charged by the operator prior to the rate in effect at the time the LFA petitioned the Commission to be certified (or re-certified) to regulate rates. The Commission also should implement NCTA's suggestion that all of the Form 1240 segments except program costs and inflation should be eliminated. Retaining the other segments, including the channel movement, deletion and addition segments, will only lead to confusion and unnecessarily burden the regulatory process.

With respect to the regulation of cable equipment rates, NCTA supports limiting such regulation to basic-only subscribers and updating the current form and rules. Likewise, NCTA also supports the Commission's conclusion that commercial services are not subject to rate regulation. MDTC and Hawaii oppose changes to the equipment rules, and argue that commercial rates should either be regulated or only narrowly exempted, but their arguments are not grounded in law or sound policy. The Commission also should reject MDTC's proposal for the adoption of new rules regulating the manner in which the BST is advertised as unnecessary and beyond the scope of this proceeding. Finally, the Commission should reject LFA arguments against repealing as obsolete Section 76.980. That section, which governs charges for changes in service tiers, applies only to upgrades and downgrades involving the addition or deletion of a regulated tier, a situation that no longer can arise given that no services beyond BST are regulated today.

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REPLY COMMENTS OF NCTA—THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA") submits its reply comments in the above-captioned *Further Notice of Proposed Rulemaking* ("*Further Notice*").[1/]

INTRODUCTION

The Commission is to be commended for including as part of its overall "modernization" efforts this proceeding to update and streamline the cable rate regulation regime it first implemented over a quarter century ago. Between 1993 and 1997, the Commission's numerous proceedings implementing the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") drew an intense level of interest from a substantial number of franchising authorities, consumer groups, and other supporters of such regulation. As the *Further Notice* acknowledges, the factual underpinning for the Commission's

1/ *Modernization of Media Regulation Initiative: Revisions to Cable Television Rate Regulations*, MB Docket No. 17-105, et al., Further Notice of Proposed Rulemaking and Report and Order, FCC 18-148 (rel. Oct. 23, 2018) ("*Further Notice*").

original approach to cable rate regulation has all but evaporated along with broad support for that approach. Indeed, only three commenters – the Massachusetts Department of Telecommunications and Cable ("MDTC"), the State of Hawaii ("Hawaii"), and the National Association of Telecommunications Officers and Administrators ("NATOA") – have sought to defend many elements of the current regime.[2/] However, as the initial comments filed by NCTA and by the American Cable Association ("ACA") demonstrate, the time is right for a substantial overhaul of the Commission's rate rules.[3/]

DISCUSSION

I. The Communications Act Does Not Allow Local Authorities to Establish Their Own Standards and Processes for Engaging in Cable Rate Regulation.

MDTC argues that the Commission can and should allow local franchising authorities ("LFAs") to adopt and implement their own rate-setting standards and procedures, with the Commission's role reduced to hearing appeals (or eliminated completely by permitting appeals to be brought directly to the courts).[4/] As NCTA explained in its initial comments, and as even

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[2/] MDTC, Hawaii, and NATOA (which filed a three-page document self-styled as "Reply Comments") will be referred to collectively herein as the "Franchising Authorities." Of course, there are thousands of local franchising authorities across the country, and only MDTC and Hawaii currently regulate cable rates, and even they do so only in a limited number of communities.

[3/] Many of the issues with the current rate regulatory regime presented in the *Further Notice* were first identified by the Commission well over a decade ago. *In the Matter of Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 (2002).

[4/] Comments of the Massachusetts Department of Telecommunications and Cable, MB Docket Nos. 17-105 *et al.*, 4-5 (Jan. 10, 2019) ("MDTC Comments"). In support of giving LFAs more leeway in regulating BST rates, MDTC emphasizes that there have been very few appeals in recent years. *Id.* at 5. Of course, the reason that there are so few appeals has more to do with the fact that hardly any systems are subject to regulation than with an absence of any problems with the current, but outdated, rate regulation rules and forms. Should more systems become subject to regulation in the future, it is likely that the number of appeals would increase. And allowing LFAs to adopt their own ad hoc rate regulation schemes would make the situation much worse.

