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

FCC 92-544

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

Notice of Proposed Rulemaking

Adopted: December 10, 1992 Released: December 24, 1992

By the Commission:

Comment Date: January 27, 1993
Reply Comment Date: February 11, 1993

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I. Introduction

1. In this Notice of Proposed Rule Making (NPRM) we propose to amend our rules to implement Sections 623, 612, and 622(c), of the Communications Act of 1934, as amended[1] by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").[2] These statutory provisions concern regulation of rates for cable service and for leased commercial access.

2. We solicit comment to help us craft a comprehensive regulatory model that will best fulfill statutory objectives related to rate regulation for the cable industry. Section II of this NPRM describes and proposes alternative procedural and substantive regulations through which the requirements of these statutory provisions could be implemented. It also discusses the advantages and disadvantages of each alternative. We tentatively conclude that we should not select cost-of-service regulation as the primary mode of regulation of cable service rates. Later, we initially find that we should adopt a benchmark regulatory alternative for regulation of cable service rates under which the Commission would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Rates above the benchmark would be presumed unreasonable. At the same time, cost-of-service regulation on an individual system basis could be applied to cable systems seeking to justify a rate above the benchmark. We also solicit comment generally on how the different rate regulation proposals presented here would affect, and be affected by, other parts of the Cable Act of 1992 addressed in separate Commission proceedings.[3]

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[1] 47 U.S.C. Sections 543, 532, and 542(c).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3,9,14, 106 Stat. 1460 (1992) (hereinafter Cable Act of 1992).

[3] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, Notice of Proposed Rulemaking, FCC 92-500 (released Nov. 6, 1992); Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 -- Indecent Programming and Other Types of Materials on Cable Access Channels, MM Docket No. 92-258, Notice of Proposed Rulemaking, FCC 92-498 (released Nov. 10, 1992) (Indecent Programming on Cable Access Channels Proceeding); Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, Notice of Proposed Rulemaking, FCC 92-499 (released Nov. 19, 1992) (Must Carry/Retransmission Consent Proceeding); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 192 -- Equal Employment Opportunities, MM Docket No. 92-261, Notice of Proposed Rulemaking, FCC 92-539 (adopted Dec. 10, 1992); Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 -- Tier Buy-Through Prohibitions, MM Docket No. 91-262, Notice of Proposed Rulemaking, FCC 92-540 (released Dec. 11, 1992); Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 -- Consumer Protection and Customer Service, MM Docket No. 92-263, Notice of Proposed

II. Proposed Implementation

A. Regulation of Cable Service Rates

1. General Issues

3. The Cable Act of 1992 directs the Commission to establish rules to govern rate regulation of cable service tiers offered by cable systems not subject to effective competition.[4] The Commission must establish, first, regulations that assure that rates for the basic service tier are reasonable, and, second, standards that permit identification, in individual cases, of rates for cable programming services that are unreasonable.[5] In this section, we propose regulatory alternatives to give effect to the specific obligations and prohibitions the Act imposes on regulators and cable operators as part of its statutory scheme for rate regulation of the basic service tier and cable programming services. We solicit comment here on whether these proposals would fulfill these statutory requirements, and, if not, how they should be modified to do so.

4. The Cable Act of 1992 states that since the rate deregulation triggered by the Cable Communications Policy Act of 1984,[6] monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable subscribers. Acknowledging that since 1984 the average number of basic channels has increased from about 24 to 30, the Act still finds that average monthly rates have risen 29 percent during the same period and that the average monthly cable rate has grown almost three times as fast as the Consumer Price Index (CPI) since deregulation.[7] The Cable Act

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Rulemaking, FCC 92-541 (released Dec. 11, 1992); Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 -- Horizontal and Vertical Ownership Limits, Cross-Ownsership Limitations and Anti-Trafficking Provisions, MM Docket No. 92-264, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 92-542 (adopted Dec. 10, 1992); Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Program Access and Carriage Regulation, MM Docket 92-265, Notice of Proposed Rulemaking, FCC 92-543 (adopted Dec. 10, 1992).

4 "Subject to effective competition" is a term defined in Section 623(l)(1) of the Cable Act of 1992, 47 U.S.C. Section 623(l)(1), and discussed, infra, at paras. 17-18.

5 "Cable programming service" is a term defined in Section 623(l)(2), 47 U.S.C. Section 543(l)(2), and discussed infra at paras. 90-110.

6 Pub. L. No. 98-549, 98 Stat. 2779 (1984).

7 See Cable Act of 1992, Pub. L. No. 102-385 §2(a), 106 Stat. 1460; see also H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 49, 53, 56 (1992) (hereinafter "Conference Report").

of 1992 also requires that regulations governing rates for cable service be based on, among other factors, the rates charged by cable systems subject to effective competition.[8] This leads to the basic question of whether the purpose and the terms of the Cable Act embody a congressional intent that our rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted (and if so, to what degree), or, rather a congressional intent that regulatory standards serve primarily as a check on prospective rate increases. To the extent Congress envisioned reductions in rates, we solicit comment on the extent to which this should be accomplished for the basic service tier and/or for cable programming services.[9] We solicit comment generally on the impact of rate reductions, or of limits on prospective rate increases, on the ability of cable operators to provide service to subscribers on the basic or higher level service tiers. If Congress intended for rules to lead to rate reductions, what are the defining characteristics of those systems for which Congress intended cable service rates be reduced?

5. The Cable Act of 1992 permits, and to some extent may encourage, if not require, a restructuring of service offerings.[10] We solicit comment on the impact of the rate regulation alternatives presented in this NPRM on the ability and incentive of cable operators to create packages of programming at different tier levels that will be useful and valuable to subscribers. We solicit comment on whether any regulatory alternative would, as a practical matter, unduly restrict the ability of cable operators to provide a full range of services on either the basic or higher level service tiers. We seek comment generally on the impact upon the cable industry, its investors, subscribers, future growth of services and of programming, and service quality of the different approaches to rate regulation that we present in this section.

2. Standards and Procedures for Identifying Cable Systems Subject to Rate Regulation for Provision of Cable Service.

a. Statutory Requirements

6. The Cable Act permits regulation of a cable system's subscriber rates only if this Commission finds that the cable system is "not subject to effective competition." If we find that a cable system is subject to effective competition, the Cable Act prohibits the regulation of rates for that system. Where effective competition does not exist, the Cable Act

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[8] Communications Act, Sections 623(b)(2)(C), 623(c)(2), 47 U.S.C. Sections 543(b)(2)(C), 623(c)(2).

