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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

COMMENTS OF COLE, RAYWID & BRAVERMAN

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January 27, 1993

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Summary

This proceeding necessarily involves a vast array of complex issues. We have attempted to address most of the key issues in a brief, but helpful manner.

By and large, the Notice of Proposed Rulemaking ("NPRM") reflects a sensible attempt to turn the statutory mandate into workable regulations. The proposed "benchmark" approach is the best option available as the primary tool for rate regulation. Cable's structure and history make it ill-suited for either "rate of return" or "price cap" regulation. Indeed, while rate of return regulation must be used as a "safety net" for benchmark regulation, the Commission must first customize conventional rate of return regulation to accommodate the special characteristics of the cable television industry.

The benchmark approach is particularly appealing, because it promises to greatly reduce the administrative burden of nationwide cable television regulation. Most cable operators will hopefully be able to offer basic service at rates that fall within the designated benchmarks.

In establishing the benchmarks for cable programming tiers, the Commission should remember that Congress rejected comprehensive regulation for non-basic services. The benchmarks for non-basic services should be set high enough to encourage their

continued development and to discourage only those abusing their pricing freedom.

The Commission should establish different regulatory approaches for equipment depending on subscriber classification. The Commission should be particularly careful not to adopt regulations that curtail technological development.

These Comments address a host of procedural issues in an effort to minimize future administrative headaches. For example, we suggest that certification requests be preceded by a pre-filing notice to the affected cable operator, and that jurisidictional challenges to certification be resolved prior to actual rate regulation proceedings. We suggest a similar pre-filing notice for "tier" complaints, and urge the Commission to adopt a standard complaint form to facilitate processing. In both cases, the Commission should make clear that there will be no review of rates falling within the safe harbor of applicable benchmarks.

These Comments also consider a variety of substantive matters raised in the NPRM. For example, the Commission should renounce the suggestion that the "uniform rate" requirement be enforced on a system-wide basis. This interpretation is inconsistent with the statute and good public policy. It would have adverse effects on cable operators not intended by Congress.

With regard to leased access channels, the Commission must be careful that its regulations do not inadvertently favor leased access arrangements over conventional cable carriage arrangements. If they do, profitable services will migrate to leased access and frustrate the goals underlying the statute's leased access provisions.

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INTRODUCTION

The law firm of Cole, Raywid & Braverman ("CR&B"), on behalf of the cable operators and associations listed below, hereby submits these Comments in the above-referenced proceeding. CR&B's participation in this proceeding should not be construed as an endorsement or acceptance of the rate regulation provisions of the 1992 Cable Act. The entities represented in this filing expressly reserve the right to challenge the legality of the underlying rate restrictions. We appreciate, however, that the Commission was assigned certain rulemaking obligations under the 1992 Cable Act, and we offer these Comments to assist in that task.

CR&B supports the Commission's tentative conclusion to rely primarily on a benchmark regulatory approach, while reserving an operator's right to cost-justify higher rates. The details of this approach are obviously critical to the cable television industry. Accordingly, CR&B urges the Commission to proceed with caution. The Commission can always make its regulations more stringent in the future, but if the regulations start off too severe, the adverse consequences on the health of the cable industry could be difficult to remedy. The Commission must remember that cable's rate depends in large part on how the financial markets perceive the new regulatory environment.

A. RATE REGULATION OF CABLE SERVICE

1. General Issues (¶¶ 3-5)

The Commission begins this rulemaking by inquiring whether Congress expected it to rollback existing rates or to serve as "a check on prospective rate increases." Faced with a conspicuous dearth of evidence that Congress intended the former, the Commission should assume the latter. In fact, Congress left in place the introductory section of the 1984 Cable Act, which identifies as a primary statutory goal, "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(6). The Commission must recognize that any regulation that lowers existing rates risks seriously undermining the confidence of the capital markets serving the cable television industry. Numerous credit agreements have been structured based on existing levels of revenue. In fashioning new rate regulations, the Commission must attempt to mitigate the disruptive impact on the cable industry and its subscribers.

