Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 STATE OF HAWAII

The State of Hawaii (the "State" or "Hawaii"),[1] by its attorneys and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. § 1.415, hereby submits the following reply comments on the rules governing the statutory process for rate regulation of cable television services.[2]

Cable rate regulation remains an important government function to ensure that consumers have effective and affordable access to multichannel video programming services in communities that continue to lack effective competition. Cable rate regulation continues to

[1] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs ("DCCA"). In Hawaii, the cable franchising process is managed by the DCCA, rather than by a local or regional governmental body.

[2] Modernization of Media Regulation Initiative, *Further Notice of Proposed Rulemaking*, MB Docket No. 17-105, *et al.* (Oct. 23, 2018) ("*FNPRM*").

apply to the basic service tier, which is purchased primarily by low income consumers that are very sensitive to unreasonable rates for services.

Despite the continued importance of cable rate regulation, only four parties filed comments on the *FNPRM*, including just two franchising authorities, two trade associations, and no cable television franchisees. In stark contrast, 468 parties filed comments in response to the Commission's 2005 cable rate regulation proceeding.[3] The lack of participation in the current proceeding does not imply a lack of importance in these issues. It instead reflects the fact that local franchising authorities operate with small staffs and very limited budgets, and therefore they must be very selective regarding which FCC proceedings to participate in.

The sparse record in this proceeding also lacks consensus on the major questions posed by the *NPRM*, except for an acknowledgement that the existing rules and forms could use a non-substantive house cleaning. On this point, all parties seem to agree. Accordingly, the Commission should use this opportunity to eliminate outdated and irrelevant rules and forms, but, as discussed further below, the Commission should refrain from making any substantive changes in the rate regulation process.

A. The Commission Should Not Direct Franchising Authorities to Negotiate Rates with Cable Operators Using the Seven Statutory Factors

One of the odd juxtapositions in the record of this proceeding is the stance of various parties on the Commission's proposal to eliminate its rate regulations and direct cable operators and franchising authorities to negotiate reasonable rates for the basic service tier based on the

[3] *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, FCC 06-180, *Report and Order and Further Notice of Proposed Rulemaking*, MB Docket No. 05-311, Appendix A (March 5, 2007).

seven factors enumerated in Section 623(b)(2)(C) of the Communications Act.[4] Both Hawaii and NCTA[5] oppose this proposal, in part because the statute clearly directs that the seven factors must be used by "the Commission" for the process of "prescribing such regulations," and not by cable operators and franchising authorities for setting their own rates.[6] NCTA further argues that permitting franchising authorities to develop their own rate setting procedures would likely lead to inconsistent rate requirements in different communities.[7]

In contrast, the Massachusetts Department of Telecommunications and Cable ("MDTC") supports this proposal, but acknowledges that it might be burdensome on smaller franchising authorities.[8] MDTC seems to further suggest that franchising authorities could assume the Commission's rate setting functions simply by recaptioning FCC Forms 1205 and 1240 as local forms. Although Hawaii believes the FCC Forms should be updated and streamlined, transferring the FCC forms to the franchising authorities would unlikely improve the process because it would simply remove the Commission from its statutorily required role without producing any apparent corresponding benefits and may create inconsistencies in interpretation and application of the forms due to different levels of expertise and knowledge at the franchising authorities level. Therefore, Hawaii continues to believe that the Commission should reject the proposal to push all rate setting to the franchising authorities.

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[4] *See FNPRM*, ¶ 11 (*citing* 47 U.S.C. § 543(b)(2)).

[5] *See* Comments of NCTA – The Internet & Television Association, MB Docket No. 17-105, *et al.*, at 4-5 (Feb. 8, 2019) ("*NCTA Comments*").

[6] 47 U.S.C. § 543(b)(2).

[7] *See NCTA Comments* at 5.

[8] *See* Comments of Massachusetts Department of Telecommunications and Cable, MB Docket No. 17-105, *et al.*, at 4-5 (Jan. 10, 2019) ("*MDTC Comments*").

