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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	
	)	
To: The Commission	)	

COMMENTS
OF
CITY OF CARSON, CALIFORNIA

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SUMMARY

The Congress of the United States has enacted revisions to the Communications Act, based inter alia, on its findings that CATV service has become a necessary service and thus a quasi-monopoly. The Congress found that in many cases CATV operators have used this monopoly power to price gouge members of the public. The Congress has added to the FCC's responsibility to regulate rates for common carrier service the additional mandate to see that the rates for the basic tier of CATV service are "reasonable" and that the rates for the second tier of CATV service are not "unreasonable."

The majority of franchising authorities do not have the expertise to regulate CATV rates any more than they have the expertise to regulate the rates for local exchange telephone service. Fairness of regulation requires that the FCC, in accordance with the Congressional mandate, establish uniform standards to judge that which is reasonable and that which is unreasonable. The FCC has, through its decades of experience in regulating common carrier rates, developed such an expertise on which the Franching Authority largely must rely.

However, it is the franchising authority that is best able to police the CATV operator to insure that the FCC's CATV rules are followed and, if not, then the franchising authority can submit to the FCC a prima facie complaint that the rules have been violated. Such a complaint will permit swift adjudication

by the FCC in the form of a paper hearing, in the same manner the FCC handles disputes regarding CATV pole attachment charges.

The Congress has decreed that the FCC "shall" regulate CATV rates. The word "shall" in the Communications Act is the language of command which mandates the FCC not to forbear from enforcing the law.

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COMMENTS OF
CITY OF CARSON, CALIFORNIA

The City of Carson, California, (hereinafter the "Franchising Authority"), by its attorneys, hereby respectfully submits its Comments in response to the Commission's Notice of Proposed Rulemaking ("N.P.R.M."), FCC 92-544, released December 24, 1992, which seeks comment on the FCC's proposed rules pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (herein "Cable Act").[1] The Franchising Authority appears before the FCC in its role as vox populi to express its opinion that the citizens of its community are being overcharged for CATV service and to support the Congress's desire that the Federal Communications FCC ("FCC") take specific action to stop such price gouging.

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[1] H.R. Rep. No. 862, 102d Cong. 2d Sess. (1992) ("The Conference Report"). The Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("The Cable Act") has been renumbered as 47 U.S.C. §§ 521-558.

I. The Franchising Authority's Fundamental Concerns

It is the belief of the representatives of the City of Carson, California, that it is the FCC which alone has the expertise to regulate CATV rates. While Carson would like to have the ability to bid the FCC to see that such rates are reasonable it is the FCC that must set the standards to judge whether rates are reasonable or unreasonable.

II. Preliminary Statement

A.

The Congress Mandated that the FCC Regulate CATV Rules.

The Franchising Authority and the Congress mutually agree that often the rates for cable television ("CATV") service are unreasonable. In such a case, the basic service tier rates must be made to be "reasonable" in order to undo the excessive rate increases that have occurred since rate deregulation in 1984. The franchising authority submits that the Congress did not make rate regulation by the FCC an option that the FCC is free to exercise or "forbear" from exercising as the FCC deems appropriate. The Congress mandated that it is the duty of the FCC to do so, except in those cases where the franchising authority desires to, and can be certified to be qualified to, regulate CATV rates itself.

Regulation of rates for telecommunications service is a field in which the FCC has developed expertise for over half a century. To achieve the goal of ensuring that common carrier monopolies offered service to the public at reasonable rates, the FCC established rules that:

(1) require all common carriers subject to the Act to maintain their accounting records in a uniform manner;

(2) determine what common carrier plant may be included in the "rate base;" and

(3) establish what is the maximum allowable rate of return on the "rate base."

B.

The Franchising Authority
Can Greatly Aid the FCC in its Role.

The Franchising Authority can have a role which will assist the FCC to simplify its determination of whether a CATV operator is in violation of the Cable Act and the FCC's rules without the Franchising Authority actually holding hearings itself. The Franchising Authority should have the right to investigate whether the CATV operator is in violation of the rules. If so, then the Franchising Authority should first give the CATV operator an opportunity to cease the transgression. In that role the Franchising Authority will act as a sort of CATV policeman.