[9] We discuss in more detail in later sections of this NPRM issues concerning reduced or low rates for the basic service tier and/or cable programming services. See paras. 32, 94 infra.

[10] See, e.g., Communications Act, Section 623 (a)(7)(A),(B), 47 U.S.C. Section 543 (a)(7)(A),(B). We discuss implementation of statutory provisions that limit cable systems' retiering discretion at paras. 125-27, infra.

states that rates for the provision of "basic cable service" are to be regulated by the franchising authority (or by this Commission in particular circumstances discussed below), while rates for "cable programming services" shall be subject to regulation only by this Commission.[11] "Effective competition", "basic cable service" and "cable programming services" are statutorily defined terms that we discuss in more detail below.

b. Discussion

7. The statute establishes three separate tests, any one of which, if met, would establish that a cable system is subject to effective competition. The first is satisfied if fewer than 30 percent of the households in the franchise area subscribe to a cable system. The second test is met if: the franchise area is (i) "served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area;" and (ii) "the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area." The third way effective competition may arise is if the franchising authority in the subject franchise area is itself a multichannel video programming distributor and "offers video programming to at least 50 percent of the households in that franchise area."[12]

8. We also seek comment on whether the standard for gauging whether households are "offered" video programming under the second and third tests should be that service is actually available to such households.[13] We plan to count each separately billed or billable customer as a "household" subscribing to or being offered cable or other video programming service . We seek comment on this tentative view. Comments are also sought on sources for data needed to evaluate such criteria, and their current availability.

9. We also seek comment on what services qualify as "a multichannel video programming distributor" for purposes of the second and third tests. The Cable Act defines multichannel video programming distributor as an entity who makes multiple channels of video programming available for purchase by subscribers or customers. As examples of such entities, Section 602(12) of the Communications Act lists: a cable operator, a DBS satellite service provider, a television receive-only satellite program

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[11] Communications Act, § 623(a)(2)(A), (B), 47 U.S.C. § 543(a)(2)(A), (B).

[12] Communications Act, § 623 (l)(1)(B),(C); 47 U.S.C. § 543 (l)(1)(B),(C).

[13] We observe in this regard that many cable source materials contain statistics for homes "passed", a term of art that refers to actual availability of cable service to potential cable subscribers, but does not account for noncable program delivery services such as those offered by wireless technologies. See, e.g., Television and Cable Factbook: Cable and Services Volume D-12 (Warren Publishing 1992).

distributor, and an MMDS provider. That section also states that this term is not limited to these specific examples. In assessing cable competition previously, this Commission has considered whether to take into account alternative or substitute delivery services readily available to subscribers in the home.[14] In this regard, we seek comment on whether a telephone company offering of "video dialtone" (i.e., transmission capacity for video programming) service or a television broadcast station offering multiplexed multichannel service would qualify as a "multichannel video programming distributor."[15] We also seek comment on our tentative view that we should

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[14] See generally Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, 6 FCC Rcd 4545, 4551-54 (1991).

[15] See generally Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), petitions for recon. pending, petitions for review docketed sub nom. Monkato Citizens Telephone Co. v. FCC, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992), Northwestern Indiana Telephone Co., Inc. v. FCC, No. 92-1406 (D.C. Cir. Filed Sept. 9, 1992), National Cable Television Ass'n v. FCC, No. 92-1530 (D.C. Cir. filed Oct. 6, 1992), and Community Antenna Television Ass'n Inc. v. FCC, No. 92-1539 (D.C. Cir. filed Oct. 9, 1992); Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992), petitions for review docketed, (video dialtone proceeding); Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, 7 FCC Rcd 4111 (1992) (proceeding on future of video marketplace). In our rulemaking addressing broadcast signal carriage issues raised by the Act, we address several other questions relating to this definition, including whether it encompasses master antenna television systems and satellite master antenna systems. Implementation of the Cable Television Consumer Protection Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, FCC 92-499. para. 42 (released Nov. 19, 1992) (Must Carry/Retransmission Consent Proceeding). In this docket, we will take into account any responses to those questions received in that docket.

A related issue is whether a leased access user offering compressed, multichannel service, or a leased access user or a franchising authority offering multichannel programming on the operator's leased access or PEG channels, on either a per-channel or a multiplexing basis, would be a "multichannel video programming distributor." Under one proposed interpretation of the Cable Act, the services the third party offered would not be available unless a customer also subscribes to the operator's basic tier. Thus, under this interpretation, a third party's services would not independently compete with a cable operator's services, and would not seem appropriately considered in our effective competition analysis. However, it may also be possible to interpret the Act as permitting the "a la carte" offering of individual program services without first purchasing the basic tier. See discussion of this issue infra, para. 12. In such case, would it be appropriate to consider the a la carte offering of a third party's services in an effective competition analysis? We seek comment on whether a

measure penetration for purposes of the second test cumulatively, i.e., by adding the subscribership of all alternative multichannel video programming distributors (other than the largest) together. Thus, the 15 percent penetration figure could be met if together two competitors (other than the largest) had subscribers totalling 15 percent of the households in a franchise area, even though individually each competitor might not meet that figure. In addition, we ask parties to address whether any minimum amount of programming or minimum number of separate channels must be provided by an entity for it to qualify as a "multichannel video programming distributor." With respect to "comparable video programming," we might presume that such comparability exists under the second statutory test for effective competition if a competitor offers multiple channels of video programming and the numerical tests for the offering of and subscription to competitive service under the second test are met.[16] This presumption might be subject to rebuttal by an opposing party. We seek comment on this approach.

3. Basic Cable Service Regulation

a. Components of the Basic Service Tier Subject to Regulation

i. Statutory Requirements

10. Under the Cable Act, each cable operator must offer its subscribers a separately available basic service tier to which subscription is required for access to "any other tier of service."[17] Qualified franchising authorities are to be the primary regulators of rates for this basic tier of service, with the Commission regulating only in certain circumstances. The statute provides that the basic service tier must include: (1) all local commercial and noncommercial educational television and qualified low power station signals carried to meet carriage obligations imposed by Sections 614 and 615 of the Cable Act; (2) any public, educational, and governmental access programming required by the franchise to be provided to subscribers; and (3) any signal of any television broadcast station that the cable operator offers to any subscriber, unless it is a signal that is secondarily transmitted by a satellite carrier beyond the local service area of such a station.[18] Section 623(b)(7)(B) permits the operator to include additional video programming signals or services in the basic tier as long as the charges for their services conform to our basic rate regulations.