B. The Commission Should Also Reject the Proposal to Permit Cable Operators to Set Rates Based on Benchmarks

The MDTC and Hawaii are in full agreement that the Commission cannot and should not permit cable operators to set regulated cable rates based on the rates that they charge for comparable offerings in other communities. As both Hawaii and MDTC explain, the use of benchmarks would clearly fail to comply with the statutory directive that regulated cable rates must be based on the seven factors enumerated in Section 623(b)(2)(C) of the Communications Act.[9] MDTC also demonstrates in its comments that the cable rates in many communities are unreasonably high and do not reflect competitive market pressures.[10] Therefore, the use of such inflated rates as benchmarks in communities that lack effective competition would fail to "ensure that the rates for the basic service tier are reasonable" in those communities as required by the statute.[11]

NCTA continues to support its benchmark proposal, but fails to explain how it could be implemented in a manner that is consistent with the statutory requirements of Section 623(b)(2)(C). As NCTA emphasizes in the opening portion of its comments, "Congress expressly instructed the Commission to 'prescribe, and periodically thereafter revise, regulations … to ensure that the rates for the basic service tier are reasonable.'"[12] NCTA further explains that "[g]iven Congress's express statutory delegation of governing authority to the Commission, it would be neither lawful nor practical for the Commission to relinquish its primary role in

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[9] *See MDTC Comments* at 9-11 (*citing* 47 U.S.C. § 543(b)(2)).

[10] *Id.* at 6-8.

[11] 47 U.S.C. § 543(b)(2).

[12] *NCTA Comments* at 4 (*quoting* 47 C.F.R. § 543(b)(2)).

establishing, and overseeing the application of, that regime."[13] NCTA's benchmarking proposal, however, would do just that, it would result in the relinquishment by the Commission of its statutory responsibility to establish regulated cable rates using the seven factors enumerated in the Communications Act and therefore the Commission must reject the benchmarking concept.

C. The Commission Should Adhere to its Long Standing Precedent that Equipment Used to Receive Basic Services is Subject to Rate Regulation

The MDTC and Hawaii are also in full agreement that the Commission cannot and should not alter its existing treatment of equipment used to receive the basic service tier of cable services.[14] Following a thorough examination of the statutory issues involved, the Commission concluded in 1993 that all equipment used to receive the basic service tier ("BST") of cable service is subject to rate regulation even if that equipment can also be used to receive other services.[15] The Commission's previous decision was supported by the U.S. Court of Appeals for the D.C. Circuit, which observed that any attempt to limit rate regulation to equipment used "exclusively" to receive the BST "does violence to the natural meaning of the term 'used.'"[16]

Given the strong statutory basis for subjecting all equipment used to receive the BST to rate regulation and the exceedingly weak record in this proceeding, the Commission should reject calls to reach back 25 years to change history. Instead, the Commission should retain its existing rules and statutory interpretation with respect to the regulation of rates for equipment used to receive the basic tier of cable service.

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[13] *Id.*

[14] *MDTC Comments* at 13.

[15] *See id.*, ¶ 17.

[16] *Time Warner Entertainment v. FCC*, 56 F. 3rd 151, 177 (D.C. Circuit 1995).

C. The Commission Should Not Exclude Commercial Subscribers From the Benefits of Cable Rate Regulation

Hawaii disagrees with the MDTC and NCTA regarding the statutory intent and importance of protecting all subscribers of cable television services, regardless of whether they are individuals or commercial entities. The overall purpose of rate regulation is clear—to serve as a substitute for competition in communities that lack such conditions in the market for multiple channel video programming services. An absence of competition equally harms both residential and commercial subscribers, forcing both to pay excessive prices for programming services.

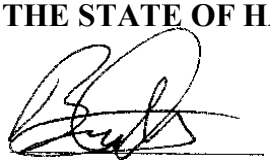
Protecting both residential and commercial subscribers is also consistent with the Communications Act, which makes no distinction—either in the relevant text of the statute or in its legislative history—between residential and commercial subscribers. The apparent effort in the *FNPRM* to create such a distinction is unpersuasive. Although the Communications Act makes unrelated reference to "households" in the definition of effective competition, the Commission has previously acknowledged that this is a reference to the Census Bureau's use of occupied housing units in population studies.[17] There is no corresponding reference to the term "households" in any other portion of Section 623 and, as Hawaii explained in its comments, imputing such a term by converting "subscribers" into "household subscribers" in all other portions of Section 623 would produce illogical and clearly unintended results. Therefore, the Commission should eliminate the long standing ambiguity on this issue by explicitly

[17] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 and 92-262, *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4324 (1994) (*citing* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8).

acknowledging that Congress intended its rate regulation requirements to benefit all subscribers of cable television services in communities that lack effective competition.

Respectfully submitted,

THE STATE OF HAWAII

By: 

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