Rather, they use exclusive contracts with the MDU owner to keep out other multichannel providers, including the franchised cable operator. In their comments, representatives of these two industries are attempting to use the nondiscrimination provisions of Sections 623(d) and (e) to prevent the franchised cable operator from responding individually to those industries' targeting of MDUs.[189] Given that an SMATV or MMDS operator negotiates individually with each MDU owner, there is no reason for the cable operator not to have the same ability.

This necessarily implies that the cable operator must not be required to offer identical proposals to each MDU in its franchised territory, nor should its franchise area-wide rates be required to be the same as the individually-negotiated rates for a particular MDU. This is especially important because the SMATV and MMDS operators' practice of serving MDUs pursuant to an exclusive contract means that the only competition that often exists is competition for the right to serve the MDU, not competition for each MDU resident's business. If the cable operator does not have the freedom to make an individually-attractive proposal to the MDU owner at the time it is selecting a multichannel provider for MDU residents, those residents will be deprived of the benefit of vigorous price competition for the life of the contract -- usually many years. Aside from blatantly

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[189]See, e.g., Wireless Cable Association International, Inc. Comments at 3, 5; Nationwide Communications, Inc. Comments at 3-4, 7.

seeking protection from the cable operator's competitive efforts,[190] no party seeking to restrict the cable operator's ability to compete for MDU business has advanced any consumer benefit rationale in support of its position. These parties would deny any consumer the benefit of competition merely because such benefits are not available to all, an outcome that enhances their own business position in MDUs.[191]

Finally, the Commenters believe that Section 623(d) should be interpreted to allow a cable operator to lower prices to meet competition in less than its entire franchised territory, in order to ensure that consumers in the overbuilt area get the full benefit of competition. While even the Competitive Cable Association declined to address directly the issue of permitting a cable operator to meet a competitive price in less than all of its franchised territory, the comments of two municipalities --

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[190]E.g., "'rifle shot' marketing practices which benefit those who reside where competition is present." Wireless Cable Association International, Inc. Comments at 3.

[191]The Massachusetts Cable Television Commission recognizes the presence of competition for the MDU business ("one of the few instances where we currently experience head-to-head multi-channel video competition"), but would cripple the cable operator's ability to compete by requiring price uniformity: "if rates for identical services were charged to MDUs and residential subscribers alike, a cable operator's plans for a rate increase would have to factor the possible subscriber (and revenue) loss from MDUs that could opt for the alternative of a SMATV system." Massachusetts Cable Television Commission Comments at 35. The Massachusetts Commission seems unable to recognize that the outcome it seeks erects a price umbrella to protect SMATV and other cable competitors who elect to compete for less than all of a cable operator's business. The SMATV operator can survive by pricing just under his cable competitor, even though that price is higher than what the cable operator would charge if it were freed from the requirement of geographic price uniformity. The SMATV competitor benefits from such a policy; the MDU consumer does not.

one that has overbuilt a private cable operator and one that is considering such an overbuild -- illustrate graphically the dangers to competition that will arise if Section 623(d) is applied inflexibly in any overbuild.

The Electric Board of the City of Glasgow, KY overbuilt a system in their city owned by Telescripps. Glasgow would have wanted Section 623(d) to protect it from price competition with Telescripps, first to have prevented Telescripps from reducing its price only in the overbuilt area and second, once the entire city was overbuilt, to have prevented Telescripps from charging less in the city than in the surrounding county served by the same system.[192] Glasgow complains that, because it did not have this protection, it failed to achieve its projected fifty percent penetration because Telescripps had the temerity to _cut_ its basic service price.[193] Consequently, the municipal system has attained only twenty-five percent penetration.[194] Not satisfied with an interpretation of Section 623(d) that would require Telescripps to have uniform prices in one _system_, Glasgow seeks price uniformity "at the very least, statewide."[195]

Similarly, the City of Manitowoc, WI apparently considering a municipal overbuild, wants some assurance that the incumbent privately-owned cable operator will not be able to reduce prices

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[192]Electric Plant Board of the City of Glasgow, KY ("Glasgow, KY") Comments at 3-4.

