competition to ensure that subscribers have real alternatives, and that these alternatives are reflected in competitive rates.

Discussion

The Coalition agrees with the FCC's tentative conclusions that, for purposes of determining whether there is effective competition, video programming is not "offered" unless it is actually available to a household.

The Coalition also asks the FCC to recognize that, for purposes of determining whether there is effective competition, an alternative provider must be engaged in head-to-head competition with the dominant cable operator. In some communities, for example, two cable operators are authorized to provide service to the entire franchise area, but in fact only one operator actually offers service to any particular household. While the minimum offering and subscription requirements may appear to be met, there is not actual competition and subscribers of both operators have only one monopoly choice. Likewise, PEG access channels simply do not provide service comparable to the package of services found on basic and non-basic; access is a subset of these services. In fact, setting aside issues as to comparability of programming, leased access does not provide competition, because (at least at present) these services are offered as part of the tiered services sold by the operator. Thus, subscribers must purchase cable service from the cable operator to receive those channels. The facilities necessary to provide the service (and the prices charged to receive it) remain under the control of the operator.

Thus, in evaluating whether 15 percent of the public subscribes to a service other than that provided by the largest provider in an area, it is only relevant to consider those subscribers who have a choice between two systems.[19]

A related problem can arise in determining whether rates in an area are deregulated because fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable operator. In areas where franchises have been issued for the entire community to several operators, but each operator builds or serves only non-overlapping portions of that community, each operator may have substantial penetration in its monopoly service area, but not have 30 percent penetration in the entire market.[20] The distinction between "franchise area served" and "franchise area the operator is authorized to serve" is especially critical in smaller communities, where the operator may not extend service to substantial, more sparsely populated areas.

The Coalition disagrees with the FCC's suggestion that comparability may be presumed if a competitor offers multiple channels of video programming to at least 50 percent of

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[19] 138 Cong. Rec. (daily ed.) Jan. 27, 1992 S412. (statement of Sen. Danforth).

[20] If three operators have divided a community into three equal parts, each could have up to 89 percent of the penetration in its area, and yet not serve 30 percent of the households in the whole community.

households in the franchise area and at least 15 percent actually subscribe. Rather, the Coalition believes that, to provide competition, the programming must truly be comparable. For example, the number of channels, the type of programming, and the quality of signals offered must be adequate to present an alternative to at least the basic and expanded basic service tiers offered by the dominant cable operator.[21] A second provider that offers only programming analogous to premium service -- no matter what number of channels is offered -- does not provide competition to basic or expanded basic tiers.[22] For instance, an alternative provider that offers a video service that contains three movie channels would not be comparable to an expanded basic service that offers 25 channels of sports, music, movies and other types of programming, even if the 50 percent and 15 percent thresholds were satisfied.[23]

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[21] This programming must be publicized, because it is with respect to this programming that the operator has the most significant market power. However, as an economic matter, the better view may be that programming must be comparable to all of an operator's services, taken together.

[22] A service cannot provide competition if it is not even in the same market. Congress recognized that basic and expanded basis were differemt types of service from premium services, which arguably face competition from each other.

[23] The fact that 15 percent of subscribers in a community obtain some form of video programming other than cable service does not itself prove there is competition to cable. Quite the opposite, it may reflect the fact that cable is overcharging as a result of undue market power, and that at least a minority of people in the community no longer are willing to put up with excessive prices or bad service. See 138 Cong. Rec. S412 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth) (noting that other sources of entertainment or information do not provide competition to cable).

2. Regulation of Basic Service Tier Rates.

A. Components of the Basic Service Tier Subject to Regulation

Summary of Coalition's Position

The FCC asks for comments on what programming may or must be included on a basic service tier, how may tiers may be established and whether a la carte of sub-basic tiers can be offered without purchasing basic.

The Coalition believes that a cable operator may, and in some cases must, offer more than one tier of basic service. Nothing in the buy-through prohibition or any other part of the Act precludes the operator from offering multiple tiers of basic service. The definition of basic service as any tier of service that includes the retransmission of local television broadcast signals remains in effect. 47 U.S.C. § 522(2). The congressional prohibition against rate regulation evasion, including evasion by retiering, makes clear that an operator should not be allowed to strip down basic service to the minimum requirements or eliminate programming that was included in basic service at the time the Act was enacted.

