

Moreover, the Commission must not justify subjecting cable subscribers to unreasonable rates for cable programming services in order to limit the number of complaints it must review -- as suggested by several cable operators.⁵⁰ Congress' primary goal in enacting Section 623 was to ensure that cable subscribers are protected from monopoly cable rates. Its secondary goal was that the Commission achieve the primary goal by adopting regulations that are easy to administer, implement and enforce. However, Congress did not intend that the Commission address administrative burden concerns at the expense of ensuring that cable subscribers pay "reasonable" cable rates. Nowhere in either the statute or legislative history is there support for the proposition that Congress intended the Commission to base its determination of what is an "unreasonable" cable programming service rate based on a calculation of how many complaints the Commission might receive.

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benchmark rate might in rare instances be inadequate, a cable operator has the flexibility of recovering any additional costs from non-regulated per-channel and per-view cable programming services.

⁵⁰ See, e.g., NCTA at 61 ("a benchmark that subjected more than five percent of all systems to complaints would create an unmanageable burden for the Commission").

Instead, Congress intended that the Commission adopt regulations that reduce the administrative burdens of handling all the legitimate complaints it receives. Local Governments have suggested that a means to reduce such burdens is to allow franchising authorities to review complaints. Comments of Local Governments at 72. This general approach has been embraced by a number of parties in this proceeding, including, among others, cable operators.⁵¹

B. The Commission Should Not Adopt Regulations That Permit Cable Operators To Circumvent The Primary Congressional Goal Of Ensuring That Cable Rates Are Reasonable

1. The Commission Should Not Preempt Local Rate Regulations In The Absence Of A Legislative Intent To Preempt Such Regulations

As we stated in our initial comments, the Commission should not preempt local rate regulations unless they are substantially inconsistent with the Commission's regulations, since there is no clear legislative intent to preempt such regulations.⁵² Hence, Local Governments strongly oppose suggestions by cable operators that the Commission preempt certain local regulation of cable systems even where such regulation is not preempted by statute or not

⁵¹ See, e.g., NCTA at 75-76; Cox at 70; Coalition of Small System Operators at 18.

⁵² Comments of Local Governments at 29 n.11.

substantially inconsistent with the Commission's regulations.

Hence, the Commission should not preempt franchise provisions governing the number of channels that must be on the basic tier, nor provisions in franchises entered into prior to 1984 that require cable operators to place particular programming services on the basic tier. Franchising authorities have the right to require in a franchise agreement that a cable operator provide a minimum number of cable channels on the basic cable service tier.⁵³ Moreover, franchising authorities have the right to enforce provisions in pre-1984 franchise agreements that require cable operators to place particular programming services on the basic service tier. See 47 U.S.C. §544(c).

The 1992 Cable Act did not amend provisions in the 1934 Communications Act permitting the enforcement of such franchise provisions.⁵⁴ Moreover, the 1992 Cable Act explicitly recognizes that a basic tier may contain programming beyond the minimum required by

⁵³ For example, Section 626(c)(1)(B), as amended by the 1992 Cable Act, makes clear that franchising authorities are not prohibited from considering the "level" of programming services provided on a cable system.

⁵⁴ Local Governments note that even the NCTA recognizes that a cable operator must be prohibited from retiering services where "the franchise specifically requires carriage of the services on the basic tier." NCTA at 37.

Section 623(b)(7).⁵⁵ Hence, contrary to the suggestion of several cable operators,⁵⁶ the 1992 Cable Act does not preempt the enforcement of such franchise provisions.⁵⁷

Similarly, the Commission must not preempt franchising authorities from enforcing the Commission's subscriber bill itemization regulations, nor prohibit a franchising authority from imposing regulations not substantially inconsistent with the Commission's regulations (e.g., regulating the manner in which items are itemized on the bill and requiring the cable system

⁵⁵ In addition, cable operators are incorrect to suggest that Congress wanted to limit the basic tier to just PEG and broadcast programming, and to encourage cable operators to retier satellite programming to other tiers. See, e.g., Time Warner at 12-13. Congress considered and rejected legislative alternatives that would have limited the basic tier to just broadcast and PEG channels. Congress simply intended to ensure that the basic tier contained at a minimum PEG and broadcast signals in order to promote important public interest goals. However, Congress recognized that the public also would want to receive other programming on the basic tier, so it made clear that cable operators could provide additional programming on the tier and instructed the Commission to adopt rate regulations that took into account that additional programming would be on the tier. See Section 623(b)(7)(B).