Where the CATV operator denies a violation exists, or refuses to roll back excessive rates, then the franchising authority, having first given the CATV operator every reasonable

opportunity to cure the violation will be able to present documentary evidence in its complaint to the FCC to establish a prima facie case that there has been price gouging. This process has long been followed by the FCC in adjudicating disputes regarding CATV pole attachments rates. If, in establishing CATV rate regulations, the FCC follows the path it established in regulating common carrier rates, then by giving to the franchising authority the right to act as a "policeman" the task of the FCC to adjudicate complaints will be greatly simplified.

C.

The Congressional Scheme of Rate Regulation.

The Conference Report relating to Section 2 of the Cable Act ("Sec. 2. Findings; Policy; Definitions" ("the Findings")) is the guide to the Congress' intent in establishing cable rate regulation. Section 2(b)(4) states that the policy of the Congress in adopting the Cable Act was to "Ensure that consumer interests are protected in receipt of cable service...." The Findings contained in Section 2(a) set forth numerous facts which are the basis upon which the Congress adopted rate regulation of the cable television industry. Section 2(a)(1) states that since the CATV industry was deregulated in 1984, cable rates have increased by 40% or more for 28% of cable television subscribers, which is a rate almost three times as much as the Consumer Price

Index.[2] Section 2(a)(2) finds that the cable industry is a quasi-monopoly with the extreme likelihood of there being only one CATV provider in any community which results in "undue market power for the cable operator as compared to that of consumers...." It is to be noted that the term "undue market power" is the predicate by which regulation of the price of necessary public services such as gas, electricity and water has been justified.

In Sections 2(a) (7-12) of the Findings, the Congress determined that the "Federal Government has a substantial interest" to promote public television, and to protect and continue commercial broadcasting which provides local news and public affairs to an informed electorate. Most importantly, in Findings Section 2(a)(17) the Congress found that cable subscribers often subscribe because they cannot receive the local broadcast signals they would otherwise be entitled to receive, or to obtain improved signals. Section 2(a)(18) found that cable systems are often the single most efficient distribution system for television programming.

The Congressional scheme of rate regulation set forth in Section 623 of the Cable Act[3] is one which obviously flows from

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[2] The very fact that multiple CATV system operator ("MSO") Tele-Communications, Inc. is reported (Broadcasting, January 18, 1993, pg. 8) to have charged its rates for basic service to $10.00 per month and second tier service to $10.00 per month effective April 1, 1993, proves the wisdom of the Congress in enacting the Cable Act.

[3] 47 U.S.C. § 543

years of experience gained from Congressional, judicial and agency regulation of the common carrier industry. Thus, the basic service tier provided by a CATV operator who has no effective competition is by statute to be regulated as a quasi-common carrier service offering. In Sections 201-203 of the Communications Act[4], the Congress determined that telephone communications were a necessary service (as basic cable service now has been found to be). As a result of this finding, the Congress reached the conclusion that such a substantial interest required that monopolistic common carriers offer service on a reasonable, nondiscriminatory, prescribed rate basis.

In reviewing Section 623 of the Cable Act, (47 U.S.C. § 543) there appears therein to be a clear Congressional intent that the basic tier of cable service,[5] similarly be treated as a necessary service and regulated in the same way as local exchange carriers are regulated as to the provision of exchange telephone service.

D.

The Congressional Scheme
Should Not Be Permitted to Be Frustrated by Retiering.

The Franchising Authority respectfully submits that it would be a frustration of the Congressional purpose in imposing rate

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[4] 47 U.S.C. §§ 201-203

[5] Consisting of the local commercial stations, the public broadcasting and governmental access stations, or whatever additional stations the cable operator may choose to add to the basic tier.

regulation of the basic service tier, to give the CATV operator the unlimited discretion to "load" the basic tier with new services not previously offered under the basic tier. Such unrestricted loading would defeat the intent of the Congress that the CATV subscriber be free to elect to receive basic tier service only at a reasonable rate. This would be per se unlawful.

