comports with the minimum requirements of the 1992 Act. Congress sought to "ensure that the rates for the basic tier of service are reasonable," leaving it to the operator to determine the mix of services that would be included in the basic service tier. To carry out Congress's objective, franchise provisions which are inconsistent with this policy should be deemed preempted, and cable operators should be permitted to retier services to provide access to a low cost basic tier free from franchise provisions that may require the inclusion of more expensive services on the basic tier.[124/] This principle should apply to all cable television franchises under which operators provide service, and Section 623(b)(1) should be deemed to preempt any franchises that prohibit such a basic rate structure.

CVI takes note of Section 623(j), which provides that during the term of an agreement made before July 1, 1990, between an operator and a franchising authority, "where there was not effective competition under Commission rules in effect on [July 1, 1990], nothing in this section . . . shall

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124/ The Commission should encourage a regulatory environment that promotes the formation of low cost basic service tiers. This can be accomplished by a recognition that provisions in programming service contracts that provide penalties for moving a service from basic to a programming service tier are inconsistent with this policy. Many programming service contracts interfere with the ability of operators to retier cable programming services through various penalty clauses. Some require operators to pay the programmer on the basis of all subscribers that receive basic service regardless of whether or not they subscribe to the tier containing the particular group service. Other provisions require an operator to pay a higher subscriber rate if the service is not on a tier that maintains certain penetration levels. In either situation, operators do not have the flexibility to retier these programming services at will. The Commission should therefore find that the Cable Act and the Commission's implementing regulations qualify as a *force majeure*, and that cable operators should have the right to renegotiate the provisions of the contracts which trigger these penalties.

abridge the ability of such franchising authority to regulate rates in accordance with such an agreement."[125] This proviso should not prohibit operators who entered into franchise agreements before July 1, 1990, from structuring their basic tiers in accordance with the minimum requirements for basic service set out in the 1992 Act, and in accordance with Congress' intent that a low cost basic tier be offered to subscribers.

It is clear that a cable operator may add video programming services to a basic tier,[126] in addition to the services required under Section 623(b)(7)(A). Thus, the fact that franchising authorities can continue to regulate only basic service rates[127] under franchise agreements made prior to July 1, 1990 in no way affects the right of a cable operator to retier its services, as long as it complies with minimum basic service requirements. A franchising authority regulating rates in accordance with a grandfathered franchise provision may continue to regulate rates for services which comprise the basic tier.

The Commission questions whether a franchising authority that regulates rates under a grandfathered franchise may "supersede Commission regulations governing the rates for cable programming services that are not part

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125/ This provision was sponsored by Congressmen Nussle, who introduced it to ensure that the rate regulation agreement between the City of Dubuque ("which has such an interesting terrain [that makes] difficult for competition") and its cable television operator would not be preempted from any "inadvertent legislative action." 138 Cong. Rec. 6506 (daily ed. July 23, 1992)

126/ 47 U.S.C. § 543(b)(7)(B).

127/ Under both the 1984 Act and the 1992 Act, franchising authorities can regulate only basic services. *See* 1984 Act, § 623(b)(1); 1992 Act, § 623(a)(2)(A).

of the basic tier as defined in the agreement. . . ."[128] CVI can conceive of no circumstances under which this would be true. No franchising authority under either the 1984 Act or the 1992 Act is authorized to regulate non-basic programming services, and any provision in a franchise that contradicts this principle should be preempted.

H. The Plain Language Of Section 623(b)(8)(A) Permits Cable Operators To Require Above-Basic Tier Subscription As A Prerequisite To Other Tier Service.

The Commission seeks comment on whether Section 623(b)(7)(A), which defines basic service as a tier "to which subscription is required for access to any other tier of service,"[129] precludes a cable operator from offering *a la carte* video services without subscribing to the basic service tier.[130]

The Commission seeks comment on its interpretation of Section 623(b)(8)(A), which prohibits an operator from requiring subscription to any tier other than the basic tier as a condition to access other video services. The Commission interprets this section as precluding an operator from requiring the purchase of services in addition to the basic tier as a precondition for ordering other programming. The Commission also questions whether other interpretations might preclude subscribers from purchasing a nonvideo or "institutional network" without first purchasing the basic tier.

128/ *Notice* at ¶ 135.

129/ 47 U.S.C. § 543(b)(7).

130/ *Notice* at ¶ 12.

The Commission has gone too far in its interpretation of the law. Operators should be permitted to offer a package of cable programming services conditioned on the subscriber purchasing a second level of other cable programming services. Where for example, an operator offers two levels of cable programming services, A and B, it should be permissable to require a subscriber to take package A as a condition to subscribing to package B. The 1992 Act only precludes cable operators, as a condition of access to video programming offered on **a per channel** or **per program basis**, from requiring the subscription to any tier other than the basic service tier. This interpretation is supported both by the House Report and the Senate debate on the Conference Report.[131/] There is no indication from either the statute or its legislative history that Congress intended to otherwise prescribe an operator's ability to package programming services as it deemed appropriate and commercially attractive to subscribers.