⁵⁶ See, e.g., Time Warner at 13; Continental at 71; Cablevision Systems Corporation at 20.

⁵⁷ Similarly, the Commission should not preempt the enforcement of programming contracts which require a cable system to carry a programming service on a particular tier or impose a penalty if a cable system does not carry a programming service on the basic tier.

to itemize other costs).⁵⁸ While section 622(c) authorities cable operators to itemize certain costs, nowhere does Section 622(c), nor the legislative history to the provision, suggest that franchising authorities are preempted from regulating the manner in which bills are itemized.⁵⁹

⁵⁸ See, e.g., Continental at 79; Comments of Harron Cable at 6.

⁵⁹ Moreover, the House Report provides the Commission clear guidance as to how the Commission must interpret Section 622(c). H.R. Rep. No. 628, 102d Cong., 2d Sess. 86 (1992) (hereinafter "House Report") (describing how costs should be itemized on a subscriber's bill). Local Governments disagree with cable operators that suggest that the House Report is not relevant since the Conference Committee adopted the Senate version of the itemization provision. As the Conference Committee noted, the House bill contained an itemization provision "virtually identical" to the Senate provision. Conference Report at 84. Given the absence of Senate legislative history defining how to interpret the itemization provision, it is appropriate for the Commission to consider the House Report in determining the meaning of Section 622(c). See 2A Norman J. Singer, Sutherland's Statutory Construction § 48.06 (5th ed. 1992); compare United States v. Atlantic Richfield Co., 612 F.2d 1132, 1138 (9th Cir. 1980) (finding House committee report probative where conference committee adopted Senate provision, but House provision not materially different).

The House Report clearly states that a "cable operator shall not identify cost [sic] itemized . . . as separate costs over and beyond the amount the cable operator charges a subscriber for cable service. The Committee intends that such costs shall be included as part of the total amount a cable operator charges a cable subscriber for cable service." House Report at 86. Local Governments believe that the Commission, therefore, must require cable operators to itemize costs in a footnote on a subscriber's bill in a manner similar to the following:

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Where Congress has made clear its intention to preempt contrary law, however, the Commission must act accordingly. Hence, Congress made clear that franchising authorities must have the right to regulate rates regardless of provisions in franchise agreements that either prohibited rate regulation or were silent on the right of franchising authorities to regulate rates. See House Report at 81. Moreover, Section 623(a)(2)(A) expressly authorizes a franchising authority to regulate rates. Cable operators that suggest that this interpretation of Section 623 and its legislative history would result in an impermissible impairment of franchise contractual rights are wrong. See, e.g., Continental at 17. The Contract Clause applies only to states; it does not prohibit the federal government from impairing contractual provisions.⁶⁰

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Basic Service.....	\$ 5.00
Expanded Basic Service.....	13.00
Remote Control Unit.....	<u>2.00</u>
Total	\$20.00*

* The total amount of the cable bill includes: (1) \$1.00 for franchise fees; (2) \$.50 for sales tax; and (3) \$.05 for the amount attributable to supporting public, educational and governmental access channels, facilities and equipment.

⁶⁰ See Pension Benefit Guaranty Corp. v. R.A. Gray &
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Moreover, as stated in our initial comments, Local Governments believe that Section 623(a)(2)(A) grants franchising authorities an independent source of authority to regulate rates. Comments of Local Governments at 30-31. Local Governments disagree with cable operators that suggest that such an interpretation of Section 623(a)(2)(A) would render meaningless the requirement that a franchising authority have the "legal authority" to regulate rates under Section 623(a)(3)(B). See, e.g., TCI at 46; Time Warner at 27. Such an interpretation does not render Section 623(a)(3)(B) meaningless, and, in fact, is consistent with Section 623(a)(3)(B). By requiring a franchising authority to certify that it has "legal authority" to regulate cable rates, Congress simply intended to ensure that a governmental entity filing a certification is the authority authorized to regulate the cable system in that franchise area. Such a provision was necessary to ensure that a governmental entity with an interest in cable service (e.g., a local cable advisory board or a consumer protection agency), but no authority to

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Co., 467 U.S. 717, 732 n.9 (1984) ("It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government").

regulate a cable system, did not get certified by the Commission to regulate rates.