Hawaii agrees,[5/] the ad hoc approach outlined by MDTC is squarely at odds with the Commission's statutory obligations and would increase regulatory costs and uncertainty.

Section 623 of the Communications Act of 1934, as amended (the "Act"), requires the Commission not merely to oversee the regulation of basic service tier ("BST") rates, but also to establish the standards and procedures that LFAs must follow in carrying out such regulation.[6/] The Commission cannot abdicate its statutorily-mandated central role by leaving it up to LFAs to create their own rate rules. Furthermore, allowing LFAs to adopt and apply their own rate-setting standards and processes would run counter to the orderly rate regulation regime Congress sought to create.[7/] If every LFA is permitted to create its own rate-setting process, the goals of regulatory uniformity and certainty will be undermined, inevitably resulting in an increase in the number and complexity of local rate order appeals.[8/] In short, MDTC's proposal would run counter to the purpose of this proceeding – to *simplify* cable rate regulation. It should not be adopted.

II. NCTA's Proposed UCB Methodology Will Streamline the Rate Regulation Process While Ensuring Reasonable Rates.

In contrast to the ad hoc local regulatory approach favored by MDTC, NCTA's proposed updated competitive benchmark ("UCB") methodology for determining the reasonableness of a cable operator's BST rate is simple and consistent with the letter and spirit of Section 623. The UCB methodology is based on the same concepts that guided the Commission in the creation of

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5/ Comments of the State of Hawaii, MB Docket Nos. 17-105 *et al.*, 4 (Feb. 8, 2019) ("Hawaii Comments").

6/ 47 U.S.C. §543(b).

7/ NCTA agrees with Hawaii's observation that MDTC's proposal to allow LFAs to engage in ad hoc rate-setting negotiations with cable operators assumes that such negotiations will take place on a level playing field and produce a fair result. In reality, even large cable operators likely would find themselves at a disadvantage in attempting to negotiate rates with a municipal or state government relieved of any obligation to abide by uniform federally-mandated standards.

8/ Comments of NCTA – The Internet & Television Association, MB Docket No. 17-105, *et al.*, at 5 (Feb. 8, 2019) ("NCTA Comments").

"benchmark" regulation in 1993, while also greatly streamlining the process and removing unnecessary historical distortions.[9/]

The Franchising Authorities' opposition to the UCB proposal is based on a misreading of the Cable Act and reflects a disagreement with Congress' determination to rely on competition, rather than regulation, to achieve reasonable rates.[10/] Their arguments do not withstand scrutiny.

For example, MDTC claims that a benchmark based on the rates charged by systems that are subject to effective competition would be inconsistent with Section 623(b)(2)(C), which MDTC characterizes as mandating that the Commission's rate rules take into account seven specific factors.[11/] But as NCTA's Comments showed, the Commission already rejected this argument in 1993, when it determined that the use of a competitive benchmark based on rates charged by systems that are subject to effective competition *is consistent with* Section 623(b)(2)(C).[12/] The Franchising Authorities also assert that merely being subject to "effective competition" does not ensure that the rates charged by cable systems are reasonable. But that argument simply ignores: (1) Congress' judgment that the presence of "effective competition" in

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[9/] 47 U.S.C. § 543(b)(1)-(b)(2); *see also* NCTA Comments at 6.

[10/] MDTC Comments at 9; Hawaii Comments at 6-7; NATOA Reply at 3.

[11/] MDTC Comments at 9.