In addition, the requirement that a subscriber buy basic service to obtain "any other tier of service" in no way precludes purchase of other, non-tiered services on a stand-alone basis. Nor does it require a subscriber to purchase basic service to get institutional network, or access-only services.

Discussion

The Coalition agrees with the FCC's tentative conclusion that an operator may include additional services in a basic service tier. The basic service requirements specified in the Act are identified as a minimum, and the Act specifically allows additions to basic service. CPCA § 623(b)(7), 106 Stat. at 1467.

The Coalition also agrees with the FCC's tentative conclusion that the Act only prohibits requiring the purchase of non-basic tiers as a prerequisite to obtain programming offered on a per-channel or per-program basis, CPCA § 623(b)(8), 106 Stat. at 1467-68, and only requires the purchase of basic as a prerequisite to another, higher tier of service. Nothing requires a subscriber to purchase basic service to obtain institutional network offerings, which are not a tier at all. Likewise, subscription to basic service is not required to obtain the sort of "universal service" offered at no or low charge on some cable systems, and consisting only of access channels.[24]

However, the Coalition disagrees with the FCC's suggestion that an operator may offer only one tier of basic service, as a result of the anti-buy-through provision of the CPCA, and may be required to offer a stripped-down tier of service. In fact, as

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[24] H.R. Rep. No. 62, 102d Cong., 2d Sess. at 85 (1992) (requirement that PEG be included on basic tiers was not intended to limit franchising authorities from permitting or requiring PEG services to be provided on tiers other than basic).

noted above, the CPCA only prohibits an operator from requiring subscription to "any tier other than the basic service tier" in order to be able to receive premium or pay-per-view programming. Multiple tiers of basic service are not inconsistent with this prohibition. To the contrary, an operator could offer several tiers of basic service, with a subscriber choosing any one of those basic tiers having access to per-program or per-channel offerings. The CPCA would be satisfied by such an arrangement.[25] This in the only reading that harmonizes the requirement of § 623(b)(7) of the CPCA, 106 Stat. at 1467, with the definition of "basic service" in the Cable Act.[26]

Moreover, the FCC's reading improperly leads it to the conclusion that a stripped-down basic service tier is required, and can be established. Not only is stripped-down basic not required, in many cases an operator will be prohibited from offering only such a stripped tier. Many franchises contain provisions that require an operator to provide a certain number of channels as part of basic service. These agreements remain enforceable (even as to specific programming requirements for

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25 Thus, for example, TCI offered a basic and expanded basic service beginning in 1990. Subscribers to only basic could purchase premium programming; subscribers who opted for expanded basic could also receive premium programming.

26 The FCC argues that references to "a basic service tier" in the CPCA § 623(b)(7)(A), 106 Stat. at 1467 and "the basic service tier" in the CPCA § 623(b)(7)(B), 106 Stat. at 1467 imply that Congress meant to require operators to offer only one basic service tier. However, the statutory language could as easily be read to mean that an operator must provide <u>at least</u> one basic service tier, and on its face, the Act allows the operator to add services to the minimum tier it wishes to do so.

pre-1984 franchises). 47 U.S.C. § 544(b)-(c), as amended. While the FCC seems to believe the operator is free to retier under the CPCA, in fact, at least in the face of a contrary franchise requirement, an operator may only "rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all the service tiers involved in such actions are not subject to regulation under Section 623." 47 U.S.C. § 545(d). Had Congress intended to allow operators to freely retier to eliminate required basic services, it would have changed both of these provisions. Indeed, versions of a predecessor of the CPCA, H.R. 1303, 101st Cong., 1st Sess. (1991) (unenacted), specifically preempted franchise requirements imposing basic service obligations.

In short, the legislation allows operators to offer more than one tier of basic service. This is sound public policy. It (1) avoids conflicts with franchises, (2) limits operator ability to use retiering to evade regulation, and (3) enhances subscriber choice. A tiny proportion of cable customers subscribe only to the stripped-down basic service tier (often called "lifeline" service) that many cable companies offer. In Montgomery County, Maryland, for example, less than 2.5 percent of cable customers subscribe only to the lowest service tier; in St. Louis, Missouri, less than 2 percent subscribe only to the lowest service tier. Encouraging operators to offer only one, stripped-down basic tier may sharply limit the protection

Congress intended when it re-established basic rate regulation.[27] See e.g., 138 Cong. Rec. S413 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth) (recognizing that less than ten percent of cable subscribers take only the stripped-down basic service, and that programming was retiered on a massive scale from lower to more expensive tiers, for the specific purpose of avoiding the possibility of rate regulation).