The 1992 Cable Act distinguishes between the regulation of "basic" service, "cable programming" service, and "pay" service. Early on, the NPRM asks for an explanation of the different treatment the 1992 Act affords these different program offerings. The fundamental goals underlying the Act's various rate provisions are:

(1) to ensure a "reasonable" price for a leaner "basic" service, by limiting its programming requirements and subjecting it to comprehensive rate regulation;

(2) to protect the continued development of "cable programming" services, by affording operators considerable pricing discretion, while still curbing egregious rate demands; and

(3) to allow market forces to control a la carte offerings, without any regulatory interference.

As developed below, CR&B believes that a benchmark approach is appropriate for regulation of both "basic" and "cable programming" offerings. The benchmark approach offers the best hope of streamlining an administrative process that could otherwise overwhelm the cable industry, franchising authorities, and the Commission.

The key difference between the "basic" and "tier" benchmarks should be in the margin of pricing flexibility afforded to cable operators. While both benchmarks should be set at levels that will accommodate the vast majority of systems within a "safe harbor," the "tier" benchmark should be set sufficiently high so that only the most extreme rate cases (perhaps 5% of all cable systems) would lie outside the "safe harbor." In either instance, if a system lies outside the safe harbor, the operator must be allowed to cost-justify its rates. The Commission should be certain that rate-of-return regulation properly recognizes the cable industry's special history and characteristics and truly affords operators a "reasonable profit."

2. Standards and Procedures for Identification of Cable Systems Subject to Effective Competition (¶6-9)

Measuring "effective competition" should be fairly straightforward in most communities. To determine whether the service of a multichannel video programming distributor ("MCVPD) is "offered" to particular households in a community, the Commission should look at the nature of the investment necessary to provide service to that household. If the investment is of an "individual" nature (such as purchasing a home satellite dish or an MMDS antenna, or installing a "cable drop"), the service should be deemed to be "offered." On the other hand, if "general" or "community" investment is required (such as launching a DBS satellite, relocating an MMDS transmitter, or extending cable trunk into a new neighborhood), the service should not be deemed to be "offered."

Cable operators routinely report the extent of their local "offering," as "potential subscribers," on FCC Form 325, Schedule 1 (community unit data). They also report the number of "current subscribers" within the community. To reach effective competition determinations, it is essential that the Commission impose similar reporting requirements on non-cable MCVPDs. The reporting should be done on an annual basis, and, where possible, incorporated into existing reporting forms.[1/]

It may be difficult for some MCVPD's, particularly those operating on a national scope, to identify their service area and subscribers on a franchise-by-franchise basis. To solve this problem, CR&B suggests a simpler zip code reporting obligation, provided the Commission permits zip code classifications to approximate franchise areas for purposes of measuring effective competition.

The plain language of the 1992 Act establishes that the term "multichannel video programming distributor" is to be broadly construed to include, among others, providers of cable, DBS and TVRO service. 47 U.S.C. § 522(12). The statute provides that Congress' list of MCVPDs is illustrative, not exhaustive. The test for a multichannel video programming distributor is any

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1/ CR&B supports the suggestion that reporting be made based on each household, rather than on an equivalent billing unit ("EBU") basis.

entity that makes multiple (i.e., two or more) channels of video programming available for purchase. The definition necessarily encompasses emerging competitors, created by technical or regulatory advances. Video dialtone providers, for example, must be treated as MCVPDs, because they comply literally with the provisions of the statutory test. Indeed, the Commission has already declared such service to be competitive with cable service.[2/] To the extent that 28 GHz operators distribute video, they, too, should be added to the list of MCVPDs. Leased access users that provide multiple channels of service should also be classified as MCVPDs.

The penetration of all competing MCVPDs must be measured cumulatively to determine whether the 15% penetration threshold for "effective competition" is satisfied. The statute looks to "the number of households subscribing to programming services offered by multichannel video programming distributors . . ." 47 U.S.C. Section 543 (l)(1)(B) (emphasis added). If Congress sought to require each multichannel video programming distributor to reach a 15 percent penetration level, it would have used the qualifying word "each" (as it did in the preceding subsection) and would not have referred to plural

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2/ See, e.g., Telephone Company - Cable Television Cross Ownership Rules, Second Report and Order, 7 FCC Rcd. 5781, 5783 (1992) (modifying cable-telco rules to advance FCC's overarching goal of "increasing competition in the video marketplace").

