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FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Sections of the Cable )  
Television Consumer Protection and )  
Competition Act of 1992 )  
 )  
Rate Regulation )

MM Docket No. 92-266 /

COMMENTS OF

**NEWHOUSE BROADCASTING CORPORATION**

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## SUMMARY

The rules adopted by the Commission to implement the rate regulation provisions of the 1992 Cable Act will have an enormous impact on the cable industry's growth and development. It is important, therefore, that the Commission avoid adopting rules that penalize cable operators whose past rates do not reflect any abuse of their deregulated status.

The rules adopted by the Commission should make clear that franchise provisions purporting to dictate the content of a cable operator's basic tier are preempted and that operators are free to move services on and off the basic tier, subject to the statutorily-imposed minimum level of service and the Commission's authority to address "evasions." The rules also should recognize that Congress only intended one basic tier to be subject to local rate regulation.

The Commission's basic rate formula should be self-effectuating, simple, devoid of cost or financial data; it should allow for reasonable profit, and it should allow rate increases consistent with FCC standards. Newhouse supports the Commission's benchmark proposal. Benchmarks should be calculated on a per-channel basis, and should not contain an overall rate cap. The benchmark should have a minimum rate or "floor." Cost of service regulation should only be used as a "safety net" to justify rates that exceed the benchmarks.

Possible benchmark factors are channel capacity, density, plant age, percent of aerial vs. underground plant, system size, MSO size, off-air broadcast signal availability, and regional

labor cost index. Advertising revenues derived from basic service should not be incorporated into the benchmark. In addition, price caps would not be an effective benchmark, and would wrongly penalize cable operators with low rates.

Regulation of equipment rates should be based on the service received. Only equipment used solely to receive basic service is regulated based on actual cost. Actual cost pricing includes installation, amortization, maintenance, financing, general administrative overhead, and a reasonable profit. Equipment used to receive cable programming service is regulated if found to be "unreasonable" pursuant to a valid complaint. Equipment used to receive pay programming is unregulated.

Cable operators should be allowed to establish flexible hourly installation rates which would be deemed reasonable if they do not exceed telco labor rates. Installation and maintenance of AOs should be subject to the same standard as equipment installations. The service aspect of AOs is governed by the 1992 Cable Act's rate regulations, depending on the service received by each AO.

Itemization on separate lines of all costs identified under the 1992 Cable Act, including PEG access support payments, franchise obligations, franchise fees, retransmission consent payments and other direct costs of basic service, and governmental assessments, should be permitted. Pass-throughs should be added to the bill below the service components, but above the total, to encourage uniform net service rates.

Basic rate increases should be implemented after 30 days' notice, subject to a limited refund rule. The FCC, not the courts, should handle disputes regarding implementation of the rate standards in order to provide national guidance.

Non-basic rate standards are designed to catch only "bad actors" in individual cases. "Bad actor" regulations should examine rates charged by comparable systems, the history of the system's rates, and the system's rates as a whole. The Commission must adopt procedural rules that discourage the filing of frivolous complaints.

The 1992 Cable Act's uniform rate and discrimination provisions apply only to similarly situated customers (except for geographic area), not to bulk, institutional, or other special classes. The applicable geographic area includes all territory served by a cable system, except where the system serves multiple franchise areas which charge different non-itemizable government assessments. Similarly, an exception to geographic uniformity should be made where the franchising authority mandates different rates.

Not all rate regulation agreements entered into prior to July 1, 1990 are grandfathered. The system must actually have been subject to rate regulation on July 1, 1990.

The Commission's data collection rules should take into account the sensitive nature of financial data, particularly for non-public companies. Data collection should take place on a single form, and it should preempt more onerous franchise

requirements. Data collection should be system, not franchise, based. If cost of service regulation is rejected, there is no basis for collecting cost data.

The Commission should adopt a moderate transition timetable in order to collect necessary data and avoid disruptions to cable operators and consumers. In no event should the rate regulation regime take effect before January 1, 1994.