To prevent operators from gaining advantages from a tying of programming to the basic service tier without that programming being treated as basic, the FCC should review the retiering that has occurred since the passage of the CPCA. Congress was concerned that retiering could be used to avoid rate regulation and directed the FCC "to prevent evasions that result from retiering." CPCA § 623(h), 106 Stat. at 1470. Since the Act was passed on October 5, 1992, many more multiple system operators ("MSO"s) have retiered services to minimize the impact of the Act's rate regulation provisions. This is precisely the type of evasive practice Congress intended to eliminate. The programming is and remains, as far as subscribers are concerned, basic programming and it should be so treated.

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[27] While the Act provides for regulation of both basic and non-basic services, the regulatory provisions for the two services are not identical. In any area where the franchising authority has initiated basic rate regulation, all basic rates must be justified in advance. In contrast, regulable non-basic rates will only be reviewed if and when an interested party objects, and then only if the FCC determines that the complaint satisfies the minimum pleading requirements.

In light of the above, the Coalition believes that the result in American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) is not in any way reduced, and in fact is strengthened, by the policies underlying the new law. In ACLU, the court noted that whether a particular service was basic or not depended on how it was marketed and priced. However, the Act contained a flaw noted by this FCC: where an operator required subscribers to buy-through a tier to purchase premium services (essentially tying basic and non-basic together), but marketed and priced services separately, only the basic rate would remain subject to regulation; where the two were sold together at a single price, both tiers were treated as basic tiers. There was, of course, no difference to subscribers. The anti-buy-through provision prevents operators from tying other services to basic, and escaping regulation of what, to subscribers is basic service. If an operator wants to offer a tier separate from basic, that tier must stand on its own merits. Consistent with this result, the Commission should make it clear that any tier that is effectively sold as basic is basic for purposes of rate regulation. In Montgomery County, Maryland, subscribers receive a bill for a single amount, even where the subscriber takes basic and expanded basic programming services and equipment. There is no distinction among services. This entire amount should be treated as basic service, because the single, billed amount includes a charge for receiving local television signals;[28] as far as a subscriber may be aware, all services are part of basic service and none stand alone.

B. Regulation of Basic Service Tier By Local Franchising Authorities and the FCC.

Summary of Coalition Position

The FCC asks what procedural rules should govern initiation of basic service rate regulation. The FCC tentatively concludes that it has no authority to regulate basic rates until a franchising authority has filed for certification.[29] It proposes to require the franchising authority to provide evidence in its certification filing that the franchise area is not subject to effective competition, and asks when and how challenges to an effective competition determination and to the certification should be made. It seeks comment on how certification could be revoked. The FCC also asks whether joint filing and joint regulation should be allowed, encouraged or even required. Finally, the FCC asks what procedures should apply if it assumes jurisdiction to regulate basic rates.

The Coalition urges the FCC to keep the certification process simple, particularly in light of the FCC's proposal that no regulation of basic rates can occur unless and until the franchising authority files for certification, and in light of

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28 A sample of bills sent to subscribers in Montgomery County, Maryland is included as Att. 3.

29 The FCC acknowledges an alternative interpretation of the Act that it has independent jurisdiction to regulate basic rates.

the fact that the effective competition definition in the 1992 Cable Act envisions widespread regulation of basic service rates.

The Coalition approves of the idea that a franchising authority would submit a simple form, such as the one proposed by the FCC, to file for certification to regulate basic rates. However, the Coalition feels strongly that such a certification filing need make no representation about effective competition in the franchise area. The 1992 Act does not require any representation by the franchising authority regarding effective competition. The Act merely requires the franchising authority to assert that it has "the legal authority to adopt" rate regulations. This requires no more than a representation that the filing party is a franchising authority, responsible under the CPCA for regulating rates.