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third party offering services on an operator's own system should be considered a "multichannel video programming distributor" for purposes of determining whether that cable system is subject to effective competition.

[16] The term "video programming" is defined in Section 602 (19) as "programming provided by, or generally considered comparable to, programming provided by, a television broadcast station."

[17] Communications Act, § 623 (b)(7)(A), 47 U.S.C. § 543 (b)(7)(A).

[18] Communications Act, § 623(b)(7)(A), 47 U.S.C. § 543(b)(7)(A).

ii. Discussion

11. The statute requires that "must-carry" local television signals, as defined by Sections 614 and 615 of the Communications Act, must be included in the basic service tier. However, the Cable Act authorizes local television stations to exercise "retransmission consent" rights in lieu of mandatory carriage. Parties are requested to comment on how the retransmission consent provisions will affect or shape the composition of the basic service tier.[19] In particular, Section 623 (b)(7)(A)(iii) would appear to make any local signal carried pursuant to retransmission consent a basic tier channel. We seek comment on this tentative conclusion.[20] We also seek comment on whether channels carried pursuant to retransmission consent would be classified as mandatory basic service channels, even if an operator had already satisfied his signal carriage obligations. We also seek comment on our tentative finding that cable operators may add any and as many video programming services to the basic tier as they wish, provided that such services are subject to basic rate regulation.

12. The statute defines basic service as a tier "to which subscription is required for access to any other tier of service."[21] We seek comment on whether this language establishes a "basic buy through" requirement, i.e., whether it precludes the offering of video services completely "a la carte" and without prior subscription to the basic service tier. Particularly in light of the plain language of the statute which limits any such "basic buy through" to other tiers of service, we also ask interested parties to comment on whether Congress intended to permit consumers the option of purchasing services, such as premium channels, or the services of a leased access programmer, on a stand-alone basis, . In addition, we interpret Section 623 (b)(8)(A) as precluding an operator's requiring the purchase of services in addition to the basic tier as a precondition for ordering other programming.[22] Are there alternative interpretations which would also preclude subscribers from purchasing a separate offering of a nonvideo or "institutional network" without first purchasing the basic tier.

13. The definition of what services are subject to rate regulation

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[19] Communications Act, § 325(b), 47 U.S.C. § 325(b). The Commission is considering issues relating to must-carry and retransmission consent provisions of the Cable Act in the Must Carry/Retransmission Consent Proceeding.

[20] We note that we have tentatively concluded in MM Docket No. 92-259 that retransmission consent channels may be used to meet the signal carriage requirements of § 614. Must Carry/Retransmission Consent Proceeding, para. 54.

[21] Communications Act, § 623 (b)(7)(A), 47 U.S.C. § 543 (b)(7)(A).

[22] Cf. discussion infra, paragraph 127, of Communications Act § 623(h), 47 U.S.C. § 543(h) (dealing with prevention of evasions, including by retiering).

as part of the basic service tier appears to contemplate only a single tier, thereby effectively amending the general "basic tier" definition that remains in the Communications Act from the 1984 Cable Act.[23] Section 602 (3) defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals" (emphasis supplied).[24] In particular, it appears that the 1992 Cable Act contemplates that there be a single "basic tier" of service that is subject to local regulation and that includes the services defined in Section 623 (b)(7)(A)(i),(ii)and (iii). If this were not the case, the anti-buy through provisions of Section 623 (b)(8) could be frustrated through the marketing of cumulative tiers of "basic" service. Further, the singular references in the statute to "the" basic tier suggest that Congress intended the existence of only one such tier.[25] We seek comment on our tentative interpretation.

b. Regulation of the Basic Service Tier by Local Franchising Authorities and the Commission

i. Statutory Requirements

14. The Cable Act of 1992 permits regulation of the rates for "basic cable service" only if effective competition does not exist. A franchising authority wishing to exert such regulatory jurisdiction must certify in writing to the Commission that: (1) the franchising authority

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[23] Communications Act, § 602 (3), 47 U.S.C. § 522 (3).

[24] The court of appeals held, under the 1984 Act, that a tier of service that incorporates, in a marketing sense, the basic tier is itself also a basic tier service, although a tier added to a basic tier for a separate charge would not be considered a basic service. American Civil Liberties Union v. FCC, 823 F. 2d 1554 (D.C. Cir. 1987). The court observed that otherwise, "use of the section 602(2) definition could lead to two different cable companies offering identical services having a different number of service tiers being considered 'basic cable service'; this critical difference would thus be based solely on the way these two hypothetical cable operators chose to market their services." ACLU, 823 F. 2d 1566. Thus, for example, if an operator sells a $10 basic tier and offers an additional set of channels for $5, these would be a basic ($10) and non-basic ($5) service. However, if the operator offers a $10 basic and a $15 tier that includes the basic service as well as additional service, both the $10 service and the $15 service are basic services under the ACLU holding. ACLU, 823 F. 2d at 1566 n.31 (giving more detailed, analogous hypothetical and noting that operator employing a cumulative, rather than an incremental, marketing and pricing approach faced the prospect of having such cumulative tiers all potentially subject to rate regulation as basic services under the Section 602(2) definition). We seek comment on the effect of the 1992 Cable Act on the ACLU interpretation of basic service.

[25] See, e.g., House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 83 (House Report) ("The purpose of Section 3 is to create a tier of low cost basic cable service.")

will adopt and administer rules with respect to the rates subject to regulation that are consistent with the regulations prescribed by the Commission; (2) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and (3) procedural laws and rules governing rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.[26] Such a certification filed with this Commission by a franchising authority will become effective 30 days after filing unless the Commission finds, after notice and a reasonable opportunity for the authority to comment, that the franchising authority has not met one of the three criteria listed above.[27] If we disapprove the certification, the Commission must notify the franchise authority of any revisions or modifications necessary to obtain approval. Further, if we disapprove or revoke a certification, Section 623(a)(6) requires the Commission to exercise the franchise authority's regulatory jurisdiction until that authority becomes qualified by filing a new certification that meets the requirements set forth above. Such new certifications become effective upon approval by this Commission, which approval (or disapproval) must be issued within 90 days of filing.[28]

ii. Discussion

aa. Jurisdictional Division

15. We interpret Section 623 of the Communications Act, as amended by the Cable Act, to permit certified local franchising authorities to regulate the rates for basic cable service in areas that are not subject to effective competition unless we disallow or revoke an authority's certification. The scope of our authority to regulate directly basic cable service rates under the statute appears quite limited. We tentatively conclude that we have the power to regulate basic cable service rates only if we have disallowed or revoked the franchise authority's certification. The Act states that rates for basic cable service "shall be subject to regulation by a franchising authority" or "by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)."[29] Paragraph (6) of Section 623(a) only permits this Commission to exercise "the franchising authority's regulatory jurisdiction" when a franchise authority's certification is disapproved or revoked, and then only until a new certification is approved.[30] Thus, it appears that, unless a local franchise authority seeks to assert regulatory jurisdiction over basic cable service, we would have no

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26 Communications Act, § 623(a)(3), 47 U.S.C. § 543(a)(3).

