conclusion that a "leased access programmer would pay for the technical support it used." *Id.* at ¶ 157. Unless the charges for technical support were unbundled from the charges for carriage, this would not be possible.

The Commission also must recognize that part time leased access programming imposes additional costs on the cable operator. Cable operators should be given the discretion to decide whether they want to take on the burdens and risks of leasing channels on a part time basis.[39/]

When an operator chooses to accept part time programming, it should be allowed to charge differing prices for different day parts, so long as the overall price for a full day of part time service does not exceed the benchmark rate. If cable operators are not given this discretion, then some day parts, notably prime time, will be greatly underpriced and others, like 2:00 - 4:00 a.m., will be greatly overpriced.

Additionally, the operator should be allowed to impose a surcharge that reflects the additional costs of leasing a channel on a part time basis. These costs include administrative and technical costs, as well as the opportunity cost of losing capacity on a particular channel. If the operator is unable to lease the remainder of the day, this could result in the part time programmer being charged the equivalent of the full time rate for the day. As long as this rate is

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39/ The operator should be given the same discretion with regard to programmers who would like to lease channel capacity on a periodic basis, *e.g.*, only on certain days of the week or certain times of the year.

not above the benchmark established by the Commission, this rate should be presumed reasonable.[40/]

B. Cable Operators And Lessees Should Have The Flexibility To Determine The Terms And Conditions Of Leased Access

Section 612(c)(4)(A)(ii) requires the Commission to establish reasonable terms and conditions for commercial use of leased access channels. Pursuant to this authority, the Commission seeks comment on whether there is a need to establish rules on tier location, channel position and time scheduling for leased access use.

The Commission asserts that such regulation would have the effect of providing increased uniformity and certainty in the leased access market, which would lead to increased use of leased access channels. At the same time, the Commission recognizes that such regulation would intrude on the legitimate discretion of the cable operator in this area. The Commission seeks comment on how to properly balance these competing interests.

As discussed, pursuant to Section 612(c)(1), any regulation of the terms and conditions of leased access should not undermine the financial condition of the cable system. 47 U.S.C. § 532(c)(1). This clearly expressed legislative concern supports the position that channel and tier placements should

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40/ In some instances, coordinating a number of part-time lessees may so complicate administrative and technical costs for the operator that any above benchmark rate would be warranted. The Commission, therefore, should consider adopting a rule that would permit percentage adjustments over and above the benchmark.

not be subject to Commission rules, but rather should be left open to negotiations between operators and programmers.

Mandating particular channel and tier placements may impose additional costs on the cable operator. Placing leased access programming on channel 8 rather than channel 53, for instance, may require significant changes in the operations of a cable system which will result in the expenditure of operator resources. An operator should be allowed to negotiate with the programmer as to who will cover the costs of such changes.[41/]

Interference by the Commission in the cable operator's discretion over the placement of a leased access service also raises significant legal questions.[42/] Decisions about channel placement are part of the cable operator's editorial functions. Any regulations that impinge upon those decisions could well be a derogation of the operator's First Amendment rights. *See Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) (invalidating must carry rules on First Amendment grounds). At the same time, regulations that, for instance, assigned leased access channels on a first-come, first-served basis could run afoul of the prohibition on regulating cable operators as common carriers.

41/ The Commission could accommodate additional charges for particular channel or tier placement by permitting the cable operator and leased access programmer to file a joint request for waiver of the benchmark. A showing that the parties had agreed freely to the additional charge should be sufficient justification to grant the waiver.

42/ The legal rights of other cable programmers also may be impinged upon by Commission rules.

47 U.S.C. § 541(c); *see also Nat'l Ass'n of Regulatory Comm'rs v. F.C.C.,* 533 F.2d 601 (D.C. Cir. 1976).

The Commission also seeks comment on what, if any, technical and production facilities the operator should be required to offer to leased access users. *Notice* at ¶ 157. In establishing these requirements, there are two important considerations that must be recognized. First, as the Commission indicates in the *Notice,* leased access programmers should be required to pay for any technical support that is provided by the operator. *Id.* Second, to the extent that an operator is required to provide technical support, this requirement should not include the obligation to invest in equipment or technology that the operator does not already possess or would not otherwise invest in.

