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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of	)	MM Docket 92-266
the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
Rate Regulation		

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

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SUMMARY

Time Warner reiterates in these Reply Comments its concern that overzealous cable rate regulation will both stifle the technological dynamism that has characterized the cable industry in recent years and impose unnecessary burdens on consumers and regulators alike. To avoid these unpropitious results, the Commission should exercise the substantial discretion accorded it under the 1992 Cable Act to establish a regulatory scheme for the basic service tier and cable programming services predicated on principles of simplicity, efficiency, and flexibility.

The great weight of the Comments eschews the adoption of complex regulatory mechanisms and urges the Commission to strive for simplicity in both the substantive and procedural aspects of its adopted rules. In this regard, most commenters counsel the rejection of rate of return regulation and the procedural accoutrements of such a complex, innovation-diminishing, investment-reducing regulatory scheme. The Commission should reject it, as well.

The record also reflects widespread support for the adoption of a regulatory framework appropriately calibrated to the particular costs and benefits of regulating a particular set of cable services and/or equipment. Toward this end, Time Warner reiterates its support for a framework that tracks the statutory scheme by establishing a comprehensive regulatory environment for the basic service tier (and related equipment), but only regulation by exception in its "outlier" approach for what

Congress intended to be a more competitive environment for cable programming services. Finally, the Act provides that premium services and equipment must be free from regulation entirely.

Lastly, Time Warner urges the Commission to remain flexible in its implementation of the rules promulgated in this proceeding. As many commenters noted, the cable industry is currently engaged in a very exciting period of growth, rapid innovation, and service expansion. Time Warner's recent announcement to embark on a major transformation of its cable networks into "full service networks" by providing a wide array of switched digital services to over 4,000 customers in Orlando Florida, is but one example of the technological dynamism permeating the cable industry. At the same time, fundamental structural changes are occurring within the industry every day. Just this week, for example, Southwestern Bell announced it will buy the cable TV franchises serving Montgomery County, Maryland and Arlington County, Virginia, marking the first time a Bell Operating Company has owned a cable franchise in the United States.

In addition, substantial reconfiguration of services, rate structures, and rate levels will be required as a result of the 1992 Cable Act and the Commission's implementing rules. Such reconfiguration will have significant effects on cable systems in many unforeseeable ways. Realistically, equilibrium will not return until after the industry has experienced regulation over some transitional time period. Accordingly, Time Warner strongly urges the Commission to adopt a flexible implementation approach to cable regulation, one that affords cable operators ample time to make the myriad changes necessary to bring their systems into compliance with the Commission's new rules and which does not inadvertently stifle the dynamic changes the industry is undergoing. This flexibility should also permit readjustment of the new rules if such adjustment is required.

Simplicity. Efficiency. Flexibility. Three principles that will go a long way toward establishing a regulatory framework that will best serve consumers, the cable industry, and regulators alike.

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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	))))))))	MM Docket 92-266

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys, hereby files its Reply Comments in the above-captioned proceeding[1] to develop regulations pursuant to which cable services may be regulated. Time Warner reiterates its support for a regulatory framework for cable service and equipment that champions simplicity, efficiency, and flexibility both in the substantive rules adopted and the procedures through which these rules are implemented.

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[1] Notice of Proposed Rule Making in MM Docket 92-266, FCC 92-544 (released December 24, 1992)("Notice").

I. EFFECTIVE COMPETITION

The 1992 Cable Act is intended to allow regulatory scrutiny of basic cable service rates only where effective competition does not exist. For this reason, Congress clearly established a preference for competition over regulation;[2] regulation is an imperfect mechanism which often produces side effects highly detrimental to consumers.

Time Warner urges the Commission to adopt regulations to implement the effective competition tests that prevent regulatory interference wherever effective competition exists. Cable operators often face competition for subscribers residing in multiple dwelling units ("MDUs") from SMATV and MMDS providers. Therefore, the Commission must recognize that "households" includes all dwelling units in MDUs that may receive subscription television service. The National Association of Telecommunications Officers and Advisors ("NATOA") suggests that MDU subscribers should not be counted as individual households if the landlord does not permit each resident to choose an alternative service.[3] However, the landlord's relationship to its tenants is not relevant to the penetration levels of the multichannel video programming service, since the level of competition for each MDU will be directly related to the number of potential subscribers in the building. Thus, each unit in an

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[2] Cable Television Protection and Competition Act, Pub. L. No. 102-385, § 3(a)(2), 106 Stat. 1460 (1992) ("1992 Cable Act" or "the Act") ("Preference for Competition").