27 Communications Act, § 623(a)(4), 47 U.S.C. § 543(a)(4).

28 Communications Act, § 623(a)(6), 47 U.S.C. § 543(a)(6).

29 Communications Act, § 623(a)(2), 47 U.S.C. § 543(a)(2).

30 The House Report explicitly states that Section 623(a)(6) was intended to "specif[y] the scope of the FCC's authority to regulate rates in lieu of a franchising authority." House Report at 81.

independent authority to initiate regulation of basic service rates. We seek comment on this tentative interpretation.

16. An alternative interpretation, although one at odds with the aforementioned specific language of the act, might emanate from the broad language of the Section 623(b) mandate that we ensure by regulation that the rates for the basic tier are reasonable.[31] Under this interpretation, we might exercise jurisdiction over basic service rates either through individual petitions or complaints or through requiring notice from the operator and possibly regulatory approval prior to a rate increase, even where local authorities have not sought certification from the Commission.[32] We seek comment on whether this (or any other alternative) jurisdictional division was intended by Congress, given the terms of the Cable Act as amended.

bb. Finding of Effective Competition

17. The Cable Act requires the Commission to "find" that a cable system is not subject to effective competition before authorizing rate regulation. We propose to base our independent findings initially on the determination by the franchising authority that effective competition does not exist. We propose to have the franchise authority submit its finding and the basis for this finding to us as part of the process, discussed below, by which local authorities are certified to regulate basic service rates. These findings should take into account information submitted by cable operators to the Commission in response to any effort to collect information or data requests concerning rates of systems subject to effective competition.[33] Given the large number of franchise areas nationally[34] and their varied

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[31] Communications Act, § 623(b), 47 U.S.C. § 543(b). See also Conference Report at 62 (The goal of Section 623(b) "is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a cable system were subject to effective competition").

[32] If we adopted this approach, there may be a case in which a franchising authority believes that rate regulation is required, but for other reasons, such as lack of personnel, is unable to make the requisite certification. We seek comment on whether we should permit a local franchising authority to file a statement explaining why the authority cannot submit a certification and requesting that we assert jurisdiction. Parties advocating this approach should explain how this is consistent with the jurisdictional framework of the Cable Act.

[33] See infra note 63.

[34] According to current Commission records, there are approximately 33,000 cable "community units" (as defined in Section 76.5(dd) of the Commission's Rules) nationally which are subject to the jurisdiction of local franchising authorities. Although the number of "franchise areas" is lower,

competitive characteristics,[35] this approach appears to be reasonable and realistic. First, the statute on its face states that local authorities may exercise regulatory jurisdiction over cable rates only if the authority certifies that it has "the legal authority to adopt ... such regulations."[36] Since the Cable Act makes the absence of effective competition a prerequisite to regulators' legal authority over basic cable rates, we find it reasonable to require that local franchising authorities provide evidence of the lack of effective competition as a threshold matter of jurisdiction. In addition, franchising authorities may be in a superior position to gather relevant local facts and to test the accuracy of operators' representations regarding competition. Economic, statistical and other relevant data may be routinely submitted or otherwise available to local authorities as part of multichannel video programming distributors' ongoing franchise or other obligations associated with doing business in that community. Local authorities can take such information into account. We also expect that they will consider any data operators submit to the Commission as a result of data requests or reporting obligations. Our proposal, we believe, would permit in many cases a more accurate and expeditious initial effective competition analysis than the Commission could undertake without local assistance. We seek comment on this proposal.[37] Parties may also wish to comment on whether challenges to a determination of lack of effective competition may appropriately be made as part of a revocation proceeding under Section 623(a)(5),[38] as discussed in more detail below, as part of our normal procedures for reconsideration and review, or, should it prove feasible to fashion procedures for taking oppositions prior to certification approval, as part of such streamlined

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since a franchise may span more than one community unit operating within a distinct geographic "franchise area," we believe that this number would be large enough to make initial FCC findings of effective competition an extremely difficult task administratively. (A community unit is defined as a cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity, including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas. 47 C.F.R. § 76.5(dd)).

35 We also seek comment on whether multichannel video programming distributors who are competitors to cable systems should be required to disclose the number of their subscribers and any other data relevant to a finding of effective competition; whether such information (e.g., as to number of subscribers) is likely to be proprietary and entitled to special protection and, if so, what such protection should be.

36 Communications Act, § 623 (a)(3), 47 U.S.C. § 543 (a)(3).

37 We propose to make effective competition determinations on an individual case basis in connection with evaluation of complaints concerning cable programming service with respect to systems in areas where a franchising authority has not sought certification for regulation of the basic service tier. See infra paras. 97-110.

38 Communications Act, § 623(a)(5), 47 U.S.C. § 543(a)(5).

processes.[39] We observe that this last alternative would give operators an opportunity to challenge an effective competition finding prior to imposition of rate regulation.

18. We also tentatively find that the language of Section 623(l)(1), which expresses the tests for the presence or absence of effective competition in terms of a "franchise area", implies that determinations that effective competition is absent should be made on a franchise-area basis. Thus, if a cable system serves more than one franchise area in a geographic region, separate effective competition determinations would have to be made for each distinct franchise area.[40] Moreover, we tentatively find that if more than one cable system is authorized to operate in a given franchise area, the requisite effective competition analysis must be applied to each system. We seek comment on these tentative conclusions. We also seek comment on whether a determination of effective competition for cable programming services, which this Commission is charged with regulating, could be made on a system-wide, as opposed to franchise-area, basis. Such larger geographic units would appear to be more appropriate for federal regulation. Moreover, system-wide regulation might help ensure uniformity in rates across a geographic region, harmonizing with other provisions of the Cable Act requiring a uniform rate structure "throughout the geographic area in which cable service is provided over [a] cable system."[41]

cc. Filing of Franchise Authority Certification

19. We propose that a franchise authority intending to regulate the rates for basic cable service be required to submit a certification meeting the requirements of Section 623(a)(3)(A-C), set forth above, and additionally stating the basis for its finding that its franchisee is not subject to effective competition. We tentatively conclude that a standardized and simple form can and should be used for certifying to the three criteria of Section 623 (a)(3), and that this form should include a section for the authority's statement and explanation of its initial finding that effective competition is lacking, with reference to documentable data, including any submissions made to the Commission. We seek comment on this tentative conclusion, as well as on the specific format for such a form.[42] We also invite comment on any other administratively efficient method for certification. Parties proposing such an alternative should also explain how their proposal is consistent with the goals of the Cable Act.