[12/] NCTA Comments at note 27, *citing Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 ¶¶ 11-13 (1993) ("First Reconsideration Order"). The Commission has also explained that "benchmarks permit a ready means of identifying systems with presumptively unreasonable rates, while at the same time defining a zone of reasonableness that can accommodate a range of existing rate levels below the benchmark . . . . A benchmark could protect consumers from excessive rates, and, by eliminating the need for detailed cost-based regulation, would keep the costs of administration and compliance low. Thus, a benchmark approach to regulation of basic tier rates holds substantial advantages." *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation,* MM Docket No. 92-266, Report and Order, 8 FCC Rcd. 5631, ¶185 (1993) ("1993 Rate Order"); *see also id.* ¶180 ("[O]ur regulations governing rates for the basic service tier are aimed toward achieving rate levels for that tier that are closer to rates of systems subject to effective competition").

a community produces reasonable rates and the Commission's previous rejection of challenges to that judgment and (2) the reality of an intensely competitive video marketplace.[13/]

MDTC wrongly assumes that BST rate increases in systems with "effective competition" are proof of the cable industry's alleged market power. In fact, cable operators confront rapidly increasing "input" costs, particularly retransmission consent fees. Those cost increases, not any exercise of market power, are the primary driver of recent BST rate increases, in both regulated and unregulated communities. The advantage of the UCB is that it offers regulated systems a much simpler means of demonstrating that their BST rates (even if such rates may increase over time) are in line with what competitive systems charge their customers. That result is, of course, exactly what Congress intended in adopting Section 623.

III. The Commission Can and Should Update and Simplify the Form 1240 Rate-Setting Methodology.

Although NCTA and the Franchising Authorities disagree over the adoption of the UCB methodology, there is consensus that an updated and simplified version of the Form 1240 methodology should be available as an alternative means for a regulated cable system to establish its permitted BST rate.[14/] However, NCTA and the Franchising Authorities have decidedly different views as to what specific changes the Commission should make to the Form 1240 methodology.

For example, NCTA has proposed that the "starting rate" for the first-time filing of a Form 1240 by a previously unregulated or newly re-regulated cable system should be the rate charged

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13/ *See Amendment to the Commission's Rules Concerning Effective Competition*, MB Docket No. 15-53, 30 FCC Rcd. 6574, ¶ 6, n.33 (2015).

14/ *See, e.g.*, NCTA Comments at 10-13 ("[T]he Form 1240 methodology could be greatly simplified."); ACA Comments at 3 (explaining that "the Commission should simplify [the rate] processes and forms for larger cable systems"); MDTC Comments at 4 (discussing that FCC Form 1240 should be updated with simplified language and instructions).

prior to the LFA filing a petition for certification (or recertification).[15/] Both Hawaii and MDTC acknowledge that substantial reform is necessary to address this issue, but they suggest a somewhat different approach – one that would establish the BST rate last approved by the LFA as a system's "starting rate."[16/] However, because a system may never have been previously regulated or may have been deregulated for many years, such an approach would fail to address one of the major problems with the current Form 1240 methodology – the fact that it can require cable operators to go back years (possibly as far as 1993) to "build" a system's current maximum permitted BST rate. Just as importantly, such an approach would fail to take into account the intervening years (or even decades) during which a cable operator's rates were set based on competitive market conditions. For that reason, NCTA's straightforward "starting rate" proposal is both more equitable and easier to administer than that proposed by the Franchising Authorities.[17/]

NCTA has also argued that, leaving aside the critical Form 1240 "segments" accounting for changes in inflation and "external" costs (like programming and retransmission consent fees), the Commission should eliminate those other segments that make the Form 1240 so complicated and time-consuming. The Franchising Authorities agree that many of the current Form 1240 rate segments contribute to the complexity and difficulty faced by operators and LFAs alike in calculating rates using the existing methodology.[18/]

15/ NCTA Comments at 11-12.

16/ Hawaii Comments at 12-13; MDTC Comments at 15.

17/ NCTA Comments at 12 (explaining that a simplified Form 1240 would reduce administrative costs and LFAs "would no longer need detailed back-up on rates and channel line-up changes made years or even decades earlier (often by prior system owners)"). Significantly, while opposed to NCTA's straight-forward solution, Hawaii concedes that it has no alternative mechanism to offer in the case of a system that was never previously subject to rate regulation. Hawaii Comments at 12.