[3] NATOA at 17, n. 25.

MDU must be counted as a "household" in applying the effective competition test, even if a single bill is sent where an MDU is billed on a "bulk" basis.

SMATV and MMDS providers are under no obligation to serve an entire franchise area and they typically focus only on MDUs. To allow the cable operator to compete in the MDU segment of its franchise area, the Commission should deregulate basic cable rates to MDU subscribers where rival providers meet the 50% and 15% thresholds as to the MDUs in the franchise area, even though basic rates to single family homes might continue to be subject to regulation.

Cable operators also face competition from DBS and TVRO providers and emerging competitors such as LMDS and video dialtone. These rival multichannel video programming distributors use different technologies than the cable operator to provide their service. To measure more accurately the "availability" of these competitors, the Commission must recognize that rival providers "offer" their services to a household when they are technically capable of providing service to that household. For the Commission to make accurate determinations of effective competition, it must require that MMDS, SMATV, DBS, TVRO, LMDS, and video dialtone providers report annual data of their subscribers and service areas so that the

Commission can make a sound determination with respect to the second test for effective competition.[4]

Some commenters, representing the interests of regulators who may lose their power where effective competition is found, seek to narrow the scope of the effective competition tests. The City of Austin, TX et al. recommend that the effective competition test apply only where there is "head-to-head" competition, i.e., deregulation would occur only as to those households which have a choice of available multichannel video programming distributors.[5] Because of the threat of competitive entry, however, the effective competition test should be satisfied when two or more multichannel video programming distributors operate in the same franchise area, but are not necessarily in head-to-head competition throughout the entire area.[6] Where two or more competing and independent providers are both technically able to provide service to at least 50% of the households in the area, any single provider is likely to implement competitive responses or it will eventually lose subscribers to other providers. Where the rival providers are able to achieve aggregate penetration levels greater than 15%,

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[4] There are presently no available services regarding the subscription levels and areas of service of these alternative distributors.

[5] City of Austin, TX et al. at 17. See also, NATOA at 14-16.

[6] This is consistent with the contestability theory which states that competitive threat of potential entrants can act as a deterrent on prices offered by existing firms. See United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964).

the cable operator will certainly implement appropriate competitive adjustments. Thus, "head-to-head" competition is not necessary for the statutory effective competition test to be satisfied.

NATOA and Municipal Franchising Authorities ("MFA") recommend that the 15% penetration rate not be based on an aggregate percentage of competitors in the franchise area.[7] This interpretation not only ignores the language of the statute,[8] it misconstrues the function of the effective competition test. Again, the test serves to measure whether competitive forces have deprived the cable operator of a sufficient amount of its potential business (more than 15%) such that the operator must make appropriate competitive adjustments. It is irrelevant whether one or many competitors are sustaining the rival force. Thus, Time Warner concurs with the Commission's tentative view in the Notice that a cumulative approach be used to measure the 15% penetration test.[9] Even rivals who compete

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[7] Municipal Franchising Authorities ("MFA") at 13; NATOA at 10-11.

[8] Communications Act § 623(l)(1)(B)(ii) (15% threshold is measured by the penetration of "services offered by multichannel video programming <u>distributors</u> other than the largest multichannel video programming <u>distributor</u>") (emphasis added).

[9] Notice at ¶ 9. A cumulative measurement is also called for by Commission precedent. <u>See</u> <u>Reexamination of Effective Competition Order</u>, 6 F.C.C. Rcd 4545, 4554 (1991) (In adopting "Multichannel Competitor Test" for the determination of "effective competition," Commission concluded that "the penetration of alternative delivery services should be calculated by combining the number of subscribers to <u>all</u> available alternative services ....") (emphasis added). This rule was subsequently codified in 47 C.F.R. 76.33(a)(2)(ii).

directly with cable operators acknowledge that the 15% threshold was intended as a cumulative measurement.[10]

Time Warner urges the Commission to adopt the presumption suggested in the Notice that when rivals meet the 15% and 50% thresholds, the rivals' programming offerings are "comparable" to that of the incumbent cable operator.[11] Some commenters insist that the Commission engage in a comparison of the types of programming[12] and the number of channels that rival distributors offer.[13] However, a comparison of the types of programming offered engages the Commission in a dangerous exercise of making content-based determinations. A comparison of the number of channels is unnecessary since the rival providers are servicing more than 15% of the households in the franchise area with multiple channels of video programming. Further, establishing a number of channels that is "comparable" may allow the rivals to control when the cable operator would be deregulated and may inhibit the expansion of programming on rival services.[14]

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[10] See, e.g., Liberty Cable at 15; Wireless Cable Association International, Inc. at 11. The Consumer Federation of America ("CFA") concedes this point, as well. CFA at 114.

