EX PARTE OR LATE FILED ORIGINAL RECEIVED

U.S. SMALL BUSINESS ADMINISTRATION FILE FEB 23 1993
WASHINGTON, D.C. 20416

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

Motion of the Chief Counsel for Advocacy of the
United States Small Business Administration
for Leave to File Comments Out of Time

The Office of Advocacy respectfully requests leave for the Federal Communications Commission (Commission or FCC) to file the attached comments formally in this proceeding for the following reasons:

1. Filing of comments was not possible until the appointment of an Acting Chief Counsel. An Acting Chief Counsel did not take office until February 18, 1993.

2. The Office of Advocacy, as the designated representative of small businesses before federal agencies, believes that these

No. of Copies rec'd 0+4
List A B C D E

comments would prove valuable to the resolution of the issues raised in this proceeding.

3. Acceptance of the comments will neither prejudice any party nor delay resolution of this proceeding.

Pursuant to 47 C.F.R. § 1.46, and for the foregoing reasons, the Office of Advocacy requests that the FCC accept the attached document as a formal comment letter.

Respectfully submitted,

Doris S. Freedman, Esq.
Acting Chief Counsel

Barry Pineles, Esq.
Assistant Chief Counsel

RECEIVED

FEB 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Notice of Proposed Rulemaking

Doris S. Freedman, Esq.
Acting Chief Counsel
for Advocacy
Office of Advocacy
Barry Pineles, Esq.
Assistant Chief Counsel
Office of Advocacy
United States Small Business
Administration
409 3rd Street, S.W.
Washington, DC 20416
(202) 205-6532

February 23, 1993

EXECUTIVE SUMMARY

Pursuant to the Cable Television Consumer Protection and Competition Act (Cable Act), the Federal Communications Commission (FCC or Commission) issued a notice of proposed rulemaking to consider various regulatory alternatives for the regulation of rates for basic and cable programming services. The Commission understands that regulations issued pursuant to the 1992 Act may impose undue burdens on small businesses. The Commission prepared an initial regulatory flexibility analysis pursuant to the Regulatory Flexibility Act.

The Office of Advocacy concurs with the Commission's conclusion that the proposed rules may have a significant economic impact upon a substantial number of small entities. The Office of Advocacy commends the FCC for preparing a regulatory flexibility analysis and seeking ways to alleviate the burdens faced by small businesses.

One potential method for lessening the potential regulatory burdens on small businesses is to interpret the 1992 Act as prohibiting the regulation of basic service rates unless the local franchising authority has requested certification pursuant to the Cable Act. Thus, a failure by a franchising authority does not represent a lapse in regulatory oversight; rather, it

demonstrates that the local franchising authority is satisfied with the rates charged for basic service. Since many local franchisors are unlikely to seek certification, the potential regulatory burdens on small operators will be substantially reduced if the Commission adopts this interpretation of the Cable Act.

The Office of Advocacy agrees with the Commission's tentative conclusion that cost-of-service rate regulation is inappropriate for regulating rates of basic or cable programming services. The Office of Advocacy supports the adoption of benchmark formulas tiered to various system characteristics. Adjustments for inflation must be based on costs faced by similarly situated entities such as electric utilities or local exchange carriers. For cable programming services, the benchmark formulas also must take account of program acquisition costs, preferably through a cost pass-through akin to those used by the Federal Energy Regulatory Commission in its regulation of natural gas pipelines and bulk electric power supplies.

Smaller multiple operator systems may face significantly greater paperwork burdens in meeting the benchmark formula test for cable programming service because they would have to calculate the benchmark for each individual system. A less burdensome alternative would permit these systems to demonstrate that, on a system-wide basis, they do not receive excessive

profits. The failure to find excessive profits is analogous to finding that the rates charged for such services are not unreasonable.

Complaints filed with Commission concerning unreasonable rates for cable programming services (the Cable may make distinction between reasonability of basic cable rates and unreasonability of cable programming service) must adhere to fairly strict, albeit understandable, guidelines. However, once the determination concerning the reasonability of cable programming service rates has been made for a particular operator, a much more stringent test must be invoked for the Commission to conclude that cable programming services are unreasonable. Specifically, the complainant must demonstrate, either with a letter from the cable operator or local franchisor, that the FCC has not made a determination on the facts alleged by the complainant. Failure to do so will result in an automatic dismissal of the complaint with prejudice.