18/ MDTC and Hawaii also urge the Commission to "clarify" its rule regarding the accrual of interest on true-up amounts. MDTC Comments at 15-16; Hawaii Comments at 14-15. In their effort to minimize the interest component, the Franchising Authorities would remove any regulatory incentive an operator might have to defer increasing its rates to the maximum permitted level. With regard to the applicable

However, the Franchising Authorities contend that the Commission should retain the various Form 1240 provisions that require cable operators to account for past and future BST channel line-up changes. Hawaii does acknowledge that there are difficulties associated with accounting for BST channel changes under the current Form 1240 methodology, but it then asserts that these difficulties do "not justify eliminating this equitable and necessary adjustment."[19/] In fact, the current channel adjustment mechanisms are anything but equitable. As NCTA noted in its comments, the current residual adjustments "can illogically lend to asymmetric rate adjustments when regulated channels . . . are added or deleted from a system's line-up."[20/]

The best solution – for the sake of regulatory simplicity – is for the Commission to eliminate the channel movement, addition, and deletion rate adjustment rules and related Form 1240 segments entirely. These elements of the Form 1240 methodology have been a source of considerable controversy over the years.[21/] Eliminating them, and the confusion that they engender, will not harm consumers.[22/]

In particular, any concerns that eliminating the channel adjustment rules would allow operators to strip out popular channels from the BST without adjusting rates are misplaced.

Form 1240 interest rate, NCTA opposes the suggestion regarding the IRS interest rate, as that figure changes periodically and would add an unnecessary complication to the Form 1240.

19/ Hawaii Comments at iii; 13-14.

20/ NCTA Comments at n.11. If the FCC retains channel adjustments, it is critical that the Commission eliminate the lopsided treatment of the "residual" adjustment that unreasonably penalizes channel deletions.

21/ Confusion over the appropriate methodology for adjusting rates to reflect channel addition and deletions finds its origins in Section 76.922(g)(8), which on its face purports to sunset the rules governing channel movements, additions and deletions. The confusion over this issue was further exacerbated when cable programming service tier ("CPST") rates were deregulated, leading to two different attempts by the Commission to promulgate an "interim" rule clarifying the situation in 2002. *See In the Matter of Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 ¶ 55 (2002); *In the Matter of Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, Order, 17 FCC Rcd 15974 ¶ 2 (2002). The Commission never followed up that "interim" clarification (which itself is very confusing) with a final rule. As suggested above, the optimal solution is to eliminate the channel addition, deletion and movement adjustment rules.

22/ NCTA Comments at n.11.

Popular channels typically have the highest programming costs and, under NCTA's proposal, any reduction in programming costs associated with deleted channels would still be reflected in the rate calculation. The resulting reduction in rates would not only protect consumers when a popular service is moved or deleted, but also would minimize any rate incentive the operator might have to remove a popular BST channel.[23/]

IV. There Are No Barriers to the Commission Revisiting and Revising the Overly Expansive Scope of Cable Equipment Rate Regulation.

The current rules regulating the rates for equipment, which are effectively unchanged since 1993, do not reflect the fact that Congress completely deregulated the rates for all services offered by a cable operator other than BST effective April 1, 1999. Given this fundamental regulatory change, NCTA demonstrated that the Commission should update its rules to limit the regulation of cable equipment rates to basic-only subscribers and to streamline the methodology for establishing the maximum permitted rates for such equipment.[24/]

MDTC and Hawaii oppose any revisions to cable equipment rate regulation, contending that: (i) it would be arbitrary and capricious for the Commission to narrow its interpretation of the breadth of equipment subject to rate regulation; and (ii) proposals to streamline the equipment rate-setting process violate the Cable Act requirement that regulated cable equipment rates be based on actual costs.[25/] In taking these positions, MDTC and Hawaii ignore the impact of the profound

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[23/] The requirement that cable operators affirmatively re-market the BST to subscribers if they make a "fundamental change" in the nature of the tier serves as a further check on operators making dramatic reductions in the number of BST channels. *See* 47 C.F.R. § 76.981(b).