20. Section 623(a)(3)(B) of the Communications Act, as amended,

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39 See infra para. 23.

40 But cf. paragraph 21, infra (proposal to permit joint certifications by franchising authorities in a geographic area).

41 Communications Act, § 623(d), 47 U.S.C. § 543(d). See infra paras. 111-15.

42 See Appendix D for proposed form.

requires that a franchising authority be able legally to adopt regulations consistent with those we establish for basic cable rate regulation. The Communications Act, as amended by the 1984 Cable Act, appeared to assume that a franchise authority derives its powers, including those to regulate rates, from state law or franchise agreements.[43] The legislative history of the Cable Act of 1992, however, suggests that the Act itself may abrogate franchise agreements in certain circumstances to permit rate regulation consistent with our rules.[44] If this were the case, however, what meaning should we give to Section 623 (a)(3)(B)? We seek comment on whether franchising authorities derive their powers to regulate from state and local laws alone, or whether the Cable Act may itself be an independent source of authority to regulate rates. To the extent the authority is not derived from state law, are there issues that need to be addressed as to which specific authorities within state and local government are entitled to exercise this authority? If the Cable Act grants franchise authorities rate regulation powers irrespective of state law, what did Congress intend by enacting Section 623 (a)(3)(B)? We also seek comment on whether exercise by this Commission of basic service rate regulation authority pursuant to Section 623(a)(6) in a state prohibiting rate regulation by local authorities would in fact constitute preemption of state law. If so, we also ask whether such preemption not only could take the form of the FCC taking jurisdiction over basic service rate regulation, but also could extend to conferring the power to regulate basic service rates on franchising authorities where they otherwise would be without such power.

21. The legislative history also appears to contemplate that two or more communities served by the same cable system could file a joint certification and exercise joint regulatory jurisdiction.[45] We propose to allow this and seek comment on this proposal, as well as on the content of rules required to give effect to this proposal. It is conceivable that franchising authorities may not choose voluntarily to make such joint filings. Are there actions we should take to provide incentives for local entities regulating a single economic entity to coordinate their activities? Should such coordination be required as part of the certification process? We seek comment on the impact of franchising authorities' decisions to proceed independently on the Act's requirement that an operator's rate structure be uniform throughout a geographic area.[46] How, under such circumstances, might a cable operator be assured that it can fulfill the

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43 Cf. Communications Act, § 602 (10), 47 U.S.C. 522 (10).

44 Cf. House Report at 81 ("The Committee intends that, as a matter of law, except as provided in Subsection 3(j) all franchising authorities, regardless of the provisions in a franchise agreement, shall have the right to regulate basic cable service rates if they meet the conditions in section 623(a)(4).").

45 House Report at 80.

46 Communications Act, § 623(d), 47 U.S.C. § 543(d). See further discussion of § 623(d) at paras. 111-15 infra.

uniform rate structure requirement?

dd. Approval of Certification by the Commission

22. The Cable Act states that the written certification submitted by a franchising authority to the Commission shall be effective 30 days after it is filed, unless we find, after notice to the authority and a reasonable opportunity for the authority to comment, that (1) the authority has adopted or is administering basic cable service rate regulations that are inconsistent with those we prescribe, (2) the authority lacks the legal authority to adopt, or the personnel to administer, such regulations, or (3) procedural laws and regulations applicable to the authority's rate regulation proceedings do not provide a reasonable opportunity for consideration of the views of interested parties.[47] The Act thus contemplates that unless we take explicit action within 30 days, a certification will be effective. The Act also appears to contemplate that any decision denying certification must be made within 30 days.

23. Given the expedited deadlines the Act imposes, we assume that Congress did not intend that the FCC establish a full pleading cycle with opportunity for interested parties, including the cable operator, to comment prior to expiration of the initial 30-day period. Thus, although we propose that each certification application be served on the franchisee cable system, we propose to base our decision on certification on the submission by the franchising authority alone. If a certification appears defective on its face, the franchise authority will be given notice, and the opportunity to submit additional information prior to our decision. Other interested parties, including cable operators, could subsequently challenge a certification by filing a petition for revocation once a certification is effective.[48] We seek comment on this approach, and on whether, in addition to this avenue of relief, cable operators or other interested parties would be allowed to seek reconsideration of our decision regarding the existence of effective competition and certification. We also ask interested parties to comment on what procedures we might adopt for the giving of notice and the submission of additional information by a franchise authority that would enable us to render decisions within the 30-day statutory period. We also seek comment on whether it would be possible and consistent with legislative intent to establish a highly expedited pleading cycle permitting interested parties, including cable operators, to comment prior to the 30-day deadline.

24. The Cable Act requires that, in disapproving a franchising authority's certification, we notify the authority of any revisions or modifications necessary to obtain approval. We propose to reflect this requirement in our rules. We tentatively conclude that denial of certification would be subject to our normal procedures for reconsideration,

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[47] Communications Act, § 623 (a)(4), 47 U.S.C. § 543 (a)(4).

[48] See infra paras. 25-28.

review and appeal.[49] We also propose that, absent a stay, we will assume regulation of basic service rates in a franchise area after we deny a certification (assuming that we have also found the cable system is not subject to effective competition). If we certify an authority, we propose to require the authority to notify each franchisee within 10 days of this decision. We seek comment on these proposals and tentative conclusion.

ee. Revocation of Certification

25. Subsection 623(a)(5) requires that "upon petition by a cable operator or other interested party," we "review the regulation of cable system rates by a franchising authority."[50] If we find that the franchising authority has acted inconsistently with the requirements of Section 623(a)(3), we are directed to "grant appropriate relief." If, after giving the franchising authority a reasonable opportunity to comment, we find the state and local laws and regulations do not conform to Commission rules governing basic service rate regulation, we must revoke the jurisdiction of such authority.