The FCC found that the common carrier practice of "bundling"[6] was unlawful. The Congress clearly does not want the CATV operator to bundle the basic service tier in order to justify rates that are not reasonable. For example, Broadcasting's issue of October 19, 1992, at page 5 reports that one cable operator charges $18.74 per month for the local stations and C-SPAN, but only $4.21 more for the next 20 channels of basic ("second tier") cable service. Another CATV operator has a $20 tier comprising of broadcast signals, government access, and Nickelodeon, but for $2.45 more per month the subscriber gets an additional 21 cable channels, and other satellite channels. The Franchising Authority submits that because it is a Congressional finding that cable service is often required in order for the subscriber to be able to receive local signals, such basic tier service must be provided by the CATV operator at a "reasonable" rate without requiring a buy-through of other tiers. It is per se unlawful retiering to allow CATV

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[6] Bundling is the tying together of several distinct services in a single package which is offered to the customer.

operators to frustrate the intent of this provision by bundling or retiering that which was previously offered in the basic service tier with some or all of the channels now provided on the secondary service tier.

III. Specific Comments In Response to the N.P.R.M.'s Inquiries

A.

The Cable Act Permits the Franchising Authority to Fill the Role of CATV Policeman and the FCC that of the Judge.

Over the decades the FCC has determined that its burden can be eased greatly, and the public's interest fully protected, if the agency establishes a scheme of self-regulation. Perhaps the best example of this is found in 47 C.F.R. § 21.100(d)(frequency coordination). Under this rule an applicant filing for a common carrier microwave radio station must first notify any party who could possibly suffer harmful electric interference from the proposed station of the specifics of that application. The applicant also must make every reasonable effort to resolve any conflict with the other party. Otherwise, the application is not "acceptable" for filing with the FCC.

In a similar vein, the franchising authority seeks a role in which it can make every reasonable effort to see that the CATV operator complies with the letter and spirit of the Cable Act before filing a complaint with the FCC. It is the right and the

duty of the franchising authority to see that the Cable subscribers are given every protection afforded to them by the Cable Act. As discussed in the subsequent sections of the Comments such a cooperative system of regulation envisions two schemes.

(i) Rate regulation of basic service.

First, the FCC must establish a uniform system of accounting such as that proposed in Appendix A of the N.P.R.M. This will establish industry norms covering items such as depreciation, amortization, and other costs, to permit classification of construction and operating expenses. This is so that inspection of the CATV operator's accounting records can be easily done by accountants employed by the franchising authority. (e.g., see 47 C.F.R. §§ 76.305 & 307).

Second, the FCC must give to the franchising authority the right, upon reasonable notice, to inspect the CATV operator's accounts to determine (1) that the accounts are being maintained in accordance with the FCC's rules and (2) that the rate charged for the basic service tier is reasonable.

Third, the FCC must require the CATV operator to respond in writing within thirty (30) days of any notice from the franchising authority that the franchising authority has reason to believe that the CATV operator is not offering the basic service tier in accordance with the requirements of the Cable Act.

Fourth, presuming the CATV operator is willing to comply, the FCC must give the CATV operator thirty (30) days to respond to the franchising authority's informal complaint by agreeing to lower the rate and refund excess payments. These excess payments include the costs borne by the franchising authority in pursuing this process such as the accountants fees, attorneys fees, and other "out-of-pocket" expenses. Neither the costs borne by the CATV operator in setting up its accounts in accordance with the FCC's rules, nor of responding to an informal or formal complaint should be permitted to justify any rate increase.

Fifth, the FCC must require that when filed with the FCC, a complaint must show that: (1) the franchising authority certifies that it has fully complied with these prerequisites, and (2) the CATV operator has refused to comply with the request that the rate for basic service be lowered and a refund be made. The complaint must include copies of the informal notice of complaint to the CATV operator, the CATV operator's response, and copies of any subsequent correspondence.

Sixth, if after a "paper hearing[7]" the FCC adjudicates that there has been a violation of Section 623 of the Cable Act,[8] the FCC must issue an Order in which it:

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[7] For example, the type of proceeding used to adjudicate violations of 47 U.S.C. § 224(b)(1) and 47 C.F.R. §§ 1.1409-1.1410 (pole attachment rates).