The Coalition supports joint certification and joint regulation, regardless of whether rates in the affected areas must be uniform. In addition, the Coalition believes that joint filing and regulation should not be limited to areas served by the same cable system. Economies of scale may be served by joint regulation even across systems. Nevertheless, nothing in the Act suggests that joint certification should be required. Moreover joint certification should not preclude independent regulation, nor should independent certification preclude joint regulation.

In addition, existing franchise agreements that either prohibit rate regulation or are silent on the matter are preempted by the Act. To find otherwise would defeat the consumer interests Congress intended the rate regulatory provisions to protect. On the other hand, agreements setting rates are enforceable.

Discussion

The Coalition agrees with the FCC's general approach that certification be a simple process, completed by filling out a short, standardized form. The FCC correctly proposes to base its decision on certification solely on the filing submitted by the franchising authority. The Coalition supports the FCC's tentative conclusions that certified local franchising authorities may regulate rates for basic cable service unless the certification is disallowed or revoked. Any denial of certification should be subject to normal procedures for reconsideration, review and appeal.

The Coalition agrees with the FCC's proposal that two or more franchising authorities may file a joint certification and exercise joint regulatory authority. However, joint certification is not required and cannot be compelled by the FCC.[30]

The Coalition believes the Commission can maximize joint efforts -- and reduce burdens on operators and franchising authorities -- if it takes an expansive view of what constitutes joint action and how it may be implemented. The NPRM could be read to suggest that those who wish to regulate jointly must file

[30] H.R. Rep. No. 628, 102d Cong., 2d Sess. 8081 (joint regulatory authority is permitted but not required).

for certification jointly; or that those who file jointly for certification must regulate jointly. But, as a practical matter, joint action may take several forms. In some cases, there may be formal, regional compacts for regulation; in others, communities may share costs of data collection and joint hearings, but each franchising authority will make an independent rate decision; in others, a larger city may act as an agent of other, surrounding communities. These arrangements may change over time; every change should not give rise to certification issues. It is only important that it be understood that each entity who seeks certification has a continuing obligation to satisfy the certification requirements, either through joint action, or by independent action (should a community choose to act alone). Therefore, the FCC should make it clear that joint certification does not preclude a franchising authority from regulating independently, and similarly, independent certification does not preclude joint regulation.

The Coalition believes that the FCC should also make it clear that joint certification and joint regulation may occur, regardless of whether the areas covered must have uniform rates. Joint certification and regulation also need not be limited to the same cable system. Joint regulation in either case would provide benefits, such as increasing efficiency and ensuring consistent application of regulations, even where the final rates are not uniform or the systems are not the same.

The FCC correctly posits that it must assume responsibility for regulating basic rates where certification is denied.[31] It is also clear that where a community seeks certification, and certification is granted, the FCC should not exercise authority over basic service rates. The harder issue is, what is the FCC's authority where no certification is sought? The problem is presented in cases where (1) a community does not seek certification because it knows it cannot satisfy the certification criteria; or (2) the community agrees not to seek certification. In either case the Commission may be unable to fulfill its mandate to "ensure that rates for the basic service tier are reasonable."

The Act appears to contemplate a scheme under which the local franchising authority must act first, and the Commission may only act if that authority cannot comply with FCC rules. On the face of CPCA § 623(a), 106 Stat. at 1464-65, the Commission appears to lack authority to step in and regulate rates, in the absence of that initial action. However, under CPCA § 623(h), 106 Stat. at 1470, the Commission can prevent evasions of guidelines. One way to prevent evasions might be to treat the failure of a community to seek certification within 120 days of the effective date of the regulations as a representation that certification requirements cannot be satisfied. This at least avoids the unnecessary burdens that would arise if communities

[31] This appears to be required by the Act. CPCA § 623(a)(6), 106 Stat. at 1465.

that cannot regulate are nevertheless required to file certification.

The Coalition agrees with the FCC's proposal that a party seeking revocation of certification or other relief against a franchising authority must serve a copy of the petition on the franchising authority, and the franchising authority may file an opposition to the petition. However, the Coalition believes that the time periods proposed by the FCC are not long enough to allow franchising authorities to respond meaningfully to a petition for revocation. In many communities, the local cable commission meets only once a month, and may not meet at all during certain summer months or holiday periods. Thus, the franchising authority should have at least 60 days to respond to a petition to revoke its regulatory authority. The Coalition also believes that the FCC may impose lesser penalties than revocation of certification. More importantly, revocation should not be demanded merely "for any minor variance with the FCC standards...."[32]

The Coalition disagrees with the FCC's suggestion that as part of the certification process, a franchising authority must determine that effective competition does not exist, and must provide the basis for that determination. The Act does not require the franchising authority to make such a finding.