Both of these positions are consistent with Section 612(c)(1) which mandates that the terms and conditions of leased access should not adversely affect the operations or financial condition of the operator.[43/] 47 U.S.C. § 532(c)(1). The best way to safeguard the financial integrity of the cable operator is to allow the parties to negotiate over what equipment and facilities will be provided and who will cover the costs.[44/]

43/ Costs to accommodate leased access users may be far from inconsequential. New program services may be located on a satellite for which an operator has no receive capability.

44/ It should be noted that in some cases cable programmers have actually provided their own facilities, such as satellite down-link equipment, as an incentive for the operator to carry a program. Since the leased access provisions are designed to encourage competition in the delivery of commercial programming over leased access channels, the Commission should not limit the

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Section 612(c)(1) also answers the question, raised by the Commission in the *Notice*, of when an operator should be allowed to require a programmer to post a bond or deposit. As with other terms and conditions of leased access, the Commission should establish rules that preserve the financial integrity of the operator by allowing a maximum flexibility for the parties involved. Given the transitory nature of many commercial programmers and the difficulties inherent in successfully operating a leased access channel, an operator should be allowed to require a performance bond or deposit in any situation where the programmer has not prepaid the full amount for use of the channel.

In discussing the need to insure that regulation of the terms and conditions of leased access not undermine the financial integrity of cable systems, the Commission questions whether operators should be required to apply the same terms and conditions for leasing channel capacity to affiliated and nonaffiliated programmers. Any attempt by the Commission to establish such a requirement would be based solely on the erroneous assumption that congressional silence on this issue vests the Commission with such authority.

As indicated in the *Notice*, the legislative history of the 1984 Act specifically envisions operators having the discretion to discriminate in their terms

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44/ (...continued)
ability of the parties to enter into arrangements such as this when both parties agree that it is mutually beneficial to do so.

and conditions.[45/] The fact that Congress authorized the Commission to establish maximum rates, terms and conditions in no way indicates that they intended for the Commission to take this discretion away from system operators. Imposing a requirement that affiliated and nonaffiliated programmers be treated equally also would be inconsistent with Section 541(c) which states that cable operators should not be regulated as common carriers.

A final issue that must be mentioned is the ability of the Commission to grant an operator special relief from the regulation of terms and conditions established in this proceeding. Though not discussed in the *Notice*, there may be situations where enforcement of the Commission's leased access rules will create a hardship for the operator and subscribers of a system. In appropriate situations, the Commission should provide for a waiver of the rules or some other form of special relief.

This issue is most likely to arise with regard to systems that have no existing capacity with which to provide leased access channels. In response to low demand for leased access channels in the past, many systems offer subscribers additional programming services on channels that might otherwise be available for leased access. This situation will become more of a concern with the

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45/ The legislative history of the 1984 Act states "nothing in these provisions is intended to impose a requirement on a cable operator that he make available on a non-discriminatory basis, channel capacity set aside for commercial use by unaffiliated persons." H.R. Rep. No. 934 98th Cong. 2d Sess. 51 (1984) ("1984 House Report").

enforcement of the must carry provisions of the 1992 Cable Act, which further limit the number of channels a system might have available for leased access.

The Commission should establish a procedure whereby a system which has no available channels for leased access could be granted a waiver from the Commission's rules. Without such a procedure, the system would be forced to eliminate programming that subscribers have grown accustomed to seeing. In many cases, the programming that would be cut would be targeted toward specific groups as part of the cable operator's efforts to offer diverse programming to its subscribers.

Since there is no way to be sure that leased access programming will add any more diversity than the programming that it replaces, the Commission should allow the system to continue offering programming that has proven to be popular with subscribers. This is particularly true where the proposed leased access programming will have to be scrambled. In this situation, a failure to waive the leased access requirements will result in most subscribers receiving less programming than they did before, a result that is clearly inconsistent with the mandate of the 1992 Cable Act.

C. The Commission Cannot Require A Lower Maximum Rate For Not-For-Profit Programmers Than For Other Leased Access Users.

The Commission seeks comment on the question of whether the 1992 Cable Act "empowers [it] to set a lower maximum rate for leased commercial access for not-for-profit programmers" in order to assure the diversity

of programming that is mandated by Section 612 of the 1934 Act. *Notice* at ¶ 153. The *Notice* also seeks comment on the need for special rates for not-for-profit programmers and the impact those rates would have on other programmers, subscribers and cable operators.