The Commission recognizes and the Office of Advocacy agrees that the proposed rules may impose significantly greater paperwork burdens on small businesses. At least in the initial phase of this proceeding, i.e., the one to develop the appropriate rate formulas, the Office of Advocacy suggests that the FCC obtain as much information as possible from as many systems as possible. For subsequent reporting activities, the

paperwork burdens must be tiered to the requirements of the benchmark formulas finally adopted by the Commission. This will ensure that small systems only face information collection requirements germane to the appropriate benchmark formula. This tailoring process is not designed to limit the FCC's options in selecting tiers for information collection requirements. Rather, the FCC must keep in mind the ultimate objective -- cost-effective rate regulation.

Finally, the Office of Advocacy recommends that the Commission delay the effective date of the regulations until all petitions for reconsideration have been addressed. This will give cable operators, the FCC staff, and local franchising authorities only one regime for implementing the rate regulation aspects of the Cable Act.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Notice of Proposed Rulemaking

I. *Introduction*

On October 5, 1992, the United States Congress, pursuant to Article I, § 7, cl. 2, overrode a veto and enacted the Cable Television Consumer Protection and Competition Act (Cable Act or 1992 Act) into law.[1] The Cable Act was passed to reduce the perceived market power of cable operators.

Implementation of the 1992 Act requires extensive rulemaking by the FCC.[2] The instant rulemaking, In the Matter of Implementation of the Cable Television Consumer Protection and

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] The 1992 Act mandates approximately 25 separate rulemakings on issues from rate regulation to access by wireless cable operator to cable programming.

Competition Act of 1992 -- Rate Regulation, MM Docket No. 92-266 (December 24, 1992) (NPRM), effectuates that portion of the 1992 Act that permit both the Federal Communications Commission (FCC or Commission) and local franchising authorities the power to regulate the rates of cable operators.

II. *The Statutory Forest*

Prior to 1984, rates were negotiated between the franchising authority and the operator. The problems associated with this process, as well as promises made in an attempt to obtain a franchise, created inordinate problems for the operators and the local communities. Congress attempted to ameliorate this problem with the enactment of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-59 (CCPA or 1984 Act).

The 1984 Act prohibited the regulation of rates unless the local cable operator did not face effective competition. The Commission was authorized by the CCPA to determine what constituted effective competition. The rules adopted by the FCC ensured that most cable operators would not be subject to rate regulation.

This alleviated the problems operators faced with their local franchising authority. More significantly, it provided operators with the financial wherewithal to increase channel

capacity which led to the rapid growth of new and diverse cable programming.

While cable operators were increasing channel capacity and delivering new programming, they were also increasing rates. Consumers became alarmed at the rapid increase in rates and a concomitant deterioration of service.[3] The hue and the cry of the consumer was heard by Congress and they commenced action in 1990 with the introduction of numerous reregulatory bills.[4]

The problems faced by consumers did not elude the attention of the Commission. In 1990, the Commission, as permitted by the CCPA, initiated a rulemaking to consider whether its standard for effective competition should be modified.[5] The Commission

---

[3] The Office of Advocacy believes that the vast majority of cable operators provide good service at reasonable rates. The Office of Advocacy does not deny that some cable operators may have taken advantage of the freedom granted in the CCPA. However, the Commission should not use the actions of a few cable operators to force rate rollbacks.

[4] The Small Business Administration expressed disapproval of the reregulatory efforts because they would adversely affect small cable operators. The Office of Advocacy still maintains that rate regulation, irrespective of its good intentions, is a panacea that will exacerbate the situation.

[5] In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, Notice of Proposed Rulemaking, MM Docket No. 90-4. The Office of Advocacy filed extensive comments on that proposed rulemaking and noted the potential adverse burden increased regulation may have on small cable operators.

issued final rules in 1991 modifying the standard and potentially imposing rate regulation on more cable companies.[6]

The efforts of the FCC failed to dissuade Congress from action. In 1991, cable bills were enacted by the House and final action on the Senate floor was delayed by opponents of the bill. Congress, showing unusual legislative fortitude, revisited the issue in 1992. Bills passed both the House and the Senate and the Cable Act was enacted into law over a veto.

The 1992 Act authorizes the regulation of basic cable service[7] in the absence of effective competition. Effective competition exists when the penetration rate for cable service is less than 30 percent,[8] or an unaffiliated multichannel video

---

[6] Subsequent events bear out the increase in rate regulatory activity. However, most of the operators subject to such regulation are small operators in rural areas. Ironically, the FCC and General Accounting Office surveys show that these firms are the ones that were least likely to significantly raise rates. Thus, the Commission (although somewhat constrained by the CCPA) fixed a problem that did not need repair.