"distributors".[3/]

CR&B opposes the establishment of either a quantitative or qualitative cut-off for the services that must be offered by an MCVPD to constitute "comparable service." It makes far better sense to rely on the marketplace for that determination. The Commission should, based on the statute, presume effective competition exists whenever two or more MCVPDs serve at least 50% of the franchise area and all MCVPDs (other than the largest) have a cumulative penetration level of at least 15%. In recognition that all MCVPD offerings might not be truly "comparable" to the offerings of the primary cable system, that presumption should be rebuttable in cases where subscribers to alternative MCVPDs also subscribe to the primary cable operator. Thus, the presumption of "effective competition" could be rebutted if a franchising authority showed that, even though 20% of local households subscribe to "alternative" MCVPDs, half of that number still retain their subscription to the primary cable system.

3/ The 1992 Act counts only "unaffiliated" distributors towards effective competition. In defining this term, the Commission should simply incorporate its existing cable ownership attribution policy as set forth in the cable rules. See 47 C.F.R. § 76.501 and accompanying notes.

3. Regulation of The Basic Service Tier Rates

a. Components of the Basic Service Tier Subject to Regulation (¶¶10-13)

The 1992 Cable Act requires a customer to buy "basic" (including all non-superstation broadcast signals) as a pre-condition to purchasing "any other tier of service." 47 U.S.C. § 543(b)(7)(A) (emphasis added). We believe this mandatory favoritism in marketing is both unconstitutional and poor policy. It is particularly galling in the case of broadcasters who use retransmission consent to obtain payment for "free broadcasting." Given the plain language of Section 623(b)(7)(A), the Commission has relatively little discretion in this area. It can and should, however, make clear that broadcasters can voluntarily waive this marketing requirement. If a broadcaster would prefer an alternative placement (perhaps in exchange for a concession from the cable operator on some other point), it should have that option.

The Commission should also explain that the "buy basic" precondition does not apply to subscribers interested only in a la carte pay or pay-per-view services. Such services are not "tiers" within the accepted meaning of that otherwise undefined term.[4/] A contrary interpretation would be inconsistent with the

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4/ Jones Dictionary of Cable Television Terminology (p.98) defines a tier as a package or level of service other than basic or pay. The Commission used the same definition in Nevada.

underlying goals of the Act.

Pay and pay-per-view programming compete far more with VCR rentals than with broadcasting,[5/] and would not likely be a substitute for broadcasting. Permitting customers to receive broadcast signals off-air and pay/PPV from cable promotes customer savings and choice, does not violate the protectionist purpose of Section 623(b)(7)(A), and provides cable operators with the same rights afforded competing MCVPDs (like MMDS).

Likewise, customers should be permitted to buy digital cable radio (DCR), interactive services, transactional services and non-video services without basic. None of those services compete significantly with broadcast television, and many do not even connect to the customer's TV receiver. A contrary ruling would require consumers to buy services they do not need (such as a commercial establishment seeking only DCR) or which they receive from competing sources.

We agree with the Commission that the precise method by which a cable operator quotes its "basic" and "tier" prices no longer has jurisdictional consequences. Under the ACLU decision, if a rate regulated cable operator quoted a "basic" price of $10 plus an "increment" of $9 for the tier, the $10 charge was

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5/ Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 4962, 4995 (1990).

regulated as "basic" and the $9 tier was not. If the operator did the arithmetic for the customer (describing a $19 offering as including "basic" plus "tier" services), he was deemed to offer two levels of "basic service," each subject to local rate regulation.[6/] As a result, marketing material and customer conversations with customer service representatives have been needlessly complicated.

The 1992 Act undoes the anomolous ACLU decision, and leaves only one level of "basic service" subject to local rate control. Section 623 repeatedly and invariably refers to "the basic service tier" in the singular. See, e.g., 47 U.S.C. § 543(b)(7)(A) ("each cable operator . . . should provide . . . a separately available basic service tier.") It expressly grants local governments an opportunity to regulate "the basic service tier," pursuant to Commission guidelines. 47 U.S.C. § 543(b)(1). That basic tier is defined as the non-superstation television broadcast stations and required PEG channels. Any additions to basic are within the discretion of the cable operator. Id. at § 543(b)(7)(A),(B). The Act also separately vests jurisdiction over all "cable programming services" in the FCC's complaint process. "Cable programming service" is defined to include any video programming other than "the basic service tier", pay

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6/ American Civil Liberties Union v. FCC, 823 F.2d 1554, 1556 (D.C. Cir. 1987).

services, and pay per view. 47 U.S.C. § 543(1). Thus, under the Act's plain language, "tiers" other than the (one and only) basic service are subject only to FCC complaint, not to local regulation as a second level of basic service.