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**COMMENTS OF**

**NEWHOUSE BROADCASTING CORPORATION**

Newhouse Broadcasting Corporation ("Newhouse") files these comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. Newhouse, through its affiliated cable companies NewChannels Corp., MetroVision, Inc. and Vision Cable Communications, Inc., owns and operates cable television systems in 17 states which, as of December 31, 1992, served approximately 1,350,000 subscribers.

INTRODUCTION

The Commission has instituted this proceeding in order to carry out its mandate to implement the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or "Act").<sup>1</sup> As reflected in the NPRM, the issues raised by those provisions are numerous and often quite complex. Moreover, how the Commission resolves the issues raised in the NPRM will have an enormous impact on the cable industry's growth and development.

Given the extraordinary significance of this proceeding, Newhouse submits that the Commission must never lose sight of the reason that Congress adopted new rate regulation provisions as part of the 1992 Cable Act, namely, as a response to concerns about the actions of a minority of "renegade" cable operators in abusing their deregulated status by unreasonably raising rates.<sup>2</sup> While the Commission's rules should ensure that the public is protected against the recurrence of such actions in the future, it is critically important that the rules steadfastly avoid penalizing "good" companies -- those whose past rates do not reflect any abuse of their deregulated status. In particular,

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<sup>1</sup>Pub. L. 102-385, 106 Stat. 1460 (1992), amending the Communications Act of 1934, 47 U.S.C. §151 et seq.

<sup>2</sup>See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) (expressing concern at actions of "some" operators who have abused their deregulated status); id. at 30 (describing the legislation as protecting consumers against "unreasonable behavior" by "renegades" in the industry); id. at 33 (a "minority of cable operators have abused their deregulated status" and raised rates "unreasonably"); id. at 86 (same).

cable operators should not be disadvantaged by virtue of a historically low rate structure or lower costs resulting from efficient and prudent business practices.

As indicated, the task presented the Commission by this proceeding may seem somewhat daunting. By remaining focused on the limited nature of the problem that Congress was seeking to address, however, the Commission should be able to craft simple, straightforward rules that provide protection for the public without imposing any undue burden on good operators.

#### DISCUSSION

##### I. BASIC CABLE SERVICE REGULATION.

###### A. The Basic Tier.

###### 1. Subject To A Statutorily-Mandated Minimum Level Of Service, Each Cable Operator Is Free To Determine The Content Of The Basic Service Tier.

Pursuant to Section 623(b) of the Act, the Commission is entrusted with the task of implementing Congress' desire that the rates cable operators charge for the basic tier of service are reasonable.<sup>3</sup> The legislative history of the 1992 Cable Act, in fact, directs the Commission to "promulgate regulations that will govern the provision of a low priced tier of programming . . . ."<sup>4</sup> The Commission should recognize, however, that Congress' desire to keep the rates charged for basic service

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<sup>3</sup>47 U.S.C. §543(b).

<sup>4</sup>H.R. Rep. No. 628 at 81-82.

tiers relatively low cannot be achieved if local and state governments are allowed to force cable operators to create large basic service tiers that include expensive cable services beyond those specified in section 623(b)(7)(A).<sup>5</sup>

Consequently, Newhouse submits that the Commission should acknowledge that the 1992 Cable Act preempts local franchise provisions requiring that cable operators place certain programming services on the basic tier of service. The right of cable operators to move different programming services in and out of the basic tier is reflected in Section 623(h) of the 1992 Cable Act, which specifically contemplates retiering.<sup>6</sup> Furthermore, it is compelled by the fact that, under Section 623(b)(7) of the Act, cable operators are both directed to bring their basic service tier into line with specified minimum basic tier requirements and broadly authorized to add additional services to that tier, over and above the minimum requirements.<sup>7</sup>

Thus, for instance, Section 623(b)(7) specifies that certain retransmission consent signals must be offered as part a

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<sup>5</sup>Newhouse itself has, for many years, sought to keep price low by offering an entry level tier of service (typically priced at \$3.00 or less per month) principally featuring retransmitted broadcast signals.