[11] Notice at ¶ 9.

[12] See City of Austin, TX et al. at 19; NATOA at 11.

[13] CFA at 116, n. 101; National Association of Broadcasters ("NAB") at 12-13; NATOA at 11-14.

[14] In addition, NATOA's suggested test for "comparability" is itself flawed. It proposes that a multichannel video program distributor's programming is "comparable" only where there is a "20 percent or less difference in the number of channels of programming offered by the competitor." NATOA at 14. In a video-on-demand environment, however, this test becomes

Lastly, Time Warner urges the Commission to implement the statutory language in the first test for effective competition that the entire franchise area is the basis for determining if the cable operator has less than 30% penetration of households.[15] NATOA states that the Commission should consider only the portion of the franchise area that is actually served by the cable operator.[16] This interpretation is contrary to the express words of the statute.[17] In franchise areas where the cable operator achieves less than 30% penetration, it is apparent that consumers have not placed a high demand on cable service. In such cases, a cable operator does not build throughout its franchise area because the demand for service in the unbuilt areas does not justify the cost of providing service.

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nonsensical, since in such an environment one channel may suffice to give consumers access to a broad array of programming.

[15] Communications Act § 623(l)(1)(A).

[16] NATOA at 14. See also, City of Austin, TX et al. at 18.

[17] In addition, the statute aggregates penetration levels of cable operators in the same franchise area. Thus, the effective competition test would not be satisfied in the situation posited in the Comments of the City of Austin, TX et al. at 18, n. 20, since three operators, each with 89% penetration in one third of the franchise area, would aggregate to a total of 89% penetration.

II. REGULATION OF THE BASIC SERVICE TIER

A. Regulation of Rates for the Basic Service Tier

1. The Record Broadly Rejects Rate of Return Regulation

Time Warner demonstrated in its initial Comments that the costs and administrative burdens attendant to rate of return regulation, the fact that such a regulatory approach would stifle the technological dynamism of the cable industry, and the great weight of economic learning, Commission precedent, and 1992 Cable Act legislative history categorically disqualify rate of return as a regulatory model for basic cable rate regulation.[18] Not surprisingly, the great weight of comments supports this view.[19] Time Warner reiterates its objection to rate of return regulation and urges the Commission to continue to abjure any such regulatory models whose primary effect will be to derail the 1992 Cable Act's goal of reducing the administrative burdens on cable subscribers, cable operators, franchising authorities, and the Commission.[20]

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18 Time Warner at 14-19. Time Warner's recent announcement to transform its cable networks into "full service networks" by providing a wide array of switched digital services to over 4,000 customers in Orlando Florida, is but one example of the technological dynamism permeating the cable industry. "Time Warner Plans Electronic Highway," Multichannel News, February 1, 1993, at 1.

19 See, e.g., Cablevision Industries at 12-14; Continental at 26; Cox at 8-11; NATOA at 44-46; NCTA at 11-15.

20 Communications Act § 623(b)(2)(A).

2. The Record Broadly Supports a Benchmark Approach

In its initial Comments, Time Warner fully endorsed the Commission's tentative conclusion to utilize a benchmark approach for basic service tier regulation.[21] Time Warner's Comments and the accompanying economic analysis of cable television regulation done by Dr. Daniel Kelley of Hatfield and Associates, Inc. ("Kelley") pointed out that benchmark regulation would be more efficient, simpler, and more certain than rate of return regulation, while posing less of a threat to the technological dynamism of the flourishing cable industry.[22] An overwhelming majority of the initial comments supports a benchmark approach, as well.[23] At the same time, Time Warner noted that actual application of any benchmark will pose inevitable and nontrivial adjustment problems which, in turn, will require further adjustments.[24] Because of these and other potential measurement problems, Time Warner deferred comment on the benefits of one benchmark over the other until the industry-wide data submission, and the Commission's proposed uses of it, could be reviewed in detail.[25] Time Warner reiterates its concerns regarding the potential measurement pitfalls of benchmark regulation for the

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21 Time Warner at 21-25.