[193]_Id_. Although Glasgow reported Telescripps' price, it never reported its own.

[194]_Id_.

[195]_Id_. at 4.

in that City to meet the competition without having to reduce prices elsewhere as well:

> [W]e are fearful that a narrow reading of the uniform rate requirement, which would limit uniform rates to a franchise area only, will enable our operator to engage in predatory pricing only in the City of Manitowoc, thus undercutting the City's efforts to fairly compete.[196]

In search of such price protection, Manitowoc seeks a rigidly uniform rate system-wide, regardless of cost differences between franchises.[197]

Clearly, consumers will not benefit if Section 623(d) is used to protect a competitor from price competition, a result both these municipal overbuild commenters seek. If consumers are to realize the benefits of competition between cable companies, the incumbent cable operator must be able to meet an overbuilder's price in the contested area, whether that area is only part of a franchised territory or is the entire territory that happens to be served by a system that serves other territories.[198] To the extent that any cable competitor is the

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[196]City of Manitowoc, WI Comments at 5.

[197]Id.

[198]Indeed, according to Glasgow, TeleScripps first lowered its price in the overbuilt area of the city until the municipal system was fully constructed. Interestingly, it also lowered its price (though not by as much) in the surrounding county, which is not overbuilt but is served by the same system. Glasgow, KY Comments at 3. Assuming that the Telescripps system as a whole is not now showing a loss, enforcement of Section 623(d) in the manner Glasgow seeks would force Telescripps to raise prices in the City to equal what it charges in the surrounding area. This, of course, would either cause customers to switch to the municipal system or would allow the municipal system to raise its prices without fear of losing customers to Telescripps. In any event, one thing is sure: if Section 623(d) is interpreted as

victim of truly anticompetitive practices, it is protected by remedies in existing state and federal antitrust and trade regulation statutes.[199]

VI. NEGATIVE OPTIONS

As the Commenters have explained, the 1992 Cable Act's negative option prohibition[200] is limited to situations where a subscriber is provided with and billed for a new programming package or service (including equipment) consisting entirely of services to which the subscriber did not already subscribe, without the subscriber's oral or written request.[201] The prohibition directly resulted from the marketing by a major cable operator of a new programming service not previously offered to subscribers on any tier, for which the cable operator billed subscribers unless and until they notified the cable operator to cancel the service.[202]

Glasgow wishes, cable customers in the City will pay more.

[199]Ironically, if a privately-owned cable operator is a victim of anticompetitive practices at the hands of a municipally-owned cable operator, it appears that it does not have a remedy under either the federal antitrust laws, the First Amendment or the Fourteenth Amendment. See, e.g. Paragould Cablevision v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991), cert. denied, ___ U.S. ___ (1992); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), cert. denied, 111 S.Ct. 2839 (1991); see also 47 U.S.C. § 555A.

[200]47 U.S.C. § 543(f).

[201]Fleischman and Walsh Comments at 137-38.

[202]Id. at 79; see also 138 Cong. Rec. S. 14248 (Sept. 21, 1992) (statement of Sen. Gorton); Cole, Raywid & Braverman Comments at 51; TCI Comments at 64-65.

Some commenters, however, ignore the statutory language and background leading to the negative option provision, and seek to label a multitude of cable operator actions as negative options when they have no connection to the intent of the negative option prohibition. For instance, NATOA states that a negative option should be deemed to occur where:

> (1) the cable subscriber now pays more to receive on two tiers of service, programming that it previously could obtain on one tier, and (2) the cable operator creates two tiers from one tier of service and forces all subscribers to take the more expensive tier, while making the less expensive tier an optional service.[203]

While NATOA's second example is ambiguous to say the least, it is clear that neither NATOA example is a negative option since there is no new programming service being offered separately from a service tier previously taken by such subscribers. Both are examples of rearranging or repackaging services through the establishment of a second tier of service, and both could be implicit rate increases subject to rate regulation, and the second example could conceivably be subject to the evasion prohibitions depending on what situation NATOA is depicting.[204] However, neither example contains the fundamental element necessary for a negative option -- the introduction of an entirely new programming service separately offered, or a tier of new programming services not previously provided to, or requested by, the subscriber.

