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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

92-266

REPLY OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company

and

New England Telephone and Telegraph Company

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SUMMARY

The Commission must adhere to the 1992 Cable Act's goals of competition and consumer protection, and must insist upon reasonable rates for cable services that carry out the will of Congress. The Commission should not succumb to the arguments of cable operators who would have the Commission interpret the teeth out of the statute.

The best method of regulating rates is the one proposed by the NYNEX Telephone Companies. Simplified cost of service methods for initializing rates, backed up by price caps to govern price changes and cost allocation to guard against cross subsidy, will remove monopoly rents from cable rates, and ensure that rates are free from cross-subsidy and predation. No other regulatory scheme proposed would do so much, or carry out the will of Congress so well.

The same standard for reasonableness of rates should apply for the basic tier as for cable programming services. This will remove the incentive for cable companies to "strip" the basic tier. Moreover, this standard is based on substantive considerations, unlike the cable companies' empty proposal that the Commission consider anything below the 98th percentile of cable companies' cable programming rates to be reasonable.

The comments highlight the need for the Commission to prohibit cross-subsidization of telephony and other ventures by regulated cable service. The Commission should also impose affiliate transaction rules that prevent cable operators from recovering monopoly profits through inflated prices paid to their unregulated programming affiliates.

The Commission should unbundle premises equipment, wiring, and installation from cable services, impose safeguards to protect competition, and allow competition to set the rates for these items. The Commission should not, as is suggested by some cable operators, limit its controls to equipment, wiring, etc. used by subscribers who only purchase the basic tier of service.

Video dialtone providers cannot be considered multichannel video programming distributors under the statute, because they do not select or package programming, nor do they provide it to the public. For these reasons, too, video dialtone providers would have difficulty providing regulatory authorities with the types of data needed to determine whether the programming on the video dialtone platform provides "effective competition" to a cable operator. Programming distributors that use video dialtone to distribute their programming, however, may fit the definition of a multichannel video programming distributor.

Congress did not intend to leave a "gap" in the regulation of cable systems that are not subject to effective competition. To fulfull the mandate to ensure reasonable rates, the Commission must step in when a local authority fails to file a certification to regulate basic rates.

The Commission must require that cable operators provide leased access channels on nondiscriminatory terms and conditions. The Commission must not tolerate exclusion of competitors or anticompetitive pricing of these channels. The Commission should apply the same standard for reasonableness of rates proposed by the NTCs for other cable services, instead of simply assuming the highest rates currently charged by cable operators are appropriate "maximum reasonable rate."

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REPLY OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully submit their Reply on cable rate regulation.

I. INTRODUCTION

The Commission is charged with carrying out the Cable Television Consumer Protection and Competition Act of 1992. This means ensuring that the rates for cable services are reasonable, as Congress intended. The Commission must not permit cable operators to make a mockery of this proceeding and of the most important provisions of the 1992 Cable Act.

Ignoring Congressional intent and the 1992 Cable Act itself, cable operators attempt to convince the Commission to leave them free of regulation except for a stripped-down tier of

basic services.[1] They ask the Commission to ignore costs, but to let them pass through numerous costs to customers and use costs to escape any benchmark the Commission establishes for reasonable prices.[2] One cable operator even goes so far as to ask the Commission to grandfather all franchise agreements on rates, while at the same time asking the Commission to preempt the same agreements insofar as they prohibit re-tiering of services.[3]

The Commission should not interpret the teeth out of statute. To fulfill its mandate in a responsible manner, the Commission must adhere to the goals of competition and consumer protection, and must insist upon rates that carry out the will of Congress.

