While it is up to the FCC to prescribe the system of accounts which are applicable to CATV regulation and to require their use by cable operators to determine the rate base upon which the maximum allowable rate of return prescribed is applied, it is the franchising authority which is in the best position to review the books and records of the CATV operator to determine that the FCC's rules in this regard are being obeyed. If they are not, then the franchising authority will be able to present the FCC with prima facie evidence in a complaint showing that the FCC's rules are being violated and that the cable operator's rate of return on basic tier service is unreasonable. By this method, the complaint process should be reduced to a fairly simple "paper hearing" in the nature of a request for a cease and desist order, prescription of rates and a refund of excessive charges. The filing of the complaint should constitute a damages request which is tolled so that if it is found that the CATV operator's rates are excessive, and therefore unreasonable, part of the relief afforded by the FCC will be a rebate order.

To further ease the burden on the FCC and the offices of the various U.S. attorneys, the FCC rules should provide that if the CATV operator fails promptly to comply with the FCC's Order, then as a third party beneficiary as representative of the CATV subscriber, the franchising authority is authorized to file an action in the U.S. District Court seeking enforcement of the Order.

Moreover, where the FCC has issued such an Order, contained therein should be authority for the franchising authority to recover its cost of prosecuting the complaint before the FCC and the additional cost of later pursuing the matter before the U.S. District Court if such action becomes necessary.

V. Preemption

Basic in the N.P.R.M. is the issue of whether any rules the FCC adopts are preemptive. That they are is so for three reasons. First, Section 637(c) (47 USC § 556(c)) so states. Second, any rule or regulation adopted by a certified franchising authority must be consistent with the rules the FCC adopts in accordance with Section 623(a)(4)(A) of the Cable Act. Third, because television transmission is per se interstate in nature, the Courts have consistently held that the FCC did not even need special statutory authority to regulate CATV operation as it is an ancillary to television broadcasting. See, United States v. Midwest Video Corp., 406 US 649 (1972); United States v. Southwestern Cable Co., 392 US 157 (1968).

VI. Charged Second Tier Service Rates May Not Be Unreasonable[20]

The Cable Act provides that while rates for the basic service tier must be reasonable, the rates for the second tier of

[20] Unreasonable rates are rates which are patently rapacious.

service may not be unreasonable. Section 623(c) [47 USC § 543(c)] makes rates for any tier, except pay services such as HBO, offered by a CATV operator unlawful if found to be unreasonable. Section 623(c) establishes six factors to be considered in establishing the criteria to determine whether rates for second tier cable programming services are unreasonable. The term "unreasonable" is a term of art which the FCC, Congress and the Courts have dealt with for many years, thereby gaining their experience in adjudicating cases pursuant to Section 201 and Section 202 of the Communications Act (47 USC §§ 201 - 202).

Section 623(c)(2)(A) notes that one of the factors to be considered are the "rates for similarly situated cable system offering comparable cable programming services...." The franchising authority submits that here it is the practice of the CATV operator in establishing rates for similar second tier services in other communities in which it is franchised to provide cable service that should be the essential "benchmark" of whether its charges for its second tier service in any specific community are unreasonable.

Since the franchising authority is only given 180 days after the effective date of the new rules to seek rollback of unreasonable rates for the second tier charges, the FCC should require the CATV operator to provide to the franchising authority a completed FCC-supplied standard form containing a description of each channel's program offering and the rates for each service

it provides in that community in accordance with the requirements of the Cable Act. This form should identify with particularity such service offerings as to (A) basic service, (B) second tier, (C) any other tier, (D) pay services - Showtime, HBO, etc., and (E) Pay Per View rates.

It would not be a burden on the CATV operator who is required to file such a notice with the local franchising authority in any particular community to also file with that franchising authority at the same time copies of similar notices that the CATV operator has filed in every other community in which it provides CATV service. This is merely a ministerial copying function and requires no additional preparation. Review by the franchising authority of copies of the rates charged in its community together with the rates that the CATV operator charges for similar service in other communities it serves will provide the franchising authority the opportunity to determine whether there is an obviously greater charge in its community for similar services. Where the rates for similar services are more than 10% higher in the franchising authority's community than it is in other communities which the cable operator serves, there should be a rebuttable presumption that the rate is excessive and therefore unreasonable, and in violation of the Cable Act.

Since the franchising authority has only 180 days subsequent to the effective date to act, the cable operator should provide this information to the franchising authority within 30 days after the effective date. Upon review of the information

received, the franchising authority would have 30 days in which to file a notice with the CATV operator that it believes that its charges for the second tier of service are unreasonable. This notice would be filed only if the rates are more than 10% in excess of rates charged for similar services in other communities served by the CATV operator, which rates are the benchmark for similar service. Within 30 days of the notice from the franchising authority that a prima facie case of unreasonable rates exist, the franchising authority would either lower the rates to the reasonable benchmark it itself has established, or file with the franchising authority the statement that it declines to lower the rates. The CATV operator would be required to state the basis in fact and in law by which it believes the rates are not unreasonable and therefore justified. If the franchising authority and the CATV operator cannot promptly resolve their dispute, then the complaint procedure outlined in these comments should follow.

