allowable safe harbor of any benchmark established by the Commission, the complaint should be summarily dismissed. To shift the burden to the cable operator to establish the reasonableness of rates that fall within the Commission's benchmark would require the Commission to implement a regulatory scheme for non-basic rates that will be far more pervasive, complex and time consuming than that applied to basic rates, a result which is completely at odds with Congressional intent.

III. GEOGRAPHICALLY UNIFORM RATES AND DISCRIMINATION.

Section 623(d) of the 1992 Cable Act mandates that a rate-regulated cable operator's rate structure be uniform throughout the "geographic area" in which service is being provided.[98] This provision was one of several amendments offered by Senator Gorton to encourage and protect head-to-head competition and was intended specifically to forbid a cable system from charging differing prices within a geographic area in an attempt to "drive out competition."[99] As such, it is clear that the Commission is correct in its tentative conclusion that the uniform rate structure requirement does not prohibit the establishment of differential rates for different categories of customers.[100] Thus, for example, Section 623(d) does not restrict a cable

---

[98]47 U.S.C. §543 (d).

[99]138 Cong. Rec. 514248 (Sept. 21, 1992) (statement of Sen. Gorton).

[100]NPRM at ¶113.

operator from charging a different price to an apartment owner who buys service "in bulk" than what is charged individual consumers living in an apartment building. Nor does Section 623(d) limit the ability of a cable operator to offer introductory discounts to new subscribers, or to charge differential rates pursuant to a line extension policy.[101]

Newhouse also believes that the Commission is correct in its tentative conclusion that Section 623(d) is applicable on a system-wide basis. That conclusion, however, necessitates the recognition of certain exceptions to the rule in order to minimize the potential for conflict between Section 623(d) and other statutory provisions. In particular, Newhouse believes that, where a single system serves more than one franchise area, the cable operator must be allowed to charge differing prices between the franchise areas if it can show that its costs (direct or indirect) differ between the franchise areas.[102]

The Commission also should make clear that the uniform rate structure requirement does not preclude cable operators from individually negotiating contracts with multiple dwelling units such as apartment buildings, hospitals, and condominium associations. Cable operators sell in a varying commercial environment -- even within the same community. While most of a cable operator's businesses may consist of month-to-month sales of cable television service to individual consumer households,

---

[101] See discussion at page 27 supra.

[102] See also discussion at pages 30-35 supra.

cable operators also sell to institutional customers, such as apartment owners, hospitals, trailer parks and condominium associations on the basis of an individually-negotiated contract.[103] In some of these circumstances, the cable operator provides service to a large number of outlets for a single institutional customer (such as a hotel) in return for a fixed monthly payment from that customer.[104] The number of outlets served does not vary during the life of the contract, and the duration of the contract is for a number of years.

There is no indication that Congress, in the 1992 Cable Act, was concerned with rates other than those charged individual residential customers. The owners or managers of MDUs are sophisticated business entities who are fully capable of representing themselves competently in negotiations with the franchised cable operator: they have a choice of multichannel service providers, the value of the contract is high enough to merit their attention and effort, and they are experienced in negotiating with various vendors of services for their

---

[103]Some franchises mandate that the cable operator provide free cable service to certain institutions, like schools, city hall, the fire station and even the municipal hospital. Clearly, the fact that free cable service is provided at certain locations pursuant to a franchise mandate cannot be used to put the cable operator at risk if it does not provide free cable service at all similar locations served by the same cable system.

[104]For example, a hotel owner may contract for basic cable and one pay service to be supplied to all of its hotel rooms. The hotel owner advertises "free cable TV," and the cost becomes part of his general overhead. The hotel guest is not billed separately for cable service. The cable operator receives the same payment regardless of the occupancy rate of the hotel.

facilities. In short, this group of customers is not in need of any special legal protection.

IV. GRANDFATHERING OF RATE AGREEMENTS.

The Commission seeks comment on Section 623(j) of the 1992 Cable Act which grandfathers certain rate regulation agreements between cable operators and franchising authorities.[105] The sole point Newhouse wishes to make concerning this provision is to stress that it only grandfathers a pre-July 1, 1990 rate regulation agreement if the system that was a party to the agreement was subject to rate regulation on July 1, 1990. Thus, the fact that a system may have been subject to rate regulation when the agreement was entered into is irrelevant. What matters is the system's status as of July 1, 1990.

V. COLLECTION OF INFORMATION AND REPORTS ON AVERAGE PRICES.

The Commission seeks comment on the scope, availability and burden of providing the Commission with financial information necessary for the effective administration and enforcement of rate regulation.[106] Newhouse urges the Commission to keep in mind that, especially for private companies, the public disclosure of financial data can raise sensitive issues.

---

[105]NPRM at ¶¶134-135; 47 U.S.C. §543(j).

[106]See NPRM at ¶¶122-24.

Furthermore, we remind the Commission that, in order to satisfy the statutory directive to minimize the administrative burdens of rate regulation, financial reporting requirements should be crafted and applied as narrowly as possible.

Specifically, Newhouse believes that cable operators should not be required to file financial information with local authorities on a regular basis. Local authorities will have need for system-specific financial data only if and when a system's rates plainly exceed the Commission-established benchmark. Such information can be provided at that time.