26. We interpret this subsection to require us to revoke an authority's certification whenever the noncompliance involves a violation of Section 623 (a)(3)(A), i.e., where local or state laws are inconsistent with our regulations concerning basic service rates. However, the statute appears to contemplate other lesser remedies where the noncompliance involved Section 623 (a)(3)(B) or (C), i.e., where local and state laws may be facially consistent with our regulations, but the authority has applied them inconsistently or has otherwise departed from the terms of its certification.[51] We seek comment on this interpretation. We also ask parties to comment on how their analysis of our power to act where local or state regulations are inconsistent with our rate regulations harmonizes with their analysis of our preemptive powers.[52] Does the 1992 Cable Act effectively preempt state or local laws, e.g., concerning the methodology of rate regulation, that may conflict with the rules that we establish? Can or should actions other than inconsistent local and state laws, e.g., lack of adequate personnel, which would have caused us to disallow a certification in the first instance, also be the basis for revocation, or should some lesser remedy be applied? We also seek comment on what types of relief, short of revocation, we could apply. Could we, for example, suspend a certification, or impose a reporting requirement on a local authority? In cases of suspension, could we, consistent with the Cable Act, assume the local authority's rate regulation authority and obligations?

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[49] 47 C.F.R. §§ 1.101-1.120; 47 U.S.C. §§ 402, 405.

[50] Communications Act, § 623 (a)(5), 47 U.S.C. § 543 (a)(5).

[51] For example, a franchise authority might adopt rate regulation standards consistent with those we establish, but fail to apply them in a particular case.

[52] See supra para. 20.

27. We also propose that a petitioner for revocation or other relief against a franchising authority serve a copy of its petition on the franchising authority, as required by statute, and that the petition contain a statement that such service was made. We also propose to permit an authority 15 days in which to file an opposition to such a petition, and a cable operator or other party ten days in which to reply. We seek comment on these proposals.

28. Finally, we seek comment on what procedures should apply if an operator in a particular franchise area, once not subject to effective competition, becomes subject to it. We tentatively find that a cable operator should be required to petition a franchising authority for a change in its regulatory status. This petition should be subject to public comment. We believe that an abbreviated pleading cycle would be appropriate, with oppositions to be filed in for example, seven or ten days. A franchising authority shall promptly inform the Commission that a cable operator has petitioned for a change in regulatory status and shall forward its findings to the Commission, including the basis for those findings. We propose to require franchising authorities to so notify the FCC within ten days of their decision. If we ratify an initial determination of the franchising authority that effective competition now exists, the franchising authority would then cease regulating basic cable service rates, and our regulatory authority over cable programming services for this system in this franchise area would also cease. Cable operators denied a change in status by a franchising authority would be entitled to seek review of that determination with this Commission, with pleadings subject to the standard filing periods.[53] We seek comment on these tentative conclusions. We also seek comment on whether a challenge to a denial of change in status regarding effective competition could or should be made as part of a petition for revocation.

ff. Assumption of Jurisdiction by the Commission

29. The Act requires that if we disapprove or revoke a franchise certification, we shall exercise the franchising authority's regulatory jurisdiction until it qualifies to exercise that jurisdiction by filing a new certification, and that we must act on the new certification within 90 days after it is filed.[54] We seek comment on the procedures that we should employ when we assume a franchising authority's jurisdiction over basic service rates. In cases of disapproval, should we require a cable operator to file its schedule of basic service rates with us, in a fashion analogous to the procedures we propose below for local implementation of basic service rate procedures? For both disapproval and revocation cases, should we follow

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[53] 47 C.F.R. § 1.45.

[54] Communications Act, § 623 (a)(6), 47 U.S.C. § 543 (a)(6). Of course, if we dismissed a request for certification on the ground that effective competition existed in the franchise area, we would not assume rate regulation jurisdiction.

basic rate regulation procedures regarding notice of rate increases and resolution of disputes similar to those we propose for franchising authorities?[55] Parties are encouraged to specify any alternatives that they believe would be more appropriate, and in particular to comment on whether the same deadlines applied to local franchising authorities would be administratively feasible for the Commission.

c. Regulations Governing Rates of the Basic Service Tier

i. Statutory Requirements

30. The Act requires the Commission to ensure, by regulation, that rates for the basic service tier are reasonable.[56] Such regulations are to be designed to protect subscribers of any cable system not subject to effective competition from paying rates higher than those that would be charged if the system were subject to effective competition.[57] In establishing regulations governing rates for the basic service tier, the Commission must seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself, and it may adopt formulas or other mechanisms and procedures to achieve this objective.[58] Our rate regulations must additionally take into account seven factors:

(1) the rates for cable systems that are subject to effective competition;

(2) the direct costs (and changes in such costs) of obtaining, transmitting, and providing signals carried on the basic tier including additional video programming signals or services beyond the "must carry" local broadcast television signals, and any public, educational, and governmental access programming required by the franchising authority;

(3) only a reasonable and properly allocable portion, as determined by the Commission, of the joint and common costs of obtaining, transmitting, and providing signals on the basic service tier;

(4) cable operator revenues from advertising on the basic tier or other consideration obtained in connection with the basic tier;

(5) the reasonably and properly allocable portion of taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers or assessments of general

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55 See infra paras. 79-89.

56 Communications Act, Section 623(b)(1), 47 U.S.C. Section 543(b)(1).

57 Id.

58 Communications Act, Section 623(b)(2)(A) and (B), 47 U.S.C. Section 543(b)(2)(A) and (B).

applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(6) the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(7) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to ensure that rates are reasonable and the goal of protecting subscribers of any cable system not subject to effective competition from paying more for basic tier service than subscribers would pay if the system were subject to effective competition.[59]

ii. Discussion

31. The statute requires that our rules ensure reasonable rates for the basic service tier. The statute does not explicitly define "reasonable", instead requiring the Commission to establish regulations designed to achieve the goals set forth in the statute and reflective of the enumerated factors. We tentatively conclude that Congress intended the Commission to embody in these regulations a standard of reasonableness for basic tier rates that reflects a reasoned balancing of these statutory goals and factors.[60] We further tentatively conclude that Congress did not intend that we give greater or primary weight to any of the statutory goals as we formulate regulations to govern rates for the basic service tier, but did intend to leave the Commission discretion to determine in the rulemaking

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[59] Communications Act, Section 623(b)(2)(C), 47 U.S.C. Section 543(b)(2)(C).