II. SIMPLIFIED COST OF SERVICE REGULATION, COMBINED WITH PRICE CAPS AND COST ALLOCATION RULES, IS THE BEST WAY TO REGULATE THE BASIC TIER AND CABLE PROGRAMMING SERVICE

The NYNEX Telephone Companies' proposal -- simplified cost of service methods for initializing rates, backed up by price caps to govern price changes and cost allocation to guard against cross-subsidy -- will remove monopoly rents from cable rates, and ensure that rates are free from cross-subsidy and predation. The same cannot be said for the regulatory schemes proposed by the cable company commenters (when they propose one

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1 See Adelphia p. 68; Cablevision Systems pp. 6-7; Time Warner p. 13; NCTA pp. 2-3.

2 See Cablevision Industries pp. vi-vii; NCTA pp. 41-44.

3 Time Warner pp. 13, 93.

at all -- most are very sketchy on what type of "benchmark" they favor).[4]

In addition to being the most effective way to ensure reasonable rates, the NTCs' proposal is also the simplest solution in the long run. It enables the Commission to use tried-and-true regulatory mechanisms rather than developing an untested benchmark from scratch. The proposal automatically takes into account the diversity among cable systems, without trying to apply to them all an "average price" or another type of set "benchmark" that will be a windfall for some and something all the rest will avoid by resorting to cost-of-service justifications anyway. And, the proposal is not overly complicated for cable systems to apply.

Most important, this proposal best carries out the will of Congress. The Commission is not free to ignore costs, since costs comprise five of the seven factors to be considered in regulating basic tier rates, and two of six factors to be considered in regulating cable programming services.[5] Yet, many commenters propose that the Commission adopt basic tier

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4 See, e.g., Time Warner p. 23 and Comcast p. 30 (both "reserv[ing] comment on the benefits of one benchmark over the other"). Indeed, Time Warner's objective appears to be to avoid rate regulation altogether. Time Warner asks the Commission to grandfather all franchise agreements that pertain to rates, even if the agreements were entered into after July 1990, but at the same time, asks the Commission to preempt franchise agreements to the extent they prohibit moving services out of the basic tier. Id. pp. 13, 93. Neither of these inconsistent positions has any support in the 1992 Cable Act or its legislative history.

5 1992 Cable Act §§ 623(b)(2)(C), 623(c)(2).

benchmarks with no relationship to costs.[6] The NTCs' proposal gives costs the weight they deserve and that Congress mandated. At the same time, the proposal incorporates other important considerations; e.g., it is simple; it promotes competition; it prevents cross subsidies; and most important, it ensures reasonable rates.

A. Simplified Cost Of Service Regulation Is Best For Initializing Rates

Cable companies want to use cost of service methods to pass through numerous costs to customers.[7] They also want to be able to use cost of service methods to avoid any benchmark set by the Commission.[8] Their requests incorporate so many cost of service elements that their opposition to cost based regulation is only explainable by their desire to have it both ways: a benchmark approach that could lead to windfall price

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6 E.g., NCTA pp. 24-26 (difference between average cable rates as a whole and average of rates subject to effective competition); Bell South pp. 3-4 (1986 rates); Bell Atlantic p. 7 (competitive benchmark); Nashoba p. 61 (average or historical rates).

7 See Cablevision Industries pp. vi-vii (arguing benchmark "should be adjusted" to account for inflation, changes in the cost capital, retransmission consent costs, the costs of franchise requirements, unusual geography, programming costs, rebuilds); NCTA pp. 42-44.

8 See Cox Cable p. 23; Time Warner p. 25; Armstrong p. 17; InterMedia Partners p. 18; Cole, Raywid & Braverman p. 24; Cablevision Industries pp. 27-30, 36-38.

increases, plus the ability to avoid the benchmark if higher rates are desired.[9]

Using costs to initialize rates will ensure that cable operators are adequately compensated, including "unique" costs, at the outset, with no need to revisit the initial rates if they exceed some "benchmark." Basing initial rates on a cost analysis will also ensure that: (1) high price providers are not exacting excessive rates; (2) monopoly rates are pinpointed and eliminated before ongoing price cap regulation begins; (3) a "benchmark" does not drive low priced cable companies to unreasonable windfall profits; and (4) Congress' mandate that costs be considered is fulfilled.