[32] Senate Report at 74, 1992 U.S.C.C.A.N. at 1207.

Rather, it requires the FCC to do so.[33] The Act simply requires the franchising authority to certify that it has the legal authority to adopt rate regulations; that is, the entity that files with the FCC must certify that it is the appropriate franchising authority to regulate rates.

This does not mean, however, that the FCC must make an "effective competition" finding before a certification goes into effect, or that the FCC must bear the burden of proving effective competition does or does not exist. By its terms, neither the certification filing, nor the approval or denial of a certification requires the FCC to make a finding that rates are subject to effective competition. CPCA § 623(a)(3), 106 Stat. at 1464. Such a finding can be addressed separately, if necessary.

However, the FCC can properly adopt a presumption that cable systems are not subject to effective competition. That presumption is implicit in the CPCA, which finds that "most cable television subscribers have no opportunity to select between competing cable systems" or other sources, resulting in cable having "undue market power." CPCA § 2(a)(2), 106 Stat. at 1460. The legislative history to the Cable Act repeatedly notes that "with rate exceptions" cable enjoys a monopoly in local communities around the country. Senate Report at 8, 1992 U.S.C.C.A.N at 1140. The "overwhelming majority of cable systems ... are not subject to effective competition." Id. at 9, 1992

[33] H.R. Ref. No. 628, 102d Cong., 1st Sess. 80 (It is for the FCC, not the franchising authority, to determine whether a system is subject to effective competition).

U.S.C.C.A.N at 1141. And the Senate concluded that "[f]ew cable systems would face competition under" the multichannel competitor test adopted by the FCC in 1991, even though that test is less stringent that the test adopted in the CPCA. Id. at 8, 1992 U.S.C.C.A.N. at 1140.[34] These factual findings demand the conclusion that most communities may regulate rates. Rather than require that communities or the FCC to prove there is no effective competition, it is far more reasonable to put the burden on operators who believe they may be subject to effective competition to come forward and say so.

It is particularly reasonable to place the burden on operators because operators are in possession of information critical to an effective competition determination. For example, for there to be effective competition, a community must be served by an independent provider; the cable operator is in control of the information required to determine whether an ostensible competitor is independent or not. Similarly, an operator will know its own penetration (crucial to the 30% test) and the area covered by its system (crucial to the 50-15 test).

If the operator does believe it faces effective competition, it should raise the issue within a short time after the community files for certification. If an operator raises the issue, the FCC could then establish a proceeding to review submissions by

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[34] Only "53 of 11,000 cable communities" have a second competing franchise, there are only 300,000 subscribers to wireless cable and two million satellite dish owners "most of whom are located in rural areas not served by cable." Id.

the operator and by the community. While the operator's challenge is pending, however, the franchising authority could establish rate levels, and the operator would be collecting its rates above these levels subject to refund. As long as the operator has an opportunity, before it is required to lower its rates, to present evidence that it should not be rate regulated because it is subject to effective competition, due process is satisfied.[35]

In addition, the Coalition urges the FCC to make clear that filing for certification serves as the instigating mechanism for rate regulation in the area. As long as a franchising authority files a certification, even if it does not believe that it is qualified to be certified, basic rates in the area must be regulated. This reduces the potential for disputes over whether a franchising authority has adequate personnel, since the ultimate result will be that the FCC will regulate if the franchising authority erroneously claimed to have adequate personnel. There is no harm to the operator, because the result is the same, and the approach is consistent with congressional intent that basic service rates in areas not facing competition be regulated, at either the local or federal level.[36]

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35 See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976); Boddie v. Connecticut, 401 U.S. 371 (1971). See also Nickey v. Mississippi, 292 U.S. 393 (1934).

36 138 Cong. Rec. S411 (daily ed. Jan. 27, 1992) (statement of Sen. Danforth), (where there "is no competition, there should be rate regulation, because the worst result is an unregulated monopoly").