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[203]NATOA Comments at 86 (emphasis added).

[204]47 U.S.C. § 543(h).

Similarly, CFA confuses rate increases with negative options. In successive sentences in its comments, CFA first states that "Congress' intent was to protect consumers from paying for services they did not affirmatively request," then immediately states that "[i]t was price increases that most concerned Congress."[205] Accordingly, CFA states that tier splitting accompanied by a price increase, without prior notice, violates the 1992 Cable Act's negative option prohibition.[206] While it may be true that Congress was concerned with price increases when enacting the 1992 Cable Act's rate regulation provisions, negative options involve unrequested programming services, not merely unwanted rate increases (which of course are regulated under other provisions of the statute, such as the rate regulation provisions and, under limited circumstances, the prohibition against evasions). Therefore, CFA's examples simply do not raise the specter of negative options.

The Austin, TX Comments have an even broader view of negative options. They argue that "all tiering changes," including instances where cable operators retier and simultaneously raise rates, and even revenue neutral tier changes, are negative options.[207] Again, retiering accompanied by a rate increase is likely subject to rate regulation scrutiny, but it has no connection to the negative option prohibition.

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[205]CFA Comments at 158.

[206]Id. at 159. Unlike some other commenters, CFA at least recognizes that revenue neutral retiering would not be a negative option. Id.

[207]Austin, TX Comments at 69-70.

Revenue neutral tier realignments, without question, do not trigger the 1992 Cable Act provisions relating to either evasions or negative options. Certainly, the subscriber has not been harmed by a revenue neutral retiering -- there has been no rate increase (and thus no evasion of the statute's rate regulation provisions), and no new programming service delivered which has not been previously received. This is merely an example of simple retiering. As the Commission has stated, the 1992 Cable Act clearly permits retiering, and indeed in some cases retiering may be necessary under the law.[208] The statute cannot be read to find that retiering is necessary or permitted under several provisions, but that such retiering automatically violates the statute's negative option prohibition. Additionally, the legislative history to the 1992 Cable Act's negative option prohibition makes clear that "[t]his provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[209] Cable operators are thus free to add or delete services to or from a tier without triggering the negative option prohibition.

The Joint AGs are similarly confused about actions that constitute negative options under the statute. According to their comments, a negative option should be deemed to occur where (1) a subscriber accepts a new cable programming service free for a period of time, and then is billed for continuing to receive the service, unless the subscriber cancels the service; and (2)

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[208]Notice at ¶ 127.

[209]Conf. Report at 65; Notice at ¶ 118.

"when tier changes are made by cable operators" accompanied by an increase in the subscriber's bill, and the cable operator requests that the subscriber "affirmatively accept or reject" the new charges.[210] We agree that the first example is a negative option because it involves the provision of and billing for a new programming service without the subscriber's prior consent after the temporary free period of service ends. However, the second example is merely a tier change accompanied by a rate increase. As with the erroneous examples cited above, this example involves a rate increase fully subject to regulation under the 1992 Cable Act, but since no new tier of programming not previously received is involved, it cannot be said to trigger the statute's negative option provisions.

It is clear from the above examples that many parties have an erroneously overbroad view, totally out of line with the statute, of what constitutes a negative option. Accordingly, the Commission must clarify that, while certain types of retiering, especially when accompanied by rate increases, may trigger the 1992 Cable Act's rate regulation provisions, the statute's negative option prohibition is simply not a catch-all designed to cover every change by a cable operator of its service offerings. The ban on negative options was enacted specifically to deal with the limited situation of the introduction of, and billing for, a new cable programming service (or equipment) separately offered or a new service tier not previously subscribed to, without prior consent.

