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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

REPLY COMMENTS OF THE STATE OF HAWAII

The State of Hawaii hereby submits reply comments in the above-captioned proceeding.

Pursuant to the Hawaii Cable Communications Systems Law, Chapter 440G, Hawaii Revised Statutes, the State has exclusive jurisdiction and responsibility for the supervision and regulation of cable systems within Hawaii. The Hawaii Cable Law directs the Director of Commerce and Consumer Affairs to undertake the responsibilities as set forth in the statute. The Director has designated the Cable Television Division within the Department to carry out these functions.

The Cable Television Division oversees seven cable systems, which have a total of about 323,000 customers. This represents a statewide penetration rate of over 76% of all homes passed. Hawaii cable systems range in size from Garden Isle Cablevision, with about 6,300 subscribers, to Oceanic Cablevision, the 8th largest cable system in the United States, with over 227,500 subscribers.

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While the State has not had an opportunity to review in detail all of the voluminous comments filed to date in this proceeding, it has had an opportunity to review the comments of a number of parties, including both cable operators and franchising authorities, and their trade associations. These reply comments are limited to the issues raised by the Commission in its Notice of Proposed Rulemaking as well as matters raised by the various commenters that have a fundamental and unique impact on the State of Hawaii, its cable subscribers or its cable operators. With respect to other issues raised by the Commission and various commenters, the State reserves offering comments pending further Commission delineation of its overall rate regulation approach.

The State wishes to comment primarily on the potential impact of the Commission's proposed basic service tier and cable programming service rate regulation benchmarking approach on Hawaii. Both franchising authorities (See, for example, Comments of NATOA et al) and cable operators (See, for example, Comments of NCTA), including the parent companies of cable operators doing business in Hawaii, embraced the benchmark approach. We note, however, that cable industry support for benchmarking was conditioned on the Commission permitting cable operators to justify individual system rates above a predetermined benchmark through use of cost-of-service ratemaking principles (as proposed by the Commissioner). See, for example, Comments of NCTA, Time-Warner and TCI.

The State shares the concern that in individual circumstances a benchmark approach will not necessarily reflect accurately reasonable basic service tier or cable programming services rates. Cable commenters were understandably concerned about circumstances in which a benchmark produces rates that are unreasonably low (and conceivably confiscatory) when applied to a particular system. However, in

other circumstances benchmarking can also result in rates that are unreasonably high and do not reflect a reasonable cost to the consumers for the service provided.

The State is concerned that any national or even regional benchmarking system may produce anomalous results when applied to the unique circumstances of cable operators doing business in Hawaii. The State believes strongly that a system that could result in rates that are either unreasonably high or low in Hawaii seriously disserves the State, its citizens, and its cable operators.

The national cable data available to the State does not provide enough information for the State to determine precisely how different Hawaii is when compared to national cable norms. The State is aware that cable penetration throughout Hawaii is the highest in the nation. Moreover, Hawaii is well aware, because of its physical remoteness from the mainland United States and other factors which make the State unique, that national and regional business and commerce data are, for the most part, generally inapplicable when applied to Hawaii. This Commission has often recognized Hawaii's "uniqueness" by taking special care to tailor federal telecommunications policies to take into account the State's special circumstances.

Because any benchmark approach when applied to Hawaii may be grossly unfair to either (or both) Hawaii cable subscribers or Hawaii cable operators, the State believes the Commission must permit the State, its citizens, and its cable operators the option of resorting to cost-of-service ratemaking principles on an individual system basis where a national or regional benchmark approach produces rates that are either unreasonably high or low. We wish to make clear that the State is <u>not</u> seeking an exemption from any proposed benchmark system of cable

regulation. Rather, the State asks merely that the Commission permit it, its citizens, and its cable operators to be able to utilize cost-of-service ratemaking principles on an individual system basis where benchmarks as applied to Hawaii produce anomalous results.

The State also wishes to make clear that it is not opposed to the attempt to develop a benchmark approach which streamlines the regulatory process. The Commission is to be commended for trying to develop a streamlined process which will serve the public interest by reducing the cost and complexity of regulation under the Cable Act of 1992. However, neither cable subscribers nor cable operators should be saddled with an approach that in a particular situation produces inequitable results. Such a circumstance is at complete odds with the clear legislative intent of the Cable Act of 1992. For example, the House Report states at page 79 that the legislation "is intended to protect consumers against specific instances of unreasonable rates for subscription to cable programming services." House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) (emphasis added).

Of course, the State hopes that the Commission develops a benchmark approach which works fairly for both Hawaii cable subscribers and cable operators avoiding the necessity of moving to cost-of-service ratemaking principles on an individual system basis. If the benchmarking approach accurately reflects Hawaii conditions, there will be no need to resort to cost-of-service ratemaking principles on an individual system basis. Conversely, where the State, its citizens or its cable operators are frequently compelled to opt to use cost-of-service ratemaking principles on an individual system basis, this is a clear indication that the Commission should revise its benchmark approach to more accurately reflect Hawaii conditions.

The State believes strongly that there is absolutely no legal justification for the arbitrary proposition put forth by some commentators that only some interested parties and not others (either cable operators or franchising authorities, but not both) should be permitted to utilize cost-of-service ratemaking principles to correct otherwise capricious situations. Even handed and rational decision making, as well as the mandate of the Cable Act of 1992, require that any option to use cost-based regulation must be available to all affected interests.

Hawaii respectfully submits that under the Cable Act of 1992 the Commission is compelled to provide the State, its citizens and its cable operators the option of utilizing cost-of-service ratemaking principles on an individual system basis.

The Conference Report to the legislation makes clear that the Cable Act of 1992 follows the rate regulation approach embodied in the House bill, H.R. 4850, with only a few enumerated changes. H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 62 (1992). While the House Report encourages the Commission to develop streamlined regulation procedures and indicates that it did not intend for the Commission to replicate Title II regulation, the House Report makes crystal clear that the Commission cannot establish either a basic service tier or cable programming services regulatory process which ignores the question of cost.

Indeed, the House Report at page 83 states that its rate regulation section "requires a 'fully allocated' costing methodology across all cable services." (emphasis added) At page 82, the House Report states: "The formula the Commission shall establish pursuant to this section must take into account the direct costs of obtaining, transmitting, and otherwise providing signals required on the basic tier and the

portion of the properly allocated joint common costs to the cable operator incurred in providing the basic service tier."

While the Conference Report altered the House approach in that it decided to require the Commission to develop multiple formulas or other mechanisms rather than a single formula to establish a maximum rate, the Conference Report makes clear at page 63 that the Commission must develop an approach at least consistent with cost based principles. ("The conferees believe that the basic cable tier should not be required to bear a larger portion of the joint and common costs than what would be allocated on a per channel basis.")

Thus, the Commission cannot adopt a benchmark system of regulation that deprives any interested party from making a cost-based assessment of the reasonableness of basic service tier or cable programming services rates on an individual system basis.

Respectfully submitted,

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February 11, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1993, an original and ten (10) copies of the Comments of the State of Hawaii In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266, were sent by Federal Express to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Jasmine Fujiwara Uehara

Jasmine Fujiwara Uehara
Acting Cable Administrator