The Coalition also asks the FCC to make clear that the Act abrogates any existing franchise agreements to the extent that they regulation or are silent on the issue. The CPCA does not require the operator's consent to local regulation of rates; it does not require rate regulation to be endorsed in a franchise (that rate authority is not dependent on the franchise is emphasized by the fact that entities that need not even have a franchise -- municipal systems -- may still be regulated in some instances. § 623(a)(1), 106 Stat. at 1464. Hence, the fact that a franchise did not give a locality the right, or affirmatively denied the locality the right to regulate rates does not matter; federal law provides the authority to regulate outside the franchise.

In addition, the Coalition believes that the Act permits franchising authorities to establish rate regulations that are "consistent with," but not necessarily identical to, federal rate regulations. CPCA § 623(b)(3)(A), 106 Stat. at 1466. Thus, the franchising authority may impose additional requirements or consider factors not specified by FCC regulations, as long as those requirements are not in conflict with FCC regulations and consistent with the Act.

C. Regulations Governing Rates of the Basic Service Tier

Summary of Coalition Position

The FCC proposes a variety of possible methods for regulating rates, and seeks comment on which method(s) will best achieve Congress' goal of ensuring that basic service rates are reasonable.

The FCC divides its proposed methods into two categories: (1) benchmarking and (2) cost-of-service. The FCC seeks comment on how the basic regulatory approach adopted will affect what types of services are offered on basic service tiers, and on whether the method established for basic rate regulation should impact regulation of non-basic services. The FCC also asks how the regulatory approach might affect investment in programming.

The Coalition believes that the Commission should apply the same approach in evaluating rates for both basic tier services and non-basic services. The Coalition has considered the advantages and disadvantages of each methodology proposed by the FCC, and recommends that the FCC adopt a formula, using industry norms which would be established by the Commission in a later proceeding. The approach is not identical to any approach suggested by the FCC, but it is closest to the cost-of-service benchmark the Commission describes. For the period before the cost-based formula is implemented, the Coalition recommends that the FCC adopt an interim regulatory method to give immediate required relief from excessive rates to consumers. This can be accomplished by considering a variety of data on prices and costs, all of which suggest that cable sevices are significantly overpriced.

An initial sample of the proposed regulatory model is attached to these comments, along with a narrative explanation. Att. 1. The model calculates a rate ceiling for both basic and expanded basic service tiers. It addresses each of the factors that Congress specified for consideration. The Coalition believes that its proposed cost-based regulatory method achieves a reasonable balance between fairness and ease of application. While it requires the FCC to collect cost data and make some calculations and determinations initially, the FCC's ongoing burdens will not be substantial. In exchange, the method ensures that both basic and expanded basic rates are reasonable, and limits rates to those that would exist in a competitive market, in accordance with the Act. The individualized information required by the model is factual, and should be easy for companies to provide or for cities to obtain. The rates derived from the model could be adjusted at regular intervals, with little burden. The model also would require the FCC to develop a uniform system of accounts.

The Coalition does not believe that the cost-based model could be implemented by April 3rd. The collection and calculation efforts might require several months to complete.

Discussion

The Coalition disagrees with the FCC's tentative conclusions that the Act does not require that rates in areas not subject to effective competition be no higher than rates in areas subject to effective competition. To the contrary, the clear, expressed command of the basic rate regulation provision is to protect subscribers "from paying more for basic tier service than subscribers would pay if the system were subject to effective competition." CPCA § 623(b)(1), 106 Stat. at 1465.

The Coalition opposes the FCC's proposal that rates not "significantly" above the benchmark will be presumed reasonable. Instead, a rate exceeding a benchmark to any extent should be presumed unreasonable. Moreover, the Coalition does not agree that a benchmark will necessarily protect consumers from excessive rates. To the contrary, if a benchmark is based on, or in any way incorporates or relies on existing, unregulated rates, the excessive rates now charged by many operators will be "locked in" and operators will be guaranteed continued monopoly profits.[37]