In addition, with respect to the information collected by the Commission, cost data should not be included. Such data is highly sensitive and, in the absence of a cost of service methodology for rate regulation, wholly unnecessary. The fact that Congress is requiring periodic reports from the Commission on average cable prices reinforces the conclusion that the collection of cost data is unnecessary, and was not intended by Congress when it enacted Section 623(g).[107]

Newhouse also submits that rules implemented by the Commission in accordance with Section 623(g) should by no means require the collection of information beyond that requested on the forms sent to selected systems on December 23, 1992.[108] The information sought on those forms wisely pertains to revenue

---

[107]See 47 U.S.C. §543(k).

[108]See Order, MM Docket No. 92-266 (released December 23, 1992).

only, thereby avoiding competitively sensitive cost data which would trigger confidentiality concerns for the cable operator and the Commission. Furthermore, the plain language of Section 623(g) and the legislative history of that provision state that the Commission's rules should require only the collection of information that is absolutely necessary to administer and enforce rate regulation, and not extra, burdensome data, such as cost of service information.[109]

The Commission's rules on collection of information should impose as light a burden as possible on cable operators who are responsible for gathering the information required by the Commission. Accordingly, the Commenters assert that all data required of cable operators should be collected and submitted to the Commission on a per system, rather than a per franchise, basis.[110] Cable operators do not ordinarily keep detailed information on a franchise-by-franchise basis. If the Commission required information on this basis, it would impose a heavy burden on the cable operator to develop such data solely for the purpose of complying with the Commission's information requests. To impose such a burden when it is unnecessary would be inconsistent with Congress' goal that "the Commission [ ] shall

---

[109]See 47 U.S.C. §543(g) (cable operators must file with the Commission "such financial information as may be needed for purposes of administering and enforcing this [rate regulation] section"); H.R. Rep. No. 628 at 88 (cable operators must file "information necessary to administer and enforce" the rate regulation section).

[110]NPRM at ¶138.

seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[111] Newhouse further asserts that all Commission requests for cable system data rate should be contained in a single form so that the cable operator will know the full extent of information required for each system.[112]

Finally, the Commission should not finalize its collection of information forms in this proceeding. Rather, the Commission should issue a further notice after the conclusion of its rate proceedings so that the forms can be specifically tailored to the rate regulations actually implemented in this proceeding.[113]

VI. EFFECTIVE DATE.

Section 623 of the Act requires the Commission to promulgate rules for the regulation of basic service rates, cable service rates and evasions within 180 days of enactment, i.e., by April 3, 1993. While the rules must be in place by then, the statute does not say that they must take full effect on that date. There are many reasons why cable operators (and franchising authorities) will need time to implement the rules.

To begin, rules for the regulation of basic and non-basic service rates will not exist in a vacuum. The implementation of these rules depends on actions taken in accordance with other

---

[111] 47 U.S.C. §543(b)(2)(A).

[112] NPRM at ¶138.

[113] See id. at ¶123.

provisions of the Act. For example, the composition of the basic tier will not be known until the must-carry/retransmission consent election has been made, and any negotiations required thereby have been completed. Therefore, rate regulation rules cannot go into effect until some time after the must-carry/retransmission consent election deadline, which has not yet been set.

Moreover, the fate of existing non-superstation carriage, and the costs of such carriage if it can be continued, will not be known until October 1993. Additionally, there will be equipment changes, subscriber billing implementation, retiering to satisfy basic service requirements, preparation of subscriber education and marketing materials, notice requirements for proposed increases in basic service rates,[114] etc. All of these changes will take time, some even several months, and action on many of them cannot be taken until after the must-carry/retransmission consent election. Finally, there may be loss of subscriber revenue as a result of downgrading to the new basic service tier.

All of these factors militate in favor of full implementation of the rate regulation rules, particularly the local basic service regulation aspect, being set on a date that allows a reasonable transition period in which to make necessary changes, and that coordinates with these other factors. When Congress passed the Communications Policy Act of 1984, thereby

---

[114]See 47 U.S.C. §543(b)(6).

deregulating basic cable rates that were subject to effective competition, it stressed the importance of giving the Commission flexibility in promulgating its rate regulation rules because of the many changes that had to be made.[115] Accordingly, Congress provided for a two-year transition period in which the Commission could fully implement its rate regulation rules.[116]

While Newhouse does not suggest a two-year transition period for implementation of the new rate regulation rules, we do assert that the rationale for allowing a transition period following enactment of the 1984 Cable Act still exists with respect to re-regulating basic cable rates under the 1992 Cable Act. Therefore, this reasoning should be taken into consideration in setting an effective date for the Commission's new rate regulation rules. Newhouse suggests January 1, 1994 as the earliest possible date which provides adequate time for the necessary adjustments to the new regime.

CONCLUSION

As these Comments demonstrate, the 1992 Cable Act gives the Commission latitude to design specific rules to implement the rate regulation provisions of the statute. Those rules will have a significant impact on the future growth and development of the cable television industry.

---

[115] See H.R. Rep. No. 934, 98th Cong., 2d Sess. 66 (1984).

[116] 47 U.S.C. §543 (1984).

Newhouse therefore strongly urges the Commission to act cautiously in implementing the Act's rate regulation provisions and to take particular care that its rules do not penalize or impose undue burdens on the "good" actors who have historically kept their rates down through prudent business practices and low costs.

Respectfully submitted,

NEWHOUSE BROADCASTING CORPORATION

By: _____
Charles S. Walsh
Seth A. Davidson
Jill Kleppe McClelland

Its Attorneys

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900

Date: January 27, 1993

4144