The legislative history confirms that "basic" regulation is confined to a single level of service. Indeed, the Conference Committee expressly rejected a Senate bill that would have extended local control through multiple service levels to the first tier with 30% penetration. Conf. Rep. at 59-62. The Conference Report is itself replete with references to "the basic service," and an intention to insulate that single service level from the costs of optional tiers. See id., at 62-64.

Finally, the purpose of various related statutory provisions cannot be fulfilled unless basic service is defined as the single level of non-superstation television broadcast signals and required PEG channels: For example, the "tier buy through" restrictions, 47 U.S.C. § 543(b)(8), could readily be defeated if tiers of cable nets could be redefined as "basic" merely by quoting cumulative prices for the tiers, rather than quoting incremental prices.

The Commission should, therefore, clarify that the ACLU interpretation of Section 602(3) (the statutory definition of "basic cable service") is an artifact of the 1984 Cable Act. That interpretation has been displaced for rate regulation purposes, by the language, history and purpose of the 1992 Act, all of which confine local jurisdiction to a single level of basic service, regardless of whether tier prices are marketed on an incremental basis or a cumulative basis. When coupled with FCC requirements on full disclosure of the "basic" option, 47 U.S.C. § 543(b)(5)(D), such a ruling will make sense of the 1992 Act and avoid the customer confusion resulting from the ACLU interpretation. Contrary franchise provisions should automatically be preempted.

b. Regulation of the Basic Service Tier by Local Franchising Authorities and the Commission

i. Jurisdictional Division (¶¶14-16)

The NPRM rightly concludes that the Commission has only limited authority to directly regulate "basic" cable rates. Under the 1992 Act, local franchising authorities have primary responsibility for administering basic rate regulation (albeit subject to FCC certification). Section 623(a)(2)(A) states, "[T]he rates for the provision of basic cable services shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisidiction pursuant to paragraph (6)." 47 U.S.C. § 543(a)(2)(A)(emphasis added). Paragraph (6) allows for the "Exercise of Jurisdiction by Commission," only "[i]f the Commission disapproves a franchising authority's certification . . . or revokes such authority's jurisdiction." Id. at § 543(a)(6). Even then, the Commission's jurisdiction is only on an interim basis until the franchising authority corrects its initial deficiency.[7/]

Leaving local franchising authorities with primary responsibility for basic rate regulation is consistent with long-established Commission policy. It is also a practical response to the potentially staggering burden of nationwide rate regulation. While many jurisdictions may refrain from seeking certification, that is hardly an indictment of the statutory scheme. To the contrary, it makes little sense to impose federal regulation where franchising authorities are satisfied with local cable rates.

Some small communities may argue that they are troubled by cable rates, but unable to shoulder additional regulatory burdens. The solution to that problem is not to turn that regulation over to the FCC, but to devise sufficiently streamlined procedures to minimize the regulatory burden. A streamlined approach, established by the Commission but administered locally, would benefit all parties concerned.

7/ Section 623(a) provides that "no federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612."

ii. Finding of Effective Competition (¶¶ 17-18)

CR&B agrees that local franchising authorities should make the initial determination regarding the presence or absence of "effective competition" in a particular community. For that approach to work, however, the Commission must carefully define "effective competition" and must ensure that local authorities have the appropriate data to make a proper determination.

Because relatively few communities currently have "effective competition," as defined in the 1992 Act, it would be unnecessarily burdensome for every MCVPD to provide data to every franchising authority across the country. As long as that data is available at the Commission, interested franchising authorities should be responsibile for obtaining it.