22 Id. at 22 and Kelley at 20.

23 See, e.g., Cablevision Industries at 14-30; Continental at 27-33; Cox at 11-22; NATOA at 40-46; NCTA at 15-26.

24 Time Warner at 23 and Kelley at 23-31.

25 Time Warner at 23.

basic service tier and once again respectfully reserves comment on any specific benchmark approach. We understand that it is the Commission's intention to make available to all interested parties in the very near term the data collected pursuant to the Commission's recent survey of cable systems. Time Warner commends the Commission on this decision and eagerly awaits the opportunity to review this data before advancing its recommendations on a specific benchmark approach.

3. Responses to Specific Benchmark Proposals

In the discussion below, Time Warner addresses specific benchmark proposals advanced by the Consumer Federation of America, the National Association of Broadcasters, and the City of Austin, TX et al. As a preliminary matter, Time Warner reiterates its support for the Notice's tentative conclusion that for rates which exceed whatever benchmark is ultimately adopted, there must also be an opportunity for cable operators to justify such rates.[26]

At the same time, Time Warner rejects the suggestions made by NAB and others that consumers or the franchising authority should be able to show that a cable operator's cost of service is lower than the benchmark as a basis for reducing that operator's

[26] Notice at ¶ 33 (concluding that cost-of-service regulatory principles could have a secondary role for cable operators seeking to justify the reasonableness of rates that do not meet the primary benchmark standard). See also Time Warner at 25.

rates.[27] The purpose of the Notice's tentative conclusion is to avoid regulation of rates which amounts to a taking of the cable operator's property under the fifth amendment.[28] The Commission should not allow this justifiable, indeed necessary, purpose to be turned on its head against cable operators. This would not only introduce into the regulation of basic cable rates, on a wide scale, the very burdens, complexities, and negative consequences of rate of return regulation which the Commission has correctly striven to avert, it would also create incentives for otherwise efficient providers of cable service to reduce their levels of efficiency. Any price control program that is broadly applicable will allow some regulated firms to earn greater returns than others, as demonstrated by the Commission's price cap scheme for local telephone companies. If the Commission were to allow subscribers or franchise authorities to reduce still further the prices charged by more efficient providers of cable service, notwithstanding their compliance with the established benchmark, it would encourage these firms to operate less efficiently, thereby raising their costs to justify their prices. Such a result would plainly be at odds with the fundamental purposes behind the 1992 Cable Act.

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[27] See, e.g., Coalition of Municipal and Other Local Governmental Franchising Authorities at 30, 39 ("COMOL"); Appendix to Comments of NAB at n. 10.

[28] Notice at n. 66.

a. <u>NAB's Benchmark Proposal is Unworkable</u>

The NAB endorses a so-called "cost-based benchmark" for capital costs. Close examination of NAB's approach demonstrates that the proposal is benchmark regulation in name only. What the NAB has really offered the Commission are the standard, textbook principles for rate of return regulation.

From a <u>practical</u> point of view, there are severe measurement difficulties associated with identifying "appropriate" capital cost surrogates. Looking at the Strategic Policy Research ("SPR") "Technical Appendix," there are obvious sources of controversy over virtually every line item. For example, "New Build Expenditures" would be a measure of the replacement cost of a system. According to SPR, "benchmarks should be developed for multiple categories defined in terms of factors that significantly affect capital costs (e.g., number of channels, whether the system has addressable convertors, amount of fiber, whether cable is aerial or buried, etc.)."[29] Other factors that might be considered include terrain, local zoning requirements, climate, local labor costs, etc.

Attempts to forecast precise capital costs on this basis will inevitably lead to many challenges of the estimate by cable systems, thus requiring the regulator to do a specific system cost-based inquiry in any event. But the New Build Expenditures are only the starting point of the NAB methodology. An annual depreciation and annual return to capital must also be estimated.

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[29] SPR at 12.

Both the Commission and state regulators expend significant resources to establish appropriate depreciation rates in the telephone industry. Establishing a depreciation rate requires an estimate of both future net salvage value and the average remaining life of the asset. The average remaining life is, in turn, a function of the projected life of the assets and the survival distribution of the plant. These are obviously complicated issues requiring a great deal of analysis.