In addition, Congress intended to give franchising authorities the option of jointly regulating the rates for cable systems that serve multiple franchise areas. House Report at 81-82. The Commission must not undermine this Congressional intent by limiting the right to enter joint agreements to those franchising authorities that have entered into joint franchise agreements with a cable system. See, e.g., Continental at 18.

2. The Commission Must Not Permit Exceptions to the Statutory Definition Of "Effective Competition"

Local Governments oppose the suggestion by Time Warner that the Commission, in applying its "effective competition" standard, be "flexible in extending unregulated status to cable operators in any segment where the effective competition test is satisfied."⁶¹ Time Warner at 8-9.⁶² Such "flexibility" is not

⁶¹ Furthermore, comments in this proceeding indicate some confusion as to whether the 15-percent penetration test under the "effective competition" standard must be measured cumulatively or individually. Local Governments believe that there should be no confusion on this issue since the 1992 Cable Act's legislative history makes clear that the test is satisfied only if a single competitor meets the test. See Conference Report at 62; House Report at 89.

⁶² Local Governments note that Time Warner's position
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permitted by the "effective competition" definition, which requires that the determination of whether effective competition exists be based on the entire franchise area where a cable operator provides service, rather than a portion of such area.⁶³ Such an interpretation also would render meaningless the "uniform" rate provision which is intended to ensure

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is not even supported by other cable operators filing in this proceeding. See, e.g., Cox at 83-84.

63 Similarly, Local Governments do not believe that multiple dwelling units ("MDUs") in a franchise area should be excluded from rate regulation solely on the basis that wireless cable operators target such units for service. However, Local Governments do not believe that Section 623(d) -- the "uniform" rate structure provision -- prohibits cable operators from treating MDUs as a class differently from individual cable subscribers and, hence, negotiating bulk rate discounts with MDUs -- so long as all MDUs have the opportunity to negotiate bulk rate discounts. Local Governments also strongly oppose the suggestion that franchising authorities be prohibited from regulating such bulk rate discounts. See Comments of Liberty Cable Company, Inc. at 8-9. Section 623 grants certified franchising authorities the right to regulate all basic cable services and makes no exception to the right of franchising authorities to regulate, pursuant to the Commission's regulations, bulk rate discounts for MDUs.

Although Local Governments do not oppose creating classes of rates for certain subscribers (e.g., MDUs and commercial users), Local Governments believe that rates for all such classes are subject to rate regulation under Section 623 and that such rates must be reasonable as required by the Section. In order to ensure compliance with Section 623, the Commission and certified franchising authorities must have the authority to review the rates charged any class of subscribers to ensure that they are reasonable and that cable operators are not discriminating among members of a class.

that similar classes of cable subscribers in a franchise area pay the same rate. See Section 623(d). Congress clearly intended to prohibit a cable operator from charging subscribers in those portions of its service area where it faces competition lower rates than those charged subscribers in those portions where there is no competition. S. Rep. No. 92, 102d Cong., 1st Sess. 76 (1992).

Similarly, equipment prices are subject to rate regulation so long as the cable system is not subject to "effective competition," as that term is defined in Section 623. Local Governments disagree with those cable operators that suggest that equipment of a regulated cable system should not be subject to rate regulation if there exist third-party sources of such equipment in a franchise area.⁶⁴ These cable operators

⁶⁴ See, e.g., Time Warner at 56 ("the 1992 Cable Act's definition of 'effective competition' is limited to the service components only and fails to address equipment, installation, and [additional outlets]"); Continental at 40.