Under this method of benchmark analysis, it is the CATV operator's rates that it has itself established in various markets pursuant to competition which form the benchmark of what is a reasonable rate for similar services. By this method the FCC is relieved of the burden of acting as policeman, and its costs and burden of adjudication should be greatly simplified since the facts are not in dispute.[21]

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[21] The FCC should clarify that the cost of the cable operator in complying with the new accounting rules established by the FCC, and in responding to any notice of potential

VII. Cable Boxes

With ever expanding technology, the modern television receiver and/or a video cassette recorder (VCR) incorporates many of the functions of the cable antenna box and the CATV operator's remote control. So-called "cable-ready" receivers and VCR's proliferate. Yet, in many cases the CATV operator charges as much as $5 a month for a box or remote control. The device lasts for many years, but the capital investment therein has been returned to the CATV operator at least once annually.[22] In those cases where the cable subscriber already has acquired a remote control device which is totally capable of providing such CATV service, to require the subscriber to lease one from the cable operator is not only an unnecessary expenditure, but indeed one in patent violation of the Cable Act.

The FCC should adopt rules which preclude the CATV operator from imposing any such unnecessary "add-on" expenditure whereby the CATV subscriber must lease unnecessary equipment in order to receive service. The Franchising Authority respectfully submits that such unnecessary charges are unlawful as requiring a CATV

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complaint by the franchising authority, or in defending any complaint before the FCC are not to be included in the operating expenses or capitalized on the rate base to justify a rate increase.

[22] Such excessive return in the case of home telephone sets was the premise for the adoption of the consumer premises rules which allowed consumers to own their own telephones. (See 47 C.F.R. § 68.1 et seq.)

subscriber to subscribe to services other than the basic service tier.

VIII. Uniform Rates

While it may seem humane to permit the CATV operator to charge lower rates to certain categories of subscribers such as the handicapped, the elderly, etc., such rate differentials have long been found to be prohibited because they are discriminatory. The rationale is quite simple. Presumably it costs as much to provide CATV service to a subscriber who is not impaired as it does to one who is. In order for the rates of service to the latter to be lower than that charged to the former, the rate for the service to the former must be higher than otherwise to provide additional revenue stream to subsidize service to the latter. There is nothing in the Cable Act which would permit such discriminatory rates. For such discriminatory rates to be reasonable they would have to be authorized under the Cable Act.[23]

In the CATV industry discriminatory rate practices, while insidious, are not uncommon. In reality it is often the case that it is the poor that bear the burden of providing CATV service to the affluent. CATV operators enter into bulk-rate arrangements with condominium associations and other multiple

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[23] For example, the Congress in establishing the corporation for public broadcasting pursuant to Section 396 of the Communications Act decreed in Section 396(h) that common carriers were permitted to render free or reduced rate communications interconnection service for public broadcasting on television or radio stations.

occupant organizations who then provide CATV service to every member of the association as part of their monthly membership fee. Such bulk-rates generally are significantly lower than the published residential subscriber rate for identical service.

Were a local exchange telephone carrier to charge a resident of a home or apartment $19.93 per month for a single unlimited service telephone line per their tariff, but only $7.00 if the subscriber were a member of a condominium association entering into a single bulk contract for service, it probably would be judged by the FCC as a discriminatory rate practice after one second of review. The CATV industry should not be allowed to enter into an arrangement whereby it can set rates per subscriber based on the best discount deal a condominium association can negotiate while ordinary citizens pay their published rates.

However, nothing precludes the CATV operator from voluntarily providing lower rates for such service to the elderly and handicapped, so long as in doing so the CATV operator absorbs the cost differential and does not pass it on to the other subscribers.

IX. Negative Option Billing

Negative option billing is billing by which a CATV subscriber is presumed to request a new service unless he in some manner advises the CATV operator that he declines to exercise

such an option.[24] The Cable Act makes clear that such negative option billing is prohibited as a matter of law. No CATV subscriber may be billed for services other than those specifically ordered. The rules the FCC adopts in this matter need merely reflect the requirements of the Act so that any CATV operator who violates the rules may be fined for violation of the Rules pursuant to 47 US § 501 et seq.

WHEREFORE, Franchising Authority respectfully requests that the Commission adopt rules and regulations which adequately address its concerns as set out herein.

Respectfully submitted,

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[24] It is analogous to failure to promptly return the certificate to the Book of the Month Club which results in a book being mailed which the member may not have actually desired.