The 1992 Cable Act does not give the FCC authority to set lower rates for not-for-profit programmers. The 1984 Act gave cable operators discretion over the manner in which leased access was provided.[46/] The rates, terms and conditions established by cable operators are to be presumed reasonable if challenged in court or at the Commission. *See* 47 U.S.C. § 532(f).

The legislative history of the 1984 Act indicates that "the overall purpose of [the leased access provisions] is to prohibit any editorial control over the selection of programming provided . . . . " 1984 House Report at 51. However, despite the lack of editorial control that operators have over leased access channels, the 1984 Act clearly envisioned that cable operators would "consider the content of a service that would be provided" in establishing rates and "[the Act] **does** contemplate permitting the cable operator to establish rates, terms and conditions which are discriminatory." 1984 House Report at 51-52

46/ Section 612(c)(1) of the Communications Act provides:

> [T]he cable operator shall establish, consistent with the purpose of this section, the price, terms and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system.

47 U.S.C. § 532(c)(1).

(emphasis added). Furthermore, "[n]othing in these provisions is in any way intended to deprive the cable operator from receiving a fair profit from the use of this designated channel capacity." 1984 House Report at 52.

The 1992 Cable Act did not change this principle. The intent of the 1992 Cable Act, however, was to increase the use of leased access channels by lowering the maximum rate that can be charged by a system operator. *See* Sen. Rep. No. 92, 102d Cong., 1st Sess. 29-32 (1992) ("Senate Report")("the leased access provision is an important safety valve for anticompetitive practices. . . . The legislation carries out this intent by requiring that the FCC establish maximum reasonable rates for access to these channels.")

There is certainly no indication that Congress intended for an operator to be prohibited from making a fair profit from leasing access to designated channels. Based on the limited changes Congress made to the leased access provisions of the 1984 Act, any action taken by the Commission which attempts to limit the rates that can be charged to certain classes of programmers, and which could prevent the operator from receiving a fair profit, would be considered beyond the scope of authority granted by the 1992 Cable Act.

D. The Alternative Dispute Resolution Should Be Available In Leased Access Disputes.

The Commission also seeks comment on the manner in which the current complaint procedure can be amended to provide for expedited resolution of disputes between system operators and aggrieved commercial programmers. Under the 1984 Act, programmers could file complaints against system operators

in federal district court or at the Commission, though damages could only be awarded in district court. *See* 47 U.S.C. § 532(d), (e). Regardless of where the complaint was brought, Section 612(h) commanded the trier of fact to presume that an operator's rates, terms and conditions were reasonable.

Congress believed that the expense of litigation and the high burden of proof has combined to "limit the extent of use of leased access capacity. The cumbersome enforcement mechanism also might explain why some cable operators cite very low demand for leased access channels." H.R. Rep. No. 102-628 at 39-40 (1992). In response to these problems, the 1992 Cable Act grants the Commission authority to establish expedited dispute resolution procedures. 47 U.S.C. § 532(c)(4)(A)(iii). Pursuant to this authorization, the Commission has proposed three alternative methods of dispute resolution.

The Commission's proposal would place the dispute resolution function within the Commission, but in a streamlined form, and would lower the burden of proof necessary to demonstrate a violation of the statute. The Commission proposes that programmers would only be required to file a simple petition setting out the facts which constitute the violation and the rule which is violated. If this petition is sufficient to establish a *prima facie* case of violation, the burden of production would shift to the system operator to disprove the allegations.

The Commission questions whether this approach is consistent with the presumption in Section 612(h) that an operator's rates, terms and conditions are presumed to be reasonable. Although the 1992 Cable Act provides the

Commission with the authority to implement more flexible procedures, there is no indication whatsoever that Congress intended to change the burden of proof in Section 612(f) that the price, terms and conditions for use of channel capacity are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.

Unless an operator's proposed price, terms, and conditions are in conflict with any of the limitations that the Commission implements, they shall be presumed to be reasonable and made in good faith. Upon a showing that the operator's price, terms, and conditions exceed those standards established by the Commission, an operator will then have the burden of demonstrating that they are not unreasonable.