Many commenters support cost of service regulation for cable companies.[10] And, many other commenters' concerns about cable rate regulation would be addressed or obviated by the use of simplified cost of service methods for initializing rates. For example, Media General Cable discusses "the huge differences" among cable operators that would make a fair benchmark solution for the entire industry virtually

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9 See also Coalition of Municipal and Other Local Governmental Franchising Authorities p. 3 ("the benchmark rate regulation scheme which the Commission has proposed is a 'no lose' proposition for cable system operators, and a 'must lose' proposition for consumers") and p. 29 (benchmark "is a 'heads the cable operator wins, tails the subscriber loses' scheme of ratemaking").

10 E.g., Coalition of Municipal and Other Local Governmental Franchising Authorities p. 29; Consumer Federation of America p. 85; State of New Jersey p. 7; Municipal Franchising Authorities, p. 9; Town of Drexel pp. 17-23.

impossible.[11] Other parties have argued that cable faces unique costs that must be taken into account by any rate regulation scheme adopted.[12] Still other parties argue that price caps would penalize low price providers by not allowing them to raise rates to the level of the benchmark.[13]

These problems, and all problems of applying one benchmark at the outset to the myriad of different cable companies in their diverse franchise areas, are avoided using cost of service methods to initialize rates, because the costs of service method automatically takes into account such differences. Each company's own costs of service are used as the starting point for price cap regulation. Each company begins its regulated existence with the assurance that it is fairly compensated. After an initial cost of service showing, price caps becomes a simple pricing mechanism which is easily applied to different initialized rates.

B. Simplified Cost Of Service Regulation Would Not Be Overly Complicated

Cable companies object to cost of service regulation on the basis that it is too complicated and burdensome.[14] The cost of service methodology proposed by the NTCs is simpler than

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11 Media General Cable of Fairfax Inc., pp. i, 3-4; see also CATA pp. 2-3.

12 See Cablevision Industries pp. 19-24; NCTA pp. 42-44; Armstrong p. 28; Time Warner pp. 32-33 n.80; ESPN pp. 6-8.

13 Adelphia p. 61; Cox Cable p. 21.

14 E.g., Time Warner pp. 14-17; NCTA pp. 11-14; 41-42; Cablevision Industries pp. 12-14.

full blown rate of return regulation. Moreover, we propose that price caps should govern rate changes after initialization.[15] When price caps are implemented, cost showings will only apply for new services and rate changes outside the price cap bands.

Standard accounting methods and financial reports, which are utilized by all businesses including cable television, can be used to derive the unit cost starting point. Sources would include the company's balance sheets and income statements, as well as data the FCC has already requested in its survey. As suggested in the NTCs' Comments, the Commission should ensure uniformity and proper computation by specifying the costs to be included.[16] Any accountant should be able to perform the necessary arithmetic easily.

As discussed, if cable companies are willing to undergo cost of service regulation to justify high rates, they should be willing to use the methodology to determine initial rates. The Commission should not heed the cable companies' complaints about the burden of cost regulation, when at the same time they are asking to pass so many costs through to customers. The cable companies may as well pass through all costs in a reasonable manner using simple cost of service

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15 Thus, the Commission can avoid the disadvantages of years of rate of return regulation, while still reaping the benefits of cost-based initial rates, which the Commission found appropriate for the start of price caps. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786 (1990) ("LEC Price Caps Order") ¶¶ 232, 301. See also Cole, Raywid & Braverman pp. 23-24 ("cost-based regulation . . . provides appropriate starting points for price caps").

16 NTC Comments pp. 5-6.

methodology to initialize their rates. Thereafter, they should be subject to the incentives of price caps.