[8] 47 U.S.C. § 543

(1) Orders the CATV operator to "cease and desist" from further violations of the Cable Act, and the FCC's rules;

(2) Prescribes reasonable rates for the basic CATV service in accordance with its findings;

(3) Orders the CATV operator to refund to its subscribers by payment or credit the sums acquired from the excessive rates charged, plus interest at the current prime rate of return for its unlawful use of these funds;

(4) Requires the CATV operator to reimburse the reasonable costs of the franchising authority in determining the existence of the violation and prosecution of the complaint, and also to pay a fine to the FCC for violation of the FCC's rules; and

(5) Authorizes the franchising authority to file in the U.S. District Court of appropriate jurisdiction acting as an agent of the FCC, a complaint for injunction and damages, including costs of prosecution, for any failure of the CATV operator to promptly comply with any such Order where that Order is no longer subject to administrative or judicial review.

(ii) Rate regulation of second tier service.

(a) Because the franchising authority has only 180 days[9] from the effective date of the new rules to file a complaint, prompt action by all parties is required. The CATV operator should be required promptly and formally to advise the franchising authority of the rates it charges for each tier of service it provides, not only in that community, but in every community it serves, and to do so again on the anniversary date of such notice.

(b) The CATV operator should be given thirty (30) days in which to either lower rates and provide a rebate to its subscribers, or refuse to do so. The CATV operator should have the burden of proof to show that its rates for the second tier of service in that community are not "unreasonable". Rates should be presumed to be unreasonable when they are at least ten (10%) percent higher than the rates for similar service charged in other communities served by the same CATV operator.

(c) The FCC must provide procedural rights similar to those for basic tier complaints for processing complaints when the second tier rates are "unreasonable." Such a system is in the public interest because:

(1) It permits the franchising authority to act as a CATV policeman to ensure that the CATV operator is acting in compliance with the FCC's rules, without the burden of acquiring a full time staff of experts to act

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[9] See Title 47 U.S.C. § 543(c)(1)(C).

on the matter as would be required in the certification process;

(2) It minimizes the FCC's adjudicatory processes to resolve the complaint; and

(3) It reimburses both the franchising authority and the FCC for their costs in the prosecution of the complaint.

B.

Jurisdiction

The Franchising Authority respectfully submits that the Congressional policy is that in all situations where cable television systems are not subject to effective competition, the FCC must establish some mechanism to "insure that consumer interests are protected in receipt of cable service".[10] This contention is clearly contradictory to the concept of the lack of FCC regulatory jurisdiction as set forth at paragraph 16 of the N.P.R.M. Therein the FCC suggests that it only has the jurisdiction to assure the existence of reasonable rates in those limited cases where the franchising authority has first requested that it be certified to regulate cable rates and the FCC has denied the certification request on the grounds that the local authority is not competent to do so. This interpretation flies in the face of obvious and explicit Congressional intent set forth in the Conference Report. It is clearly contradictory to

[10] Conference Report, Section 2(b)(4).

those sections of the Cable Act that require the establishment of a unified nationwide scheme of regulation, such as those applied by the FCC to the provision of interstate telephone service by dominant carriers. Since the Congress has found that "most cable television subscribers have no opportunity to select between competing cable systems,"[11] in the absence of effective competition, CATV operators should be deemed to be "dominant" in the provision of basic service, and thus subject to full FCC rate regulation.

47 U.S.C. §543(b)(1)[12] of the Cable Act, entitled "FCC obligation to subscribers" states: "the FCC shall by regulation, insure that the rates for the basic service tier are reasonable." Section 543(b)(2)(C) mandates that the FCC "shall take into account the following [seven] factors". As the United States Court of Appeals has reminded us "shall ... is the language of command" and, as such, the statute is not open to the FCC's construction,[13] nor is the FCC given any discretion to forbear from enforcing it.

There are governmental bodies, such as the New York State Cable FCC, that over the years have developed staffs who have the expertise to fully regulate cable rates. Thus, just as the Congress has divided jurisdiction over common carrier regulation

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[11] Conference Report, Section 2(a)(2)

[12] Section 623 of the Cable Act

[13] American Telephone and Telegraph Company v. FCC, Slip op. no. 92-1053 (DC Cir. November 13, 1992) at pp. 15-17.

between those who regulate intrastate telephone service and the FCC regulation of interstate telephone service pursuant to Section 201 of the Communications Act (47 U.S.C. 201)), so too, the Congress has divided jurisdiction over cable rate regulation between those who are certified to possess the expertise to locally regulate basic service CATV rates and the FCC itself.