[7] Basic cable service is the transmission of local over-the-air broadcast signals, public access channels, and any government owned channels.

[8] Penetration rates refer to the number of households actually receiving cable service in relation to the total number of households passed by the cable system. On a national basis, the penetration rate is about 60 percent. Cable systems can serve close to 93 percent of all households in the United States.

program provider offers comparable service to 50 percent of the community and has a penetration rate of at least 15 percent.[9]

The Cable Act mandates the FCC to develop rate regulations standards for utilization by local franchising authorities. The standards must ensure that the rates for basic cable service are reasonable and at a level comparable to that of rates for systems facing effective competition.

Local authorities may not exercise rate regulation authority until they obtain a certification from the FCC that demonstrates their capacity to implement the Commission's basic service tier regulations. The Commission also has the authority to reject applications for certification or revoke those that have been issued if the franchising authority is no longer able to comply with the FCC's regulations.

Congress recognized that the regulation limited to basic service would not help consumers obtain relief from rising cable rates. Many cable operators simply would tier their services so that only basic services would be carried on a tier subject to regulation.[10] Few consumers would purchase this type of basic

---

[9] The penetration rate for a competing provider does not apply if the competitor is the local franchising authority. The 1992 Act permits local franchising authorities to own and operate cable systems.

[10] The 1990 House bill was limited to this type of regulation.

service and the cable rates for the vast majority of consumers still would be unregulated. To eliminate that potential, Congress mandated that the Commission adopt regulations and procedures to determine whether rates for cable programming services[11] would be unreasonable. After making a determination of unreasonability, the FCC could roll back the unreasonable rates.

Congress recognized that rate regulation may have some adverse consequences on small cable companies and local franchising authorities. Congress requested that the FCC should consider alternatives that alleviate these burdens for cable systems with less than 1,000 subscribers.[12]

The 1992 Act also provides for a number of miscellaneous provisions related to rate regulation: 1) grandfathering of rate agreements; 2) negative option billing;[13] 3) rates for equipment

---

[11] Cable programming services are all cable programming services other than those programs that constitute basic service. The definition excludes those programs sold on an individual basis such as Showtime, HBO, The Movie Channel, or pay-per-view events.

[12] Little useful legislative history exists on why Congress selected 1,000 subscribers. The House bill had a 500 subscriber limit and the Conference Committee raised that to 1,000 but the final report does not explain the rationale.

[13] Negative option billing is akin to the billing practice used by book clubs -- if a consumer does not want that month's book the member of the club must take action otherwise the book will be sent. Negative option billing was not addressed in previous versions of the legislation but one of the largest

(continued...)

rental; 4) itemization of bills; 5) various reporting requirements; and 6) geographically uniform rates. Thus, the 1992 Act, once implemented, would provide a comprehensive rate regulatory scheme.

III. *The Regulatory Seedlings*

Congress landscaped the cable regulatory forest in the 1992 Act. However, it left the task of selecting the various regulatory species to the FCC. The Commission issued the instant rulemaking to obtain input on which regulatory seedlings it should plant.

The FCC seeks to achieve a cost-effective rate regulation scheme for all affected parties -- operators, the Commission, local franchising authorities, and subscribers. The Commission reasons that overly detailed and burdensome regulatory methodologies will neither foster diversity in programming or reduce cable rates. NPRM at ¶ 2. The Commission also desires to maintain control at the local level to the extent permitted by law. *Id.* at ¶¶ 20, 79. The FCC tentatively concludes that some form of a benchmark formula, easily utilized or calculated by all

---

[13](...continued)
multiple system operators implemented negative option billing for a new premium channel while the Senate was debating its version of the Cable Act. The hue and cry forced the operator to revise its operation and focussed Congressional attention on negative option billing.

parties involved, will satisfy the mandate of the statute and achieve the goals of the Commission. *Id.* at ¶¶ 40, 92.

The FCC also understands that these regulatory goals may impose undue burdens on a wide variety of cable operators not just those with less than 1,000 subscribers. As a result, the Commission performed an initial regulatory flexibility analysis pursuant to § 603 of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA). *Id.* at ¶¶ 176-83. The Commission, while emphasizing the statutory mandate to seek alternatives for systems with less than 1,00 subscribers, requests comments on alternatives to lessen the burdens on all small businesses.[14]

---

[14] For purposes of complying with the RFA, a regulatory agency may adopt the definition of small business defined in the Small Business Act, 15 U.S.C. § 632. That defines a small business as one that is independently owned and operated and not dominant in its field.