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[210]Joint AG Comments at 13.

VII. **EVASIONS**

As the Commenters have explained, the 1992 Cable Act's prohibition against "evasions" of the statute's rate regulation section[211] is not meant to generally prohibit retiering, or rate increases not accompanied by "evasive" behavior (e.g., removing services from a tier).[212] Retiering and service rearrangement is not prohibited by the new law and, indeed, it is expressly authorized in a number of instances. Rather, a proper reading of the statute and its legislative history confirms that evasions are limited to unreasonable implicit rate increases which may result when cable operators retier services, split tiers, or take other actions which decrease the number of channels to the subscriber without a sufficient corresponding rate adjustment.[213]

Some commenters seek to completely miscast the intent of the "evasions" section, and seek to require the regulations against evasions to prohibit retiering, programming mix changes, and other legitimate cable operator practices, or to label all rate increases as "evasions." For example, NATOA mislabels as evasions the following practices: (1) rate increases for existing programming services "in anticipation of the Commission's rate regulations;" (2) retiering "to minimize the impact of rate regulation" (presumably by decreasing the number of services offered on basic before the 1992 Cable Act takes effect); and (3) "future retiering" (presumably meaning retiering

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[211]47 U.S.C. § 543(h).

[212]Fleischman and Walsh Comments at 88-89.

[213]Id. at 89.

after the rate provisions of the 1992 Cable Act take effect).[214] NATOA requests that the Commission permit franchising authorities to hold rate regulatory proceedings to review any of the above conduct, whereby the actions would be presumed evasions and the cable operator would bear the burden to demonstrate, by a preponderance of the evidence, "that its action was done predominantly for a legitimate business purpose unrelated to any evasive effect, and not done solely on grounds of enhancing revenue."[215]

There are several significant flaws with the NATOA approach to evasions. First, the burden to prove that a legitimate business practice is an evasion of rate regulation must not be imposed on the cable operator. If the conduct is not otherwise expressly prohibited by the statute or implementing FCC regulations, then the burden in a claim of evasion must be on the complainant. Second, operator conduct alleged to be an evasion cannot be based on the state of mind of the cable operator. The evasion section was not meant to entail a criminal intent determination or some form of psychological evaluation of the purpose of the operator's action. Thus, NATOA's criteria of evasion hinging on whether a legitimate rate increase pre-April 1993 was "in anticipation" of new regulations or that otherwise appropriate retiering was done "to minimize" rate regulation was

[214]NATOA Comments at 82-84.

[215]Id. at 84.

unintended by Congress,[216] is unfair to the cable operator and will be unworkable for the Commission.

Finally, NATOA's definition of evasion is in direct conflict with numerous other provisions of both the 1984 Cable Act and the 1992 Cable Act. For example, the labeling of either pre-April 1993 or future retiering as an evasion is directly in conflict with (1) Section 624(b)(1) of the 1984 Cable Act, which prevents a franchising authority after 1984 from establishing any requirements with respect to cable programming or other information services,[217] and (2) Section 623(b)(7)(B), which expressly provides that any services added to the basic tier, beyond the statutory minimum requirements, are solely within the discretion of the cable operator.[218] Moreover, the natural result, indeed, perhaps the intended response of a low-priced basic level offering as advocated by the new law is the retiering of non-required services off the basic tier.[219]

As the NATOA manifestations indicate, many cities, flush with the anticipation of rate regulation, are eager to take an extremely creative view (which bears no relation to practicality or fairness) of the 1992 Cable Act's evasion provisions. Accordingly, the Commission must clarify the limits of this prohibition. Without having to list every hypothetical situation, the Commission must nevertheless articulate the narrow

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[216]Id. at 82-84.

[217]47 U.S.C. § 544(b)(1).

[218]Id. at § 543(b)(7)(B).