C. Price Caps Should Apply After Rates Are Initialized

Cable operators argue against price caps for rate changes on the grounds that price caps have the same problems as rate of return regulation, and that they have unique cost inputs for which price caps cannot be adapted.[17] Nonsense. Cable companies are not so different from telephone companies, and their services are not more heterogenous. Telephone companies, like cable companies, have unique cost inputs and varied services that price caps must accommodate, and there is no reason why price caps cannot work for cable companies as well.[18]

As the Commission has recognized, GNP-PI is the proper measure of inflation.[19] "Extraordinary" indices suggested by some cable companies are not appropriate -- most industries have expenses which are "unique" to their business and are part of the cost of being in that business. An Entertainment Index

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17 Time Warner pp. 20-21; Cole, Raywid & Braverman pp. 23-24; Armstrong p. 17.

18 Several cable companies have asked to be allowed to pass through numerous costs to customers. E.g., Cablevision Industries pp. vi-vii, 19-20; Armstrong p. 28. Under price cap regulation, some of these might be considered "exogenous" and could be "passed through" to customers; others, would not be exogenous, and cannot be passed through after rate initialization without nullifying the efficiency and productivity incentives of price caps.

19 LEC Price Cap Order, 5 FCC Rcd. 6786 at ¶ 50.

based heavily on programming costs[20] is a particularly inappropriate measure, since many cable companies are affiliated with their programming sources and thus "charge themselves" for these costs.

D. The Commission Should Apply The Same Standard Of Reasonableness To Basic Tier Service And Cable Programming Services

Many governmental entities and consumer groups express great concern about cable companies "stripping" the basic tier to the bare minimum.[21] To avoid this problem, the Commission should simply remove the incentive for cable companies to retier service in this manner. The cable companies are stripping the basic tier because they think this will remove all but the minimum programming services from regulation.[22] By imposing the same standard for reasonableness of rates on cable programming services as the standard for basic tier services, the Commission can remove the incentive to retier services to escape the law.

Imposing the same test for reasonableness on both types of cable service is supported in the statute. Meeting the standard will determine that rates for basic service are "reasonable," while failure to meet the standard will establish

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20 Time Warner pp. 24, and Kelley Report attached thereto p. 26; ESPN p. 8.

21 Attorneys General p. 11; Consumer Federation of America pp. 75-76; League of California Cities pp. 4-5; Connecticut Attorney General pp. 3-4. See also E! Entertainment Television p. 5; ESPN p. 5.

22 See Time Warner p. 13.

that rates for cable programming service are "unreasonable."[23] The different procedural frameworks for enforcing the regulations for each type of service do not necessitate a different substantive standard for differentiating between reasonable and unreasonable rates. Certainly, such a standard for cable programming service meets Congress' objectives better than the cable companies' empty proposal to catch "renegades" by presuming only those rates above the 95th or 98th (!) percentile of cable programming rates to be unreasonable.[24] The NTCs' cost of service/price caps proposal will accurately identify unreasonable pricing, based on provable substantive standards. Presuming rates below the 95th percentile to be reasonable and those higher to be unreasonable is completely unsupported.

E. The Comments Highlight The Need For Cost Allocation Rules To Guard Against Cross Subsidy

Many cable companies ask to continue their practices of bundling cable services with other services, and bundling equipment with services.[25] Some admit that they routinely bundle and cross-subsidize some services by others.[26] Some

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23 See 1992 Cable Act §§ 623(b)(1), 623(c)(1). See also New York State Consumer Protection Board pp. 12-13; Connecticut Attorney General pp. 3-4.