<sup>6</sup>47 U.S.C. §543(h) (directing the Commission to establish methods for preventing rate regulation evasions resulting from retiering).

<sup>7</sup>Id. at §543(b)(7).

cable operator's basic tier. If, however, a cable operator and a broadcaster opting for retransmission consent cannot reach agreement on the terms for granting such consent, the operator will be forced to delete the station's signal from the system's basic service tier. Because such an outcome obviously cannot be reconciled with a local franchise provision requiring that such signal be carried, the 1992 Cable Act must be read to preempt franchise requirements that attempt to dictate the content of the basic service tier.<sup>8</sup>

The Act's preemption of local franchise control over the content of a cable operator's basic tier reflects a fundamental policy trade-off. Under the Act, franchising authorities are given expanded regulatory authority with respect to basic service rates, while cable operators are given expanded discretion to determine the content of the basic tier, subject to a statutorily-specified minimum level of service. Additionally, as noted above, the Commission is given authority to prevent evasions of the new rate regulations, including those "that result from retiering."<sup>9</sup> Taken together, these provisions reflect Congress' clear intent to ensure, by balancing the

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<sup>8</sup>Similarly, Section 623(b)(7)(A)(iii) of the Act specifically exempts from required inclusion in the basic service tier any broadcast station "signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station." 47 U.S.C. §543(b)(7)(A)(iii). Again, this provision compels the conclusion that Congress intended to preempt any franchise provisions specifically requiring the carriage of particular services on the basic tier.

<sup>9</sup>47 U.S.C. §543(h).

respective positions of cable operators, local officials, and the Commission, that consumers can be offered a low cost, minimum level of service.

**2. Only One Tier Of "Basic Service" Is Subject To Local Rate Oversight.**

In the NPRM, the Commission tentatively concludes that Congress intended for there to be only a single tier of "basic service" subject to regulation under Section 623(b), thereby effectively reversing the interpretation of the term "basic cable service" adopted by the D.C. Circuit in the ACLU case.<sup>10</sup> Newhouse believes that this conclusion is absolutely correct.

As the Commission points out, the D.C. Circuit, in the ACLU case, construed the statutory definition of the term "basic cable service," as adopted in the 1984 Cable Act, to encompass multiple tiers of basic. Specifically, the court held that where a system offers a cumulatively-priced package that includes all of the signals offered on the lowest-priced basic tier plus additional services not offered on that tier, both the lowest-priced package and the cumulatively priced package fall within the definition of "basic cable service." Under the new Act, however, this interpretation is no longer viable.

First, the 1992 Act uniformly refers to the regulated "basic service tier" in the singular. For example, under Section 623(b)(7), which is entitled "Components of basic tier

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<sup>10</sup>NPRM at ¶13, citing American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

subject to rate regulation", each cable operator is directed to provide its subscribers with "a separately available basic service tier to which subscription is required for access to any other tier of service."<sup>11</sup> It is this one tier, and only this one tier, that is subject to local regulation.

Second, and of equal significance, is the fact that the entire structure of Section 623 makes no sense if the Act is read as encompassing multiple tiers of basic service. For example, the "buy through" prohibition contained in Section 623(b)(8) forbids cable operators from requiring subscribers to take any tier other than "the basic service tier" required by Section 623(b)(7) "as a condition of access to video programming offered on a per channel or per program basis."<sup>12</sup> As stated in the legislative history of the 1992 Cable Act, "the purpose of this provision is to increase the options of consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs."<sup>13</sup> This purpose would be frustrated if cable operators were able to offer all tiers as "basic" simply by incorporating the basic tier services into the upper tiers of service.

Similarly, if cumulatively priced tiers were deemed "basic" for purposes of Section 623, the bifurcated regulatory

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<sup>11</sup>47 U.S.C. §543(b)(7)(A). See also H.R. Rep. No. 628 at 82.