The Commission also proposed two alternate forms of dispute resolution that could be used to supplement the proposed streamlined procedures at the Commission level. The Commission indicates that it favors some form of Alternative Dispute Resolution ("ADR").[47/]

The Commission asks whether the parties should be permitted to choose ADR before a programmer establishes a *prima facie* case at the Commission. In general, as long as both parties agree that ADR serves their interests, there is no reason to burden the Commission with the obligation to hear a complaint which can be resolved by other means. The parties should also

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47/ Administrative Dispute Resolution Act of 1990, P.L. 101-552, 104 Stat. 2736 (1990). *See also Use of Alternative Dispute Resolution Procedures in Commission Proceedings in Which the Commission is a Party (Initial Policy Statement and Order),* 6 FCC Rcd 5669 (1991).

be allowed the same flexibility with regard to deciding which issues are appropriate for ADR. As long as neither party is forced into a ADR proceeding, there is no reason for the Commission to limit the choices that are available to the parties.

The Commission also seeks comment on the role that franchising authorities should play in resolving conflicts between system operators and aggrieved commercial programmers. The Commission suggests that local authorities may be better able to handle time-sensitive disputes. Considering the limited resources of many franchising authorities, their lack of experience in adjudicating such disputes, and the streamlined dispute resolution procedures that will be in place at the Commission, local authorities are not in a better position to handle time-sensitive disputes. There is no guarantee that either an operator or complainant will be able to obtain a dispassionate resolution of the dispute by the franchising authority. For these same reasons, a franchising authority should not review the dispute as a prerequisite to review by the Commission.[48/]

The 1992 Cable Act directed the Commission only to establish procedures and standards to govern leased access. If Congress had intended the franchising authority to undertake this additional role, it would have amended the 1984 Cable Act accordingly.

48/ In particular, there is a concern that franchising authorities, acting as mediators, will have access to confidential information that they would not otherwise be entitled to receive.

VI. PROCEDURES FOR BASIC SERVICE REGULATION.

Section 623(a)(3), adopted from the House bill H.R. 4850,[49] establishes three requirements for certification. First, the franchising authority must adopt regulations that are consistent with Commission regulations. Second, the franchising authority must have "legal authority" to adopt, and the personnel to administer, these regulations. Finally, the procedural regulations for rate regulation proceedings must provide a reasonable opportunity for consideration of the views of interested parties.

A. Local Rate Regulations Are A Prerequisite To Certification.

Section 623(a)(3) provides that a franchising authority must certify that it "will adopt and administer regulations with respect to the rates subject to regulation . . . that are consistent with the regulations prescribed by the Commission." 47 U.S.C. § 543(a)(3). This provision conflicts with Section 623(a)(4), which provides that a certification will become effective 30 days after the date it is filed unless the Commission finds that "the franchising authority **has** adopted or **is** administering regulations with respect to the rates subject to regulation . . . that are not consistent with the regulations prescribed by the Commission." 47 U.S.C. § 543(a)(4)(emphasis supplied). The Commission cannot make a determination that a franchising authority **has** adopted or **is**

49/ H.R. 4850, 102d Cong., 2d Sess. (1992).

administering regulations not inconsistent with Subsection 623(b) when the franchising authority has only certified that it **will** adopt such regulations.[50/]

Unless regulations are implemented by a franchising authority that are consistent with those regulations established by the Commission prior to the certification becoming effective, there is no assurance that a franchising authority will implement regulations in accordance with the Commission's requirements. A franchising authority therefore should be required to implement regulations prior to the submission of its certification, and to serve the operator with a copy of the regulations.[51/] This requirement will permit the Commission to make a determination that the franchising authority's regulations are not inconsistent with those adopted by the Commission, thereby reducing the occasions on which cable operators are required to file petitions for revocation or denial of certifications.

50/ The House Report contemplates that a franchising authority, at the time that a certification is filed, will have already adopted the requisite regulations. The certification will take effect unless the FCC finds that the "regulations adopted by the franchising authority are not consistent with, or are not being administered with, the regulations prescribed by the FCC." House Report at 81.

51/ Franchising authorities that file joint certifications should also be required to demonstrate that they are in conformity with the Commission's regulations. They should also serve the operator with a copy of the regulations or statute pursuant to which they have agreed to jointly regulate rates. The form proposed in Appendix D should be amended to enable franchising authorities to jointly certify that they will exert jurisdiction in conformity with the Commission's rate regulations. The form should contain a section in which franchising authorities would certify that each franchising authority has the legal authority to enter into a joint certification agreement. Where two or more franchising authorities enter into an agreement to jointly certify their rates, a copy of the agreement should be filed with the Commission at the time that the certification is filed.