Section 16 of the N.P.R.M. suggests that a void exists which requires the franchising authority to first endeavor to be certified by the FCC as qualified to regulate cable rates and fail to do so before the FCC would acquire jurisdiction to set rates. There is no such great void by which the FCC is free to ignore the Congressional mandate. The Congress has given to the FCC a mandate to regulate cable rates when it used the term "shall" in the Cable Act, and no matter how burdensome, that mandate must be followed.

IV. Basic Cable Service Rates

In its Findings at Section 2(a)(2),[14] the Congress determined that most cable television subscribers have no opportunity to select between "competing cable systems". The Congress has also found that the federal government has a substantial interest in making the basic service tier signals available on cable systems at a reasonable rate,[15] and further

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[14] Conference Report, Section 2(a)(2)

[15] Id. at 2(a)(8)-(11)

that CATV service is necessary to those who subscribe in order to either obtain local signals which they would otherwise not be able to receive, or to improve the quality of those signals.[16] To achieve this goal the Congress has established a policy that "where cable television systems are not subject to effective competition, that the FCC as an arm of the Congress ensure that consumer interests are protected in receipt of cable service".[17] This policy is substantially the same as the predicate for the very creation of the FCC itself, i.e., "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication services with adequate facilities at reasonable charges...." (47 U.S.C. § 151.)(underscoring supplied)

In fulfillment of this mandate, in 1934 Congress included in the Communications Act Section 201 (47 U.S.C. § 201). This section requires that every common carrier provide basic telephone service by which "all charges, practices, classifications and regulations ... shall be just and reasonable." In the Findings,[18] Congress noted that since rates for cable television services were deregulated in 1984 the monthly rate for basic cable service has increased by 40 percent or more for 28 percent of cable television subscribers. That the monthly cable rate had increased about three times as much as the

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[16] Id. at 2(a)(17)

[17] Id. at 2(b)(4).

[18] Conference Report 2(a)(1).

Consumer Price Index since rate deregulation obviously was of great concern to the Congress, or it would not have made this the very first of its 21 separate Findings.

Having so found, Congress imposed a scheme of basic cable service rate regulation which is patently analogous to the scheme of rate regulation of common carriers by the FCC pursuant to Sections 201-208 of the Communications Act (47 U.S.C. § 201-208). The FCC is mandated, upon the filing of a complaint, to prescribe common carrier rates which are just and reasonable where it finds that there has been violation of the Communications Act, (47 U.S.C. § 205). So too, in the absence of effective competition, the Congress has mandated that "the FCC shall, by regulation, ensure that the rates for the basic service tier are reasonable" (47 U.S.C. § 543(b)(1), underscoring supplied).

Nothing in Section 543(b)(1) can be reasonably read as saying "only in those cases where the FCC has denied certification upon the application of the local franchising authority then the FCC shall ...." This scheme of regulation mandated by the Act for the regulation of cable service rates is analogous to the scheme of regulation of common carrier service with which the Congress, the FCC and the Courts have had long familiarity.

That scheme of cable regulation contemplates the seven factors set forth in 47 U.S.C. § 543(b)(2)(c). Those seven factors are based on the cost of building and operating the CATV plant for the basic service tier, including cost of equipment and

installation. These seven factors are analogous to the scheme of common carrier regulation set forth in Parts 61 and 65 of the FCC's Rules which require the publication of rates for service offerings and the determination of that portion of the plant which shall be included in the "rate base" as set forth in Section 65.800-830 of the FCC's Rules.