<sup>12</sup>47 U.S.C. §543(b)(8)(A).

<sup>13</sup>138 Cong. Rec. S14224, 14608-09 (1992) (Statement of Sen. Inouye).

structure contained in the Act might be frustrated. That bifurcated structure empowers local franchising authorities to engage in rate regulation only with respect to the basic service tier, while committing regulatory authority over the rates for all other "cable programming services" (i.e., all other tiers) to the Commission.

Thus, it is apparent that Congress intended for there to be a single basic service tier subject to local rate regulation under the 1992 Cable Act and that to the extent the ACLU decision is inconsistent with that intent, the decision must be considered to have been overruled. In order to avoid any confusion with regard to this issue, Newhouse urges the Commission to expressly affirm that where a system offers, in addition to a separately priced, separately available basic tier, a cumulatively-priced tier that contains the basic tier services plus other cable programming services, the price charged for such an expanded tier is not subject to local regulation as part of the basic tier of services, but is only subject to regulation by the Commission pursuant to the complaint procedure established under Section 623(c).<sup>14</sup>

**B. Basic Rate Formula.**

The 1992 Cable Act directs the Commission to adopt

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<sup>14</sup>47 U.S.C. §543(c). This result is supported by the legislative history of the new law, which states that "[t]he FCC can regulate rates for extended basic services, such as CNN and ESPN, if it receives a complaint that rate increases have been unreasonable."

regulations designed to ensure that basic cable rates are "reasonable."<sup>15</sup> In the NPRM, the Commission has asked for comment on two approaches to such regulations: (i) a benchmark rate or rate formula; or (ii) a cost-based approach, under which an individual system's costs would be examined following traditional cost of service principles and its rates then set to permit an appropriate rate of return.<sup>16</sup>

Newhouse urges that the Commission, in selecting between a benchmark and a cost-based approach, keep in mind the 1992 Cable Act's requirement that regulations governing basic rates must reduce administrative burdens on subscribers, cable operators, franchising authorities, and the Commission.<sup>17</sup> The Commission also should keep in mind the need to adopt an approach that does not penalize cable operators who, through prudent business practices, held their basic rates below the industry norm. These objectives can be best achieved by (1) making basic rate standards virtually self-effectuating; (2) adopting a simple formula whereby reasonable rates can be calculated with certainty based upon empirical factors without reference to system cost figures or other specific financial data;<sup>18</sup> and (3) allowing cable operators subject to basic rate regulation to promptly implement basic rate increases, subject to challenge by the

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<sup>15</sup>47 U.S.C. §543(b)(1).

<sup>16</sup>NPRM at ¶33.

<sup>17</sup>47 U.S.C. §543(b)(2)(A).

<sup>18</sup>See NPRM at ¶¶53-56.

franchising authority.

**1. Rate of return regulation would be inappropriate.**

The Commission has previously rejected cost based rate of return regulation due to its inherent flaws:

Conventional rate of return regulation has a number of drawbacks that would appear to be equally applicable in the cable television context. This method of regulation is not only administratively cumbersome but, because it interferes with incentives to operate efficiently, may also fail over the long run to assure consumers the lowest reasonable rates for the services to which they subscribe.<sup>19</sup>

Congress has also reached the same conclusion, stating in the 1992 Cable Act's legislative history that "[t]he Committee is concerned that several of the terms used in this section are similar to those used in the regulation of telephone common carriers. It is not the Committee's intention to replicate Title II regulation."<sup>20</sup> Congress also rejected this type of regulation in Section 621(c) of the 1984 Cable Act, which is left intact by the 1992 Cable Act: "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."<sup>21</sup> Accordingly, we agree with the

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<sup>19</sup>See Notice of Proposed Rulemaking, CC Docket No. 87-313 2 FCC Rcd 5208 (1987) at ¶39; Notice of Inquiry, MM Docket No. 89-600, 5 FCC Rcd 362 (1989) at ¶45; Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195, 3217-28 (1988); Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 66 RR 2d 372, 382, 390 (1989).