24 NCTA pp. vii, 59-62; Time Warner pp. 43-45.

25 E.g., NCTA pp. 38, 47, 50-52; Time Warner pp. 59, 64-65.

26 Cole, Raywid & Braverman p. 32; Comcast p. 30; Cox Cable pp. 26-27; Time Warner p. 23.

discuss cable's entry into the telephone business.[27]

The NYNEX Telephone Companies emphasize that the regulated cable services, which include basic tier and cable programming, must not be allowed to cross-subsidize other ventures such as cable equipment and wiring, and telephone service. Indeed, Time Warner's own expert states that "[e]xplicit subsidies of one cable service by another would not be a wise public policy choice."[28] Telephone companies are not allowed to subsidize enhanced services, CPE, or any other non-telecommunications venture, with regulated telephone revenues. Allowing cable companies to compete in telephony using their cable services as a springboard would create still more of a regulatory imbalance between the two converging industries.[29]

The comments asking the Commission to allow cable companies to "pass-through" programming costs[30] highlight the need for rules guarding against cross subsidy in affiliate transactions. Many cable operators and programming suppliers are vertically integrated, and these cable operators effectively

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27 Kelley Report (attached to Time Warner Comments) p. 5.

28 Kelley Report (attached to Time Warner Comments) p. 33; see also id. p. 5 n. 12. Mr. Kelley then contradicts himself, saying that government-imposed subsidies would not be wise, while cable operators may have economic reasons to cross-subsidize services. Id. p. 33 n. 39. He does not explain what these reasons might be.

29 In addition, cable programming service should not subsidize basic cable rates. An artificially low-priced basic tier would discourage the emergence of competition to the monopoly cable operator in a service area.

30 See supra notes, 7, 12.

pay themselves for the costs of programming. The Commission should adopt affiliate transaction rules that prevent cable operators from recovering monopoly profits through inflated prices paid to unregulated programming affiliates.

III. EQUIPMENT PRICES

Several cable operators attempt to limit the Commission's regulatory controls to equipment used by subscribers purchasing the basic tier of service only.[31] If they are successful, the five largest MSOs in New York will be subject to rules on equipment for only 1.34% of their subscribers.[32] This blatantly contravenes Congressional intent. Congress was concerned about equipment "used" to receive the basic tier of service;[33] this clearly includes equipment used in receiving the basic tier even if it is also used to receive other cable services. There is no basis for limiting regulatory controls to equipment used by subscribers who only subscribe to the basic tier.[34]

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31 NCTA pp. 45-50; Adelphia p. 68; Cablevision Systems pp. 6-7.

32 See New York State Commission on Cable Television p. 8 n. 5.

33 1992 Cable Act § 623(b)(3).

34 The NTCs have proposed that the FCC implement controls that will promote a competitive market for all cable customer premises equipment and cable home wiring, and that, once in place, these controls plus the competitive market will ensure that cable company prices are reasonable. NTC Comments pp. 11-13.

Certain cable operators also argue against unbundling equipment and wiring from cable service, stating that Congress did not intend to require unbundling.[35] To the contrary, Congress exhibited clear intent to promote competition and interchangeability among equipment supplied by cable operators and that supplied by others. The statute itself requires the Commission "to promote the commercial availability" of equipment, from cable operators "and retail vendors that are not affiliated with cable systems."[36] Unbundling is the only effective means to fulfill the Congressional mandate.

Unbundling of much equipment from cable services presents no security problem, as cable operators admit.[37] And, as a cable operators move toward using addressable systems, any security risk associated with competitive converter boxes, installation, and additional outlets disappears. As part of its rulemaking, the Commission may wish to give those cable companies with nonaddressable systems a reasonable amount of time to adopt technologies that can be unbundled from cable service without risking theft of service, before requiring those companies to unbundle such equipment completely. Network disclosure rules, however, should be put in place immediately,

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35 NCTA p. 45.

36 1992 Cable Act § 624A(c)(2)(C).

37 NCTA pp. 46-47.

to permit manufacturers to build competitive CPE, and to ensure compatibility with the cable network.[38]

Unbundling will also help resolve the problems consumers have with being overcharged for additional outlets.[39] It is simply outrageous to argue that basic rate regulation applies only to the delivery of basic service to the first outlet, and delivery of the same service to additional outlets should command higher rates.[40] Unbundling premises equipment and wiring from cable services, putting cable home wiring under the customer's control, and promoting competition in the provision and installation of this equipment and wiring will help prevent cable companies from overcharging consumers for hooking up more than one television set. In addition, requiring initial rates to be based upon costs, as the NTCs have proposed, will ensure that any charges for providing the same service to additional outlets will be nominal at most.