Pursuant to § 632, the Small Business Administration has defined small cable operators as one with less than $7.5 million in gross revenue. 13 C.F.R. § 121.601. Assuming that the average cable bill for a subscriber is $20 (a rough estimate based on the data accumulated by the FCC and cited in In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, Report (July 31, 1990)), a small operator is any system with less than 31,000 subscribers. This definition applies whether that total is achieved in one system or a number of systems owned and operated by the same entity.

Of the more than 20,000 cable franchises in the United States, some two-thirds have fewer than 31,000 subscribers. However, many are part of multiple system operations that may well exceed the 31,000 limit.

The Office of Advocacy recognizes that the definition, for purposes of rate regulation, may be problematic especially given

(continued...)

The Office of Advocacy concurs with the Commission's tentative conclusions and commends the FCC for preparing a regulatory flexibility analysis. The comments that follow are designed to assist the FCC in developing a regulatory scheme that implements rate regulation in a timely and cost-effective manner while ensuring that small cable operators have sufficient financial resources to continue providing and upgrading their service. The Office of Advocacy also notes that any cost-effective rate regulatory plan will reduce the burdens on other small entities.[15]

IV. *The Certification Process*

Before any regulation of basic service rates, the Cable Act requires the Commission to certify that the local authority is

---

[14](...continued)
the inability to distinguish between small independent systems and those operated by large multiple system owners. Nevertheless, the Office of Advocacy will use this definition as the outer limit for small cable system operator and any references in these comments to small cable systems means any system or systems with a total of less than 31,000 subscribers.

[15] Agencies in performing their analytical responsibilities under the RFA are not limited to examining the impacts on small businesses. The RFA also covers small governmental jurisdictions which are defined as any government of a city, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. § 601(5). Rate regulation also may impose substantial burdens on small governmental jurisdictions and the Office of Advocacy requests that the Commission's final regulatory flexibility analysis consider these the effects on local franchising authorities.

capable of regulating the rates. The FCC only tangentially addresses the consequences of a local franchising authority's failure to request certification and the effect that failure has on the ability to subject the cable operator to basic service rate regulation. *Id.* at ¶¶ 19-29. The omission of a full discussion is related to the Commission's belief that the vast majority of the more than 11,000 franchising authorities[16] will file such certification requests.

Consultation with the cable industry reveals that many smaller communities may not be interested in exercising their rights under the 1992 Act due to their satisfaction with the rates and service of their franchisees. As a result, it is unclear under the Act whether the FCC may exercise that authority. The Cable Act appears to prohibit the regulation of basic service by any governmental body, including the FCC, if the local franchising authority fails to request such certification.

This interpretation of the 1992 Cable Act has two primary benefits. First, it comports with Congressional intent to

---

[16] Since some governmental jurisdictions are served by the more than one cable operator, there are more cable franchises than regulating entities. For example, Prince George's County, Maryland has two exclusive franchises with different operators serving different parts of the county.

maintain local control of cable rates.[17] Congress believed that local franchising authorities were in a better position to determine whether current basic service rates are reasonable. A failure to request certification implies that the local authorities are satisfied with basic rates and the FCC must not second guess that decision. Second, it reduces the regulatory burden on small cable operators by removing the specter of FCC regulation and the uncertainty such regulation might entail. The absence of regulation also will lessen the possibility that increased regulation, by itself, will force small operators to raise their rates to meet the costs of increased regulation. The Office of Advocacy recommends that the Commission adopt this interpretation of the Cable Act.

V. *Benchmark Rate Regulation*

The Commission proposes a number of alternatives for calculating the reasonability of basic service rates. The FCC also offers the same options for calculating whether cable programming service rates are unreasonable. *Id.* at ¶¶ 30-61, 90-

---

[17] Congress rejected amendments to the 1992 Act that would have required the rate regulation be performed by state utility commissions. Furthermore, Congress only required the Commission to intervene if the communities sought but did not meet the standards to obtain rate regulation authority or such authority was subsequently revoked by the FCC. The FCC was to cede this authority as soon as possible under after approving a previously rejected or revoked certification.