[60] Section 325 of the Communications Act as amended by the Cable Act of 1992 requires the Commission to consider the impact of retransmission consent on rates for the basic service tier and to ensure that our retransmission consent regulations do not conflict with our obligation under Section 623 to ensure that the rates for the basic service tier are reasonable. In the Must Carry/Retransmission Consent proceeding, we stated that we would consider the appropriate treatment of retransmission consent compensation in establishing regulations governing rates for the basic service tier in the instant proceeding. As indicated, one of the seven statutory factors that we must take into account is the direct costs of providing signals to subscribers. We tentatively conclude that our obligation under Section 325 to consider the impact of retransmission consent on rates for the basic service tier will be fully discharged by our balancing of the enumerated statutory factors, including the direct costs of signals. We will embody the seven factors in the standard of reasonableness that will govern the lawfulness of rates for the basic service tier. We solicit comments on this analysis. We solicit comment generally on how we should take into account retransmission consent compensation in establishing regulations governing rates for the basic service tier.

process the comparative weight to be assigned to each of the seven factors.[61] We solicit comment on this analysis.

32. We note that a low priced basic service tier could enhance the ability of potential subscribers, especially those with low incomes, to receive the minimum components of the basic service tier mandated by the statute.[62] On the other hand, rules designed to assure a low priced basic service tier that either formally or as a practical matter restrict the ability of cable systems to incur and recover appropriate costs could create incentives for cable systems to limit the basic service tier to the statutory minimum components. We solicit comment on the extent to which Congress intended a low priced basic service tier, and the extent to which our rate regulations should not effectively restrict a cable operator's discretion to provide programming on the basic service tier beyond the minimum statutory components. If our regulations produce low rates for the basic service tier, would this in turn require us to permit more flexibility in pricing for higher tiers? If so, would such pricing flexibility limit access by subscribers to popular cable programming services that are bumped to the higher priced tiers? What might be the impact of a low priced basic service tier on cable systems' investment in programming? We believe that any rate regulation approach should effectuate fully the goals of the Cable Act without creating unintended limits on a cable operator's discretion to tier programming services, and, indirectly, on the continued growth of cable programming services.

33. We have identified two generic approaches for regulation of rates for basic tier service: benchmarking and cost-based.[63] In the next

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[61] We solicit comment on whether Congress intended that we should give primary weight to the goal of protecting subscribers of any cable system from rates higher than those that would be charged if the system were subject to effective competition. We observe that the statute lists rates for cable systems subject to effective competition as only one of seven factors to be taken into account in establishing regulations governing the basic tier. We tentatively conclude that, while requiring reasonable rates, the statute does not per se require that aggregate rates for the basic tier of a cable system not subject to effective competition be no higher than the rates charged by systems subject to effective competition. We solicit comment on this analysis. We further solicit comment on the extent to which we should design our regulations to produce rates for the basic service tier that are generally lower than those in effect in the cable industry for the lowest service tier at the time of enactment of the Cable Act of 1992. Should we seek to do so, we solicit comment on the balancing of the statutory factors for the basic service tier that would accomplish this result.

[62] See Communications Act 623(b)(7)(A), 47 U.S.C. Section 543(b)(7)(A). We discuss the components of the basic service tier at paras. 10-13, supra.

[63] As we explain at para. 92, infra, these generic approaches could also be applied to regulation of rates for cable programming services. In a separate Order, we have directed cable systems to submit to the Commission by

few paragraphs we describe these two generic approaches generally and explain how we believe each would satisfy congressional objectives. We then present specific regulatory alternatives falling within the two generic approaches and seek comment on the extent to which a specific regulatory alternative should be made a component of the comprehensive scheme by which we will assure reasonable cable rates. Among the alternatives we describe is one based on the cost-of-service regulation model upon which this Commission and state public services commissions have relied in the past to regulate public utility rates. More recently, this Commission and some state public service commissions have concluded that incentive regulation is a more effective means of achieving reasonable rates for consumers.[64] In our common carrier price cap orders we have discussed at length the disadvantages associated with traditional rate of return regulation.[65] Among the most significant of its disadvantages is that it is neither simple nor inexpensive to administer. Because the Cable Act of 1992 directs us to craft rules that will reduce burdens on cable operators, franchising authorities, this Commission, and consumers, we tentatively conclude that we should not select a cost-of-service alternative as the primary mode of cable rate regulation unless we are unable to gather the information needed to develop one of the other alternatives described in the following paragraphs. We propose to adopt one of the benchmarking alternatives as the primary mode of regulation of basic service tier rates. We tentatively conclude that each of these benchmarking alternatives could achieve reasonable rates at lower costs and with less administrative burdens than could traditional cost-of-service regulation. We nonetheless conclude that cost-of-service regulatory principles could have a secondary role for cable operators seeking to justify the reasonableness of rates that do not meet our primary benchmarking standard.[66] We seek comment on these tentative conclusions.

January 22, 1993, rate and other information. See Order, FCC 92-545, released December 23, 1992. This information will assure that we have an adequate record on which to fully assess the alternatives for regulation of the basic service tier and cable programming services that we discuss in this NPRM.

[64] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket 87-313, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989) (Price Cap Order) and Erratum, 4 FCC Rcd 3379 (1989), modified on recon. 6 FCC Rcd 665 (1991) rev'd in part on other grounds AT&T v. FCC, No. 91-1178 (D.C. Cir. Sept. 8, 1992); Second Report and Order, 5 FCC Rcd 6786 (1990) (Second Price Cap Order) and Erratum 5 FCC Rcd 7664 (1990), modified on recon. 6 FCC Rcd 2637 (1991), appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

[65] Price Cap Order, 4 FCC Rcd 2873, 2889-93 (1989); Second Price Cap Order, 5 FCC Rcd 6786, 6789-92.

[66] The Fifth Amendment to the United States Constitution prohibits taking of private property for public use without just compensation. A substantial body of judicially approved principles has been established affecting the limits of rate regulation of public utilities, including

34. Benchmarking. By a benchmark rate we mean a price against which a given cable system's basic tier rate would be compared. The system's rate would be presumed reasonable if it did not exceed the benchmark. Under a benchmarking approach to rate regulation, the Commission would establish a benchmark rate, or a simple formula which could be used to derive such a rate. Cable systems with rates exceeding the benchmark price by a significant amount as determined by the Commission would be required to reduce their rates to the benchmark level unless the system could justify a rate higher than the benchmark.[67] The benchmark would permit identification of systems with presumptively unreasonable rates, while establishing a zone of reasonableness for systems with rates below the benchmark. Relying on a benchmark alone to define a reasonable rate would allow those systems with rates below the benchmark to raise rates to the benchmark level. We solicit comment, however, on whether to include as a component of any benchmark alternative a price cap formula to limit how quickly systems with rates below the benchmark could raise their rates to that benchmark price. We solicit comment on what such a price cap formula should be.[68] We also propose to establish mechanisms to adjust the benchmark itself over time. The adjustment mechanism might be a formula or, if the benchmark itself is calculated pursuant to a formula, might be incorporated within the formula.