[24/] *See* NCTA Comments at 13-14. Hawaii mistakenly assumes that a cable operator could avoid all equipment regulation "simply by only offering equipment that is capable of mixed use." Hawaii Comments at 7. In fact, any equipment used by a BST-only subscriber could remain subject to rate regulation (regardless of its capability), but the rates for equipment that is actually used by other subscribers to access additional unregulated services would be deregulated.

[25/] MDTC Comments at 11-13; Hawaii Comments at 7-8.

change in regulation that occurred in 1999 and the changes in the marketplace that have occurred since then. They also misread the Cable Act.

First, the Franchising Authorities' defense of the breadth of equipment subject to rate regulation is not supported by a careful review of the Act. Hawaii argues that the Commission itself previously concluded that it was obligated to adopt an expansive approach to equipment rate regulation and cannot justify revising its interpretation of the Cable Act's treatment of cable equipment in the face of that conclusion and the D.C. Circuit's decision upholding that interpretation.[26/] However, as NCTA pointed out in its initial comments, the appeals court did not find that the Commission's expansive reading of the scope of equipment regulation was mandated by the statutory language. The court simply upheld the Commission's definition of the scope of equipment regulation as a "permissible interpretation" of the statute, and the Commission remains empowered to revisit and amend that interpretation so long as it provides a reasoned explanation.[27/] Here, the sunset of the CPST rate regulations and the evolution of competition in the video marketplace support the Commission in revisiting and revising the scope of cable equipment rate regulation.[28/]

26/ Hawaii Comments at 8.

27/ *Encino Motorcars, LLC v. Navarro,* 36 S.Ct. 2117, 2120, 2126 (2016) (explaining that "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change"); *see also* Terrestrial Program Access Order, 25 FCC Rcd at 752 n.23 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-964 (1984); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (explaining that initial agency interpretations are not "carved in stone" and that the Commission has a duty to consider varying interpretations and policy judgments on an on-going basis.)

28/ NCTA reiterates its support for simplifying Form 1205 requirements. In particular, the Commission should clarify that cable operators filing a Form 1205 are not required to affirmatively establish whether the cost categories taken into account in calculating an operator's current equipment rates were "unbundled" from service rates in 1993. It simply is unreasonable, more than twenty-five years after the fact, and in many cases after systems have changed hands one or more times, to expect a cable operator to be able to make such a showing. Instead, the Commission should make clear that Form 1205 rates are to be calculated based solely on the operator's most recent fiscal year costs. Moreover, as suggested in NCTA's initial Comments, the Commission should consider whether there are additional ways in which the Form 1205 methodology can be streamlined and simplified. *See* NCTA Comments at 13-14.

Second, the Commission has long understood that the reference to "actual costs" in Section 623 does not require operators to justify equipment rates based on a traditional "cost of service" approach. This was made clear by the Commission in 1993:

> Congress intended that our regulations establish *equipment rates similar to those that would exist in a competitive environment*. Under the 'actual costs' standard, cable operators recover their costs including a reasonable profit. This will result in rates comparable to those that would exist in a competitive environment….[29/]

In other words, setting equipment rates using a cost-of-service-like calculation was a means to an end, not an end in itself. In 1993, there was no way for a competitive benchmark for equipment rates to be established. But, today, a UCB-type approach would ensure that equipment rates – just like BST service rates – reflect the rates found in a competitive environment.

V. NCTA Supports the Commission's Tentative Conclusion that Commercial Services Should Remain Unregulated.

Both NCTA and MDTC support the Commission's tentative conclusion in the *Further Notice* that the rates for commercial customers should remain unregulated.[30/] Exempting commercial service from rate regulation is consistent with the statutory scheme. Moreover, there does not appear to be a present need to subject commercial services to rate regulation and, in fact, given the many years during which the cable industry and commercial customers have successfully operated without any need for local regulatory intervention, it would be perverse to subject commercial rates to rate regulation at this late date.

29/ First Order on Reconsideration, 9 FCC Rcd. at 1164, ¶42 (emphasis added).