CR&B supports the Commission's tentative conclusion that "effective competition" should be measured on a franchise area basis. That is the only basis referred to in the statutory definition of "effective competition." 47 U.S.C. § 543(l). It is also the most sensible approach. If regulation is to be administered on a franchise-specific basis, "effective competition" should be determined on that same basis.

iii. Filing of Franchise Authority Certification (¶19-21)

CR&B supports the proposal for a simple certification process, but believes that process should be conditioned upon each franchising authority first providing the local operator with 15 days advance notice. This simple step should dramatically reduce the Commission's processing burden, as local parties may be able to resolve rate disputes on an informal basis without ever burdening the Commission. Such informal processes should be encouraged. Accordingly, a section should be added to the proposed certification form so that the franchising authority can state that the advance notice was provided, whether the operator provided any response, and what that response was.[8/]

CR&B strongly disagrees with the suggestion that the 1992 Act abrogates inconsistent franchise agreements and constitutes "an independent source of authority to regulate rates." Franchising authorities must demonstrate that they have authority pursuant to applicable state and local laws. Those franchising authorities that cannot make that showing are contractually and constitutionally precluded from asserting rate regulation

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8/ The operator's failure to respond to the franchising authority should not be construed as a waiver of its right to contest the certification before the Commission. Initially, it may be difficult for cable operators to respond to certification notifications in a timely fashion. In some instances, the cable operator may conclude it would be pointless to contest the matter at the local level.

authority. The Commission cannot now empower franchising authorities to do what they otherwise lack legal authority to do.

The House Report briefly addresses this issue and, like the Commission, concludes that franchising authorities can now unilaterally impose rate regulation. But the Report reveals a fundamental misunderstanding of the the dynamics underlying the franchising process. It notes that rate deregulation under the 1984 Act "eliminat[ed] the need for rate regulation provisions in many franchise agreements."9/

The truth is franchise negotiators over the past decade were well aware that federal regulation might be reimposed. Indeed, even before Congress adopted the 1992 Act, the Commission had increased the governing "effective competition" standards under the 1984 Act from three to six over-the-air signals. Franchising authorities committed to exercising lawful rate regulation expressly reserved that right in their agreements with local cable operators, notwithstanding the then prevailing federal preemption. That reservation was often fiercely negotiated. Without such a reservation, franchising authorites lack the legal authority to regulate cable rates. The certification form should therefore identify the source of authority in state and local law.10/

9/ See H.R. Rep. at 81.

10/ Where franchise agreements reserve rate regulation authority and include a regulatory mechanism more favorable to the

[Footnote cont'd.]

The NPRM asks whether multiple franchising authorities can certify and exercise joint regulatory jurisidiction. Franchise agreements are usually entered into on a community-by-community basis. The particulars of cable service vary widely from community to community, often depending on franchise obligations. See Section A.5.a, infra. Rate regulation should be administered on a community-by-community basis as well. The sole exception to that rule should be in cases where the initial franchise encompasses multiple communities or where the cable operator voluntarily consents to a subsequent consolidation of regulatory authority. As a general rule, we do not believe joint regulation is appropriate (even when a single, consolidated system is at issue), because franchise dates, terms, conditions and operating circumstances may vary significantly.

iv. Commission Certification Review (¶¶22-29)

The certification process should be quick and simple, but it should not be automatic. We suggest the following modifications.

First, franchising authorities should advise cable operators in writing 15 days before filing with the FCC of their

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[Footnote cont'd.]

cable operator than the federal rules, the operator is entitled to rely on the more favorable terms.

intention to request certification. As explained above, this will give the parties the opportunity to address the matter on an informal basis. In many instances, the matter may be resolved without imposing any burden whatsoever on the Commission.

Second, cable operators should be afforded the right to contest certification requests on jurisdictional grounds <u>prior</u> to Commission action. It would make little sense to allow franchising authorities to commence rate regulation proceedings where they lack the jurisdiction to do so. If an operator believes the franchising authority lacks regulatory authority because of either a legal deficiency, or the presence of effective competition 47 U.S.C. §§ 543(a)(2); 543(a)(3)(A),(B), those issues should be resolved during the certification process. Those issues are relatively easy to adjudicate and are readily distinguished from issues of whether the franchising authority has properly exercised regulatory authority. The latter can generally be put off until after the franchising authority reaches a rate decision.

As described above, the vast majority of certification applications will likely go unchallenged and can be approved within the 30 day statutory period. After an initial transition period, it may even be possible for the Commission to devise a pleading cycle that will allow all certification requests to be decided within the 30 day statutory period. But the volume of