However, the Commission must establish rates for equipment that are consistent with Congress' desire to promote competition in the provision of equipment. Therefore, Local Governments are opposed to the Commission establishing an overall "basket" rate for equipment which would allow a cable operator to establish any rate it wants for a particular piece of equipment so long as the total of individual equipment rates do not exceed the total "basket" rate. See, e.g., Time Warner at 65; Cablevision at 12-14. Such pricing by cable operators would permit predatory pricing for

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base their argument on the conclusion that the "effective competition" standard does not apply to equipment and installation. This conclusion is wrong. Section 623(a)(2) subjects the rates for "cable service" to rate regulation. The "effective competition" definition covers cable systems providing "cable service." Section 623(1). Congress did not intend, as suggested by these cable operators, for "cable service" to be interpreted narrowly to include programming services and to exclude equipment, installation and additional outlets. That such a narrow definition is incorrect is demonstrated by the statutory definition of "cable programming service," which states, in relevant part, that the "term 'cable programming service' means any video programming provided over a cable system . . . including installation or rental of equipment used for the receipt of such video programming." Section

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equipment that is available from third parties, while permitting pricing significantly above cost for equipment not available competitively. Such "basket" pricing would undermine the development of a competitive market for equipment.

Similarly, promotional rates for installation should be allowed only to the extent a cable operator is willing to cover the cost of such promotional rates from its profit. Local Governments oppose suggestions that a cable operator be able to recoup the costs of such promotions by increasing the rates for cable programming services. See, e.g., InterMedia at 24.

623(1)(2) (emphasis added).⁶⁵ Clearly, then, equipment and installation rates are subsumed under the term "cable service" and, thus, are covered by the "effective competition" standard.

3. The Commission Should Broadly Interpret Its Authority To Prohibit Rate Evasions

In our initial comments filed in this proceeding, Local Governments urged the Commission to interpret broadly its authority to prevent rate evasions. Local Governments strongly oppose comments filed by cable operators in this proceeding which recommend that the Commission narrowly interpret its authority to prevent such evasions by, for example, limiting review to acts that result in implicit rate increases or a price that is outside the benchmark for reasonableness. See, e.g., Time Warner at 89.

Such a narrow reading is not consistent with Congressional intent and would result in cable subscriber not receiving the protections intended by Section 623. The Commission must review any action that

⁶⁵ Moreover, the cable operators' interpretation is inconsistent with the structure of Section 623. Under Section 623, a cable operator's rates would not be subject to rate regulation if it is subject to effective competition. However, the cable operators would carve out an exception and allow equipment to be regulated if there are no alternative sources of equipment. Such a result would be inconsistent with Congressional intent, and probably would be opposed by the very cable operators suggesting that equipment is not subject to the "effective competition" standard.

would circumvent any provision in Section 623. In addition to actions recommended for review in the initial comments,⁶⁶ Local Governments urge the Commission to be on guard against other evasive tactics by cable operators as they reconfigure their systems in anticipation of rate regulation.

Local Governments are especially concerned with announcements by TCI and other MSOs of plans to offer a stripped-down basic tier that offers only 10 to 12 channels of PEG access and local television broadcast station programming. Local Governments are concerned that the creation of such tiers may represent a conscious attempt by MSOs to evade the rate provisions in Section 623.

First, a tier of only 10 to 12 channels may not contain all of the programming cable operators are required to carry pursuant to Section 623(b)(7)(A). In the top 25 ADIs, for example, we estimate that the number of must carry stations alone will be 10 or more in 19 of these markets.⁶⁷ Moreover, if one assumes that at least two PEG channels will be on the basic tier, we

⁶⁶ Comments of Local Governments at 83-85.

⁶⁷ A rough, yet conservative, estimate of the number of must carry signals in the top 25 ADIs produces a range from a high of 21 in San Francisco to a low of eight in San Diego. The estimates were determined by reviewing the Television and Cable Fact Book (1992).

estimate that a 10-channel tier would require the dropping of must carry signals in 24 of the markets. Such actions by cable operators in these markets would have a substantial impact on subscribers nationwide, given that more than half of the nation's subscribers reside in the top 25 ADIs.⁶⁸ If cable operators refuse to increase the basic tier size to include all must carry signals, such action is not only a violation of Section 623(h), but a flagrant violation of Section 623(b)(7)(A). The Commission must exercise authority pursuant to Section 623(h) to prohibit such actions.