<sup>20</sup>H.R. Rep. No. 628 at 83.

<sup>21</sup>47 U.S.C. §541(c).

Commission's preliminary conclusion that cost-based rate of return regulation is a choice of last resort,<sup>22</sup> which should be turned to only as a fail-safe to avoid confiscatory rates.

**2. A benchmark approach appears to be the best alternative.**

The second approach to basic rate regulation identified by the Commission is "benchmarking." The NPRM describes a "benchmark" as a price against which a given cable system's basic rate would be compared, "establishing a zone of reasonableness for systems with rates below the benchmark."<sup>23</sup> Noting that an appropriately crafted benchmark approach "could achieve reasonable rates at lower costs and with less administrative burdens than could traditional cost-of-service regulation," the Commission has tentatively decided to adopt such an approach.<sup>24</sup> Newhouse agrees.

Specifically, Newhouse believes that the Commission should adopt a per channel benchmarking approach, both for administrative ease<sup>25</sup> and to account for differences in sizes of

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<sup>22</sup>NPRM at ¶¶33, 39, 40, 57-59.

<sup>23</sup>Id. at ¶34.

<sup>24</sup>Id. at ¶33.

<sup>25</sup>While some precision might be sacrificed by a simple basic rate formula, NPRM at ¶36, we believe that a more complex formula would be an administrative nightmare. We also agree with the NPRM that a simple formula "would protect consumers from excessive rates and, by eliminating the need for detailed cost-based regulation in many jurisdictions, would keep the costs of administration and compliance low." Id.

basic offerings.<sup>26</sup> Furthermore, the per-channel benchmark should not be combined with any overall cap on the basic service rate. Otherwise, the per-channel rate would become meaningless for cable systems with numerous must carry or PEG access stations.

For example, if the per-channel benchmark is set as \$1.00, but the overall basic rate is capped at \$13.00, systems with over 13 channels required on the basic tier would not be able to charge the per-channel benchmark rate. For the same reasons, unless the benchmarks were calculated on a per-channel basis with no overall basic rate cap, cable operators would have no incentives to add programming to the basic service level beyond the minimum statutory requirements, and indeed would have incentives to remove any programming services off basic that were not statutorily required.<sup>27</sup> The benchmark, however, should have a "floor," similar to a telco subscriber line fee, to reflect the extensive fixed, joint and common costs associated with connecting any subscriber.

In order to provide more reliable comparisons among

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<sup>26</sup>The concept of a per-channel benchmark is correctly based on the idea that one overall basic service rate could not possibly reflect the various costs different cable operators face, or the differing value of each basic offering which depends largely on the number of services offered. Thus, a "low" or "reasonable" basic rate, as intended by Congress, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 62-63 (1992), is not an absolute number, but rather a relative term based on such cost and value components.

<sup>27</sup>See H.R. Rep. No. 628 at 82 (expressing Congress' intent "to permit cable programmers to be fairly compensated for the service they provide to cable subscribers and to encourage cable systems to carry such services on the basic tier").

similarly situated systems, the NPRM seeks "comment on what variables should be used for defining the classes of systems to which a different benchmark rate should apply."<sup>28</sup> We suggest the following factors, many of which were mentioned in the NPRM,<sup>29</sup> as characteristics that would appropriately group together similar cable systems for purposes of establishing fair benchmarks:

(a) **Channel capacity.** We believe that 36 channels would be an appropriate dividing line between higher and lower capacity systems. This would be consistent with other statutory provisions that distinguish between systems with more than 36 channels and systems with fewer than 36 channels.<sup>30</sup>

(b) **Density.** Generally, the lower the density (number of homes per route mile), the more expensive to build and operate the system, because of the extra labor, equipment, wiring, etc. required to connect a given number of homes, as well as the fewer potential customers among which to spread the costs. Sixty homes per mile might provide a reasonable density benchmark dividing line.