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telecommunications companies. We solicit comment on the extent to which these principles control the rate regulation of cable service that we could undertake under this statute. We solicit comment on whether the various alternatives we have set forth for rate regulation of cable service in this NPRM are acceptable under the Fifth Amendment. We solicit comment on whether, in determining a regulatory framework's consistency with the Fifth Amendment, we may or must consider the impact of regulation on an individual tier, cable service as a whole including both regulated and nonregulated services, and/or company enterprises as a whole, if any, including other cable systems and lines of business. We solicit comment generally on circumstances under which rate regulation of cable service would lead to an unlawful taking.

[67] We solicit comment identifying the standards we should employ for this showing. One possibility would be to apply cost-of-service principles as discussed at paras. 57-61 infra. Alternatively, we could require cable systems to show that as applied to them the benchmark would be confiscatory under applicable constitutional standards. We solicit comment on these alternatives.

[68] We address in paras. 49-52, infra, price caps as one benchmarking alternative for regulating rates on the basic service tier. The issues raised there concerning a price cap benchmarking alternative generally are also relevant to consideration of possible application of price caps to govern rates below a benchmark rate. We request commenters to address the issues raised in paras. 49-52 in the portion of their comments concerning possible application of price caps to govern cable system rates below a benchmark rate, as well as in the portion of their comments addressing a price cap benchmarking alternative generally.

The Commission could also review the benchmark price and adjust it periodically based on appropriate empirical or market considerations.[69]

35. The benchmark itself would be based on selected general industry characteristics and, if well designed, could assure that the rates of each individual system subject to it are reasonable. The benchmark would embody a balancing of the various statutory factors and goals that govern regulation of rates for cable service. A well designed benchmark would additionally assure that almost all cable systems subject to it would have neither the incentive nor the ability to show that the benchmark as applied to them produces confiscatory rates under applicable constitutional principles.

36. We recognize the potential tension between the need, on the one hand, to establish an accurate benchmark using sound data collection processes and ratemaking methodologies, and the command of the Act, on the other hand, to simplify regulation. Using a very simple formula to set the benchmark may produce a standard that is only a rough indicator of whether a cable system's basic tier rates lie within a reasonable range. Even the simple formula, however, would protect consumers from excessive rates and, by eliminating the need for detailed cost-based regulation in many jurisdictions, would keep the costs of administration and compliance low. Because the franchising authority or local citizens could easily verify a system's compliance under a benchmark model, benchmark regulation would meet the legislative goal of reducing the administrative burdens on cable operators and franchising authorities. Like the price caps used in telephone regulation, a benchmark not based on the costs of individual systems could also provide an incentive for systems to be efficient by allowing low-cost systems to keep any savings achieved through increased efficiencies. A trade-off would exist between the costs of developing a more refined set of benchmarks tailored to reflect more closely the particular conditions facing individual systems, and the costs of a coarser set of benchmarks that might either allow low-cost systems to charge rates substantially above cost or require higher-cost systems to charge below-cost rates. Allowing higher-cost systems to opt for cost-based regulation if the benchmark rate proved unreasonably low would, however, provide a safety valve to prevent confiscatory rates.

37. Under a benchmark alternative, the Commission could separate cable systems into distinct classes based upon specified variables and then define a benchmark for each class of systems. The benchmarks might then be set forth in a matrix or table. The variables used to separate cable systems into distinct classes might include such cost-defining characteristics as: homes passed per mile, number of subscribers, number of channels, system age,

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[69] We have proposed a similar approach in our recent proposal to reform the process we use to set the rate of return for certain telephone companies' interstate services. Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Process, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688 (1992).

miles of underground cable, terrain crossed, above average programming costs, or readily identifiable costs. Another variable could be the local price level in comparison to the national price level as measured by appropriate indexes. For each of the benchmarking alternatives that we discuss below, we solicit comment on what variables should be used for defining the classes of systems to which a different benchmark rate should apply. We recognize that the extent to which a system of simple rate benchmarks would meet statutory goals would depend on the criteria used to determine the individual benchmark. One effect of benchmarks could be to cause the rates of the systems subject to the same benchmark to converge over time to that benchmark. We solicit comment on whether this would be a desirable result. If we were to conclude that such a result would not be desirable, we could also permit some benchmark adjustment based upon individual system characteristics. For example, we could adjust the benchmark applicable to an individual system based on such system costs as franchise fees or the costs of franchise requirements such as PEG channels. While "customizing" the benchmark, this might also make it less simple to administer. We solicit comment on whether we should permit individual system adjustment to otherwise widely applicable benchmarks and what measures should and could be established to permit such adjustments. We solicit comment on appropriate indexes for local and national price levels that we could use as a variable in establishing benchmarks.

38. Another important adjustment factor is a general change in the cost of doing business. Such changes often are represented by the general consumer price index (CPI) or producer price index (PPI) compiled on a national or regional basis by the Bureau of the Census and Bureau of Labor Statistics. While readily available, the CPI or PPI are baskets of goods and services that may not be useful to a local service business such as cable television. We therefore seek comment on the tentative conclusion that a local service price index (SPI) would be more appropriate than the CPI or PPI for adjusting cable rate benchmarks, if such an index can be easily determined. We also seek comment on the composition of such a local SPI,[70] how such an index would be created, what services should be included, where data would come from, and what geographical area would be appropriate for comparison.

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[70] It would appear that such an index should be comprised of a variety of local and popular service items from categories including: education (e.g., two-year and four-year part-time tuition); indoor entertainment (e.g., movie ticket prices, museum admission, cable monthly rates); outdoor entertainment (e.g., amusement park, public park, and zoo admission/rides; lodging (e.g., high volume hotels/motels); medical services (e.g., dental tooth filing, physician office visits); personal services (e.g., baby sitter rates, newspaper classified ad rates; woman's/men's haircuts); participant sports (e.g., bowling, public golf green fees, weekend ski lift ticket); spectator sports (e.g., major league/"Grapefruit League"/"Cactus League"/minor league baseball, professional/college basketball, professional/college football, professional/college hockey); transportation (e.g., bus/subway/train/cab fares, airport parking); and utilities (e.g., residential electric/gas/telephone rates).