[219]See Notice at ¶ 127.

scope of evasions in clear principles. First, retiering itself is not an evasion. Cable operators have a fundamental right to retier.[220] As mentioned above and as the Commission's Notice recognizes, the 1992 Cable Act may, indeed, make it necessary for an operator to retier in certain cases.[221] As explained in the Commenters' discussion of negative options, it would be an absurd reading of the statute to claim that retiering is necessary or permitted under numerous sections of the law but outlawed under the general evasions section. Rather, the evasions clause merely assures that the rate which results from retiering may be scrutinized under the applicable basic or non-basic standard ultimately adopted by the Commission.

Second, explicit rate increases subject to the FCC's rate standards, while potentially unreasonable, are not evasions. As NATOA acknowledges,[222] rate increases are subject to scrutiny under the statute's rate regulation provisions, including the basic rate standards and complaints regarding unreasonable cable programming service rates, etc. Applying the evasions prohibition to rate increases would thus be completely redundant. Rather, an evasion may be found only in conduct that attempts to avoid rate regulation scrutiny after the effective date of the new FCC regulations.

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[220]See In re Community Cable TV, Inc., 95 FCC 2d 1204 (1983), recon. denied, 98 FCC 2d 1180 (1984); Conf. Report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service").

[221]See Notice at ¶ 127.

[222]NATOA Comments at n.39.

The obvious example is where a cable operator removes services from a tier but keeps the rate the same, and claims that there has been no rate increase merely because the amount has not changed even though the number of channels offered has been reduced. Take, for example, a cable system under a benchmark approach whose basic rate benchmark is $1.00 per channel, and the system currently offers thirteen basic channels for $13.00, thus meeting the benchmark. If the cable operator removes two channels from basic and decreases the rate by $1.00, an evasion may have occurred, because the resulting basic service now has eleven channels for $12.00, or $1.09 per channel, in excess of the $1.00 per channel benchmark. Thus, the evasion section is designed to assure that this revised basic service will be subject to rate scrutiny, even though the price has not changed.

On the other hand, if the cable operator retains the same level of services and simply raises the rate to $14.00, the explicit rate increase is fully subject to regulation (assuming the system is not subject to effective competition). Obviously, this example cannot be labeled an "evasion" of the statute's rate regulation provisions. There is simply no conduct in this second example designed to evade rate regulation -- the cable operator's action will be fully exposed to regulatory scrutiny.

The third principle that the Commission should articulate in clarifying the limits of the evasions prohibition is that it is not retroactive. Some parties claim, for example, that all retiering undertaken after the enactment of the 1992 Cable Act is somehow an illegal "evasion" which can be required to be undone.[223] However, the statute clearly states that the Commission is to establish regulations to prevent evasions within 180 days of enactment.[224] Congress could have specified that regulations be promulgated sooner, as it did with other sections of the 1992 Cable Act, such as antitrafficking[225] and municipal ownership[226] (both effective sixty days after enactment), but it did not do so.

Therefore, actions taken by cable operators before April 3, 1993 cannot be considered evasions. Of course, the results of such actions would be fully covered by the statute's rate regulation provisions, so no premature or heightened level of scrutiny is required. For instance, if a cable operator retiered at any time prior to April 3, 1993, and the resulting rate for non-basic cable programming service falls outside the standards ultimately established by the Commission, subscribers will have the full 180-day period after the effective date of the rate regulations promulgated pursuant to the 1992 Cable Act to file a complaint. If the rate concerns basic service, it will be subject to the benchmark or other basic rate regulation on the effective date of the statute's rate regulation provisions. Therefore, consumers are protected without reading the evasions prohibition more broadly than Congress intended.

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[223]See, e.g., Austin, TX Comments at 73-75.

[224]47 U.S.C. § 543(h).

[225]Id. at § 537.

[226]Id. at § 541(c).