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[37] A General Accounting Office survey showed that during the four and a half years since deregulation, rates for the lowest priced service increased, on average, 56 percent, and rates for the most popular basic service tier increased, on average, 61 percent. The national price index for consumer goods rose by approximately 17.9 percent during this period. United States General Accounting Office, 1991 Survey of Cable Television Rates and Services, at 4 (July 1991). The increases continue. In 1991 alone, cable rates rose 10 percent, about three times the rate of inflation. Paul Farhi, Reregulating Cable: A Political Response to a Wired Nation, The Washington Post, Jan. 22, 1992, at A1, A14. A further flood of

The Coalition does not agree that costs may be ignored or over the long term that Congress' goal of eliminating monopoly cable rates can be achieved over the long term absent some consideration of the cost of providing service. This is because, as discussed below, all the other alternatives proposed by the Commission would require significant refinement to prevent cable industry abuses, and may be difficult to apply over time. On the other hand, the Coalition does not believe that the final regulatory methods must be in place by April 3rd. A reasonable short-term rate can be derived using date now available. The Act does not preclude the FCC from adopting interim rate regulations and then adopting a more detailed method of regulating rates later on. Thus, while it may not be feasible to implement by April a model based on cost of service, the FCC is not prohibited from adopting such a model later on.

In any event, there can be no justification for allowing operators to retain monopoly rents. Eliminating monopoly profits will not decrease operators' investment in programming in a way that will significantly harm subscribers or programmers. The CPCA is intended to encourage a competitive market for programming services, which in turn will result in healthy development of programming services, even if operators reduce their individual investments. CPCA § 11(a)(2), 106 Stat. at

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rate hikes occurred after the 1992 Act was passed in October, with increases again surpassing inflation rates. Paul Farhi, Cable TV Rates Rise in Advance of Limit Law, The Washington Post, Dec. 7, 1992, at A18-19.

1486-87 and CPCA § 12, 106 Stat. at 1488. Congress recognized that there is vertical integration between programmers and operators. CPCA § 2(a)(5), 106 Stat. at 1460-61. As a result of this vertical integration, programming costs may well have been uncompetitively high. In addition, Congress explicitly found that the high concentration in the cable industry may limit new programming sources and decrease diversity of expression. CPCA § 2(a)(4), 106 Stat. at 1460. A competitive market can be expected to stimulate investment in and development of programming, which will promote subscribers' interest in having new and diverse programming.[38] The FCC should not in any way jeopardize effective rate regulation in an unnecessary effort to protect investment in programming.

Over the long term, it will also be necessary to adopt a uniform system of accounts, to ensure costs are accurately booked and attributed to the proper functions. The information contained in these accounts must be provided to the franchising authority on a regular basis.[39]

The issues faced by the FCC in regulating rates have all been addressed previously in telephone regulation, which applies

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[38] See 138 Cong. Rec. S662 (daily ed. Jan. 30, 1992) (statements of Senators Gore and Inouye); 138 Cong. Rec. S427 (daily ed. Jan. 27, 1992) (statement of Sen. Gore) (limits on vertical integration imposed by the Act will stimulate programming by fostering competitive market).

[39] Regulators cannot review costs unless companies keep their records in some uniform and prescribed fashion. 1 Alfred E. Kahn, The Economics of Rate Regulation: Principles and Institutions 26 n.18 (John Wiley & Sons, Inc. 1970).

to a more complex industry, and by other federal agencies. Regulatory concepts regarding rates, costs and accounting procedures can be translated successfully to the cable industry.

Evaluation of Proposed Regulatory Methods

The FCC proposes five benchmark and two cost-of-service approaches to regulating rates. The following comments briefly address the FCC's proposals and describe the Coalition's model.

1. Rates charged by systems facing effective competition

This method would promote Congress' intent that rates be no higher than rates that would be charged if the area were subject to effective competition. Moreover, the method would not be unduly burdensome to administer. However, to properly use this information as a benchmark, there must be a sufficiently large number of systems facing effective competition, and the data must be effectively collected and applied. Assuming that in the long run, the rates charged by operators in effective competition communities are sufficient to cover average costs (including a reasonable profit or return or investment but no higher), this approach would also satisfy the Act's suggestion that the rate should consider certain specified costs. Therefore, the Coalition encourages the FCC to collect data from systems in communities where there is effective competition to help provide a check for determining appropriate rates in areas where there is not. The FCC should collect cost information from these systems, as well as rate information.