30/ NCTA Comments a 15; MDTC Comments at 14. One difference between NCTA and MDTC regarding the status of commercial rates is that MDTC suggests that the definition of "commercial service" should exclude any location that acts as a residence – even temporarily – regardless of ownership structure or management. MDTC Comments at 14. NCTA reiterates that there are no policy reasons to regulate the rates charged to commercial establishments, which have needs that differ from the needs of residential subscribers.

Hawaii, however, argues that because Congress did not expressly exclude commercial rates from regulation, such rates must be subject to regulation.[31/] This argument fails because, as NCTA has explained, there is no evidence in the legislative history or elsewhere that Congress was concerned about cable rates charged to commercial customers.[32/] Rather, the legislative history focuses on the impact of cable rates on residential customers and the test for establishing effective competition refers to "households," indicating clearly that Congress' goal was to protect subscribing members of the public, – not business enterprises.[33/] Commercial entities tend to be sophisticated marketplace participants capable of effectively negotiating rates and services in today's competitive video programming marketplace. Their motivation for subscribing to cable – usually to attract paying customers – creates a much different value/demand equation than for residential cable customers. Thus, the more reasonable interpretation of the Cable Act's rate regulation provision in light of its purposes and history – and the sound public policy choice – is to continue to exclude commercial services from the cable rate regime.

VI. The Commission Should Not Adopt MDTC's Proposal to Regulate the Manner in Which the BST Is Advertised.

There is no reason for the Commission to adopt new regulations requiring cable operators to advertise and offer BST-only service in the same manner that other tiers are offered.[34/] The Commission already requires cable operators to provide consumers with information about all of their service offerings, including the BST.[35/] In any event, MDTC's proposal involves marketing

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31/ Hawaii Comments at 9-10.

32/ Comments of the National Cable Television Association on the Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 15-17 (filed June 29, 1994).

33/ 47 U.S.C. § 543(l); *see also* Comments of the National Cable Television Association on the Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, at 16 (filed June 29, 1994).

34/ MDTC Comments at 18.

35/ *See* 47 C.F.R. §76.1602(b). The FCC recently updated those rules in its E-Notice Order. See Electronic Delivery of MVPD Communications; Modernization of Media Regulation Initiative, MB and advertising matters that go well-beyond the scope of this proceeding. Any new regulations in this regard would run counter to the underlying goal of reducing the regulatory burdens placed on cable operators and should not be adopted.

VII. Section 76.980 of the Commission's Rules Was Rendered Obsolete By the Sunset of CPST Regulation and Should Be Repealed.

NCTA's initial comments included Section 76.980 in a list of obsolete rule provisions that the Commission should repeal.[36/] This rule addresses the charges that a cable operator may impose on subscribers when they upgrade or downgrade their service. MDTC and Hawaii contend that Section 76.980 should be retained, at least for situations where a subscriber downgrades to BST-only service.[37/] However, as a matter of statutory construction, the appropriate action is to repeal the rule in its entirety.

The source for Section 76.980 is Section 623(b)(5)(C) of the Communications Act, which directs the Commission to implement and enforce "standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment *subject to regulation under this section*…."[38/] This provision thus was intended to apply only when a subscriber added or dropped a regulated service. Because BST is the only regulated service, whenever a subscriber adds a new service, the subscriber is selecting an unregulated service. And whenever a subscriber drops a service, that service also is an unregulated service. Thus, there no longer is any legal basis for the continued application of this rule.

CONCLUSION

Dockets No. 17-317, 17-105, Report and Order and Further Notice of Proposed Rulemaking, FCC 18-166 (2018).

36/ NCTA comments at n.37

37/ MDTC Comments at 16-18; Hawaii Comments at 18.

38/ 47 U.S.C. § 543(b)(5)(C).

For the reasons stated in NCTA's Comments and in these Reply Comments, the Commission should streamline and modernize its cable rate regulations and associated forms.

Respectfully submitted,

/s/ Rich Chessen

Rick Chessen
Diane B. Burstein
NCTA – The Internet & Television Association
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001-1431
(202) 222-2445

Seth A. Davidson
Alyssia J. Bryant
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7447
Counsel for NCTA – The Internet & Television Association

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