96. These options can be narrowed to two mechanisms -- benchmark formulas or cost-of-service rate regulation.

The Office of Advocacy agrees with the Commission that cost-of-service rate regulation is expensive and burdensome especially for small cable operators. The Office of Advocacy supports the FCC's tentative conclusion to develop a benchmark formula for determining the reasonability of basic service rates or the unreasonability of rates for cable programming services.

A. Basic Service Rates

The Commission defines a benchmark formula as a "price against which a given cable system's basic tier rate would be compared." *Id.* at ¶ 34. This formula, especially if kept relatively simple, can provide both small cable operators and small governmental jurisdictions a cost-effective means for determining whether rates for basic service are reasonable.

In developing this benchmark formula, the FCC must first obtain as much information as possible on the costs faced by different types and sizes of systems. The Office of Advocacy recommends that this be on an as extensive basis as possible.[18]

---

[18] The gathering of this data may require many smaller cable operators to expend more than usual sums in providing information to the Commission. While this may be burdensome, the alternative (continued...)

Without an accurate understanding of costs for systems, the Commission will be unable to construct an appropriate benchmark.

The FCC proposes the development of one benchmark for systems with more than 1,000 subscribers. The Office of Advocacy believes that one benchmark formula may mask substantial differences in systems with very different capacities, both economic and technical. Rates for basic service depend upon a cable system's size, density, plant age, technical capabilities, and financing. Rather than regulate the disparate cable systems under one benchmark, the FCC should develop a series of benchmark formulas that regulate similarly situated systems using the appropriate formula.[19]

---

[18](...continued)
for small operators is far worse -- a benchmark formula that is inappropriate for the type of system regulated. The potential adverse consequences of such an inaccurate benchmark need no further explication.

This need for information becomes even more critical in the development of a benchmark formula for cable programming services. Inaccuracies in that formula will be catastrophic because it will directly affect the ability of cable operators, especially small independents, to offer diverse programming normally associated with cable television.

[19] The Commission currently is collecting significant amounts of data that may help it in establishing the appropriate benchmarks for different types of systems. This analysis also will assist the Commission in determining which, if any, of the alternative benchmark formulas discussed in the NPRM is most appropriate. NPRM at ¶¶ 41-53. The Office of Advocacy believes that analysis of the data may lead to the construction of other types of benchmark formulas as well. The Office of Advocacy further recommends that the final regulatory flexibility analysis examine a wide variety of benchmark formulas not just those cited in the NPRM.

In an ideal world, these benchmarks would be both simple to use and very accurate for estimating the cost of providing cable service. A balance between these two standards is difficult to achieve. If the Commission cannot achieve this balance, then it should favor simplicity. However, the Commission should allow a cable operator to demonstrate that the formula does not accurately portray the costs associated with the provision of basic service.[20]

Once the benchmark formula is established basic service tier rate regulation becomes a relatively easy matter. The cable operator and franchisor determine which benchmark formula applies given system characteristics and use that formula to determine rate reasonability. This process has three primary benefits. First, it ensures that rates are not confiscatory and thus not in violation of the Fifth Amendment.[21] Second, it regulates rates in a cost-effective manner for all cable operators and local franchising authorities. This will ensure that cable rates for the basic service tier will not rise simply due to the advent of regulation but because cable systems face true increases in

---

[20] This would allow the cable operator to determine whether the benefits of more accurate cost determinations outweigh the burdens associated with providing local franchisors with this information.

[21] The basic tenet of any rate regulation is that the rates cannot be so low that they are tantamount to a taking of property without due compensation. FPC v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944); Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 160 (1930).

costs. Third, this type of benchmark will more accurately reflect the costs of providing service without requiring the detail necessitated by cost-of-service rate regulation.

The Office of Advocacy also agrees with the FCC that the benchmark must be adjusted for general increases in the cost of doing business. *Id.* at ¶ 38. The Office of Advocacy, however, disagrees with the Commission's proposal to adopt a service price index.[22] The service price index does not measure the costs associated with program acquisition[23] or the building of telecommunication facilities. The Office of Advocacy believes that either a general cost index (such as the Consumer or Producer Price Index) or a utility specific cost index (with modifications appropriate to the entertainment industry) will more accurately reflect the changes in costs faced by cable systems.[24] In addition, the data needed to develop this index

---

[22] The service price index would measure the change in the price of a wide variety of services from education to utilities. NPRM at ¶ 38 n.70.