VIII. GRANDFATHERING OF RATE AGREEMENTS

In paragraphs 134 and 135 of the Notice, the Commission addresses the grandfathering of rate regulation agreements entered into prior to July 1, 1990.[227] The Commenters assert that this provision warrants equivalent treatment for all contractual agreements between cable operators and franchising authorities. The Commission should adopt the Commenters' suggestion that all rate regulation agreements in effect upon implementation of these rules should be treated in the same manner -- they should be grandfathered.[228] Such a rule would be consistent with the legislative history and the plain language of the statute,[229] as well as with Congress' purpose of exempting cable operators whose rates are already being regulated from the Commission's rate regulation rules.[230]

The Commenters' assertion that any rate regulation agreements, whether entered into before or after July 1, 1990, should be fully enforceable by either the franchising authority or the cable operator is further supported by the Austin, TX comments.[231] The Commission should recognize the complete enforceability of rate regulation agreements entered into between

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[227]47 U.S.C. § 543(j).

[228]See Fleischman and Walsh Comments at 150.

[229]See id. at n.220.

[230]See House Report at 89; Fleischman and Walsh Comments at 151; see also Austin, TX Comments at 77.

[231]Austin, TX Comments at 77 ("The Coalition also asks the FCC to recognize that the terms of rate agreements, whether entered into before or after July 1, 1990, are fully enforceable.").

franchising authorities and cable operators as valid rate regulations for cable systems that may not be subject to effective competition under the Commission's regulations. On the other hand, the Commission must reject the patently self-serving suggestion by Austin, TX that rate regulation agreements are enforceable only if they provide greater latitude to the regulators, but not less.[232] For example, any franchise agreement whereby the franchising authority and the cable operator have contractually agreed to forbear from rate regulation would be fully enforceable for the life of such contract.

IX. COLLECTION OF INFORMATION AND REPORTS ON AVERAGE PRICES

Some parties addressed the issue of collection of information for the purpose of administering and enforcing the Commission's rate regulation rules. Several of these parties agree with the Commenters that, if the Commission adopts a benchmark approach to rate regulation (and there is widespread support for a benchmark approach), there is no need to collect any cost of service information.[233] If there is no need to collect cost of service data, then none should be collected because Congress explicitly intended for the Commission to collect only that financial information that is "necessary to

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[232]Id. at n.46.

[233]See, e.g., Comcast Corp. Comments at 64; National Association of Regulatory Utility Commissioners ("NARUC") Comments at 6.

administer and enforce" rate regulation,[234] and to minimize the burdens on cable operators and franchising authorities.[235]

The United States Telephone Association ("USTA") contends that the cost data requested in Appendix A to the Notice is data that the Commission needs from systems of more than one thousand subscribers "whether or not the Commission adopts a benchmark or cost of service alternative."[236] The Commenters disagree -- cost data is simply unnecessary for a benchmark approach to regulation, and the Commission, therefore, should not waste time and effort in gathering and maintaining such information.[237] Moreover, cost data may be competitively sensitive and, therefore, not proper for public disclosure. Collection of such competitively sensitive information raises confidentiality concerns and creates an added administrative burden because such

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[234]House Report at 88; see also 47 U.S.C. § 543(g); Time Warner Comments at 86 & n.199; Fleischman and Walsh Comments at 153 & n.325; but see Austin, TX Comments at 41-42, 72 (Commission should collect revenue information and cost of service information).

[235]See 47 U.S.C. § 543(b)(2)(A).

[236]USTA Comments at 15.