B. The Commission Cannot Regulate Basic Service Rates Unless The Franchising Authority Is Disqualified.

The Commission may regulate basic service rates only where a franchising authority's certification has been denied or revoked. Under Section 623(a)(6), the Commission has jurisdiction to exercise the franchising authority's regulatory jurisdiction over basic cable service rates "[i]f the Commission disapproves a franchising authority's certification under [Section 623(a)(4)], or revokes such authority's jurisdiction under [Section 623(a)(5)]."[52/] This is the only provision in the 992 Cable Act that authorizes the Commission to regulate basic rates. As a general matter, the Commission is still obligated to implement regulations to insure that basic service rates are reasonable.[53/] However, these regulations do not authorize the Commission to exercise a franchising authority's jurisdiction over individual cable operators in the absence of the filing of a certification.[54/]

The House Report supports this position. Section 623(a)(6) of the House bill "**specifies the scope of the FCC's authority** to regulate basic cable rates in lieu of a franchising authority. The FCC may exercise regulatory authority with respect to basic cable rates **only in those instances** where the franchising authority's certification has been disapproved or has been revoked and

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52/ 47 U.S.C. § 543(a)(6).

53/ 47 U.S.C. § 543(b).

54/ *c48*See at ¶ 6.

only until the franchising authority has qualified to exercise that jurisdiction by filing a valid certification."[55]

Congress intended to leave the discretion of whether to regulate rates for basic cable service solely within the franchising authority, and nothing in the 1992 Cable Act requires local authorities to seek certification. Indeed, where a franchising authority has elected not to regulate rates, it is a demonstration that rates for basic service are reasonable. If Congress had intended to give the Commission regulatory authority over basic rates where local franchising authorities elect not to become certified, then it would have expressly granted this authority in Section 623(a)(5).

C. The Commission Should Adopt A Reasonable Pleading Cycle.

It is not feasible to conduct a full pleading cycle which would permit the Commission within thirty days to determine the status of a contested certification. As a practical matter, the Commission will not be able to adequately review and act on each certification that is filed within the statutory time period after the Commission's regulations take effect. The Commission's regulations should therefore provide that the failure to reject a certification should not for any reason be dispositive of whether the certification meets the 1992 Cable Act's requirements.

55/ House Report at 81 (emphasis added).

Because the statute does not provide sufficient time for the Commission to adequately review each certification within the 30-day window, an expedited pleading cycle should be established after an opposition to a certification has been filed with the Commission. An opposition to a certification that is filed prior to the expiration of the 30-day review period should automatically be treated as a petition for revocation of the certification. A franchising authority should be required to file an answer within ten (10) days from the filing of an opposition to a certification. An operator should respond to the reply within seven (7) days and the Commission should issue its findings as expeditiously as possible. During the pendency of a challenge to the certification prior to it becoming effective, the franchising authority should have no right to exercise rate regulation authority.

D. Notification of Certification.

The Commission proposes to require a franchising authority to notify each franchisee within ten (10) days of the grant of a certification. Cox believes that the Commission also should publish a list of certifications that have been granted and denied in its daily Public *Notice*. This would afford all interested parties timely notice of the Commission's action. Where the Commission has disapproved a certification and notifies the authority of any revisions or modifications that are necessary to obtain approval, the Commission should provide the cable operator with a copy of the notification.

E. A Franchising Authority Cannot Regulate Basic Service Rates Until The Commission Finds That A Cable System Is Not Subject To Effective Competition.

In the *Notice*, the Commission proposes to permit franchising authorities to make an initial determination that a cable system is not subject to effective competition and to then incorporate that determination into the certification process. *Notice* at ¶ 17. This proposal is inconsistent with the Commission's obligations under the 1992 Cable Act, and must be modified to lodge the responsibility for effective competition determinations with the Commission.