Just as the FCC has recognized through long experience that it is impossible to determine what is the rate base if different accounting, methods are used, in the N.P.R.M. at Appendix A, the FCC has "Proposed Cost Accounting Requirements". The FCC has decades of experience in regulating cost accounting, having prescribed Part 32 of its Rules which establishes a uniform system of accounts for telecommunications companies. Unless each CATV operator accounts for its capital investment in plant on uniform FCC prescribed accounting standards, there is no practical way in which the FCC can determine whether the charge for the basic service tier is reasonable.[19] For example, the number of years in which headend equipment is to be depreciated must be constant throughout the CATV industry. The cost categories contained in Appendix A of the N.P.R.M. of basic cable plant consisting of land and buildings, headend, trunk and distribution system, and program origination equipment, encompasses the CATV plant that provides the basic service tier

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[19] It is a common practice for common carriers to maintain several sets of accounts by which depreciation in accordance with IRS standards may differ from the standards for rate regulation purposes.

because it does not include satellites, programming costs, and other costs which would not be components of the basic service tier.

In common carrier practice, calculation of the rate base is the cost of plant as originally installed, minus depreciation (net plant). The cost of the plant as recapitalized following purchase of the CATV system by a subsequent operator should not be permitted to be used as the rate base. The use of recapitalized cost in the rate base would permit windfall profits because most of this money is for goodwill and other intangibles.

Under basic rate of return regulation, operating expenses are an excluded factor. Thus, cost of retransmission consent, copyright fees, labor, electricity, etc., are all annual operating expenses which are subtracted from the calculation of gross revenues received before the determination of whether the net revenue resulting therefrom does not exceed the maximum rate of return allowable under the prescribed rate base.

The separation of joint and common costs to be allotted to the basic service tier from those used to provide the second tier of cable services and other services such as HBO, Showtime or Pay Per View is merely a matter of determining the ratio of use. For example, if there are 20 basic tier channels, 20 second tier cable channels and 20 channels such as HBO, Showtime, Pay Per View, etc., then the basic service tier would be allocated for its rate base one-third of the plant cost to construct the

cable system and one-third of the joint and common costs in providing the service.

The rate of return formula for basic service tier rate regulation should be a relatively simple one. For example, to determine rate of return for a CATV system:

A. Determine the ratio of basic service tier channels offered vis-a-vis all common plant channels offered (e.g., with a CATV system of 60 channel capacity with 20 channels dedicated to the basic service tier one-third of the plant's common cost (backbone, headend etc.) is allocated to basic service;

B. Determine the cost of the common plant, part of which is used to provide basic service as separated from the cost of satellite equipment etc. not so used and then calculate one-third of this cost as the rate base upon which the maximum allowable rate of return is applied. (e.g., see 47 CFR § 65.800);

C. Determine the maximum allowable rate of return on the rate base (e.g., the FCC allows AT&T an 11.25% maximum allowable rate of return);

D. Calculate the gross revenues resulting from the provision of the basic service tier;

E. andSubtract from this the operating costs applicable only to the basic service tier (e.g., retransmission consent);

F. Subtract from this all of the common plant operating costs applicable to the basic tier, e.g.,electricity, maintenance, labor, and related costs.

G. This formula determines the net revenue derived from providing the basic service tier. If this net revenue exceeds the maximum allowable rate of return it is unlawful. If not, it is lawful.

A simple hypothetical showing how this would work if effectuated in the FCC's rules is as follows:

A. Total plant cost is $300,000;

B. Basic service tier is one-third of this common plant or $100,000;

C. Return is ten (10%) percent, or $10,000;

D. Gross revenues from providing the basic service tier is $300,000;

E. One subtracts operating expenses such as retransmission consent solely applicable to the basic service tier of $200,000 and one-third of common operating costs of $80,000. This leaves a net basic service tier revenue of $20,000. Since this exceeds the maximum allowable return on the rate base of the plant of $10,000 the return is excessive, i.e., it exceeds a "reasonable profit" and the charge for basic service must be reduced.

In order to simplify its costs in regulating the rate for basic service, the FCC should require that the CATV operator's accounting records be made available for inspection upon reasonable request to federal, state and local franchising authorities. While the franchising authority may not have the staff or the expertise available to determine whether the rates for the basic service tier are reasonable, most franchising authorities have either on the city payroll or readily available from outside sources the services of accountants, who can determine that the CATV operator is in fact keeping its books and records in accordance with the FCC prescribed rules.

While it is up to the FCC to prescribe the system of accounts which are applicable to CATV regulation and to require