I. Basic Tier Subscription Is Not A Prerequisite To A La Carte Video Service Subscription.

Cable operators may, in the future, decide to offer services solely on a pay-per-program basis and this should not be prohibited. The 1992 Act does not preclude cable operators from offering individual video services independent

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131/ [Section 623(b)(3) of the House bill] prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier before being permitted to purchase programming offered on a per-channel or per-program basis." House Report at 85. Sen. Inouye commented, "The purpose of [the anti buy-through] provision is to increase the options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs." 138 Cong. Rec. S14,608-09 (daily ed. Sept. 22, 1992).

of the basic service tier. A subscription to basic service is a prerequisite only to other **tiers** of service, and should not be construed to require subscribers to purchase basic service when they prefer to receive only *a la carte* video program services and the operator is willing to sell services on that basis. As the Commission suggests in paragraph 12 of the Notice, the basic buy-through restriction was explicitly placed on other **tiers** of service, leading to the conclusion that Congress may have "intended to permit consumers the option of purchasing services, such as premium channels, or the services of a leased access programmer, on a stand-alone basis."[132/] This interpretation is consistent with the Commission's policy to develop other competitive video programming services. For example, providers of a video dialtone service would be able to offer consumers *a la carte* video selections, as would providers of DBS and wireless services. Cable operators would be placed at a competitive disadvantage if in the future they were not able to do likewise in competition with other video program providers.

J. Pay-Per-View and Per Channel Services That Are Bundled Should Not Be Subject To Rate Regulation

Pay-per-view and per channel services that are packaged as a unit should not be subject to rate regulation pursuant to Section 623(c). If an operator offers a service on an *a la carte* basis, the bundling of that service with other *a la carte* services at a discounted rate should not subject the bundled

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132/ *Notice* at ¶ 12.

package to rate regulation. Offering subscribers of per channel services an opportunity to reduce their per channel costs when purchasing additional per channel services could hardly be said to work to the disadvantage of subscribers. To the contrary, subscribers should have the benefit of choosing between many per channel promotions at discounted prices or selecting individual premium channels on an *a la carte* basis.

K. Basic Or Other Tier Subscription Should Not Be A Prerequisite To Non-Video Service Subscription.

The Commission questions whether Section 623(b)(8)(A) might be interpreted to preclude subscribers from purchasing nonvideo or institutional network services on an *a la carte* basis.[133/] The 1992 Act, however, only addresses marketing of **video** programming services[134/] and is silent with respect to nonvideo services. It would be wrong to interpret that silence as an intent to interfere with or otherwise affect cable operator practices concerning nonvideo services or institutionalized network services.[135/]

133/ *Notice* at ¶ 12.

134/ "A cable operator may not require the subscription to any tier other than the basic service tier . . . as a condition of access to video programming. . . ." (emphasis added).

135/ Though the House Report states that Section 623(b)(8) of the 1992 Act (Section 623(b)(3) of the House bill) prohibits subscription to other tiers as a prerequisite to "programming offered on a per-channel or per-program basis," House Report at 85, even the House bill specified "video" programming.

L. No Additional Regulations To Implement The Negative Option Billing Provisions Of The 1992 Act Are Necessary.

The 1992 Act prohibits cable operators from charging for services that subscribers do not affirmatively request,[136] so that a "non-response" following a proposed addition of a new service or equipment does not constitute approval by the subscriber. CVI agrees with the Commission's tentative proposal that either oral or written acceptance of proposed service changes should be necessary to show acceptance of a new service or equipment.[137] However, requiring that subscribers confirm in writing that they accept a new service or equipment would be burdensome to both subscribers and cable operators.

CVI also agrees that a "change in the composition of a tier that was accompanied by a price increase justified **under [Commission] rate regulations** would not be subject to the negative option billing prohibition."[138] Likewise, system-wide equipment upgrades accompanied by an increase would not trigger the negative option provision.

There is no need for the Commission to adopt specific rules to address this issue. Franchising authorities and subscribers may file a complaint

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136/ 47 U.S.C. § 543(f).

137/ Senate debate on the issue of negative option billing indicates that the purpose of the provision is to insure that subscribers don't pay for services "without consciously knowing they are purchasing that service and making a decision to do so." 138 Cong. Rec. S567-8 (daily ed., Jan. 29, 1992) (remarks by Sen. Gorton). Affirmative acceptance of any kind, whether oral or written, should therefore be permissible.

138/ *Notice* at ¶ 120 (emphasis added).

with the Commission should they believe that a cable operator is in violation of this section. State and municipal laws that conflict with the provision[139] should be preempted to the extent that they are inconsistent with Commission policies and regulations.

The Commission need not adopt additional protections against retiering abuses by cable operators. The regulations that govern basic and non-basic tier services will provide adequate protection against tier changes that violate the negative option billing provision. Therefore it is unnecessary to regulate tier changes further.

Similarly, there is no need for the Commission to adopt a provision requiring cable operators to notify subscribers of service changes. Cable operators routinely provide subscribers with notices of service changes, and such requirements are often contained in franchises or addressed by customer service standards.

139/ For example, a state or municipal law requires consumers, including cable subscribers, to provide written, rather than oral acceptance of new service, would be preempted.

VIII. CONCLUSION.

The Commission must adopt rules that advance all of the goals of the 1992 Act and must, consequently, preserve the ability of cable operators to respond to the needs of their subscribers and to the marketplace. For all of these reasons, the Commission should adopt rules and policies in accordance with the proposals contained in these comments.

Respectfully submitted,

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