The 1992 Cable Act is very specific. The rates for either basic cable service or cable programming service can be regulated only "[i]f the Commission finds that a cable system is not subject to effective competition[.]" 47 U.S.C. § 543(a)(2). The Commission cannot defer that responsibility to any other party, and cannot, as the *Notice* proposes, treat a franchising authority's determination as a finding under the 1992 Cable Act.[56/] Neither the Commission nor any franchising authority has the legal authority to regulate any system's rates until the Commission finds that system is not subject to effective competition, and

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56/ The Commission's proposal would treat a franchising authority's determination regarding effective competition as if it were part of the franchising authority's certification request. The 1992 Cable Act makes it clear that these are separate processes. Among other things, it specifically sets a 30-day consideration period for certifications, which does not apply to effective competition determinations. *See* 47 U.S.C. § 543(a)(4) (describing certification procedures). If Congress had intended for the processes to be combined, the statute would say so.

a franchising authority's certification cannot become effective absent such determination.

It also would be inappropriate to depend on franchising authorities to make a determination regarding effective competition.[57] Any franchising authority that files a certification request is declaring that it requests authority to regulate basic service. This creates a potential bias which makes any franchising authority determination that effective competition is not present suspect.

The Commission should, in any event, require franchising authorities to provide sufficient information for the Commission to make a finding regarding the presence or absence of effective competition. The form proposed in the *Notice* merely asks the franchising authority to check a single space to indicate whether the franchising authority believes there is effective competition. *Notice*, Appendix D. This is clearly insufficient to permit the Commission to determine whether effective competition exists. Instead, the Commission should modify the form so that the franchising authority must provide information on each of the statutory criteria, including: (1) How many households subscribe to the cable system? (2) What other multichannel video providers serve the franchise area, how many households can receive their services, and how many households subscribe? (3) Does the franchising authority operate a competing video programming service and, if so, how many households can receive that service? *See* 47 U.S.C. § 543(l)(1). Without this information,

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57/ Franchising authorities have no special expertise which allows them to determine if effective competition exists.

the Commission cannot even commence an inquiry to determine whether or not there is effective competition. There may be many instances, in fact, when the franchising authority is incapable of providing all the data requisite to a finding of the presence or absence of effective competition and the Commission will need to employ its own resources to make a determination. Until the Commission determines that effective competition is not present, the franchising authority would not have the legal authority to adopt rate regulations and the certification cannot become effective.

The Commission also should establish certain presumptions for any determination regarding effective competition. In particular, it should establish that certain services automatically meet the 1992 Cable Act's requirement that an alternative multi-channel provider be available to 50 percent of the homes in a franchise area before it can be considered in effective competition calculations. *Id.* The Commission should establish that all services delivered by satellite are available to 100 percent of a franchise area. This same presumption should apply to areas that are served by wireless cable operators. This presumption is reasonable for any alternative video service like DBS or wireless cable if its signal is available throughout the franchise area. Indeed, the Commission has made this assumption in its earlier regulations on effective competition.

If the Commission adopts Cox's proposal that the franchising authority be required to provide the Commission with the information necessary for the Commission to make a determination regarding the presence or absence of effective competition, the Commission must establish procedures by which the

franchising authority will be able to ascertain whether the statutory criteria are present within a community. Other video programming distributors, including wireless cable, SMATV, DBS, and video dialtone providers are not required to provide local franchising authorities with any information that would enable them to make a determination regarding the existence of effective competition. Only where another cable operator provides service in the franchise area would a local franchising authority have knowledge.[58/] Therefore, the Commission must institute annual reporting requirements for all multi-channel video programming distributors which would enable a franchising authority or cable operator to make a determination that effective competition exists within a cable community. The Commission has the authority to require the reporting of this information under the Communications Act.[59/] Unless the Commission imposes a reporting requirement on multi-channel video programming distributors, there is no practical means by which the franchising authority, cable operator or Commission can reasonably make a determination regarding the extent or presence of effective competition within a specific area.

58/ The Commission questions whether video dialtone providers and television stations that broadcast on more then one channel should also be included in an effective competition analysis. All multichannel video providers should be included in the effective competition determination, and they should be counted cumulatively. At this time it is difficult to determine the precise formula that will be used for calculating their penetration. Until this issue is resolved, operators should be able to demonstrate their presence on a market-by-market basis.

59/ *See* 47 U.S.C. § 303.