[237]A clear distinction should be drawn between information required to be submitted annually by cable operators pursuant to Section 623(g) of the 1992 Cable Act, which should be no greater than absolutely necessary to implement the Commission's rate regulatory scheme, and information that a cable operator voluntarily submits in an effort to justify a rate that may fall outside the applicable benchmark. In this latter case, the scope of the information submitted is entirely within the discretion of the cable operator.

information must be screened from all publicly available records.[238]

While the collection of cost information is wholly inappropriate, the collection of revenue information such as that requested on the forms sent to selected systems on December 23, 1992 appears to be reasonably targeted to implementation of a benchmark rate approach.[239] Revenue information is necessary for administration and enforcement of a benchmark approach to regulation, and does not raise the same level of concern regarding disclosure because it is less competitively sensitive. However, any financial information collected by the Commission pursuant to Section 623(g) should not be made available to the public simply as part of the Commission's publicly available files or computer database, as suggested by NARUC.[240] Rather, the Commission should not disclose such information unless or until a rate controversy has matured to the point where disclosure of revenue information is essential.

The Commenters reiterate their assertion that the Commission should not rush to finalize its collection of information forms in the present proceeding, but should address the forms specifically in a further proceeding following implementation of

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[238]Congress specifically directed the Commission to seek to reduce the administrative burdens on the Commission as well as on cable operators, subscribers and franchising authorities. 47 U.S.C. § 543(b)(2)(A). The Commission, therefore, should not implement rules that it knows will create added administrative burdens on itself and other entities as well.

[239]See NARUC Comments at 6.

[240]See id. at 5.

the rate regulations that are the subject of this rulemaking so that the forms are no more comprehensive or burdensome than absolutely necessary for the effective administration of rate regulation.[241]

X. EFFECTIVE DATE

Section 623 of the Act requires the Commission to implement rules for the regulation of basic service rates, cable service rates and evasions by April 3, 1993 (180 days from the enactment of the 1992 Cable Act). The Commission correctly recognizes, however, that rules promulgated in accordance with Section 623 need not take full effect upon implementation.[242] The Commenters take this opportunity to stress the importance of allowing a reasonable amount of time between the implementation of the rate regulation rules and the effective date of those rules because the lack of data necessary to act in accordance with the rules dictates that the rules cannot become effective immediately upon implementation.[243]

NATOA contends that Congress intended for cable subscribers to receive rate protection no later than April 3, 1993,[244] and

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[241]See Notice at ¶ 123.

[242]See id. at ¶ 143; accord Fleischman and Walsh Comments at 155; Continental Comments at 74; Armstrong Utilities Comments at 37; Intermedia Partners Comments at 38; Cole, Raywid & Braverman Comments at 62; NCTA Comments at 84-87; TCI Comments at 69.

[243]See Fleischman and Walsh Comments at 155-56; Armstrong Utilities Comments at 37-38; Intermedia Partners Comments at 39; see also Austin, TX Comments at 61-62; TCI Comments at 69-70.

[244]NATOA Comments at 90.

the State of New Jersey Board of Regulatory Commissioners contends that rate regulation should take effect as of December 5, 1992.[245] Neither of these proposed effective dates is feasible,[246] nor is either in accordance with Congress' intent[247] or the Commission's own practice.[248] The Commission simply cannot put its forthcoming rate regulation rules into effect in the absence of certain critical information that will not even be available upon implementation of those rules on April 3, 1993. For example, the rate regulation rules cannot go into effect until after the as yet undetermined must-carry/retransmission consent election deadline, because the composition of the basic tier will not be known until such election has been made.[249]

Furthermore, the Commission will need to collect the information necessary for the administration and enforcement of

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[245]State of New Jersey Board of Regulatory Commissioners Comments at 28.

[246]See Armstrong Utilities Comments at 37 (it is not clear that the Commission will be able to set benchmarks for regulation by April 3, 1993); Intermedia Partners Comments at 38 (Commission may not be able to set benchmarks and other standards by April 3, 1993); NCTA Comments at 86 (Commission needs time to reconfigure systems and otherwise comply with new standards).

[247]See NCTA Comments at 86 (the 1992 Cable Act indicates that Congress contemplated that the date on which rules must be promulgated and the effective date of such rules would be different); see also 47 U.S.C. § 543 (1984) (Congress allowed a two-year transition period in which the Commission could fully implement new rate regulation rules).

