COMMONWEALTH OF MASSACHUSETTS

Department of Telecommunications and Cable
1000 Washington Street, Suite 820, Boston, MA 02118
(617) 305-3580
www.mass.gov/dtc

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

MIKE KENNEALY
SECRETARY OF HOUSING AND ECONOMIC DEVELOPMENT

EDWARD A. PALLESCHI
UNDERSECRETARY

KAREN CHARLES PETERSON
COMMISSIONER

April 12, 2019

Ex Parte Letter -- Filed Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

In re Modernization of Media Regulation Initiative, MB Docket No. 17-105
In re Revisions to Cable Television Rate Regulations, MB Docket No. 02-144
In re 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
In re Adoption of Uniform Accounting System for the Provision of Regulated Cable Service, CS Docket No. 94-28
In re Cable Pricing Flexibility, CS Docket No. 96-157

Dear Ms. Dortch:

The Massachusetts Department of Telecommunications and Cable ("MDTC") respectfully submits this *ex parte* letter in the above-captioned proceedings to respond to a novel claim submitted by NCTA in its reply comments.[1] Specifically, NCTA claims that its "Updated Comparative Benchmark" proposal is statutorily permissible by relying on a portion of the Commission's 1993 rate order that adopted a benchmark *as one part* of the Commission's comprehensive rate regulation framework.[2] NCTA mischaracterizes the Commission's order by ignoring this comprehensive framework and the critical aspects of the order that implemented the framework—aspects that, as discussed below, the Commission found to validate its use of a benchmark but are fatally absent from NCTA's proposal.[3]

Congress directed the Commission to take into account seven factors when crafting its framework to ensure that basic service tier rates are reasonable.[4] In 1993, the Commission adopted a benchmark that took into account only the first factor (rates for cable systems subject

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1 *See* NCTA Reply Comments at 4 & n.12 (Mar. 11, 2019).

2 *See id.* (discussing *In re Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 9 FCC Rcd. 1164, 1173-75 (1993) ("*Order on Reconsideration*")).

3 *See id.*

4 47 U.S.C. § 543(b)(2)(C); *In re Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5749-50 (1993) ("*Rate Order*").

to effective competition), but at the same time supplemented that benchmark with rate-setting methodologies that incorporated the other six factors.[5] Indeed, in upholding its use of the benchmark, the Commission stated:

> Additionally, and significantly, while we ultimately based the rate-setting methodology on the rates and other characteristics of competing systems, we took all of the statutory factors into account when developing this rate regulation scheme. In this regard, it is necessary to consider the various rate regulation mechanisms employed—benchmarks, cost-of-service showings and price caps—not in isolation, but as part of a regulatory system that incorporates the various statutory factors.[6]

In contrast to this comprehensive framework, NCTA's proposal takes into account only the first of the seven factors, and would not be "part of a regulatory system that incorporates the various statutory factors."[7] NCTA claims that the Commission "determined that the use of a competitive benchmark based on rates charged by systems that are subject to effective competition *is consistent with*" the statute.[8] What the Commission actually said in adopting its benchmark was: "*Primary reliance* on a benchmark formula based on competitive rates, *as an initial means of determining regulated cable rates, with supplemental reliance on cost of service showings*, is . . . consistent with provisions of the Cable Act of 1992."[9] NCTA's proposal would result in *exclusive* reliance on a benchmark based on competitive rates, with no supplemental reliance on anything else.[10]

Indeed, while NCTA claims that its proposal would be "consistent with" section 543(b)(2)(C), that does not paint the whole picture.[11] If a farmhand is tasked with picking seven rows of corn, his picking the first row is consistent with that task, but does not fully discharge the task. Likewise, the Commission's adoption of NCTA's proposal would not fully discharge the Commission's statutory duty to take into account the seven enumerated factors.[12]

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5 47 U.S.C. § 543(b)(2)(C); *Rate Order*, 8 FCC Rcd. at 5757 ("As indicated, we believe that the best method of regulating basic service tier rates is to set rates initially using benchmarks and then to apply a price cap approach on a going-forward basis."); *Order on Reconsideration*, 9 FCC Rcd. at 1176 (addressing the benchmark's accounting for rates of cable systems subject to effective competition and then stating that "[t]he other statutory factors are provided for in the price cap allowances").

6 *Order on Reconsideration*, 9 FCC Rcd. at 1176.

7 *Id.*

8 NCTA Reply Comments at 4.

9 *Order on Reconsideration*, 9 FCC Rcd. at 1175 (emphasis added).

10 *See* FNPRM, ¶¶ 13-14.

11 NCTA Comments at 7 (Feb. 8, 2019).

12 47 U.S.C. § 543(b)(2)(C). NCTA's proposal to allow cable operators, at their sole discretion, to voluntarily choose to calculate rates with "alternative rate support" in lieu of the proposed benchmark does not save the benchmark proposal. *See In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148, ¶ 14 (Oct. 23, 2018) ("FNPRM"). As discussed above, the Commission in 1993 used a benchmark to establish initial rates, but then supplemented that benchmark with mandatory price caps or cost of service showings, thus ensuring that all seven factors were taken into account. *Order on Reconsideration*, 9 FCC Rcd. at 1175. In contrast, NCTA's proposal would permit a cable operator to use the one-factor benchmark exclusively and in

The MDTC also notes that the Commission's 1993 benchmark was applied on a community-by-community basis, based on the historical rates in each individual community.[13] In contrast, NCTA's proposal would uniformly apply regionally or even nationally with no relation back to the previous rates of individual communities.[14] The benchmarks are apples and oranges, further distancing NCTA's proposed benchmark from that of the Commission.

Notably, though, the MDTC is not arguing that all other benchmarks are impermissible. To the contrary, in our initial comments, we proposed a modification to NCTA's proposal that would simplify rate oversight and at the same time fully discharge the Commission's duty to take into account all seven factors in section 543(b)(2)(C):

> 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.[15]

In contrast to NCTA's proposal, the MDTC's proposal would be based on rates established under the Commission's historical rate setting framework, thereby inherently taking into account the seven statutory factors.[16] No commenter objected to this proposal.[17]

The Commission may choose to adopt the MDTC's benchmark proposal or maintain a version of its existing framework, but it is clear that the Commission should not consider NCTA's benchmark proposal, because it is not permissible under federal law.

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically via ECFS with your office. Thank you for your time and please do not hesitate to contact me should you have any questions.

Respectfully,

/s/ *Sean M. Carroll*
Sean M. Carroll
Deputy General Counsel

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perpetuity, without any supplemental reliance or "other rate regulation mechanisms employed," thus violating section 543(b)(2)(C). *Id.*; *see also* FNPRM, ¶¶ 13-14.

[13] *Rate Order*, 8 FCC Rcd. at 5770-71. While the Commission's benchmark was established without accounting for differences in individual system costs, it was applied, in contrast to NCTA's proposal, to each individual system based on the prevailing rate of each individual system. *See In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 9 FCC Rcd. 4119, 4158-59, 4220 (1994).

[14] FNPRM, ¶ 13. This, of course, is one result of the proposal's failure to account for all seven statutory factors.

[15] MDTC Comments at 12-13 (Jan. 10, 2019).

[16] *Id.*

[17] It is also notable that the cable operators that are actually subject to the Commission's current regime did not file comments in this proceeding. The sheer dearth of public comment objecting to the current framework for basic service tier rates is indicative that the framework is working.