Currently, the reporting requirement would be applicable to all providers of video programming over SMATV systems, wireless cable systems and all forms of satellite distribution to subscribers. The responsibility for filing the reports would be that of the programmer's and not the licensee of the facilities, unless they are one and the same. The requirement would also pertain to programmers that were providing service over a video dialtone. These reporting requirements are absolutely essential if the Commission is to carry out its statutory responsibility under the 1992 Cable Act and if cable operators are to determine when there has been a change in their systems' status. In the interim, if an operator opposes a certification based on the fact that effective competition is present, or may be present in a community based on the presence of other multi-channel video providers, the Commission must undertake an inquiry to determine whether not effective competition exists within a community, and where necessary, obtain information from all multi-channel video providers in each franchise in issue. This should be accomplished as expeditiously as possible because until the Commission makes a determination that effective competition does not exist, the franchising authority does not have the legal authority to regulate rates and no certification can become effective.

F. Agreed-To Decertification Should be Self-Executing.

If a cable system that has been previously regulated becomes subject to effective competition, the recognition of that change in status should be made expeditiously. A change in an operator's status is properly the basis for a

petition of revocation because the legal basis for the certification is no longer operative. To expedite the decertification process, the Commission should permit agreement by an operator and franchising authority that effective competition is present in the cable community. Immediately thereafter, an operator would no longer be subject to rate regulation, and the franchising authority would then certify to the Commission that its certification should be cancelled because of a change in the status of the system.[60/] The decertification mechanism would therefore be self-executing whenever the parties were in agreement that effective competition was present.

G. Procedures For Basic Rate Increase.

The Commission has been directed to prescribe regulations that reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission. As discussed above, a benchmark approach to rate regulation will most likely lend itself to achieving this result.

An operator should be able to implement a rate increase that falls within a basic service benchmark (or an alternative test that the Commission establish) without franchising approval thirty (30) days after notification to a

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60/ Section 76.33(a)(4) of the Commission's current regulations provides that where a cable system becomes subject to effective competition, the right of the local franchising authority to regulate the basic cable service rates of such a system shall terminate immediately. Only where disputes arise between a franchising authority and a cable operator regarding changed circumstances is the status quo maintained until the matter is resolved by the parties or by the Commission. 47 C.F.R. § 76.33(a)(4).

Commission's regulations. In particular, the Commission is concerned with: (1) whether a franchising authority could order refunds if an operator failed to comply with a rate decision; (2) whether remedies such as revocation of franchises and fines would be available under state or local law; and (3) whether the Commission could impose forfeitures upon cable operators for failing to comply with franchising authority decisions that are consistent with the Commission's rules.[63/]

Franchising authorities are authorized pursuant to Section 623(a) of the 1992 Cable Act to regulate basic service rates in a manner which is consistent with the 1992 Cable Act and Commission regulations.[64/] For example, a franchising authority could require an operator to modify its rates to conform to a Commission benchmark. The 1992 Cable Act, however, does not provide a franchising authority the with the power to order a refund. Fines or other forfeitures can be imposed by the franchising authority only if it has such powers pursuant to its franchise agreement with the cable operator or state or municipal law.

M. The Commission Can Impose Forfeitures If Necessary.

The Commission seeks comment on whether it may impose forfeitures upon a cable operator who fails to comply with franchising authority

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63/ *Notice* at ¶ 86.

64/ 47 U.S.C. § 543(a).

submission by the operator supporting the proposed increase. If a franchising authority concludes that a current rate does not conform to an existing benchmark, or that the operator has not provided justification for the higher rate, then it may require the operator to conform the rate to the benchmark, subject to appeal.[61]

I. The Commission Should Limit Information That Must Be Disclosed To Franchising Authorities.

The Commission should implement confidentiality restrictions on the information that local franchising authorities are permitted to obtain when investigating basic cable rates. A franchising authority should not be able to obtain information from an operator regarding basic cable rates where the rates fall within a benchmark or other index that the Commission may adopt. Similarly, if an operator proposes a rate increase that is within a benchmark, access to information should be prohibited. Where an operator is required to supply information to a franchising authority to support an existing rate or an above-benchmark rate increase, a franchising authority should be required to afford confidentiality to such information in accordance with the Commission's regulations and procedures where an operator requests confidentiality.[62] The

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61/ Any decision to order the roll-back of an existing rate should be stayed pending appeal to the Commission; rate increases would not take effect in the interim period.

62/ *See* 47 C.F.R. §§ 0.457 - .459.