Second, by offering a basic tier of only 10 to 12 channels, a cable operator would be able to provide basic cable service directly to a cable subscriber's television set -- without the need of a converter. By directly connecting basic cable service to a television receiver, a cable operator may be attempting to avoid the regulation of cable equipment at "actual cost," as required by Section 623(b)(3). To the extent such action is taken to evade the regulation of cable equipment, the Commission must prevent such action.

⁶⁸ There are approximately 88 million households passed by cable systems in the United States. Cablevision at 14 (Nov. 30, 1992). Approximately 45.6 million of these households are in the top 25 ADIs. Broadcasting Yearbook at D-38 (1991).

Third, cable operators incur no programming costs for the carriage of must carry and PEG channels. Yet, cable operators might be permitted to charge a benchmark basic tier rate that is based on an assumption that the cable operator incurred programming costs on the basic tier. Such a result would be unfair to subscribers and result in windfall profit to the cable operator. To the extent a cable operator attempts to evade the imposition of a "reasonable" rate for basic cable service in this manner, the Commission must act to prohibit such an action.

Local Governments will provide the Commission with further evidence of attempts by cable operators to evade rate regulations in the manner described above as such information becomes available.

4. The Commission May Exercise "Flexibility" In Implementing Its Regulations So Long As Such Flexibility Is Not At The Expense Of Protecting Cable Subscribers

Local Governments agree with parties that urge the Commission to exhibit flexibility in implementing its regulations. Local Governments believe that the Commission should monitor its regulations -- and modify them if necessary -- to ensure that consumers are receiving the rate protections Congress intended. However, Local Governments strongly oppose suggestions by parties that the Commission delay implementation of

its regulations, and compliance by cable operators with such regulations, in order to give the Commission, franchising authorities and cable operators time to determine how to bring cable systems in to compliance with such regulations.⁶⁹ Congress did not intend for the Commission to delay in this way the rate protections intended for consumers under Section 623.

5. The Commission Should Not Use This Proceeding To Address Matters Not Appropriately Before It

Local Governments strongly oppose the suggestion by the Competitive Cable Association ("Association") that the Commission link certification and rate appeals with eliminating "anticompetitive rules and practices of the local regulators and the 'friendly' regulated." Comments of the Association at 8-12. Congress addressed the Association's "anticompetitive" concerns in Section 7 of the 1992 Cable Act, which prohibits a

⁶⁹ See, e.g., Cox at 7 (Cox proposes that the Commission: (a) prohibit franchising authorities and the Commission from regulating rates until a period of 90 days after regulations are issued in order to give franchising authorities, the Commission and cable operators the opportunity to review benchmark levels and determine whether adjustments in current rates are needed; and (b) delay the effective date of regulations governing the unbundling of equipment for one year); Comments of Cablevision Systems Corporation at 17 (proposing that cable operators be given 18 months to bring their cable systems into compliance with the new rules); Community Antenna Television Association, Inc. at 12 (urging smaller communities to delay seeking certification until certifications by larger communities are completed).

franchising authority from unreasonably denying a franchise request. Moreover, the Commission should not use this proceeding to "establish controls over the renewal process." Comments of the Association at 12. The Association's concerns with the renewal process are already addressed by Section 626 of the 1934 Communications Act and amendments made to Section 626 by the 1992 Cable Act. See Section 18, 1992 Cable Act.

Section 623 does not require the Commission -- nor grant the Commission authority -- to link rate regulation to such concerns. The Commission should not address the Association's concerns in this proceeding.

III. CONCLUSION

Local Governments urge the Commission to adopt rate regulations that best protect cable subscribers from unreasonable cable rates, while limiting the administrative burdens of rate regulation. The Commission must not adopt regulations that would undermine these goals.

Respectfully Submitted,



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