(c) **Age of plant.** Newer plant (e.g., less than seven years old) obviously reflects higher costs and more modern technology. As a related factor, the Commission may wish to consider the length of the franchise term in classifying systems.

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<sup>28</sup>NPRM at ¶37.

<sup>29</sup>Id.

<sup>30</sup>See 47 U.S.C. §532(b)(1)(D) (exempting systems with fewer than 36 channels from leased access requirements). See also 47 U.S.C. §535(b)(3) (non-commercial must-carry).

(d) Percent of aerial vs. underground cable.

Underground cable systems are generally more expensive to build, operate, and maintain. Accordingly, we believe that a cable system with 40 percent or more underground cable should be categorized as "heavily" underground.

(e) System size (i.e., number of subscribers).

Depending, of course, on other costs of doing business, smaller systems have fewer subscribers over which to spread their costs, so that each individual subscriber's rate could be higher than for otherwise similarly situated larger systems. Accordingly, we believe that a 10,000 subscriber cutoff would equitably separate larger cable systems from smaller ones.

(f) MSO size. This factor could account for large variances in cable system costs, including programming acquisition, equipment, capital, etc. In this regard, the top 5 MSOs should comprise the first category due to their size, followed by MSOs 6 through 50, then MSOs below 50.

(g) Off-air broadcast signal availability. As explained above, this factor (along with PEG access) largely determines the minimum number of basic channels that must be provided. Moreover, the Commission has conducted comprehensive studies which verify that off-air broadcast signal availability is perhaps the most significant factor in measuring demand for cable television.<sup>31</sup>

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<sup>31</sup>Report, MM Docket No. 89-600, FCC 90-276, 5 FCC Rcd 4962 at ¶¶50-52, 59-66, citing M. Bykowsky & T. Sloan, NTIA Staff Report, "Competitive Effects of Broadcast Signals on the Price of Basic

(h) Regional cost of labor index. As the NPRM recognizes, this is "another important adjustment factor" that represents "a general change in the cost of doing business."<sup>32</sup> Another related factor could be based on the system's customer service efforts.

One factor that should not be incorporated into the benchmark is advertising revenue earned from the provision of basic service. If such revenue is offset against permissible rates, cable operators will be discouraged from including more cable programming networks on the basic level, contrary to Congressional intent.<sup>33</sup> This will in turn have a detrimental effect on cable's commitment to local advertising.

Furthermore, Newhouse strongly recommends against the adoption of a "price cap" benchmark alternative. According to the NPRM, such a benchmark would "define reasonable increases in rates for the basic tier."<sup>34</sup> We believe a price cap is not an effective benchmark for several reasons. If a cable operator has been a "good actor" by keeping rates at or below the benchmark

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Service," (1990); R. Crandall, "Regulation, Competition and Cable Performance," (1990); J. Dertouzos and S. Wildman, "Competitive Effects of Broadcast signals on Cable," (1990); See also FCC 1985 Staff Study, Alternative Criteria for Defining Effective Competition: A Statistical Analysis of Small Cable Markets, at 3; FCC Mass Media Bureau, Policy and Rules Division, Staff Report, Cable System Broadcast Signal Carriage Survey Report (Sept. 1, 1988) ("FCC 1988 Staff Report").

<sup>32</sup>NPRM at ¶38.

<sup>33</sup>See H.R. Rep. No. 628 at 82.

<sup>34</sup>Id. at ¶49.

ultimately adopted by the Commission, there is no reason to believe it will suddenly impose excessive rate increases. Price caps would indeed punish operators with the lowest rates, by limiting their ability to raise rates to the benchmark, which, by definition, is a reasonable price that such operators should be permitted to charge. Moreover, price caps will (and indeed already have) encouraged some cable operators to raise rates prematurely to avoid artificial price cap limits which may be imposed.<sup>35</sup>