Estimating an appropriate return to capital is at least as complex a process. The Commission's CC Docket No. 89-624 rate of return prescription proceeding was initiated in December of 1989 and not completed until September of 1990, at which point the decision was appealed. As Time Warner noted in its initial Comments, conducting such a proceeding for each cable system subject to regulation would consume an enormous amount of resources.[30]

In addition, NAB's analysis wholly ignores a myriad of additional costs, most notably intangible assets. While intangible assets present monumental measurement difficulties,[31] this is no reason to disregard them. NAB's proposed cost-based

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[30] See Kelley at 18-19.

[31] One commentator has noted that "the measurement of the replacement cost of intangible assets is an enormous task that requires gathering a massive amount of data and using sophisticated economic analyses to arrive at an estimate of replacement costs.... To design the appropriate surveys, gather the data, develop the economic analysis, and then analyze the data would take years to complete." Grossman, On the Misuse of Tobin's Q to Measure Monopoly Power, 1990, filed as Attachment to Comments of NCTA in MM Docket 89-600, at 11.

benchmark does just this and, not surprisingly, comes up with ludicrously low "average" basic rates based on grossly underestimated cost figures.

The bottom line is that the NAB "cost benchmark" is really not a benchmark at all. Application of the concept will quickly degenerate into something that looks very much like the rate of return regulation that most commenters strongly reject.

Finally, NAB's Technical Appendix is littered with errors and omissions which further distort its calculations and recommendations. As an initial matter, Time Warner seriously questions the level of credibility to be afforded a study whose sample results are predicated on plainly misrepresentative, non-capital cost estimates ranging from $.69 to $4.56 per subscriber/per month -- a range of cost figures so wide as to be inherently incredible. Numerous other basic flaws are observable in the NAB Technical Appendix. To identify just a few:[32]

1) NAB's figures for non-capital costs per subscriber for Comcast and Falcon are simply wrong. While the estimated non-capital costs shown for these two multiple systems operators represent <u>regional</u> costs, in the "Basic Subscribers" column, NAB's consultants have indicated the number of total subscribers on a <u>system-wide</u> basis. Thus, whereas NAB's consultants report 2,509,000 subscribers for the Comcast/Philadelphia system, the actual number of Comcast subscribers in this region is closer to 155,000. The Falcon figures are similarly mismatched. The "Basic Subscriber" figure

[32] Time Warner does not concede the accuracy of the figures not addressed here. The bottom line is that the readily observable errors and inaccuracies render the entire effort incredible.

for Falcon is nearer to 100,000, not 892,000 as the Technical Appendix indicates. Of course, once these figures are corrected, the per cost/per subscriber column increases dramatically;

2) Falcon's figures are further skewed in that SPR conveniently chose to treat the unavailable figures for "Administrative Expense" as the equivalent of no expenses. Wouldn't it be nice if all corporate expenses could be so handily elided;

3) The Technical Appendix is a trifle stingy, to say the least, in its estimated annual return of 8%, especially in light of the substantially higher inflation-adjusted returns available to the entrenched local exchange monopolies.

In the end, NAB's benchmark proposal is as flawed as it is complex. If nothing else, NAB's benchmark scheme is instructive in that it counsels its own rejection. Plainly, the Commission should not consider adopting such a cost benchmark to be utilized by all local franchising authorities when the very designers of the approach -- professional consultants operating in their field of expertise -- have gotten it so wrong.

On a broader level, the Commission must keep in mind that the obviously low rates that NAB recommends are motivated by the strategic interaction between the NAB and the cable industry. If many cable systems are not allowed to recover their cost of capital due to overly constraining regulation, cable companies will not be able to invest in systems that provide increased entertainment options for consumers. In other words, the NAB would face a reduced competitive threat from cable companies, and consumers would suffer as a result. It is also interesting to note that the NAB effort is partially based upon work done in the course of their consultants' representation of another set of firms with strategic interests in hamstringing cable companies -- the local telephone companies.

b. CFA's Benchmark Proposal is Unworkable

CFA's "global formulaic approach" is severely flawed. The failure of the benchmark to reflect large increases in significant programming input costs or capital operating expenditures designed to improve quality is a fundamental error. A simple PPI inflator or linear historical projections are plainly inadequate for cable services, given the large increases in costs which were documented in Time Warner's initial Comments.[33]

This error is exacerbated by the fact that CFA proposes to escalate base year rates without adjusting for increases in the number of channels. The basic service rate would be established by escalating the base year monthly rate by the PPI and then dividing by the number of channels available in 1993.[34] The result is that the CFA benchmark formula provides absolutely no compensation for cable systems that have incurred expenses to expand and modernize their systems. Only by comparing per channel rates in the base period with per channel rates in 1993 can the Commission avoid this inequitable result.