IV. EFFECTIVE COMPETITION

A few commenters suggest without analysis that telephone company video dialtone providers could be considered

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38 See Media General Cable of Fairfax Inc. p. 11. In addition, the Commission may want to consider encouraging the standardization of cable equipment. This would encourage manufacturers to make compatible CPE, and would allow a person who moves from one franchise area to another to use the same cable premises equipment in the new location without having to buy equipment of a completely different type.

39 See Letter from James Pappas dated January 6, 1993.

40 Cablevision Systems p. 9.

"multichannel video programming distributors" for purposes of applying the statutory test for effective competition.[41] This would be both contrary to Congressional intent, and impracticable. The statute's definition of multichannel video programming distributor includes only entities that package video programming and sell it to subscribers.[42] With minor exceptions, telephone companies are prohibited from doing this,[43] and in any event, do not do this as providers of video dialtone service. Moreover, telephone company video dialtone providers would be unable in many cases to provide information to regulators relevant to a determination of effective competition. For example, the telephone company is unlikely to know whether the programming it carries is "comparable" to that provided by a cable operator. Telephone companies providing video dialtone are common carriers; they do not necessarily know the content of the conversations, data, or programming transported over their facilities. Moreover, because telephone companies do not provide the programming to subscribers, they are not in as good a position as their programmer-customers to know which end users view or "subscribe" to which programmer's programming on the video dialtone network. For these reasons, telephone companies providing video dialtone are not (and should

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41 Time Warner p. 8 n. 21; Adelphia p. 6 n. 13.

42 1992 Cable Act § 2(b)(12).

43 47 U.S.C. § 533(b).

not be considered) multichannel video programming distributors.[44]

Time Warner states that the standard for effective competition can be satisfied when less than 30% of a franchise area subscribes to cable service, regardless of whether the remaining 70% has access to the services of cable operators or other multichannel video programming distributors.[45] The Commission should only permit this if the cable operator's service is available at a reasonable price to the rest of the franchise area; otherwise, cable companies could build or price their services so as to serve less than thirty percent of the area and avoid regulation.

Certain cable operators attempt to read out of the effective competition standard the requirement that "comparable video programming" be offered by competing multichannel video programming distributors.[46] The Commission should not be persuaded to drop this important requirement. "Comparable" programming was clearly intended to refer to the quality, not just the quantity, of programming available on competing systems. Retaining this requirement may help to align vertically integrated cable operators' incentives with their obligations to make programming available to competitors on reasonable and nondiscriminatory terms and conditions. They

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44 Some of the program providers that use video dialtone to distribute their programming, however, may be multichannel video programming distributors.

45 Time Warner p. 6; Adelphia p. 5.

46 E.g., Adelphia pp. 9-10.

will see that making the programming available will lead eventually to nonregulated status for their cable system. Thus, the determination of whether a distributor provides "comparable programming" cannot be made simply by counting the number of channels the distributor provides,[47] but must also include an assessment of whether the distributor has reasonable access to the same programming or programming of comparable quality.

V. PROCEDURAL CONSIDERATIONS

Several parties assert that, if a franchising authority fails to file a certification with the Commission, the cable company must remain unregulated.[48] This simply cannot be squared with the Commission's obligation to ensure reasonable rates for cable service. What the Commission should do is establish a time limit in which all franchise authorities that wish to regulate cable companies must file their certificates.[49] State cable commissions should be permitted to file on behalf of localities that do not wish to assume the

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47 See NPRM ¶ 9.