[248]See Continental Comments at 74 (Commission's usual approach for implementing major policy and rules changes has been to allow time to phase in the new rules).

[249]See Armstrong Utilities Comments at 37-38; Intermedia Partners Comments at 38-39; Fleischman and Walsh Comments at 155.

the rate regulation provisions.[250] Such information cannot be gathered and evaluated until some time after April 3, 1993. If the Commission adopts a benchmark approach to rate regulation, and implements those rules on April 3, 1993, it must then begin steps to carry out the benchmark approach. This will include resurveying all cable systems, collecting and analyzing data on each system, and establishing a per-channel benchmark amount for each category of service. In order to establish fair benchmarks, the Commission will need to group similar cable systems together by gathering information on the following factors: activated channel capacity, density, age of plant, percent of aerial vs. underground cable, system size, MSO size, off-air broadcast availability and regional cost of labor index.[251] After all the necessary information is collected, many changes will have to be made in order to actually begin application of the new scheme.[252] Thus, the rate regulation rules cannot become effective until after the necessary information has been collected and changes have been made in accordance therewith.

Some parties have recognized the impossibility of making the rate regulation rules effective upon implementation by proposing the adoption of interim rules to govern while the Commission collects the data necessary to set rate levels in accordance with the new scheme.[253] The Commenters assert that interim rules

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[250]See 47 U.S.C. § 543(g).

[251]Fleischman and Walsh Comments at 53-56; Notice at ¶ 37.

[252]See Fleischman and Walsh Comments at 156.

[253]See Austin, TX Comments at 61-62; TCI Comments at 69-70.

would only add to the administrative burden of rate regulation because the Commission would have to adopt not one, but two sets of rules regarding the regulation of rates. The Commission should, however, recognize that the proposal of interim rules is further indication that rate regulation rules simply cannot become effective before allowing affected parties a reasonable amount of time to gather necessary information and make changes accordingly.

The Commenters urge the Commission to set January 1, 1994 as the earliest possible effective date for the rate regulation rules.[254] A January 1, 1994 effective date should allow adequate time for affected parties to make adjustments in accordance with the new regulatory scheme, including those changes that depend on must-carry/retransmission consent election.[255]

CONCLUSION

The Commenters urge the Commission to undertake carefully its obligation to impose rate regulation on the cable television industry. Regulations promulgated in this proceeding should

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[254]Accord Cole, Raywid & Braverman Comments at 62; see also TCI Comments at 70 (TCI proposes a two-stage transition process, involving interim rate regulation rules, whereby the "permanent" rate levels, based on new data, could be established by January 1, 1995). The Commenters acknowledge that, even without interim rules, the parties affected by the new rate regulation regime may need more time than the Commenters' proposed date of January 1, 1994 would allow. Thus, the Commenters stress that January 1, 1994 is the earliest possible date on which the rate rules should become effective.

[255]See NCTA Comments at 86-87 ("Commission should provide such an opportunity [for reconfiguration of systems] by making its rules effective only after a transition period that is sufficient to allow operators to determine how best to tier and price their systems").

ensure that cable operators, as well as consumers, are treated fairly. As competition and new technologies emerge in video programming distribution, it is in the interests of both the public and the cable industry to invest in new ideas and to offer new services in the years to come. However, if the Commission formulates rules that force the industry to be unresponsive to change, opportunities for improving cable service will be lost. The Commission needs to adopt rules to implement the 1992 Cable Act which do not hamper the cable industry's ability to improve and compete in the future.

Respectfully submitted,

Adelphia Communications Corporation
Arizona Cable Television Association
Cable TV of Georgia
Cable Video Enterprises
Coaxial Communications, Inc.
Hauser Communications
Mid-America Cable Television Association
Mt. Vernon Cablevision
Pennsylvania Cable Television Association
Prestige Cable TV
Star Cable Associates
Tele-Media Corporation
WestStar Communications, Inc.
Whitcom Investment Company

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Date: February 11, 1993