**C. Regulation of Rates for Equipment.**

The 1992 Cable Act establishes two distinct approaches for evaluating the rates charged by cable operators for various types of equipment provided to cable subscribers. Specifically, pursuant to Section 623(b)(3), the Commission's basic rate regulations are to include rate standards for "installation and lease of the equipment used by subscribers to receive the basic service tier," as well as "installation and monthly use of connections for additional television receivers" ["additional outlets" or "AOs."]<sup>36</sup> Pursuant to Section 623(c), on the other hand, the Commission's regulations applicable to cable programming services (or "tiers") are to include "installation or

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<sup>35</sup>See, e.g., Henry Gilgoff, "What Should Cable Cost?" Newsday, March 15, 1992; Diane Duston, "Cable TV Rates Rise, One More Time," Baltimore Sun, Dec. 21, 1992; Jay Greene, "New Year to Bring Higher Cable TV Rates," Cleveland Plain Dealer, Dec. 19, 1992.

<sup>36</sup>47 U.S.C. §543(b)(3)(A), (B).

rental of equipment used for the receipt of such video programming."<sup>37</sup> Equipment utilized solely to receive pay or a la carte services would remain outside either standard and would continue to be deregulated.

**1. Only Equipment Used Solely to Receive Basic Service is Regulated Based on Actual Cost Pursuant to Section 623(b)(3).**

As the NPRM correctly points out,<sup>38</sup> the 1992 Cable Act clearly distinguishes between regulation of rates for equipment used to receive basic service and equipment used to receive cable programming services. One key difference is that regulation of equipment used to receive basic service involves pricing based on actual cost.<sup>39</sup> This criterion was intended to ensure that the rates for basic equipment are reasonable. Oversight of rates associated with cable programming service, including equipment used to receive such service, involves cost as only one of several factors to be considered.<sup>40</sup> Thus, the clear intent of the 1992 Cable Act is to provide two different approaches to rate scrutiny, based upon the type of service being provided, and to subject only equipment required solely to receive basic service

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<sup>37</sup>Id. at §543(c)(2), (1)(2).

<sup>38</sup>NPRM at ¶64.

<sup>39</sup>47 U.S.C. §543(b)(3). Pricing based on actual cost does, however, include a reasonable profit. See id. at §543(b)(2)(C)(vii); H.R. Conf. Rep. No. 862 at 63 ("[t]he conferees agree that the cable operators are entitled to earn a reasonable profit.").

<sup>40</sup>47 U.S.C. §543(c), (1)(2).

to pricing based on actual cost.

This intent to have different standards for basic, non-basic, and premium service-related equipment is further evidenced by an examination of Section 623(b)(3)(A) of the 1992 Cable Act, which specifies the two types of equipment that must be priced as basic equipment (i.e., based on actual cost): (1) equipment "used by subscribers to receive the basic service tier," and (2) "such addressable converter box or other equipment as is required" for a basic-only subscriber to receive programming on a per channel or per program basis pursuant to Section 623(b)(8) of the 1992 Cable Act (i.e., without being required to "buy through" intermediate service tiers).<sup>41</sup> If Congress intended all equipment to be priced based on actual cost, there would have been no need to specify that rates applicable to descrambling equipment used to receive pay services by a basic-only subscriber should be reviewed on the basis of actual cost, because such equipment would have been included.<sup>42</sup>

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<sup>41</sup>Id. at §543(b)(3)(A) (emphasis added).

<sup>42</sup>Moreover, a cable operator who charges a different price to non-basic or pay subscribers for converter box equipment does not violate the 1992 Cable Act's uniform rate structure provisions, 47 U.S.C. §543(d), since all subscribers who request the same service in the same geographic area will still be charged the same rate. See also S. Rep. No. 92, 102d Cong., 1st Sess. 76 (1991) (uniform rate structure is intended to prevent cable operators from charging different rates in different geographical areas of the franchise). Subscribers who request different services, which require different uses of the converter box, may be charged different rates. In addition, this practice would not violate the non-discrimination clause of the 1992 Cable Act's anti buy-through prohibition, since there would be no discrimination as to "rates charged for video programming." 47 U.S.C. §543(b)(8)(A).