48 Adelphia p. 36; Time Warner pp. 25; Comcast p. 17; Nashoba pp. 23-24; Armstrong p. 8. Parties that suggest that the FCC's authority to regulate equals the authority of the local franchising authority, and that such authority is derived from state law, are wrong. See Adelphia p. 36; New York State Commission on Cable Television pp. 6-8. The FCC has authority over all interstate communications, including cable television, and, more specifically, has been mandated in the 1992 Cable Act to ensure reasonable rates. The FCC's authority is not derived from state law, nor is it co-terminous with that of a municipal franchise authority.

49 See New York State Cable Commission p. 23.

burdens of regulation themselves.[50] If no certification is filed, the FCC must examine the locality itself and, if the cable operator is not subject to effective competition, must regulate that cable operator's basic rates.[51]

Several parties urge the Commission to make sure that they obtain notice and the opportunity to participate in proceedings that flow from the Commission's rate regulations. For example, cable operators want advance notice and a head start in responding to complaints, before these go to the Commission; while regulatory agencies want the opportunity to participate in these proceedings as well.[52] These comments underscore the point that all interested parties must be given notice of proceedings and the opportunity to participate in them, if the 1992 Cable Act is to be implemented and enforced in the optimal manner.[53]

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50 See id. pp. ii, 23; Massachusetts Community Antenna TV Commission pp. 5-6.

51 If the FCC fails to step in when a local authority does not file a certification, this would create enormous incentives for cable operators to influence their local authorities not to file, influence that some commenters suggest would be only too likely to succeed. See Competitive Cable Association pp. 6-8 (noting "cozy, symbiotic relationship" between franchise authorities and franchised cable operators).

52 E.g., Time Warner p. 29; New York State Consumer Protection Board p. 11; New York State Cable Commission p. 11.

53 NTC Comments pp. 22.

VI. THE COMMISSION MUST REQUIRE NONDISCRIMINATORY TERMS AND CONDITIONS FOR LEASED ACCESS CHANNELS

NCTA proposes that rates for leased access channels be based on costs and the "effect of the leased channel on a cable operator's own program packages and offerings."[54] The NTCs submit that this is an amorphous and unworkable standard. Worse, it would permit cable operators to price their leased channels anticompetitively to exclude competitive programming. In order to fulfill the Act's mandate of determining "maximum reasonable rates" and "reasonable terms and conditions" for leased access,[55] the Commission should require cable operators to make leased channels available to unaffiliated entities on nondiscriminatory prices, terms and conditions.[56] Similarly situated customers should be treated the same, and discrimination based on competitive considerations should be strictly prohibited.[57]

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54 NCTA p. 90.

55 1992 Cable Act § 9.

56 See NTC Comments pp. 18-22.

57 In its recent order on indecent programming, the Commission gave cable operators a great deal of discretion in prohibiting indecent programming on leased access channels, and stated that aggrieved customers must resort to the courts rather than the FCC for redress. See In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order, MM Docket No. 92-258, February 3, 1993 ¶¶ 29-31. The NTCs are concerned that some cable operators may try to use this ruling to unreasonably deny access to channel capacity in the guise of prohibiting indecent programming. The Commission should clarify that in such a case the cable operator

(Footnote Continued On Next Page)

And, with respect to rate standards, the Commission should not simply set the "maximum reasonable rate" at the highest rate currently charged for any leased channel, as some cable operators suggest.[58] This would read the word "reasonable" out of the standard. Instead, the formula for "reasonableness" should be consistent with what is reasonable for other cable services: simplified cost of service should initialize rates, changes in rates should be governed by price caps, and cost allocation rules should guard against cross subsidy, across the board.[59]

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57 (Footnote Continued From Previous Page)

would violate the rules governing reasonable terms and conditions for access, and the aggrieved customer would have recourse to the Commission under the expedited procedures established in this rulemaking.

58 E.g., Cole, Raywid & Braverman p. 64; NCTA p. 93.

59 See also Fox p. 5.