[23] The service price index, without some form of accounting for program acquisition costs, will be totally inappropriate for cable programming services because the greatest single cost to cable operators of those services is program acquisition. Even under basic service, operators may face increases in program acquisition costs resulting from the interplay of the Cable Act's must carry/retransmission consent provisions. *See infra* Part V B.

[24] The Cable Act does not modify the CCPA's prohibition against regulating cable systems as common carriers under Title II of the 1934 Communications Act. Thus, cable operators are not to be regulated as public utilities.

(continued...)

is widely available at the Commission, other federal agencies, and at the state utility commission offices. Finally, a narrowly focused utility price index may allow the Commission to tailor the index for regional differences which take account of general differences in such items as labor costs faced by geographically diverse utilities.

In sum, a properly constructed benchmark formula will have the benefit of ease of construction and use yet remain relatively accurate. The procedures outlined above will result in the development of appropriate benchmark formulas for determining reasonability of basic service rates without unduly burdening small business or governmental jurisdictions.

B. Cable Programming Service Rates

The main distinction between the regulation of basic service rates and cable programming service rates is that cable programming service rates are not regulated unless the Commission finds that these rates are unreasonable. Although the FCC

---

[24](...continued)
While that may be true, cable systems more closely resemble other regulated utilities than they do some of the other businesses cited in the Commission's putative service price index. For example, cable operators need people whose skills are similar, if not identical, to those required of telephone or electric companies such as linemen or home installation wirers. Thus, a measure of the costs faced by electric and telephone companies may be more relevant than the costs faced by physicians.

requests comments on what Congress intended by adopting an unreasonable standard, *id.* at ¶ 91 n.127, the Office of Advocacy does not believe that the difference in statutory language will result in changes to the methods outlined above for the construction of appropriately tiered benchmark formulas.[25] However, the content of cable programming services will require the benchmark formulas to account for additional costs associated with program acquisition.

Under the 1976 Copyright Act, 17 U.S.C. § 111, cable operators have a compulsory license to retransmit local broadcast signals without the payment of a fee for use of copyrighted material. Any other programming requires the payment of a license fee; either a statutorily determined fee for superstations or a payment per subscriber for cable channels such as MTV or ESPN. Thus, the cost of obtaining cable programming services is substantially higher than that on the basic service tier.[26]

---

[25] To the extent that the FCC finds that the difference in statutory language requires a finding of something more than unreasonability, the Office of Advocacy raises no objection. This will simply require that unreasonability be defined as any rate in excess of the benchmark formula plus a certain percentage beyond that benchmark determination. The Office of Advocacy takes no position on the amount of that additional percentage.

[26] The basic service tier consists of any programming that meets the requirements of the Cable Act's must carry/retransmission consent provisions, educational and non-profit stations, and local access channels. Other programming may be offered on the basic service tier but that programming

(continued...)

The difference in the cost of programming must be reflected in the benchmark rate formula for calculating whether cable programming service rates are unreasonable. The Office of Advocacy recommends that the Commission use the same formula as used for the basic service tier with an added factor specifically designed to account for program acquisition. Any such formula must take account of volume discounts available to large multiple system operators.[27] In most circumstances, and in almost all cases of smaller cable operators, the cost of programming is beyond their control.[28] To ensure that these exogenous costs

---

[26](...continued)
must satisfy the basic service tier rate regulation.

Since basic service rates will be regulated, most cable operators will not accept the Cable Act's invitation to provide other programming on the basic service tier. All other programming, including that which meets the requirements of the basic service tier will be offered on other tiers and will be regulated as cable programming service.

[27] Small cable systems that are owned by large multiple system operators can obtain programming at substantially lower costs than systems of similar size that do not have access to such large purchasing power. Purchasing cooperatives for smaller independent systems have been formed, such as the National Cable Television Cooperative (NCTC), to obtain similar volume discounts. However, the NCTC has previously stated to the Commission its difficulty in obtaining such discounts.

[28] Under the must carry/retransmission consent provisions in the 1992 Act, cable operators do have some control over the cost of programming. The Cable Act requires that a cable operator carry all local broadcast signals. If the cable operator decides not to carry all local broadcast signals, then the cable operator must negotiate a retransmission consent contract with each local broadcaster that the operator wishes to carry. Such agreements may require monetary compensation or changes in channel positioning or both. Depending on the option chosen by the operator, it may face an increase in costs for programming that had previously obtained without payment. Yet, the exact
(continued...)