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[33] See Time Warner at 44-45 and Kelley at 26 and Exhibit II.

[34] See CFA at 91.

In addition, CFA completely ignores the disparate economic and public interest factors that distinguish basic and cable programming service regulation and which justify differing treatment for each. Such improper conflation of the two levels of service has skewed CFA's benchmark accordingly.

Finally, CFA's description of pre- and post-deregulation performance in the cable industry is also seriously flawed.[35] Much of this discussion is a poor attempt at denigrating the good performance the cable industry has demonstrated over the past decade.[36] CFA is nevertheless forced to conclude that "projecting out the pre-deregulation trend leads us to expect that there would be about 51.3 million subscribers by 1992, compared to the 55.5 million who actually subscribed in 1992."[37] This fact can be interpreted in no other way but that consumers have in fact <u>benefited</u> from cable industry performance in the post-deregulation period.

CFA's implicit conclusion that the cable industry performed better between 1975-1981 due to regulation is simply incorrect. First, because of programming deregulation, it is factually erroneous to say that the period 1975-1981 was one of "thorough regulation."[38] The Commission had taken substantial action to deregulate all but the basic service tier over this time

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35 CFA at 41-45.

36 <u>See</u> Kelley at 3-5.

37 CFA at 51.

38 <u>Id.</u> at 47.

period.[39] Second, the comparison to later periods is on the basis of simple percentage changes. It is obvious that as the industry grows, percentage rates of growth will fall as the base on which percentages are measured rises.

CFA's mischaracterization of the cable industry's performance during the pre- and post-deregulation periods, its improper conflation of the basic tier and cable programming service frameworks, and its willingness to ignore wholeheartedly the significant programming costs incurred by the expanding cable industry, all lead to a confusing, unrepresentative, and unworkable benchmark approach that the Commission should decidedly avoid.

c. Austin, TX et al.'s Proposal is Unworkable

The rate regulation proposal advanced by the City of Austin, TX et al. repeats many of the shortcomings of the proposals of NAB and CFA. Most fundamentally, the Coalition has invited the Commission to engage in cost-of-service regulation, contrary to the record here and the Commission's own views.

Like CFA, the Coalition wholly disregards how cable service has changed during the past 8 years; rather, it seems particularly enamored of low rates for low rate's sake, without any regard to service quality.[40] Like NAB, the Coalition

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[39] See Community Cable T.V., Inc., 95 F.C.C.2d 1204 (1983).

[40] The Coalition's failure to appreciate the subscriber benefits of deregulation is most evident in its proposal to regulate the price charged for cable programming service as

proposes a regulatory scheme in the form of a benchmark, but one that requires in effect rate of return proceedings for a number of system classes.

Nor do the Coalition's consultants provide any guidance to the Commission as to how to go about implementing their proposal. They simply assert that some national benchmark norm for replacement costs in each system category would be the best way to calculate the rate base.[41] Such simple assertions, however, belie the level of exertion required to implement their cost-based scheme.

In addition, the proposed interim rates are themselves frivolous given the contrivances used to derive them. In the first of four methods employed by the Coalition, it used estimates of the costs per channel for a "sample" of only thirteen cable systems. It is impossible to determine how representative these cable systems are because their identities are not disclosed. Worse yet, the systems were not chosen randomly by the authors' own admission. And most extraordinarily, the Coalition conveniently excludes the highest

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rigidly as that for basic service. As observed <u>supra</u>, such conflation of these disparate regulatory frameworks will reduce the quality of cable service and consumer benefits, as well.

[41] Moreover, like NAB, the Coalition's economists exclusively focus on estimating replacement costs for <u>tangible</u> assets, while wholly ignoring <u>intangible</u> assets. In the face of such an error, it is not surprising that the "competitive" rates they subsequently calculate are so low. <u>See</u> Exhibits B-4 and B-7.